

Criterion of Good Faith Principle and Its Scope in the Saudi System: An Analytical Study

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Abstract

This research addresses the criterion of the principle of good faith and its scope in the Saudi system (an analytical study). It is organized into two sections. The first section states the definition of good faith principle and highlights how it is distinguished from other similar terms. It also deals with the principle criterion, while the second section deals with its scope. The results and findings of the research are well-stated. The most important of which is: The criterion of the principle of good faith in the Saudi system did not deviate from its two criterions: the subjective (personal) criterion, and the objective (material) criterion. The scope of the criterion includes all stages of commercial contracts, and it is not limited to a part(s). This research recommended that the Saudi regulator is advised to establish a control over the principle of good faith in commercial law, criminal law, civil law, international law, and so on.

Keywords: *Good faith, honorable motive, good conduct.*

Introduction

The principle of good faith is considered one of the important principles upon which material transactions among people are based. It is a wide-ranging principle that extends to include all actions and contracts. Its subject matter is too great to stop at a limit and too broad to be dismissed as premature, so the intention is to study the criterion of this principle and its scope in the Saudi system under the title: The criterion of the principle of good faith and its scope in the Saudi system (an analytical study).

Significance of research

The significance of this research lies in the following:

- 1) Revealing and approving the extent of the Saudi regulator's interest in the principle of good faith.
- 2) A statement of deficiencies or shortcomings - if any - and a suggestion for correction.

Reasons for selecting this research topic

There are a number of reasons that led me to choose this topic and explore its depths, which are as follows:

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- 1) What was aforementioned in the significance section.
- 2) This principle is of great importance, especially in this era in which rights have been lost and liabilities destroyed.
- 3) The principle of good faith is largely aimed at combating fraud and corruption; in order to protect the individual and society from actions based on bad faith.

Research objectives

This research aims to:

- 1) Reveal the extent to which the principle of good faith is implemented in the Saudi system.
- 2) Analyze the principle of good faith and highlight it in the situations where it must be implemented.
- 3) Explain the extent to which the principle of good faith contributes to achieving justice, preserving rights, and combating fraud and deception.

Literature review

There is a book that talks about the principle of good faith entitled: Good faith and its impact on actions in Islamic jurisprudence and civil law by Dr. Abdul Halim Abdul Latif Al-Qouni, University Press House, 2010 AD. It has great similarities with the title of this research.

The author talked about the historical origins of the principle of good faith in actions, its reality, its legitimacy, the factors that helped establish it, its criterion, functions, scope, proof, and the penalty for breaching it in actions in Islamic jurisprudence and civil law. The point of agreement between the two studies lies in the fact that each of them addressed the criterion and scope of this principle in the study. The difference between them is that the legal reliance in the previous study is on the Egyptian Civil Law, while the legal reliance in this research is on the Saudi system.

Research Methodology

This research was based on the analytical approach. The analysis adhered to the following steps:

- 1) Collecting statutory texts related to the research topic and analyzing them,
- 2) Attributing Quranic verses by mentioning the name of the surah and the verse number in the margin, and writing them in Uthmani script,
- 3) Attributing the texts and opinions of scholars directly to their books, and not attributing them through an intermediary except when the original is not possible,
- 4) In the case of conveying a statement or opinion in the text, the quoted text is placed between two quotation marks and the source is indicated in the bottom margin of the page in the following manner: the name of the author - the title of the book - the part - the page. However, in the case of conveying in the meaning, it is preceded by the word (to be considered),
- 5) Controlling ambiguous words by vowelization, especially those words that if they are not vowelized, would create ambiguity,
- 6) Taking care of the correctness and integrity of what is written from a spelling and linguistic standpoint, and taking into account the good consistency of speech and the sophistication of its style,

7) Append the research with recognized technical indexes.

Research outline

The research consists of two sections, a conclusion, and indexes. The first section i.e. defining the principle of good faith, and distinguishing it from similar terms, has two topics. The two topics are defining the principle of good faith in the Saudi system; distinguishing the principle of good faith from similar terms. The second section i.e. the criterion of the principle of good faith, and its scope in the Saudi system, has two topics. The two topics are: the criterion of the principle of good faith in the Saudi system; scope of the principle of good faith in the Saudi system. The conclusion of this research includes the most important results and recommendations. Finally there is a list of index that contains appropriate recognized technical indexes.

