Chapter 2.

The Rule of Law in Private Law and the Principle of Good Faith: A German Perspective

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Abstract: The relationship of good faith to the rule of law principle has not been widely explored thus far. This article determines to which extent the good faith principle is consistent with the rule of law and its associated values, like legal certainty and proportionality. It examines whether good faith acts as a meta-principle of law, which governs the application of other principles and serves the more legal purposes associated with the rule of law principle, or it is a special manifestation of the rule of law. The article shows that good faith and the rule of law are not only interrelated but that the good faith principle can weaken the effect of the rule of law. While good faith can help to mediate the effects of State powers in constitutional law, it can also be used to import ideology, as seen in some countries during the period of totalitarianism.

1. Introduction

Together with the principle of democracy, the rule of law principle is the cornerstone of a liberal state. In Germany and, e.g., in Switzerland, it is explicitly enshrined ("Rechtsstaat") in the constitution; likewise, it is in the primary law of the European Union [1]. The term "rule of law" dates to the 19th century and was originally a legal-political "fighting term" (Kampfbegriff) [2]. With its political content, the rule of law describes "one, perhaps the ideal of the state" [3]: the ideal of the rule of law, which is primarily directed not against monarch or legislature but against a highly developed administrative apparatus [4]. Its legal condensate is the rule of law as a constitutional principle. According to the German Federal Constitutional Court (Bundesverfassungsgericht - BVerfG), the "rule of law principle", together with the principle of democracy and the principle of the federal state, is "one of the fundamental principles of the Basic Law" [5]. The rule of law has a focus on the state and, therefore, primarily on public law. In private law - except the civil procedural law, which regulates sovereign relations and is basically public law - there is almost never any mention of the rule of law principle. Instead, the discourse in private law, especially in contract law, is characterised by good faith as the highest principle. This principle originates in private law but has also been recognised as a principle of public law since the time of the Weimar Empire [6].

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Vice versa, the rule of law, which is extensive, should be demonstrable in private law, even if it is not explicitly mentioned there. In a state governed by the rule of law, private autonomy does not apply by itself but owes its existence to the state's guarantee and legitimation.

The following questions will be examined in further detail below:

(1) How does the principle of the rule of law manifest itself in private law?
(2) Are there connections between the rule of law principle and the principle of good faith in private law, and what is the nature of these interrelations?

Is one of the two principles the overarching one, or is the statement that one can read in the literature true, that good faith and the rule of law stand “independently side by side”, even if individual contents are congruent [7]?

In particular, are private law legal institutions such as the protection of legitimate expectations and forfeiture, which are usually associated with good faith, also or first and foremost a manifestation of the rule of law principle?

2. The Principle of Good Faith

2.1. Functions of Good Faith in Private Law

The German Civil Code (BGB) mentions the term “good faith” in seven different places. The most important is undoubtedly section 242 (“Performance in good faith”), which reads as follows: “An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration”. Systematically, it is assigned to the general part of the law of obligations; however, far beyond its wording, which is limited to determining the content of performance obligations of any kind, it is virtually understood as the epitome of the principle of good faith in the whole German law system and is constantly cited in this function. Section 157 of the German Civil Code (“Interpretation of Contracts”) is also frequently cited, albeit to a much lesser extent than section 242. It is found in the so-called general part of the German Civil Code, which claims application for the entire Code but, by its content, is to be assigned to contract law. According to this, contracts are to be interpreted “as required by good faith, taking customary practice into consideration”. Regarding the determination of the content of contractual obligations, section 157 BGB and section 242 BGB are closely related.

Sections 275, 307 and 320 BGB deserve special mention. According to para. 2 of section 275 BGB (“Exclusion of the duty to performance”), which is dedicated to impossibility, the obligor may refuse performance (among other things) insofar as it “requires an expenditure of time and effort that, taking into account the subject matter of the obligation and the requirement of acting in good faith, is grossly disproportionate to the obligee’s interest in performance”.

In this case of so-called practical (or factual) impossibility, which extends the idea

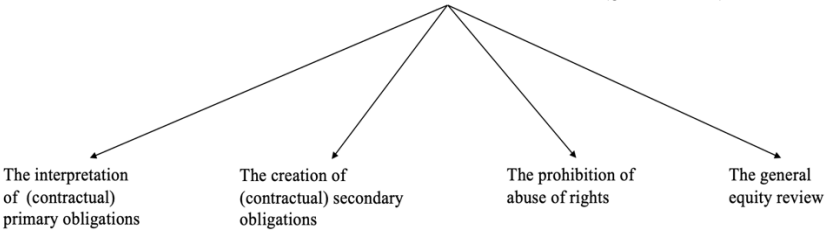
of the principle ultra posse nemo obligatur beyond impossibility under natural law, the concept of proportionality is expressed. The same applies to para. 2 of section 320 of the Civil Code, which is dedicated to the defence of an unperformed contract. The provision reads: "If one party has performed in part, consideration may not be refused to the extent that refusal, in the circumstances, in particular, because the part in arrears is relatively trivial, would be in bad faith". The law thus establishes a direct connection between good faith and proportionality.

The provision of section 307 ("Test of reasonableness of contents") of the German Civil Code, which is the core provision of the judicial review of general terms and conditions, expresses another aspect of the principle of good faith, fairness in contractual relations (and even beyond). According to the first sentence of the clause, "provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the party contracting with the user".

In summary, four functions of good faith can be identified in German private law:

(1) the concretization/interpretation of (contractual) primary obligations,
(2) the creation of (contractual) secondary obligations, whereby a distinction is made between performance-related secondary obligations (implied terms) and further duties of conduct (duties to protect), which are basically of a tortious nature,
(3) the prohibition of abuse of rights. These include:
- the prohibition of harassment (section 226 BGB),
- the objection of contradictory conduct (venire contra factum proprium),
- the maxim dolo agit, qui petit, quod statim redditurus est,
- forfeiture and
- other cases of abuse of rights (individually and institutionally in the form of circumvention of the law),
(4) the general equity test, i.e., the correction of the results of (statutory or contractual) interpretation that are perceived to be extremely unjust, which is no longer within the scope of the admissible methods of interpretation.

