

THE ROLE OF OBJECTIVE GOOD FAITH IN CURRENT CONTRACT LAW: FOR A GENERAL DUTY OF *INTER PARTES* COOPERATION AND SOLIDARITY

Lucas Abreu Barroso* and Laio Portes Sthel†

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ABSTRACT

Seen from the historical-cultural perspective, theoretical models of modernity, still present in law, are anachronistic before the increasingly complex and dynamic contemporary reality. In this scenario, and with the aim of providing a renewal of Brazilian Civil Law, the 2002 Civil Code was developed with several general clauses. Among them is the general clause of objective good faith and in the midst of its practical uses is its role in establishing the “attached duties”. The doctrine that discusses this topic, however, runs counter to the epistemological assumptions adopted in this study and thereby is insufficient and contradictory in relation to the understanding of today's contractual reality. Therefore, it is important to build a new rationale for objective good faith, starting from the critical-methodological approach. In

* Ph.D. in Law, Pontifical Catholic University of São Paulo; Professor of Civil Law, Federal University of Espírito Santo and University of Itaúna (Brazil); Head of the Research Group “Civil law in legal post-modernity.”

† Law student, Federal University of Espírito Santo (Brazil); Member of the Research Group “Civil law in legal post-modernity.”

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this perspective, there is the need to think of an *inter partes* general duty. This, in turn, should find its foundation on cooperation and solidarity, in view of the prospective constitutionalization of the national civil law and the quest for civil law as an effective tool of autonomous but responsible human fulfillment.

I. INTRODUCTION

The legal phenomenon, a cultural product of humanity, has an inherent connection with the standards which exist at any given place or time. In addition to political and sociological thought, it is closely related to the dominant concepts within a historical and social context, and obtains from this context the vectors that will illuminate the development of its basic concepts.¹ In this sense, law was perceived in different ways at various historical moments in Western civilization—after all, the Roman jurist’s approach towards legal issues was very different from that of the medieval jurist, whose attitude, in turn, differed from that of the modern age jurist.² Therefore, and in view of the aim of the research project proposed by the advisor for this sub-project, the contemporary jurist, without losing sight of contributions of the past legal thought, must also assume his historicity. He should also seek to respond to new demands—arising out of the progression of society—in a way that is consistent with the cultural context in which he operates.

In this sense, it may be asserted that theoretical models constructed in modernity, characteristic of the industrial age, are in crisis because they no longer match the current reality, which is marked by pluralism, cultural and economic globalization, and the

1. Nelson Saldanha, *Sobre o “direito civil constitucional”: notas sobre a crise do classicismo jurídico*, 36 REVISTA DA FACULDADE DE DIREITO DA UFPR 87-92 (2001).

2. ANTÓNIO CASTANHEIRA NEVES, 1 DIGESTA: ESCRITOS ACERCA DO DIREITO, DO PENSAMENTO JURÍDICO, DA SUA METODOLOGIA E OUTROS 12-13 (Coimbra Editora 2010) [hereinafter DIGESTA VOL. 1].

complexity of the social texture.³ Thus, the mathematical concept of law is unfounded. That concept identified law as a closed system through which legal reasoning was regulated by logical deduction and whose applied methodology had a markedly exegetical nature. Now, legal thought must take account of a new epistemological paradigm, characterized by complexity, and that challenges the truths and dogmas established by traditional legal doctrine.⁴

Given this renewed view of reality, and in the face of the need to readjust legal thought, new legislative techniques have arisen, of which the general clauses are a powerful example. Due to the imprecise meaning caused by vague terminology and expressions contained in their normative hypotheses, these clauses have the function of making the legal system more open and flexible to new social demands.⁵ The current Civil Code of 2002 was prepared precisely in this spirit and, for this reason, is filled with general clauses which, in theory, favor the approximation of the legal text to the mutability of everyday human relations.

Specifically in the field of civil law, the general clause of objective good faith reflects such a systematic opening, and determines a range of developments not only in the obligational and contractual context, but also in civil law as a whole.⁶ That is because “the advancement of civil law, in terms of concrete solutions during the present century, is due to the recourse to good faith”⁷ and “at present, the growth areas of civil law . . . keep connected with good faith.”⁸

3. Francisco Amaral, *O direito civil na pós-modernidade* in DIREITO CIVIL: ATUALIDADES 61-77 (Bruno Torquato de Oliveira Naves, César Fiuza, & Maria de Fátima Freire de Sá (coords.), Del Rey 2003).

