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Abstract

by Hayato HIRATA

Title: *The Principle of Good Faith and What Underlies the Principle* (Seibundo, October 20, 2006)

Abstract: “The Principle of Good Faith and What Underlies the Principle”

This study has clarified the structure of a legal reasoning based on the principle of good faith, using two scientific methodologies. One is a method of applying the verbal and logical analysis to the good faith principle. Another is a method of applying the psychological and sociological technique to the principle.

With the globalization of the economy, the disputes on civil affairs concerning international business transactions have been rapidly increasing. That is why we need the fair and equitable principle that is available all over the world, irrespective of the legal traditions, the political and economic conditions. In this situation, much attention is being attracted to UNIDROIT Principles (UNIDROIT Principles of International Commercial Contracts) and PECL (Principles of European Contract Law) as well as CISG (UN Convention on Contracts for the International Sale of Goods), and the importance of these principles is increasing more and more in these days. In the international transactions, it is difficult to defend the adversary parties or the courts against any attacks of the insincere and malice parties. Therefore, we cannot help relying on the general clause of the good faith principle. However, there is a risk of the abuse of the principle because of the polysemy. To prevent such abuse, the principle is classified into typical patterns according to the individual legal proposition.

Thanks to Grants-in-Aid for scientific research, this study has been able to clarify a close relationship between the good faith principle and legal topos. The individual legal proposition of the fair and equitable principle is a so-called “legal topos,” and it serves as a guideline for the application of rules and regulations, and, at the same time, is controlled by higher meta-rules.

The “topos” is a philosophical term of Greek origin, and “legal topos” belongs to Aristotle's so-called “special topos.” Professor Gerhard Schtrück had developed “Topoi Catalog” to clarify the role and the importance of “legal topos,” with 64 legal topoi in this catalog. The “legal topoi” are possible to be roughly categorized into five groups as follows:

- (1) The Topos concerning basic value that the law tries to protect and promote
- (2) The Topos concerning good faith principle or the individual legal proposition
- (3) The Topos concerning viewpoints that should be considered when a law being established, interpreted, and applied by the lawmaker or the judge
- (4) The Topos concerning general principles of law
- (5) The Topos concerning maxims or old saws written in Latin

You may replace “legal topos” with “legal viewpoint,” “legal issue,” or “legal value,” and replace “topoi catalog” with “congeries of legal values.”

Through this study, it has been clarified that “legal topos” gives a suitable guideline to a legal reasoning and expands the intellectual framework of the judge for a reasonable and impartial solution. The mutually-connected “legal topos” can control the legal judgment of value if we make a good use of the systematical “topoi catalog.”

This book can be roughly divided into two parts: Chapter 1 “Legal reasoning based on good faith principle” and Chapter 2 “what underlies the principle.”

Chapter 1: the analysis of the legal reasoning process based on the good faith principle, or the analysis of the background knowledge over the principle.

Chapter 2: the discussion about the relationship of the principle with philosophy, psychology, and sociology; the international contract law, and the structural thinking.

The good faith principle is deeply related not only to “Civil Law” and “Civil Procedure Law” but also “Legal Information Science” and “Computational Intelligence and Systems Science.”

Surely it is important to apply these adjacent disciplines to the good faith principle. If such a study about the principle can diminish or overcome some weaknesses of the traditional and conventional idea, it is more than the author can dream of.

Reference: “The Art of Conciliation — the Good Faith Principle and Substratum of Conciliation” *The Asahi Law Review*, No. 44·45, 10 Oct. 2013: 1-61.

In these days, owing to the heightened awareness of human rights and the diversification of values among the people, the rationality has been being required in the conciliation practice. If a court demands merely give-and-take by conciliation, it is very difficult to agree on settlement. Sharing the idea of the fair and equitable principle, however, not only in the case of trial but also the case of conciliation, it will be able to make a great advancement toward settlement. That is why the author has tried to clarify, through this paper, that what underlies the principle is not out of keeping with the substratum of conciliation, but has common basic idea.