Functions of Good Faith in German Private Law (§ 242 BGB)



Thus, according to German understanding, the principle of good faith is in international comparison, especially with common law countries, exceptionally extensive and charged [8]. In its function as a principle of interpretation, on the other hand,

good faith is likely to be the international standard [9]. We will return to the equity test and the principle of proportionality later.

2.2. Good Faith in Public Law

As already stated, good faith is one of the general principles of private and public law, including federal and state administrative law [10]. This is no surprise since good faith is considered a general principle of the entire German legal system [11]. Another question we will not discuss here is whether it is correct to cite the provision of section 242 BGB to justify the principle of good faith outside private law. In the literature, it is pointed out that section 242 BGB was deliberately not included in the general part of the law by the legislator but was anchored in the law of obligations so that it should be understood merely as a partial codification of a general principle of law [12].

In a more or less narrow sense, the principle of good faith is likely to be found in all legal systems - as long as they are not characterised by pure arbitrariness [13]. Accordingly, the principle is, for example, considered a customary rule of general international law [14].

However, using the good faith argument is rare in public law practice. First, as in private law, good faith is encountered as a principle of interpretation of singular legal acts like administrative acts and general decrees in contrast to statutes [15].

Second, the principle of good faith in public law has a certain value for protecting citizens who rely on the continued existence of a factual or legal situation created by the public decision-makers (Vertrauensschutz, “protection of legitimate expectations”). By the above distinction of the functions of good faith, the corresponding groups of cases can be assigned to the two areas of justification/concretisation of obligations or the prohibition of abuse of rights, depending on the case.

One group of cases, which, however, lost its significance in 1976 through its codification in the (almost word-for-word identical) administrative procedure laws of the (formerly) federal states and the federal government, was the withdrawal of unlawful administrative acts favouring the citizen (e.g., decision on social benefits; decision on subsidy; building permit, etc.) by the authority with effect for the past. Back then, the Federal Administrative Court expressly invoked the principle of good faith to protect the citizen’s legitimate expectations in the continued existence of an unlawful administrative act. In 1959, for example, the Court did not accept the argument that the rule-of-law principle of the legality of administrative action required the reimbursement of wrongfully granted pensions in every case. According to the Court, the consideration of the citizen's interest in reliance is not a violation of the legality of administrative action if it is a requirement of good faith “because good faith itself belongs to the core of the legal system” [16].

Similarly, administrative case law has, in individual cases, under the aspect of forfeiture (as a manifestation of good faith), denied allowing the administration to

exercise its rights vis-à-vis the citizen [17].

Now, however, the protection of the citizen's legitimate expectations in the case of retroactive administrative action is predominantly treated as a problem of the principle of the rule of law insofar as it is not regulated by law anyhow.

Likewise, in contrast to private law, the principle of proportionality in public law is not associated with the principle of good faith; it is derived from the principle of the rule of law and especially fundamental rights [18].

2.3. Constitutional Rank of the Public Law Principle of Good Faith

By referring to the principle of the rule of law, case law avoids the question of the rank of the principle of good faith in the hierarchy of norms. Unlike the Swiss Federal Constitution [19], the German constitutional legislator has refrained from referring to good faith.

In the decision from 1959, the Federal Administrative Court apparently assumed that good faith, which it saw as being in the "core of the legal system", has constitutional rank. Otherwise, this principle would not even be able to relativise the principle of the legality of administrative action [20]. In a decision of 1989 [21], the Federal Fiscal Court (Bundesfinanzhof, BFH) expressly left open the question of "what rank the principle of good faith is to be assigned in each case among the tax legal norms".

Suppose it is assumed with the so-called inner theory (Innentheorie) that good faith is inherent in rights [22]. In that case, it will be difficult to deny constitutional rank to rights that find their basis in constitutional law, including all state authorities interfering with fundamental rights.

3. Rule of Law Principle

3.1 Conventional (constitutional) Understanding of the Rule of Law Principle in Public Law

According to conventional German understanding, the rule of law principle has a formal and a substantive (or material) aspect [23]. The formal aspect includes the separation of powers, the binding of the legislature by constitutional order, the executive and the judiciary by law and justice (Art. 20 (3) Basic Law). Furthermore, must be added the guarantee of legal remedies for citizens (Article 19 (4) Basic Law), the right to be heard in court, the prohibition of retroactivity for criminal law and double jeopardy (Article 103 (1) to (3) Basic Law). The material aspect of the rule of law, as understood in Germany, constitutes the "state of justice" (Gerechtigkeitsstaat). It is characterized essentially by fundamental rights and the principle of proportionality associated with fundamental rights, as well as the foreseeability and predictability of state measures or, put another way, legal certainty.

In the words of the Federal Constitutional Court, the rule of law contains “as an essential element the guarantee of legal certainty”, which requires “not only a regulated procedure of legal determination but also a completion whose legal stability is ensured” [24]. The protection of legitimate expectations includes that the enactment of laws with so-called “true” retroactive effect, i.e., with legal consequences that are linked to a citizen's past conduct, is “generally impermissible” [25]. The Court is particularly strict regarding the retroactive effect of laws linked to completed facts and legal relationships for the future, given the democratic legitimacy of the legislature [26]. In the case of the retroactive correction of materially erroneous administrative acts, the Court sets lower requirements since the protection of legitimate expectations is offset here by the interest in the enforcement of statutory law, which is based on the rule of law, too [27]; there is no mention of good faith in the cited decision.

According to the case law of the Federal Constitutional Court, the principle of proportionality (in the broader sense) and - as a partial aspect - the prohibition of excessiveness are also “to be derived from the principle of the rule of law as overarching guiding rules of all state action” [28]. The principle of proportionality states that a state measure must be suitable for achieving the objective pursued, that it must be necessary in the sense of the mildest means of achieving the goal, and that it must be reasonable when the interests concerned are weighed up, i.e., that it must not represent excessive hardship for the person concerned. It should only be noted in passing that the principle of proportionality vis-à-vis the legislature, insofar as the legislator is free to define its objectives, is hardly more than a plausibility check, which moreover runs empty as far as the Constitutional Court takes the lawmaker's factual bases as its own.