4. Francisco Amaral, *O direito civil no paradigma da complexidade*, 40/41 REVISTA BRASILEIRA DE DIREITO COMPARADO 67-68 (1º e 2º sem, 2011).

5. Francisco Amaral, *Objeto e método no direito civil brasileiro*, 36 REVISTA BRASILEIRA DE DIREITO COMPARADO 35 (1º sem., 2009).

6. CÓDIGO CIVIL [C.C.] (Brasil), art. 422 (2002).

7. MENEZES CORDEIRO, DA BOA FÉ NO DIREITO CIVIL 396 (1st ed., 3d reprint, Almedina 2007).

8. *Id.* at 397.

Amidst the multiple purposes of the above clause, its role in establishing duties for the parties during the existence of the contract stands out. However, such duties, according to traditional doctrine would have only an ancillary, attached, integrative or parallel function to contractual obligations. In other words, they would simply be a means of providing correct progress or an optimization to the unfolding of the contractual relationship,⁹ acting to assist in the development of obligational prestations contractually established.

However, if there is recognition that the duties established because of objective good faith are housed in much deeper levels of law based on the very nature of good faith as the “general vector of the legal system,”¹⁰ how does one speak of it as having a merely auxiliary nature? After all, if concrete solutions based on good faith express a true return to the ultimate purposes of law,¹¹ it seems appropriate to reflect on the profound role of this institution, as opposed to the strictly ancillary action of the duties extracted from it. More than that, it is necessary to investigate to which areas of the legal life good faith allegedly connects and are manifested in its realization. Such investigations, because of the growing phenomenon of constitutionalization of the Brazilian Civil Law, require conjugation with the fundamental objective of “building a free, just and solidary society,”¹² and the republican foundation of the dignity of the human person.¹³

II. OBJECTIVES

Having demarcated the assumptions and issues of this research, we stress that the study of the proposed theme hints at the need to

9. *Id.* at 592; JUDITH MARTINS-COSTA, A BOA-FÉ NO DIREITO PRIVADO: SISTEMA E TÓPICA NO PROCESSO OBRIGACIONAL 440 (1st ed., 2d prtg, Revista dos Tribunais 2000).

10. CORDEIRO, *supra* note 7, at 395.

11. CORDEIRO, *supra* note 7, at 341.

12. CONSTITUIÇÃO FEDERAL [C.F.] (Brasil), art. 3, I. (1988).

13. *Id.* at art.1, III. (1988).

identify not accessory duties imposed by objective good faith, but a general duty which is consistent with the socio-cultural fluctuations impacting contracts and civil law as a whole. Thus, the research sub-project is aimed primarily at determining whether, from objective good faith and the plexus of utilities that it represents, it would be possible to extract the idea of a general duty of cooperation and solidarity to be observed by the parties in the course of the contractual relationship. Moreover, the study seeks to determine if such a duty represents a need in current Brazilian law that the parties cooperate during contract performance in the name of objective good faith and based on solidary constitutional dictates.

As for specific objectives proposed in the original sub-project, it is possible to summarize them as follows: (i) to deepen the understanding of the social context of post-modernity that arises as a backdrop to the changes undergone by law—such a purpose, as discussed in the results and discussion section, was vitally important to guide the improvement of conclusions; and (ii) to understand the relevance of objective good faith in establishing a possible general duty of cooperation and solidarity—a duty founded on constitutional dictates—investigating the limits and limitations of such theoretical construct.

These are the objectives of this sub-project, which are expected to have been achieved successfully and consistently from the methodology applied and theoretical references used.

III. METHODOLOGY

This research adopted the *critical-methodological* line of investigation,¹⁴ as it was done based on theses that have emerged from the developments affecting both legal thought and the methodology of realization of law in post-modernity. Within this

14. MARIA TEREZA FONSECA DIAS & MIRACY BARBOSA DE SOUSA GUSTON, (RE)PENSANDO A PESQUISA JURÍDICA: TEORIA E PRÁTICA 20-21 (Del Rey 2006).

line, we have chosen the *legal-theoretical* perspective,¹⁵ to delineate a possible new duty, of general character, from the comparison between the theoretical constructs already made about objective good faith and the new demands arising from social practice. Therefore, the rationale employed was based on the vision of law as a practical science, focused on its implementation and the effective solution to concrete problems. Moreover, *legal-exploratory* and *legal-interpretative* types of research were conducted to outline an initial overview of the problem and, from that, to interpret the data of legal reality and its needs.¹⁶