The first section: defining the principle of good faith, and distinguishing it from similar terms

The first topic: Defining the principle of good faith in the Saudi system

Defining good faith requires defining the two terms related i.e. good faith in the language and the system, then defining it as an additional compound.

Firstly: Defining the term "good faith" in the language

"Good" linguistically is the opposite of ugliness, so "good" is an adjective for what is good, and it is and was good. In short, "good" reflects the beauty. On the other hand, "intention" comes from the verb "intend". The meaning of saying "he intends to do something" is "he resolved to do it, and to the place".

Secondly: Defining the term "good faith" in the system

I did not find a definition for the word "good" that is specific only to law. Moreover, through my reading about the concept of "good" among legal scholars, I found that they only use the linguistic meaning of the word, which is beauty and the opposite of ugliness. This does not mean at all that there is no criterion for goodness in the law - especially the topic of good faith, which is the focus of the research, this is because goodness is a universal meaning, with its own criterion, which each group is unique in defining in terms of its source.

Some see it as social judgments linked to the prevailing values in a particular society. These values stem from the rules and laws that prevail in society in an era. Some value it as focusing on characterization of goodness according to the following concepts: sincerity, honesty, justified ignorance of a particular fact, false belief, dealing honestly, uprightly and honorably, correct behavior, normal behavior, taking into account the relationship of trust in dealing, acting reasonably, acting justly, taking the legitimate interests of the other party into account, frankness.

They look at it from the negative side and say: It is not acting opportunistically, not treachery, betrayal, lying, not deceit and injustice, and other such expressions. To me, it seems that society's custom is what determines what is good or not, but that will not provide an explanation. It is clear to the nature of this norm even with variety of societies, it is very difficult to give a unified answer to the term. Even though, it can be said that in the positive laws of Western countries in particular, the prevailing beliefs in the group, as well as the human mind and the custom based on it, along with whims, play a major role in determining a short-cut definition for the term.

As for intention, the commentators of the law have defined it without any addition, and among their definitions is that it is: an intentional element that allows some legal situations to be described correctly, and therefore: intention and intent are synonymous terms in the law.

Thirdly: Defining "good faith" as an additional compound term

The reality is that the Saudi system did not mention an independent definition of good faith, and this is true in other legislation, as it lacks a direct definition of good faith, even though it considers it as a necessary rule in all legal relations, and it is assumed a priori in all cases. By referring to the jurisprudence of legal scholars, we find that they differed in its definition, and perhaps the chosen definition is: “an obligation to direct the will in achieving the direct purpose of concluding the resolution, in a way that is consistent with the legitimate justified interests of the opposing party”. This definition includes many characteristics, which are:

- 1) It is a directing of the will. It requires the negotiating parties to direct their will in a manner consistent with what good faith requires in concluding resolution. It is a directive of the will to achieve the direct purpose of concluding the resolution.
- 2) The guidance shall be in a manner consistent with the legitimate, justified interests of the opposing party. By saying: “consistent” we exclude the necessity of sincerity in directing the will because sincerity requires directing the will for the sole benefit of the opposing party.
- 3) The commitment to good faith in concluding contracts is a mutual obligation between the two parties. It is not an obligation imposed on one party for the benefit of the other party only. Directing the will is imposed on both parties.
- 4) Directing the will is prior to concluding the contract because good faith requires directing the will, and acting in accordance with the directive requires the existence of the directive before the issuance of the will.

The second topic: distinguishing the principle of good faith from similar terms

First: Distinguishing good faith from honorable motivation:

The term "Motivating" in language comes from the verb “motive,”, both words have one root i.e. motive. It is said: "I sent the camel when I stirred it." ()

The term "Honorable" is taken from “honor”, and that indicates highness and elevation. So the honor refers to elevation. The honorable refers to the high man i.e. An honorable man is from noble people.

As for the definition of "motive" according to legal jurists, we find it frequently mentioned in criminal law. It has been defined with several definitions, perhaps the most prominent of which is that "motive" is “the psychological force resulting from the perception of the goal, and the impetus for voluntary behavior”. Considering this definition, it has become clear that to what the extent there is a strong relationship between " the motive" and " the will". Thus the relationship appears as that the motive is nothing but a mover of the will and a guide to the intention.

As for distinguishing "good faith" from "the honorable motive", the honorable motive - which is called the social, humanitarian, or moral motive - in light of the previous definition is the criterion for the availability of good faith. In other words, the motive in general is the one who describes the intention as good or bad. If he was honorable, the intention was good, and if he was dishonest, the intention was bad. In this regard, there should be no confusion between honorable motive and good faith, as they are not the same concept. This is because good faith requires adding, in addition to the mere intention, an honorable motive.