3.2. Private Law Implications

Private law connections can arise for such material aspects of the rule of law that do not have a compelling sovereign reference, such as the separation of powers. In particular, fundamental rights are considered, including the principle of equality, legal certainty, proportionality, as well as the corrective measures under private law in the service of material justice and equity. The direct rule of law requiements for private law (in particular, the prohibition of retroactivity and legal certainty) and civil proceedings (the requirement of fair and speedy trial, neutrality, etc.) are not considered here because they do not have any private law specificity.

3.2.1. Fundamental Rights

3.2.1.1. Indirect third-party effect. Fundamental rights are seen as an essential component of the material rule of law. It has long been recognised in the federal republican legal system that fundamental rights, although initially rights of defence vis-à-vis the state, affect the relationship among private individuals. This so-called indirect third-party effect of fundamental rights under private law can be traced back to the principle of the rule of law, even if the rule of law does not usually

appear in the chain of argumentation. The “Lüth” judgement of the Federal Constitutional Court of 1958 [29] on freedom of expression and its impact on private law, which admittedly likewise makes no explicit reference to the rule of law, was formative for developing the theory of indirect third-party effect.

The decision was based on a court ruling by the Hamburg Regional Court, which prohibited the head of the Hamburg press office, at the same time president of the “Hamburger Presseclub e.V.” (plaintiff), from repeating his call for a boycott of a movie directed by a person who was proven to be anti-Semitic during the time of the “Third Reich”. The Regional Court had qualified the call for a boycott as intentional and immoral damage within the meaning of German tort law (section 826 BGB). The Federal Constitutional Court found the ruling to violate the freedom of expression. It means that, in addition to their function as rights of defence against the state, fundamental rights were part of the “objective system of values” of the constitutional order, in which “a principled strengthening of the normative power of those basic rights is manifested” (juris, no 26). This system of values must apply as a fundamental constitutional standard to all areas of law and naturally “also influences the private law”. No provision of private law may “contradict it”; each must be “interpreted in its spirit” (juris, no. 26). Accordingly, the civil courts would have to consider for instance, the importance of freedom of expression in proceedings over calls for boycotts by way of a “balancing of interests” when interpreting the characteristic of immorality in the context of tort law (juris, no. 38).

In other words, the state can violate fundamental rights through direct interference and indirectly by not giving them sufficient effect in the relationship between private individuals. Of course, the effect of fundamental rights in a private must be weaker than in a sovereign relationship because the other party of the private-law relationship is also the bearer of fundamental rights. In this case, the director has a fundamental right to exercise his general freedom of action. From today's perspective, one might think of countering the notorious censorship measures of powerful multimedia companies such as Facebook and YouTube against contributions critical of the government in certain areas (e.g., Corona politics) with the third-party effect of freedom of expression, particularly. However, no corresponding case law has become known so far. Instead, the claims of those affected are, insofar as can be ascertained, decided exclusively based on the relevant general terms and conditions.

It is interesting, moreover, to look at two court decisions on the significance of freedom of conscience and religion (Article 4 GG) in the context of contracts, which draw a connection between the protection of fundamental rights (under the rule of law) and the principle of good faith. The Düsseldorf Regional Labour Court (Landesarbeitsgericht, LAG) distinguished itself in a judgement of 1988 [30] by stating that “if, according to the common view, the performance of the work would bring the person concerned into an unreasonable conflict of conscience, the employer would be in breach of good faith by making such a request”. The case concerned the complaint of the head of the research department of a pharmaceutical company against his dismissal. He had been dismissed because he had

refused, on medical-ethical grounds, to develop further a substance that was capable of suppressing symptoms of nuclear radiation in the short term, thereby ensuring the continued deployment of soldiers. The Federal Labour Court (Bundesarbeitsgericht, BAG) overturned the decision [31], however, not because of the reference to good faith but because the Regional Labour Court had wrongly denied the existence of a sufficient conflict of conscience in the specific case.

The second case is a judgement of the Regional Court of Heidelberg from 1965 [32]. Here, the Court granted the landlord of a large hall the right to withdraw from a lease on grounds of conscience after learning that the tenant planned to hold a lecture event in the hall featuring a controversial American history professor. The legal basis for the right of withdrawal here is the unreasonableness of the further fulfilment of the contract, derived from the principle of good faith according to section 242 BGB. The unreasonableness resulted from the fact that the fundamental right of freedom of conscience takes precedence over the legal obligation to contractual obligation.

3.2.1.2. Principle of equality in private law? Although equality is a fundamental right, it is rarely cited in connection with the principle of the rule of law. Some authors regard it as another fundamental principle standing alongside the rule of law. Indisputably, equality is a central expression of the idea of justice [33]. Whatever the case, the principle of equality (or, more precisely, the principle of equal treatment) has two manifestations in the sense of the German constitution. According to its general side (Article 3(1) of the Basic Law), all unequal treatment by the state towards its citizens requires a sufficient objective reason. On its specific side (Article 3(2) and (3) of the Basic Law), the principle of equal treatment prohibits certain differentiation criteria (gender, race, belief, religion, etc.) to protect disadvantaged groups and thus declares them - with few exceptions - to be unobjective reasons across the board (prohibition of discrimination). The so-called General Equal Treatment Act of 2006 (Allgemeines Gleichbehandlungsgesetz – AGG) has, admittedly not in the name of the Basic Law, but based on European law, created similar private law prohibitions of discrimination for bulk transactions as well as in particular for employment relationships.

Furthermore, the law knows various absolute prohibitions of equal treatment, such as the requirement of equal treatment of shareholders by the public limited company (section 53a Stock Corporation Act - Aktiengesetz) and of equal treatment of holders of securities in the case of public purchase and takeover offers [34] or the indirect requirement of equal informational treatment of investors in the context of the prohibition of insider trading under capital market law [35].