Having presented the perspectives adopted in the development of the sub-project, we emphasize that the reflection on the theme was based primarily on bibliographical research in the works cited herein. Books and papers of importance in regard to contracts and objective good faith were used. The highlights are the works of António Manuel da Rocha Menezes Cordeiro (2007) and Judith Martins-Costa (1999), which are references required on this subject, and also those books that helped us understand the legal phenomenon in a way that was largely different from the one that guided us in the beginning of this research. Emphasis is placed on the study of the writings of Francisco Amaral and António Castanheira Neves,¹⁷ whose ius-philosophical ponderings largely contributed to rethinking the current sense of law and its problems, promoting the investigation of the reflexes of these meditations on the results of this sub-project.

In addition, meetings between the advisor and members of the research group linked to the main project were conducted during which it was possible to exchange information of mutual relevance

15. *Id.* at 22.

16. *Id.* at 28-29.

17. Arising from the study of the thought of this philosopher of Portuguese law, the following summary, presented orally at the I Semana Científica do Direito UFES, was produced: Laio Portes Sthel & Morgana Neves de Jesus, *A razão prática como uma solução possível para a atualcrise do Direito*, SEMANA CIENTÍFICA DO DIREITO UFES: GRADUAÇÃO E PÓS-GRADUAÇÃO (2012), available at www.periodicos.ufes.br/ppgdir-semanajuridica/article/view/9810.

for the advisees and to obtain input from debates and discussions aimed at better understanding law in the current historical and cultural context as well as understanding its reverberations on the theme of this sub-project.

Finally, it is noted that due to the highly theoretical direction given to this research, the jurisprudential research proposed in the sub-project became unnecessary. For this reason, the research on the rulings of the Superior Court of Justice was not carried out, in order to maintain consistency with the search for legal and theoretical foundations for the proposed theme.

IV. RESULTS AND DISCUSSIONS

Just as the legal phenomenon is not divorced from the historical and cultural reality that surrounds it, in light of what was already presented in the introduction of this report, so objective good faith must also be observed from the perspective of a certain understanding of law in space and time. As Menezes Cordeiro asserts, good faith cannot be reduced to the idea of a common legal institution, but rather expresses the completeness of an “. . . important cultural factor, linked closely to a certain understanding of the legal phenomenon.”¹⁸ Given the depth and relevance of Cordeiro’s study, it is worth investigating this Portuguese jurist’s understanding of law and good faith as well as his contributions to the overall comprehension of good faith and of the panorama surrounding it.

In the introduction to his work, Menezes Cordeiro lays the epistemological postulates on which he will build the development of his thought about good faith. From the defense of legal dogmatics and of the eminently scientific character of law, the Portuguese jurist explains that every legal phenomenon is positive and that although it is not exhausted in the legal order given,

18. CORDEIRO, *supra* note 7, at 371.

dogmatics plants its roots in the same positiveness.¹⁹ Thus, even if good faith does not conform to the classical subsumptive interpretation/application, and even if it is impossible to define it in legal and positive terms—the role of jurisprudence being to fill its content in the concrete case—good faith should be seen in a dogmatic way to escape from what the author calls a methodological unreality and the ensuing mythification of this civil institution.²⁰ These phenomena, pointed out and criticized by the author under discussion, emanate from the difficulty of the scientific understanding of the developments concerning good faith obtained from jurisprudence: the jurists who proposed to study it are guided by merely formal, grandiose propositions that do not provide sufficient material criteria for a decision, which therefore leads to mythification of the concept of objective good faith—i.e., an institution “. . . where all hopes are possible.”²¹

Thus, to circumvent these methodological difficulties, Menezes Cordeiro starts from German jurisprudence in order to extract the duties that the parties must observe in the unfolding of the contractual relationship, establishing a tripartite division into duties of protection, loyalty and information or clarification.²² However, he points out that the duty of protection, as it is designed in a unified way by German legal thought, has no applicability in legal systems where there is the possibility of extracting the same practical result from the rules relating to extra-contractual liability,²³ as is the case of Brazil.²⁴

Therefore, it is possible to infer that the attached duties would be restricted to the others: (i) loyalty—the duty to assume behavior that provides an accurate and honest negotiation, encompassing duties of care, confidentiality and consequent action, and (ii)

19. *Id.* at 30-31.

20. *Id.* at 41-43.

21. *Id.* at 401.

22. *Id.* at 603-607.

23. *Id.* at 636-37.