On the other hand the honorable motive is merely a criterion by which the availability of good faith is known after the existence of the intention. However, it precedes good faith, meaning that it is not possible for someone who is characterized by good faith to be motivated to do anything, except after to verify that its motive is honorable. ()

Second: Distinguishing good faith from good behavior

"Goodness" has already been defined in language and terminology, so there is no need to repeat it. As for behavior, linguistically, it is given several meanings, the closest to which is the meaning: its root is "disposition," and "disposition" is to return something from its face, and to act in the matter is to deal with it, to deceive or change it, and to act: the path. It is said: "putting it at his disposal" means "putting it at his request".

In short, the meaning of disposal refers to returning the thing, transforming it from one side, or transferring it from one side to another. Accordingly, if we say: "So-and-so disposed of the matter", what this means is that he turned the matter around and moved it from one side to another, or from one state to another, such as if the price was deferred and became immediate, or it was sold and became rented, and so on.

In other words, the case is that to transform the matter and turn it from a bad state to a good state, and from a good state to a better state, and there is no doubt that this requires skill and opinion. The definition of "behavior" according to legal scholars is: "the direction of the will towards creating a legal effect, whether this effect is the creation, modification, transfer, or termination of a right." ()

The legal act may be binding on both parties, such as a sales contract that obligates the seller to transfer ownership to the buyer and obligates the buyer to pay the price to the seller. On the other way, it may be binding on one side, such as a declaration and a will. In a will, it is sufficient to complete the disposition towards the will of one person in order to produce legal effect.

As for the definition of good behavior, it is: "what is issued by a distinguished person voluntarily, whether in word or deed, in a way that achieves the interest of the contract." As for distinguishing good faith from good conduct, there is no correlation between them. A person may have good intentions but behave poorly. Most likely, the person with bad intentions misbehaves, but nevertheless he may act well to achieve his bad goal.

A person is praised for his good intentions, but he may not be praised for his bad actions. However, if it is known that he is known for his advice and guidance, then he will be excused for his bad behavior and an excuse will be sought for him. Accordingly, intention precedes action and is its motivation. Good or bad behavior may be considered evidence of good or bad intentions.

The second section: the criterion of the principle of good faith, and its scope in the Saudi system

The first topic: the criterion of good faith in the Saudi system

One of the characteristics of this principle is that the system measures it using two criterions. First criterion is "subjective", in which it refers to the intention of the person acting. The other one is objective, in which it refers to the subject of the action, and its apparent form. Both criterions are illustrated as follows:

First: The subjective (personal) criterion:

A group of legal and judiciary jurists took the subjective criterion, which generally means: "the direction of the disposer's intention and intention to adhere to the provisions of the law, the values of society, and its ethics, in legally permissible behavior." Thus, the entry point of this criterion is the intention of the disposer, as his intent must be investigated. To verify whether he intended to deviate from the rule of law and the values of society, or he did not intend to do so, then the reality of the voluntary direction must be verified. By his way it can be judged either the intention good or bad.

It is not a difficult matter for those who advocate this criterion. Just as evidence is based on the existence or non-existence of intention, it is also based on describing it as good or bad. The evidence that indicates description is always easier than that which indicates existence. As the intention exists, and all that remains, it is to have a degree of acumen

and intelligence in understanding its description. The basis of this criterion goes back to the idea of justice, and the rules of morality. This is because these two matters prevent a person from intentionally harming others, or from circumventing the provisions of the law to achieve an illicit purpose. The more advanced the values of society and the lofty morals of society, the more purity, sincerity, and purity of the people's intentions appear, and vice versa.

After mentioning the previous concepts, it becomes clear to us the basis on which the principle of good faith is based on the subjective criterion and that it does not depart from two cases: the absence of intention to harm others; the absence of intention to circumvent the provisions of the law in order to achieve an illegal purpose. The two cases can be detailed as follows:

The first case is the absence of intention to harm others. Good faith in this case is achieved by its own criterion i.e. if one of the contracting parties does not intend to harm the other, whether in concluding or implementing contracts. The intention of harming negates and removes good faith. Therefore, the system is greatly concerned with preventing harm to others.