So far, however, there is no evidence of the general principle of equality having a broad impact on the relationship between private individuals in German law. There have been attempts in the literature to install the general principle of equality in private law, with the consequence that unequal treatment would not have the blessing of private autonomy behind it but would require justification per se; fortunately, this approach has not found any significant resonance so far. Only in

extreme cases can unequal treatment in the conclusion of a contract be sanctioned as immoral (intentional) damage under tort law (section 826 BGB), going beyond the prohibitions of discrimination in the General Equal Treatment Act of 2006.

The judgement of the Supreme Court of the German Reich (Reichsgericht) of 3.2.1914 [35a] can by no means be interpreted as the seed of a duty of equal treatment under private law. It cannot be transferred to the present day, for example, in the sense that the manufacturer of a limited vaccine would be obliged to serve all prospective buyers equally [36]. In the Reichsgericht case, the plaintiff had agreed in advance with a farmer on a contract to purchase a certain quantity of sugar beet seeds. Due to an unusually poor harvest because of high drought, the seller had only delivered a minor part of the goods to the buyer when the delivery obligation became due. After that, the plaintiff sued for subsequent delivery of the rest. The seed breeder claimed that he could only make a proportionate delivery in view of his other buyers. The Reichsgericht ruled in favour of the seed breeder, arguing that delivery was impossible. All buyers could have demanded that the seed breeder "proceed according to law and equity, i.e., evenly" in the distribution. The complete delivery to the plaintiff at the expense of the other buyers was not reasonable for the seed breeder because he would then be exposed to claims for compensation from these buyers; a corresponding demand would be "contrary to section 242 BGB". The seed breeder only had to perform "in good faith and with due regard to custom and usage" [37]. Between the buyers, "foreseeable to each of them", a "community of interests" had arisen, the consequence of which "had to be shown if the harvest was sufficient to satisfy individuals but not all".

So here we have a decision that justifies equal treatment in private law, though not on the basis of the rule of law but on good faith. Nevertheless, it cannot be generalised. The peculiarity of the case here is that the other buyers could have sued the supplier in the same way and that the Court could then have combined all the proceedings into a single action (section 147 of the Code of Civil Procedure) so that all the buyers would become joint litigants by law [38]. In this situation, however, an overall consideration of whether delivery was still possible would have been imperative; the Court would not have had the right to favour any individual of the resulting litigants. By finding a "community of interests", the Court, in this respect, only anticipated hypothetically possible joint litigation of the buyers in dispute.

For the sake of completeness, it should be mentioned that the equal treatment requirements are supplemented by norms which, conversely, even permit or order discrimination against members of (actually or supposedly) privileged groups based on the criteria determining group membership. This instrument is called Gleichstellung, literally "equalisation", in English terminology: equality. Constitutionally, it has found expression in Article 3 (2) sentence 2 of the Basic Law [39]. However, the approach is also followed by the four European Equal Treatment Directives that relate to private law and have been transposed into German law by the General Equal Treatment Act. The private law effects are considerable: examples are the allowance of so-called "positive discrimination" on the grounds

of race or ethnic origin, gender, religion or belief, disability, age, or sexual identity under this Act (section 5 in conjunction with section 1) or the gender quotas for executive and supervisory boards in stock corporations under the Stock Corporation Act (section 76 para. 3a, section 96 para. 2). In contrast to the equal treatment requirements, however, it is difficult to still interpret equality as a special manifestation or even a necessity of the rule of law.

3.2.2. Legal certainty in private law. Foremost, legal certainty can be used to deduce requirements for private law legislators (e.g., the prohibition of retroactivity). Since this is not a special private law effect of the rule of law principle, it will not be discussed further here.

Legal certainty also has an impact on what methods of applying the law are admissible. This concerns the legal interpretation and the methodical limits of "judicial further development of the law" (richterliche Rechtsfortbildung) beyond interpretation [40]. To ensure that the judiciary respects its constitutional commitment to law and justice, judicial reasoning must remain within the scope of the recognised rules regarding the application of the law. Again, this is not a specific private law effect of the rule of law. Nevertheless, it has an important point of contact with the principle of good faith insofar as the latter - mainly in private law - must serve to adjust statutory decisions in the name of equity. The rule of law sets limits to the freehand argumentation of equity. An interpretation contra legem is generally not allowed [41]. An exception is only conceded in extreme cases [42].
Moreover, legal certainty in the sense of the rule of law, i.e., the foreseeability of state action, is vaguely reminiscent of the private law principle of the protection of legal transactions (Verkehrssicherheit), which could be understood as private law legal certainty. Both principles are under the overarching sign of the protection of legitimate expectations. One could, therefore, initially fall for the idea that the security of legal transactions, e.g. the good faith acquisition from a person not entitled (sections 932 et seq. BGB, section 892 et seq. BGB; section 366 of Commercial Code - HGB) or the good faith protection regarding entries in state registers (e.g. land register, commercial register, e.g. section 891, 900 BGB; section 15 HGB), is an expression of the principle of the rule of law. However, such an assumption is by no means evident. The fact that the legal system treats erroneous ideas of participants in legal transactions (such as persons who consult the commercial register or even only could consult it) as if they were true rather conflicts with the rule of law. The rule of law is built on the legality of state action, which includes that only those legal consequences occur whose factual prerequisites are (really) fulfilled.

This impression that the protection of legal transactions cannot be derived directly from the rule of law is reflected in the observation that the private law prerequisites for the protection of legitimate expectations, e.g., with regard to an official register entry, are by no means always the same. Rather, the legislature balances the interests involved in different ways in each case. Sometimes, the protection is even effective against bad faith, and sometimes, simple negligent ignorance is damaging.

Nevertheless, it can be said that there is a connection between the private law protection of reliance on official announcements and the rule of law, for only those state authorities that act by the rule of law are reliable. In terms of civil proceedings, this idea is expressed in the special evidential value that the law assigns to official documents (section 415, para 1 of the Code of Civil Procedure).