24. *See* C.C., art. 186 (2002).

information or clarification—the duty to provide all information necessary for the contract to be finalized and performed honestly.²⁵ The consideration of these duties emerges from the already-consolidated visualization of the intra-obligational complexity that surpasses the traditional bipolar view of debit and credit to recognize the obligation as a reality also composed of other elements.²⁶ Thus, besides the main prestation, embodied in human behavior to be performed by the debtor in favor of the creditor, there would exist various other material operations and conducts to be taken by the contracting parties—among them compliance with certain legal requirements, such as the attached duties of objective good faith.²⁷

Incidentally, as Menezes Cordeiro puts it, the nature of these duties under discussion is essentially legal, because objective good faith comes from within the positive legal system, i.e., it reminds all under its jurisdiction that we are still dealing with the application of positive law and its science.²⁸ Moreover, the same author argues that to achieve good faith, it is necessary to bear in mind two principles: the protection of trust and the materiality of legal regulation. The first principle turns to the protection of legitimate expectations generated in the other contracting party or adherence to representations that this party deems effective,²⁹ while the second principle represents the fight against legal formalism and its blind obedience to the legal rules and against pure syllogism.³⁰ These would, in short, be the vectors to be followed in achieving good faith in cases being decided.

As one can see, Menezes Cordeiro does not shun the idea that law is essentially positive and therefore systematic, even if it is still

25. CORDEIRO, *supra* note 7, at 583.

26. *Id.* at 586.

27. *Id.* at 590-91.

28. *Id.* at 650.

29. *Id.* at 1234.

30. *Id.* at 1252.

an open, mobile, heterogeneous and cybernetic system.³¹ In this conception, good faith appears as a legal element that provides the entry of extra-systematic elements into the set of prescriptive propositions legally established, enriching the legal system and allowing its malleability when facing concrete cases. The attached duties thus would be inserted into this dogmatic conception of law, serving as a way to model contractual relationships in the senses that the legal system itself and its ultimate purposes would provide.

Judith Martins-Costa, another prominent name in the study of objective good faith, understands the matter in a similar fashion. We will now discuss her views in order to complete the study of the state of the art the theme is in the dominant legal thought. In fact, the above-mentioned Brazilian jurist sees good faith as a useful way to “. . . the construction of a substantial sense of law, acting as a model able to develop an open system . . .”³²—or rather, a relatively open system or a system of relative self-reference, since the full opening could result in an incongruent de-systematization.³³

Thus, objective good faith, set in a general clause in the civil code, could cause this systematic opening of the legal system—making it porous to the insertion of elements then regarded as extra-legal. At the same time, good faith would generate an internal mobility. That is, it would provide the return or re-forwarding of the solution given in the concrete case to the provisions within the legal system.³⁴ Effectively, according to the author mentioned, objective good faith should be praised for dispensing with the closed design of law, allowing, in addition to this internal system modification, a re-systematization of the elements which escape the boundaries of positive legal rules,

31. To better understand these terms, see CORDEIRO, *supra* note 7, at 1260-63.

32. MARTINS-COSTA, *supra* note 9, at 382.

33. *Id.* at 275.

34. *Id.* at 341.

rearranging them within the very system.³⁵ Consequently, from this line of thinking, it follows that objective good faith would favor an intermittent readjustment and a constant innovation of law.

With respect to the attached duties themselves, Martins-Costa is also guided by the changes in the obligational process to substantiate their existence. She adds, thus, that the obligational relationship must be seen through the prism of its intrinsic dynamics, from an overall and process-based view of the obligation: this would “. . . encompass, in a permanent flow, all the vicissitudes, ‘cases’ and problems that may be taken to it—[an obligation] that moves processually, once invented and developed in light of a purpose”³⁶ Among these events are the attached, accessory or instrumental duties, whose dependence on the specific case for their determination and consequent changeability is stressed by Martins-Costa with the aim of justifying—unlike Menezes Cordeiro—her preference for not reducing and numbering them dogmatically. In fact, the quoted jurist lays out an illustrative list of such duties, into which she even inserts a duty of “collaboration and cooperation” and refers to the fact that such duties, in general, are called “duties of cooperation and protection of mutual interests.”³⁷

For the application of the general clause of objective good faith and, consequently, to determine the duties to be followed by contracting parties in a specific case, Martins-Costa defends a required distance from the axiomatic-deductive method: in her opinion, the most appropriate methodology to be adopted is juridical topics coming from Theodor Vieweg’s theories.³⁸ Although criticized by Menezes Cordeiro,³⁹ “topic reasoning” is presented by Martins-Costa as essentially problem-oriented (and

35. *Id.* at 22, 369.