When exploring jurists' point of view regarding the issue "the abuse of rights" in this research, we find that most of them have considered the intention to harm as the top criterion for this theory. In order for responsibility to be achieved, the person who uses his right must intend to harm others. In this case, the intention to harm others must be the main factor for the person who uses his right, such that he is considered to have deviated from the usual behavior of the usual person. Then, his action is considered intransigence. The explanation for this criterion is very clear, as rights in law were established to bring benefits and ward off harms. If rights are used to bring evil and as a means of transgression and harm to others, then this use loses its legitimacy. This criterion extends to all rights and actions.

The second case is "absence of the intention to contradict or the intention to deceive". This criterion also represents the absence of any intention to contradict the organizer's intention to legislate actions and grant rights or any intention to circumvent the provisions of the law. There is no doubt that someone who acts with intent that is contrary to the purposes for which the actions were legalized indicates bad faith with respect to that person. Therefore, we find regimes - including Saudi - fighting this intention and seeking to impose sanctions on its perpetrator.

Second: Objective (material) criterion:

The objective criterion means that behavior is consistent with the provisions of the law and the values and ethics of society. This shows that the law does not consider the validity or otherwise of actions based on what a person believes in them alone, but it nonetheless requires that the actions be correct in the view of law and the values of society.

This criterion finds its basis in justice and the rules of morality as it is the case in the subjective criterion. The reason for this is that ethics recommend that the individual's actions be according to and consistent with the provisions of the law and the values of society. The rules of the law are imbued with a moral element because the law is first and foremost a reflection of the behavior of individuals in the society in which they live.

Accordingly, the more a society's ethics and values are superior, the more advanced the law is and is connected to the rules of ethics. This criterion requires a person who deals with others - especially commercial and financial transactions - to be vigilant and careful in all his actions so as not to harm others. This is because justice and the rules of morality do not recognize the intention to harm others - subjective bad faith - nor do they recognize negligence and negligence - objective bad faith -. We find this matter stipulated in the law in its various branches.

Inquiry: After mentioning the previous two criterions in the system, which of them can we work upon application?

Some legal scholars decided to be satisfied with the subjective criterion. Some of them saw the adoption of the subjective criterion and making it an objective criterion. This is because the ignorance of the person acting that his behavior harms others cannot be called absolute good faith if this ignorance results from negligence and dereliction. This is what made some jurists decide that the reality of the situation does not make a distinction between good faith and honorable dealings because the first situation is not achieved when it deviates from the second situation.

This opinion did not completely abolish the idea of an objective criterion. What is more correct in my point of view is what some have suggested by working with both criterions because they are intertwined i.e. with their presence, good faith is achieved in the absolute sense required in legal actions. Intention alone is incomplete and is not sufficient for actions to exist, but it must appear in a material element that translates the intention and shows it to the outside world.

The second topic: "The scope of the principle of good faith in the Saudi system"

If this principle is to be followed, to what extent can it be applied? To answer this, the company contract goes through several stages. Each stage is related to this principle. I will limit the research to the two most important stages: the formation and implementation stages.

As for the principle of good faith in forming a company contract, legal scholars have established general and specific pillars for contracts, including the company contract. The reason for this is that these pillars are considered an indirect basis for this principle.

The general objective elements of the company contract are consent, subject matter, purpose, and capacity. With a quick analytical look at these elements, we find that they are linked to this principle and that they are within its scope. The pillar of satisfaction must be correct and not tainted by any of the defects of satisfaction. The defects of consent are error, fraud, coercion and exploitation. These defects in themselves are indicative of bad faith.

The subject matter must be specific, possible, legitimate, and not contrary to public order or morals. Naturally, violating these conditions is considered evidence of bad faith. Thus, the connection of this pillar to this principle appears.

As for the purpose, some believe that if the company's subject matter is illegal, such as trading in drugs or slaves, then its purpose will be illegal as well. It is a well-agreed fact that obtaining a profit is not legitimate unless it arises from a legitimate subject matter and exploitation. There is no doubt that an illegitimate purpose can only come from bad intentions.

As for legal capacity, the jurists have detailed the provisions for the incompetent person, such as the insane, the foolish person, the incompetent minor, and the incompetent person, such as the discerning minor. There is no doubt that these provisions result in closing the way of a person with bad intentions so that he does not deal with this type of people.

As for the special elements, they are the multiplicity of partners, the provision of shares, the intention to participate, and the sharing of profits and losses.