3.2.3. Proportionality principle in private law. We have already pointed out above (2.1.) that the principle of good faith in German law contains an aspect that protects against unreasonable or disproportionate obligations in the relationship between private parties. Moreover, there are several monographic studies on the existence of a general principle of proportionality in private law and on the question of whether such a principle can be derived from the public-law principle of proportionality (Verhältnismäßigkeitsprinzip) and the prohibition of excessiveness (Übermaßverbot) in the relationship of the citizen to the state. At first glance, to the extent that the fundamental rights to which the public-law principle of proportionality is ultimately attributable are indirectly reflected in the relationship between private individuals, this idea might be adopted at first glance. However, it has already been said that the standards for protecting fundamental rights in private law are unequal to those in sovereign relationships because, in private law, there are fundamental rights holders on both sides, so the balancing of the interests involved must be different. Stürner, in his comprehensive study of the principle of proportionality in contract law [43], has likewise concluded that a simple transfer of the dogmatics of the principle of proportionality developed for public law is also “hardly worth considering” for private law. Parallels exist only on an abstract, methodological level, namely insofar as proportionality or, more precisely, its absence in balancing processes shows itself as an immanent limit for exercising a right.

Here, one might counter: If proportionality is ultimately viewed as “striving for material justice”, “then its root actually lies in the principle of the rule of law” [44]. With this understanding, however, proportionality moves away from the core of its meaning in public law.

3.2.4. Material justice. Material justice in private law is the overriding aspect that underlies the criteria above of equality and proportionality as a catch-all to some extent. It operates at two levels: the constitutional control of statutory law by the Federal Constitutional Court under the aspect of the indirect effect of fundamental rights and the further development of the statutory law by courts.

3.2.4.1. Control of Statutory Law. The indirect third-party effect of fundamental rights has already been mentioned above. In the present context, the focus lies on corrections of ordinary statutory law, which are under the sign of proportionality, the rule of law, or even justice.

For example, the Federal Constitutional Court has repeatedly ruled on the compensation of old-age pension claims under private law in the event of divorce from a marriage. According to the Court decision in 1983 [45], the relevant provi-

sion of the Civil Code (Section 1587b para. (3) old version) was incompatible with the general freedom of action (Article 2 (1) of the Basic Law) “in conjunction with the principle of the rule of law” and was null and void. In the reasoning of its decision, the Court expresses the duty of the legislator “to give room leeway in extreme cases to the realisation of the principles of proportionality and of the welfare state as opposed to a rigid implementation of pension equalisation”. According to the Court, the existence of a statutory hardship clause (Härteklausel) is a possibility for courts to make “decisions oriented toward the idea of justice” (Gerechtigkeitsgedanken) in cases “in which the implementation of pension equalisation could lead to a simple 'premium reward’ for the conduct of one spouse in breach of duty or could be unfairly inequitable due to long periods of separation” [46].

The same line of thought can already be found in a preceding judgment of 1980 [47]. There, the Court measured the post-marital equalisation of pensions, i.e., the transfer of part of one partner's pension entitlements to the other partner, against the fundamental right of property (Article 14 of the Basic Law), which relates to all property rights, including pension entitlements (property rights in the constitutional sense) [48].

Interestingly, the Court also comments in this context on the aspect of the protection of legitimate expectations under private law without, however, referring to any of the special regulations for the protection of legal transactions mentioned above (3.2.2.). According to the Court, an essential function of the property guarantee is “to guarantee the citizen legal certainty with regard to the goods protected by Article 14 (1) of the Basic Law and to protect reliance on the property formed by the constitutional laws” (juris, no. 189). In this respect, the “rule-of-law principle of the protection of legitimate expectations for property has found its own expression and constitutional order in the fundamental property right” [49]. The property guarantee fulfils “therefore the function of the protection of legitimate expectations against acts of intervention for the pension insurance positions protected by it” (juris, no. 189). Here, the Court mentions at least - even if only roughly and hardly generalisable since it refers to the special case of a transfer of claims by the sovereign act - the constitutional necessity of protection of legitimate expectations under private law.

The decision of 1966 should not be forgotten either [50], where the Federal Constitutional Court repeats its earlier statement that the rule of law includes “not only legal certainty but also material justice” (juris, no. 33) [51].

3.2.4.2. Further development of law. The alternative way (to addressing the private law legislator and annulling unconstitutional private law) is the correction, immanent in the law, of inequitable results through “constitutional interpretation” (verfassungskonforme Auslegung) of private law norms. In particular, the general clauses of the Civil Code, like good faith and immorality, provide an opportunity to take constitutional value decisions into account. A judgement of 1994 of the Federal Constitutional Court on the constitutional limits of the principle of pacta sunt

servanda in the case of a surety agreement is important in this respect ("Bürgschaftsbeschluss") [52].

The third-party effect of fundamental rights, which has been recognised since the "Lüth" judgement of 1958 (see 3.2.1. above), is only confirmed; what is at issue, however, is the Court's intervention in a contractual obligation justified by the constitution, under the aspect of "disturbed contractual parity" (gestörte Vertragsparität). In this specific case, a bank asserted its rights under a surety contract against the daughter (and her husband) of its borrowers. The daughter had assured the repayment of her father's bank loan. The loan was to serve the acquisition of a plot of land and the construction of a house on this land without any discernible (direct) self-interest of the daughter. The civil courts, including the Federal Court of Justice (Bundesgerichtshof - BGH), had ruled in favour of the bank. The Federal Constitutional Court overturned these decisions insofar as they confirmed the surety's obligation and, at the same time, gave guidelines to the civil courts for the necessary rehearing of the case.

In interpreting the general clauses of the applicable private law, namely section 242 BGB (good faith) and section 138 BGB (immorality), the civil courts have, according to the Constitutional Court, to ensure that "contracts do not serve as a means of external determination" (juris, no. 22). The Court found that the daughter's liability risk was "extraordinarily high given her economic circumstances". At the time of the conclusion of the contract, her income was "by far not even" sufficient "to cover even the interest accruing on the loan for which she was liable beyond the amount of the surety" (juris, no. 24). The ability of the daughter (and her husband) to make an "independent decision when entering into the surety obligations" had been impaired given her young age and her lack of prior professional training (juris, no. 25). The civil courts had not sufficiently considered in their previous decisions the aspect of "disrupted contractual parity", they had misjudged the importance of this aspect "under the guarantee of private autonomy" in Article 2 (1) of the Basic Law (general freedom of action) (juris, no. 27). In other words, the daughter had only formally exercised her private autonomy; in reality, her signature on the surety contract was externally determined (juris, no. 21 f.), i.e. heteronomous [53].