36. *Id.* at 394.

37. *Id.* at 439.

38. *Id.* at 355 et seq.

39. CORDEIRO, *supra* note 7, at 1132 et seq.

therefore operative and pragmatic), conforming very well to the way objective good faith demands its implementation,⁴⁰ without abandoning the systematic thinking altogether. Both are complementarily dialectical and are at the root of the development of an open system.⁴¹

Thus, comparatively, it is observed that while maintaining the defense of a distinct methodology for the realization of objective good faith and the “attached duties”, both authors based their epistemological assumptions on similar pillars. Menezes Cordeiro is firm in the conviction that the principles of materiality of legal regulation and trust must be adopted as guiding tools for the achievement of objective good faith, whereas Martins-Costa prefers juridical topics for achieving this desideratum. Here lie some of the main difficulties encountered during the research proposed by the sub-project: the jurists discussed here, representatives of the dominant legal current on the subject, see objective good faith from a dogmatic and systematic view of the legal phenomenon, nevertheless they start from an open understanding of this phenomenon. This way, even though both reject the mere subsumptive logic of application of law, their conceptions collide with the gnosiological bases already outlined in the introduction to this report, which illuminated the continuation of this research and the studies conducted between the advisor and advisees. Thus, as we search for a different foundation for objective good faith, it is imperative to note how contractual reality and its underlying economic dimension—regulated by such institution and its attached duties—have been faced.

Like any legal institution, the contract is subject to what can be termed as “. . . the principle of historical relativity”⁴² This is meant to say that the contract is also subject to historical

40. MARTINS-COSTA, *supra* note 9, at 371-72.

41. *Id.* at 376-77.

42. ENZO ROPPO, O CONTRATO 347-48 (Ana Coimbra & M. Januário C. Gomes trans., Almedina 2009).

contingencies that mark its understanding. And any position intending to establish an alleged unitary and universal “essence” of contract, extracted from a single strand of legal knowledge, is open to criticism. In fact, today the fragmentation that permeates postmodern contract theory is recognizable; as the contract is marked by varied facets, it becomes impractical to obtain a concept that is unique and revealing of its structure.⁴³ Even the standardization of exchanges do not determine the “death” of the contract, but the readjustment of its discipline in face of today’s dynamic socio-economic requirements.⁴⁴

This, however, does not preclude the possibility to outline some general lines of the profile of contracts. These, incidentally, are traditionally defined as “. . . two or more parties agreeing to constitute, regulate or extinguish a legal patrimonial relationship.”⁴⁵ Thus, the patrimonial nature, or better, the economic nature is the element that marks the contract, as the contract is realized solely in relationships that have the economic nature as their basic component.⁴⁶ This does not mean that the contractual universe is tied to a mere idea of exchange; a donation, for example, is also characterized as being a contract, because it is also a means of the circulation of wealth.

In this sense, the contract is a genuine legal-formal garment for economic operations—where such garment is not present, one cannot identify the existence of a contract.⁴⁷ Therefore, as a legal concept, the contract is intended to regulate the objective

43. Lucas Barroso, *A teoria do contrato no paradigma constitucional*, 84 *REVISTA DE DIREITO DO CONSUMIDOR* 163 (2012).

44. PIETRO PERLINGIERI, *O DIREITO CIVIL NA LEGALIDADE CONSTITUCIONAL* 397 (Maria Cristina De Cicco trans., Renovar 2008).

45. CESARE BIANCA, *DERECHO CIVIL: EL CONTRATO* 23 (Fernando Hinestrosa & Edgar Cortés trans., Universidad Externado de Colombia 2007). (Free translation from Spanish. Original text: “. . . *el acuerdo de dos o más partes para constituir, regular o extinguir entre ellas una relación jurídica patrimonial*”.)

46. LUCAS BARROSO, AMANDA MORRIS, ET. AL., *DIREITO DOS CONTRATOS* 40 (Revista dos Tribunais 2008).

47. ROPPO, *supra* note 42, at 11.

circulation of wealth, whether current or potential, from one person to another, depending on the direction and organization one wants to give to the interests involved in the realization of the economic operations.⁴⁸ It is seen, accordingly, that the contract appears as an instrument immersed in the economic and social context: it is the legal and formal translation of such context, with a view to the formation of a complex body of rules that protect the interests of the contracting parties.