The relationship of the multiplicity of partners element to the principle of good faith is based on the idea of solidarity as in the joint liability and limited partnership companies. The person who contributes to a general partnership or limited partnership is considered a joint partner responsible for the company's debts. The partner who commits to paying his share and takes the initiative to bear responsibility for the company's debts is

characterized by his good faith, unlike the one who procrastinates without a convincing reason, who is considered to be in bad faith. As for the element of offering shares, the partner who takes the initiative to pay his share without delaying this is considered evidence of his good faith, and vice versa.

The pillar of intention to participate undoubtedly confirms the principle of good faith in corporate contracts, as there must be intention. Therefore, this intention must be good in order for the contract to be valid and have its effects.

As for the element of sharing profits and losses, it is not permissible to include in the company contract a condition requiring the exclusion or deprivation of one of the partners from the company's profits or exempting him from its losses, which is known as the lion's condition. The Saudi commercial system has ruled that the condition alone, not the contract, is invalid. There is no doubt that this condition is unjust to anyone with insight, and whoever fulfills it deserves to be described as having bad intentions, not good intentions. What clarifies the scope of the principle of good faith in forming a company contract is the formal conditions stipulated by the law, which are summed up in two conditions: writing the company contract and declaring it. These two conditions are within the scope of good faith. Thus, the system blocks the way for bad faith by requiring the contract to be written so that bad faith does not find a way to harm others.

As for the condition of declaring the contract, in view of the fact that the company contract results in the criterion of a legal person that deals with others, who has rights and obligations, protection for third parties with whom he deals, and informing him of the existence of the company, its activity, its duration, and the extent of the responsibility of the partners in it for its obligations, the system requires the company to be announced and subject commercial companies to the procedures of the month. This is a clear indication that this condition confirms the scope of the principle of good faith in forming the company contract.

Regarding the principle of good faith in implementing the company contract, the company contract - like other contracts - must be implemented in all its clauses. The contract is the creation of the obligation. The effect of the obligation is that it must be implemented based on the general rule "the contract is the law of the contracting parties." If the judge interprets the contract and determines its scope, all that remains is for him to oblige the parties to implement it in all that it contains, as long as it was created correctly. The judge applies the contract as he applies the law because the contract takes the place of the law in regulating the contractual relationship between the parties. We must emphasize that the principle of good faith in implementing the contract is based on the absence of error - any error - whether it is an intentional error or negligence, and whether the error is estimated by a subjective criterion or an objective criterion.

Anyone who considers the Saudi corporate system will find many provisions affirming the principle of good faith during the implementation of the contract. Article (100) of the system stipulates: "It is not permissible to trade the cash shares subscribed by the founders, the in-kind shares, or the founding shares before the publication of the budget and the profit and loss account for two complete financial years, each of which is not less than twelve months from the date of the company's founding." The instruments shall be marked with an indication of their type, the date of their establishment, and the period during which they may not be traded.

The purpose behind stipulating these restrictions is to oblige the company's founders to remain in the company for a full period of two years, which is sufficient time to determine the company's actual financial position and ensure its seriousness. These provisions apply during the implementation of the contract, and this is considered a manifestation of this principle during the implementation of the contract.

One of the important provisions is what is stated in the Companies Law, which states: "It is not permissible for the company manager, nor a member of its board of directors, to have any direct or indirect interest in the business and contracts that are carried out on behalf of the company, except with a license from the partners, the general assembly, the shareholders, or those authorized by him." " It means that it is not permissible to exploit the company's management position to achieve a private interest except after the permission of those mentioned above, and implementing this restriction can only be issued in good faith. Thus, this is one of the manifestations of this principle at the contract implementation stage.

Conclusion

The most important results and recommendations include:

First: The most important results:

- 1) The definition of good faith in the system is an obligation to direct the will in achieving the direct purpose of concluding the contract in a way that is consistent with the justified interests of the opposing party.
- 2) The criterion of good faith in the Saudi system does not deviate from two criteria: the subjective (personal) criterion, and the objective (material) criterion.
- 3) The scope of the principle of good faith in the Saudi system includes all stages of commercial contracts, and is not limited to part or parts of them.

Second: The most prominent recommendations:

- 1) The Saudi regulator must refer to the principle of good faith independently in one or more articles, whether in the Commercial Companies Law or in other regulations, given its utmost importance.
- 2) It is suggested that the Saudi regulator establish a control for this principle in all fields, and mention its control when talking about crimes and punishments, as in criminal law, and the like in commercial, civil, and international law, and so on because it appears in all of these laws, and there is nothing in the Saudi system that indicates a control in them.

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