The concept of the rule of law is not explicitly used in this decision, nor the concept of equity or justice, but that of the "fundamental right guaranteeing private autonomy", which can be understood as a concretisation of the rule of law. The fact that the Court invokes the social state principle instead of the rule of law (juris, no. 21) is somewhat surprising and, at the same time, shows that the (material) rule of law cannot be clearly distinguished from the social state principle.

4. Connection Between Good Faith and the Rule of Law Principle

4.1. Similarities and Differences

The foregoing overview of the principle of good faith and the rule of law, each in

private and public law, has revealed certain similarities and differences. The function as a principle of interpretation, whether for legal transactions or legal acts, seems to be reserved for the principle of good faith. The objection of abuse of rights (Rechtsmissbrauch or unzulässige Rechtsausübuing –inadmissible exercise of rights) also seems to be preferably based on the principle of good faith (section 242 BGB) in both private and public law [54]. The objection of forfeiture, which in private law is likewise argued with the principle of good faith, is justified in public law inconsistently with good faith or with the principle of the rule of law [55]. In addition, overlaps between the two arguments and influences of good faith into the preserve of the rule of law can be observed in the public law discourse, at least in the older one, furthermore in the justification of the protection of legitimate expectations regarding the existence of unlawful favourable administrative acts (2.2. above).

Another connection between the two principles is quite basic. The rule of law demands not only that the actions of the executive and the judiciary (including civil courts) are objectively in accordance with the law and within the bounds of the (at least just acceptable) interpretation of the law. In addition, it requires subjectively that the representatives of the state, when applying the laws, act with an honest will to give effect to the law. In the rule of law, the law is not merely an instrument of power but the framework and limit of the exercise of power (rule of law vs. rule by law). It would be incompatible with the rule of law to deliberately interpret the law as well as the underlying facts in such a way as to suit the state officials' own power interests. The fact that the application of law should not be with bad faith and, in this sense, requires “good faith” can be understood as a minimum condition of the principle of good faith.

In private law, the principle of good faith clearly dominates, as already stated in the introduction above. To the extent that the material rule of law is based on the existence of fundamental rights, however, the functioning of the indirect third-party effect of fundamental rights allows the identification of rule-of-law argumentation topoi in private law.

In the case of the protection of legitimate expectations under private law in the form of the safety of legal transactions, on the other hand, the rule of law is only indirectly discernible via the courts' binding to the law. Here, private law statutes create a framework that the judiciary must apply and on which participants in private law transactions can rely.

However, the protection of the reliance of private individuals in announcements by public authorities is justified more on the basis of the rule of law. The various elements of the so-called materialisation of private law [56], which correct the results of formal justice (especially the principle of pacta sunt servanda) with elements of material justice (equity), also bear the stamp of the rule of law. They have been implemented, at least so far, essentially only through the existing general clauses, especially the requirement of good faith and the corrective of immorality, which nullifies legal transactions (section 138 BGB) and generates claims for

damages and injunctive relief (sections 826, 1004 BGB). In their endeavour to realise "justice", they ultimately rely on the justice objective of the rule of law.

4.2. Good Faith as Part of the Rule of Law Principle or Vice Versa?

In the positivist-oriented German legal culture, the most convincing arguments are those that proceed from the written text. Unlike the principle of good faith, the rule of law is explicitly fixed in the constitution, in the Basic Law, and therefore can assert itself against simple statutory law, thanks to its unquestionable constitutional rank. For this reason, from a German perspective, the principle of the rule of law will ultimately be accorded the higher authority compared to good faith, even if case law has recognised that good faith pervades all areas of law, including constitutional law.

There is, however, a certain tendency to prefer the good faith argument when correcting statutory rules, even in public law, if the balancing considerations and the need for correction arise from the concrete circumstances of the parties' behaviour, especially the administration, in the individual case, whereas the rule of law principle is preferred in a more abstract-general argumentation [57]. For example, the Federal Fiscal Court (Bundesfinanzhof, BFH) wrote in a judgement of 1989 [58] that the "displacement of statutory law by the principle of good faith" could "only be considered in cases in which "the taxpayer's reliance on a certain conduct of the administration is worthy of protection to such a high degree according to the general feeling of justice [allgemeines Rechtsgefühl] that the principles of the legality of administrative action have to recede in relation to it" [59].

Last but not least, we would like to point out the following: To the extent that good faith and the rule-of-law argument are committed to material justice, they are both ideology-prone. Mostly, but by no means exclusively, this is true for ideology-driven totalitarian states. It is quite possible that the latter formally subscribes to the rule of law and good faith. Take the example of the socialist German Democratic Republic (GDR), which perished in 1990. Although the term "rule of law" did not appear in the GDR Constitution of October 7, 1974, we can find evidence of some rule of law principles there as well if we look closely. According to Article 19 of that Constitution, the German Democratic Republic guaranteed "socialist legality and legal certainty" and ensured "respect for and protection of the dignity and freedom of the personality" as a requirement for all state organs and all "social forces and every individual citizen"; this could be interpreted as a kind of socialist third-party effect of those fundamental rights.

As far as the principle of good faith is concerned, the BGB, including its section 242, applied not only throughout the German Reich from 1900 to 1945, including the period of the "Third Reich", and after the war in the Federal Republic of Germany, which back then was limited to the western part of the divided country, but also in the eastern part under the regime of the German Democratic Republic up to and including 1975. The independent civil code of the GDR of 1976 avoided the concept of good faith; however, the text did contain elements that could be under-

stood as an “emulation” of this principle under socialist premises. For example, the parties to private law relationships had a duty to cooperate “in good faith”, albeit in accordance with the „principles of socialist morality“ (sections 14 and 44 of the GDR Civil Code), as well as a duty to „exercise rights consciously“ (section 15 of the Code), whereby the exercise of a right was inadmissible “if it pursues goals contrary to the legal provisions or the principles of socialist morality”.