In terms of legislative developments, it is known that the classical contractual paradigm, derived from the Enlightenment context of the eighteenth century, influenced the first legal contract systematics, inserted into the Napoleonic Code of 1804. However, the strictly conceptual overview outlined earlier did not prevent contractual theory, since its origin, from playing an ideological role. The contract actually became “. . . the flag of societies born out of bourgeois revolutions and, ultimately, an element of their legitimacy.”⁴⁹ So, one understands the deep connection between the conceptual roots of contract theory and the economic goals of the emerging bourgeois class, aimed, ultimately, at the consolidation of the capitalist system as a prevailing mode of production.

This perspective becomes even more latent when we better analyze the core of primal contract theory, namely, freedom of choice, today recognized as private autonomy.⁵⁰ To begin with, private autonomy can be defined as the power by which the legal system establishes the possibility of holders of rights to determine the juridicization of their activities, choosing the legal effects to be

48. *Id.* at 9, 13.

49. *Id.* at 28.

50. As a result of in-depth studies on private autonomy and its current problems in face of the concrete contractual relations, we co-authored the following scientific article for the XXI National Congress of CONPEDI: Jussara Gomes & Laio Stel, *O atual dilema da autonomia privada: entre a teórica contratual e a efetividade das práticas sociais* in *RELAÇÕES PRIVADAS E DEMOCRACIA* 164-83 (Otávio Luiz Rodrigues Jr.; Giordano Bruno Soares Roberto & Nelson Luiz Pinto (coords.), FUNJAB 2012).

produced.⁵¹ However, and beyond this purely doctrinal construct, one sees that, at its root, the defense of autonomy to all individuals had been determined by the need to declare the freedom of workers from the bonds that harnessed them to the land of the feudal lords in order that they might serve as free labor to the rising bourgeoisie.⁵² In the words of Ana Prata, “the connection between the worker and the means of production is only possible by *agreement* between the worker and the owner of these means.”⁵³

It is noted, however, that the defense of private autonomy and its legal significance emerged at the time of the final collapse of feudalism and of the capitalist expansion, thus determining the universalization of the latter and of other favorable concepts to the consolidation of this economic system of production. In such context, the juridical transaction, under which the contract is the largest exponent, is revealed as true affirmation of individual freedom and economic freedom of all.⁵⁴ However, it must be said that the exaltation of freedom and equality among individuals, at that juncture, did not leave the theoretical field; the abstraction of these principles, in fact, served to conceal the deep substantial inequalities, in particular relating to the economic and social power between the parties, so as to disguise the existence of materially unfair agreements of the will, hence the affirmation of the ideological function embedded in the origins of the legal construct of contracts.⁵⁵

Thus, having made this historical digression on classical contract theory and its essential pillar, private autonomy, we need to emphasize that such a bourgeois-liberal paradigm does not seem so far away from the civilian legal thought in contemporary times.

51. Diogo de Melo. *Princípios do direito contratual: autonomia privada, relatividade, força obrigatória, consensualismo* in TEORIA GERAL DOS CONTRATOS 82 (Renan Lotufo & Giovanni Nanni (coords.), Atlas 2011).

52. ANA PRATA, A TUTELA CONSTITUCIONAL DA AUTONOMIA PRIVADA 9 (Livraria Almedina 1982).

53. *Id.* at 8, emphasis added.

54. *Id.* at 10.

55. ROPPO, *supra* note 42, at 37-38.

Indeed, although there is a plurality that permeates the contractual phenomenon, which is felt in the presence of different paradigms in action, it is important to point to the fact that, in light of Maria Luiza Feitosa's views, the image of the contract extracted from liberal rationality would still prevail.⁵⁶ This author adds that "in the national context, for example, contracts that objectively fit in the legal system and do not involve consumer relationships have not changed, to the point of seeing in that system, the exhaustion of the classical paradigm."⁵⁷ Thus, the concept of contract as a meeting of free wills based on a formal freedom and equality continues to influence civilian doctrine and pertinent legislation.

This fact, in turn, must be taken into account when analyzing the basis given to objective good faith. Effectively, throughout the development of the research, the analysis of the contract panorama proved of great value in that it hinted at how the theory that embraces it remains imbued, in many respects, with nineteenth-century liberal-bourgeois individualism. Thus, to affirm the strictly incidental and integrative nature of the attached duties is to adopt an acritical position on the very reality with which one is dealing. After all, if such duties are simple guidelines directed to the ". . . exact processing of the obligational relationship . . .",⁵⁸ i.e., the pursuit of contractual purposes embodied in the due performance, nothing else they will be doing than condone the ideological bias found in the intricacies of contract theory and which hides the actual *inter partes* inequalities.