Even the “Third Reich” acknowledged, at least initially, the rule of law, as reported by Carl Schmitt. The author wrote in 1934: “As soon as the Leader of our German legal front utters the word ‘constitutional state’ – I have often experienced this at larger meetings and conferences – there is usually a particularly lively applause. Interrupted by the applause, the continuation of his word that it is, of course, a National Socialist constitutional state and that the National Socialist principles are unbreakable, is then sometimes lost” [60]. Schmitt himself tries to downplay the rule of law in the sense of the traditional understanding to a mere (formal legal) “state of statutes” (Gesetzesstaat), to which he contrasts the (“true”) rule of law that strives for justice (“state of justice”, Gerechtigkeitsstaat). Regarding the principle of good faith, which, as mentioned, remained applicable between 1933 and 1945 in the form of the BGB, Schmitt writes [61]: “All indeterminate terms, all so-called general clauses are to be applied unconditionally and without reservation in the National Socialist sense [...] 'good morals', 'good faith', [...] and whatever all these formulas are, are to be applied and expounded [...] without exception, in the National Socialist spirit”.

Carl Schmitt's opportunistic statements during the period of the “Third Reich” are a striking example of the ideological appropriation of good faith and the rule of law. However, we should not deceive ourselves: Such appropriation is not exclusive to National Socialist or socialist ideology. This vulnerability exists at all times and vis-à-vis all ideologies, and therefore, the argument for justice, whether based on good faith or the rule of law, must not be overused. Distrust is called for, especially towards modern ideologies.

Conclusions

The article explores the relationship between the principle of good faith and the rule of law in German private law and, - for comparison - also in German public law. While good faith is regulated in the Civil Code and is seen as the fundamental principle in private law, the rule of law is a cornerstone of a liberal state, focusing on public law and explicitly enshrined in the Constitution. However, the two principles are interconnected. First of all, it can be stated that good faith has long been recognised as a principle of public law as well. There, it is applied in particular in the relationship between the citizen and the administration, insofar as no special rules on protecting legitimate expectations are available. The principle of the rule of law seems less suitable than good faith for putting a stop to unfair state behavior in individual cases.

The application of the rule of law principle in private law is less explicit but

unavoidable because of its extensive nature. In a state governed by the rule of law, private law does not stand alongside public law, and private autonomy does not apply by itself but owes ist existence to the state's guarantee and legitimation and is therefore coined by the principles of the rule of law. In private law, the justice mission of the rule of law principle is primarily pursued under the banner of so-called materialisation. Insofar as it has not found expression in special regulations, e.g. on employee, tenant, and consumer protection, it is realised by the so-called third-party effect of fundamental rights, i.e. the need for civil courts to consider themwhen interpreting general clauses like immorality and even good faith itself.

Delving into the interrelations of good faith and the rule of law, the article identifies functional similarities between the two principles. In addition to the protection of fundamental rights already mentioned, this is also the (related) principle of proportionality. The protection of legitimate expectations and equality are also principles mentioned in the context of the rule of law, as well as of good faith. However, both principles have different content.

Regarding the (more academic) question of whether the principle of good faith is part of the rule of law or vice versa, the article gives priority to the constitutional principle of the rule of law, taking into account the positivist-oriented German legal culture. Overall, the article provides valuable insights into the complex interplay between good faith and the rule of law and underscores the need for continued research, particularly in light of evolving legal and societal dynamics.

References

[1] Art. 2 of the Treaty on European Union: “Rule of Law”; Preamble of the EU Charter of Fundamental Rights: “It [the Union] is based on the principles of democracy and the rule of law”.

[2] Biaggini, BV-Kommentar, Zurich 2017, Art. 5, note 2.

[3] Bäcker, Gerechtigkeit im Rechtsstaat, Tübingen 2015, p. 182.

[4] Hayek, The Constitution of Liberty, Chicago 1960, reprinted in: Hamowy (ed.), The collected works of F.A. Hayek, Chicago 2011, Vol. XVII, p. 305.

[5] BVerfG, Judgement of 23.10.1951, 2 BvG 1/51, juris, at note 28.

[6] E.g., RG, Judgement of 2.2.1926, III 626/24, RGZ 113, 19, 24.

[7] In this sense Kemmler, Geldschulden im öffentlichen Recht, p. 533; with reference to Lünstedt, Treu und Glauben im Verwaltungsrecht, Diss. Heidelberg 1963, p. 114. Lünstedt, loc. cit., however, primarily compares the principle of legal certainty as a partial aspect of the rule of law principle with good faith.

[8] See, e.g., Zimmermann and Whittaker, Good faith in European contract law: surveying the legal landscape, in Good Faith in European Contract Law, ed. Zimmermann and Whittaker, Cambridge 2000, S. 7-62.

[9] Cf. Art. 31 para. 1 of the Vienna Convention on the Law of Treaties: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose”.

[10] Thus, expressly Federal Administrative Court (Bundesverwaltungsgericht - BVerwG), Judgement of 1.4.2004, 4 B 17/04, juris, note 4.

[11] See, e.g., Bauer, Die Bundestreue, Tübingen 1992, p. 245, with further references.

[12] Kähler, in: BeckOnline-Großkommentar, BGB, section 242, note 124, as of 1.7.2023, Munich.

[13] See e.g., Filion, Les principes généraux du Droit et de la justice - Principes universels, Lévis (Canada), 2022, p. 94 (“Devoir de bonne foi”) and p. 136 (“Devoir de loyauté”).

[14] E.g., ECJ, Judgment of 11.7.2018, C-15/17, para. 45, Bosphorus Queen Shipping; so BGH, Judgment of 24.2.2015, XI ZR 193/14, juris, note 16.

[15] On the interpretation of a general decree, see Verwaltungsgericht Karlsruhe, Judgment of 17.1.2022, 14 K 119/22, juris, note 57.