Following this conclusion, how may law resolve this problem more fully if it is regarded—in the view adopted by Menezes Cordeiro—as lacking of a reductionism to become operative in the face of the growing complexity of modern societies?⁵⁹ Now, the

56. MARIA LUIZA PEREIRA DE ALENCAR MAYER FEITOSA, *PARADIGMAS INCONCLUSOS: OS CONTRATOS ENTRE A AUTONOMIA PRIVADA, A REGULAÇÃO ESTATAL E A GLOBALIZAÇÃO DOS MERCADOS* 566 (Coimbra Editora 2007).

57. *Id.* at 569.

58. MARTINS-COSTA, *supra* note 9, at 440 (emphasis added by author).

59. CORDEIRO, *supra* note 7, at 1258.

legal phenomenon, according to what has been repeatedly asserted in this report, cannot be taken as the product of an axiomatic and simplified perspective. Law must essentially confront this complexity, since it emanated from it. After all, if today's laws no longer exclusively form a legal statute, becoming the result of political contingencies and partisan forces, it is necessary, according to the teachings of António Castanheira Neves, that:

. . . [T]he (committedly) political nature of the legislative function must have its counter-pole in the (autonomously legal) nature of the jurisdictional function. In this sense, but only in this sense, one can speak of the ‘*Vom Gesetzesstaat zum Richterstaat*’ evolution (R. Maric) which, since thus understood, is beyond the question of the (democratic) legitimacy of the jurisdictional function in terms of its legally creative manifestations, because it is not a dispute between powers, it is *not even* assigning ‘*Alle Macht den Richtern*’ and thus the eventual emergence of the ‘government of judges’, but it is to assert law to power, the possibility to ultimately recognize law as a constitutively unailing dimension of the state and so truly [recognize] the state as rule-of-law.⁶⁰

Therefore, if the desire to keep law as an effective counterpoint to power in its political-legislative manifestation still exists, law cannot be returned to mere legality, nor to a dogmatics said to be, paradoxically, open to what is called “meta-legal concepts.” It is noteworthy that, regarding the author mentioned, not even the general clauses served to overcome the alienation suffered by formalist rationality when closing law in on itself.⁶¹

From these conclusions, this research sought to lay a renewed foundation to objective good faith so that it is observed through a prism of a practical and jurisprudential analysis in which its usefulness in the judicative-decisory realization of law becomes a

60. ANTÓNIO CASTANHEIRA NEVES, 3 DIGESTA: ESCRITOS ACERCA DO DIREITO, DO PENSAMENTO JURÍDICO, DA SUA METODOLOGIA E OUTROS 173 (Coimbra Editora 2010) [hereinafter DIGESTA VOL. 3] (emphasis added by authors).

61. *Id.* at 51.

time of full reach of the major objectives of legal existence. Bearing in mind the growing movement of constitutionalization of civil law, in which “values proposed by the Constitution are present in every corner of the normative fabric,”⁶² we recognize the direct application of constitutional principles to legal relationships established in a traditional civil rights context.⁶³ Starting from this premise we need, therefore, to reflect on the influence of the precepts contained in the 1988 Major Law [The Constitution] on the study of objective good faith and on the outlining of the duties arising out of it.

Constitutional civil law may be understood as the culmination of a renewal in the fundamentals of this branch of private law, favored by the democratic Constitution. Its central axis is the existential domain of the human being, i.e., the humanization of national civil law.⁶⁴ Thus, by the proclamation of justice and social solidarity⁶⁵ and human dignity,⁶⁶ the current Constitution helped us see the demand for democratization of civil law, starting from its change of basic foundation, i.e., from patrimoniality to the human person as the ultimate foundation of private law. In this sense one can say, in the words of Paulo Lôbo, “the restoration of the primacy of the human person in civil relationships is the first condition to adapt law to reality and to the constitutional foundations.”⁶⁷ Incidentally, the caveat is that the constitutionalization of civil law does not intend to eliminate patrimoniality from relationships regulated by it, but to give them new significance in favor of a legal protection that is qualitatively

62. Giselda Hironaka, Flávio Tartuce & José Fernando Simão, *O código civil de 2002 e a constituição federal: 5 anos e 20 anos* in OS 20 ANOS DA CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL 463-519 (Alexandre Moraes (coord.), Atlas 2009).

63. PERLINGIERI, *supra* note 44, at 589.

64. Barroso, *supra* note 43, at 156, 160.

65. F.C., art.3, I. (1988).

66. F.C., art.1, III. (1988).

67. Paulo Luiz Netto Lôbo, *Constitucionalização do direito civil* in DIREITO CIVIL: ATUALIDADES 206 (Bruno Torquato de Oliveira Naves, César Fiuza & Maria de Fátima Freire de Sá (coords.), Del Rey 2003).

different, so that the economic situation may serve as support for people's full development, and not vice versa.⁶⁸

Moreover, it is necessary to emphasize that, to avoid falling back into a dogmatic legalism, the Brazilian Constitution should also be seen as a product of historical and political contingencies. It would not be consistent, therefore, to visualize it absolutely blindly and acritically. We advocate that the Basic Law, like any other piece of legislation, be seen as one (not the only) axis of realization of law and it must justify itself before legal principles and the concrete case itself.⁶⁹ It is in this sense, finally, that the prospective constitutionalization is accredited, i.e., it firms up the commitment to the “. . . steady journey that captures the historical, cultural meanings of codes and rewrites, through the re-signification of these linguistic beacons, the limits and the emancipatory possibilities of law itself.”⁷⁰

In this step, the study of objective good faith undertaken in this research reaps its foundations on such a perspective, since good faith, as any civil legal institution, cannot escape the social commitments, already constitutionally assumed. Only then will we be able to see the importance of objective good faith as a legal principle governing the exercise of contractual prerogatives by making private autonomy, and therefore contracts, essentially subjected to social solidarity.⁷¹ It is in this sense, finally, that the findings of this research will be established.

V. CONCLUSIONS

Given the relevance of objective good faith in the design of the current profile of today's contracts,⁷² its study becomes important

68. PERLINGIERI, *supra* note 44, at 121-22.

69. NEVES, DIGESTA VOL. 1, *supra* note 2, at 48.

70. Luiz Edson Fachin, *Apresentação to 2 APONTAMENTOS CRÍTICOS PARA O DIREITO CIVIL BRASILEIRO CONTEMPORÂNEO 13* (Eroulths Cortiano Júnior; Jussara Maria Leal de Meirelles & Paulo Nalin (coords.), Juruá 2009).

71. BIANCA, *supra* note 45, at 57.

72. FEITOSA, *supra* note 56, at 557.

due to the sense that one wants to give to contractual relations and their underlying economic transactions. At the end of this research, it is therefore possible to summarize the conclusions as follows:

1) The systematic understanding of objective good faith intended to emphasize its importance in the methodological renewal of the realization of law, from a dogmatic bias and therefore, reductionist. However, we hope to have demonstrated that the current human reality is much more complex and dynamic than the legal system can assume. The legal system will always be doubly exceeded, either by the principles that determine the evaluative agenda of the community project, or by the historical reality that it is intended.⁷³ Thus, the understanding of objective good faith must be based on another perspective which is historical-problematic and that effectively put civil law and its institutions at the service of the human person.

2) The doctrine of attached duties becomes insufficient and barely profitable when contrasted with the epistemological assumptions on which this research was based. Indeed, to defend the idea that duties coming out of objective good faith have an ancillary nature is to serve the mere achievement of individualistic purposes of contracts. Therefore, the end result is corroborating with the old classical liberal paradigm that still permeates the dominant contractual theory, without having a critical perspective on actual reality regulated.

3) To avoid this problematic subordination of good faith to classical contract theory, it is therefore necessary to enforce a general duty that—beyond purely individualistic impulses of the parties—stands as an actual curb to private autonomy. In view of the foregoing, it is concluded that the perspective outlined at the end of this research can provide the concept of objective good faith as an ethical-normative element of effective re-signification of

73. NEVES, DIGESTA VOL. 1, *supra* note 2, at 47.

contractual relations established in our times, serving as a sufficient basis for what is advocated here.

4) This general duty, in view of the increasing constitutionalization of civil law, should pass through the ideals of solidarity and cooperation, so that the contracting parties seek the satisfaction of their goals with concern for the legal position of the other. It is in this sense that economicity, inherent to the idea of economic transactions to which the contracts serve as a legal garment, must follow. Only then may objective good faith be consistent with the renewal suffered by civil law, especially in regard to the search for its concept as an instrument of autonomous but responsible human fulfillment.