[16] Federal Administrative Court, Judgement of 28.10.1959, VI C 88.57, BVerwGE 9, 251, juris, note 26.

[17] E.g., Higher Administrative Court (Oberverwaltungsgericht) of Lüneburg, Judgement of 11.12.2017, 2 LA 1/17, juris, note 15, on the prerequisites for the withdrawal of the doctoral degree and the reclaiming of the doctoral certificate due to plagiarism.

[18] E.g., BVerfG, Judgement of 15.12.1965, 1 BvR 513/65, juris, headnote 1.

[19] See Article 9: “Protection against arbitrary conduct and principle of good faith: Every person has the right to be treated by state authorities in good faith and in a non-arbitrary manner”.

[20] Apparently disagreeing Turava, Die Aufhebung von Verwaltungsakten im georgischen Recht: Eine rechtsvergleichende Untersuchung unter besonderer Berücksichtigung der vertrauensschutzrechtlichen Aufhebungsvorschriften des deutschen Rechts und des Rechts der Europäischen Gemeinschaften, Berlin 2007, p. 96: The author referring to Maurer, Das Vertrauensschutzprinzip bei Rücknahme und Widerruf von Verwaltungsakten, in: Schmitt Glaeser (ed.),

Verwaltungsverfahren, Commemorative publication on the occasion of the 50th anniversary of Richard Boorberg Verlag, 1977, pp. 223, 227, claims to recognise that the Federal Administrative Court does not accord constitutional rank to the principle of good faith.

[21] BFH, Judgement of 9.8.1989, I R 181/85, Bundessteuerblatt II 1989, 990, juris, note 13.

[22] See, e.g., BVerfG, Judgement of 19.10.1993, 1 BvR 567/89 et al., BVerfGE 89, 214, juris, note 55: „More differentiated legal consequences result from section 242 BGB. Civil law scholars agree that the principle of good faith is an immanent limit of contractual power [...]".

[23] E.g., Weber, Rechtswörterbuch, Munich 30th ed. 2023, "Rechtsstaat".

[24] BVerfG, Judgement of 1.7.1953, 1 BvL 23/51, BVerfGE 2, 380, juris, headnote 6.

[25] E.g., BVerfG, Judgement of 10.6.2009, 1 BvR 571/07, juris, note 22.

[26] BVerfG, Judgement of 10.6.2009, see above, juris, note 24.

[27] BVerfG, Judgement of 10.6.2009, juris, note 25, on the right of the tax authorities tax assessment that is erroneous and can no longer be formally changed within the framework of taxation proceedings to the detriment of the taxpayer pursuant to section 177 para. 3 of the German Fiscal Code (Abgabenordnung).

[28] E.g., BVerfG, Judgement of 4.2.1975, 2 BvL 5/74, BVerfGE 38, 348, juris, note 60; confirmed, for example, by BVerfG, Judgement of 5.2.2002, 2 BvR 305/93 et al., BVerfGE 105, 17, 36.

[29] BVerfG, Judgement of 15.1.1958, 1 BvR 400/51, BVerfGE 7, 198. Erich Lüth was the name of the plaintiff.

[30] LAG Düsseldorf, Judgement of 22.4.1988, 11 Sa 1349/87 (unpublished), cited in BAG, judgement of 24.5.1989, 2 AZR 285/88, BAGE 62, 59, juris, note 34.

[31] BAG, Judgement of 24.5.1989, 2 AZR 285/88, BAGE 62, 59, juris, note 37 ff.

[32] Heidelberg, Judgement of 14.4.1965, 3 S 78/64, NJW 1966, 1922, 1923.

[33] Kainer, Gleichbehandlungsgrundsatz im Zivilrecht, 2011, unpublished to date, page 1, with further, but not comprehensible, references.

[34] See Section 3(1) of the Securities Acquisition and Takeover Act (Wertpapiererwerbs- und Übernahmegesetz): "Holders of securities of the target company belonging to the same class shall be treated equally".

[35] See recital 24 of Regulation (EU) no. 596/2014 on market abuse: investor confidence is "based on the assurance [...] that investors will be placed on an equal footing and protected from the misuse of inside information"; for an overview of further examples, see Grünberger, Grundstrukturen (allgemeine Strukturmerkmale) von Gleichheitssätzen, in Kempny und Reimer (eds.), Gleichheitssatz: Dogmatik heute, Tübingen 2016, pp. 5, 14 et seq.

[35a] Reichsgericht, Judgement of 3.2.1914, II 625/13, RGZ 84, 125, 128 f.

[36] But so Kainer, Knapper Impfstoff und privatrechtliche Gleichbehandlungspflichten, NJW 2021, p. 816, 816.

[37] This was explicitly stated by the Reichsgericht, loc. cit., citing the wording of section 242 BGB.

[38] E.g., Fritsche, in Münchener Kommentar zur Zivilprozessordnung, 6th ed., Munich 2020, section 147, note 9.

[39] Art. 3 para. 2 sentence 2 GG reads: "The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist".

[40] E.g., BVerfG, Judgment of 6.6.2018, 1 BvL 7/14 et al.

[41] See, e.g., BGH, Judgment of 7.4.1965, VIII ZR 200/63, juris, note 34, on rent agreements in work promotion contracts of private parties (on the application of law contra legem): "[...] Deciding against the law is fundamentally denied to the judge, who is bound by law and statute [...]. In doing so, he would substitute his own legal policy assessment for the assessment made by the legislature and thus arrogate to himself powers that only the legislature has [...]".

[42] Cf. BGH, Judgment of 7.4.1965, VIII ZR 200/63, juris, note 34, with further references: "An exception may apply to cases in which compliance with the law would lead to 'intolerable injustice' [...] or to a 'legal emergency' [...] which could only be remedied by a decision against the law. [...]".

[43] Stürner, Der Grundsatz der Verhältnismäßigkeit im Schuldvertragsrecht, Tübingen 2010, p. 445.
[44] Stürner, loc. cit., pp. 440 ff.

[45] BVerfG, Judgment of 27.1.1983, 1 BvR 1008/79 et al, BVerfGE 63, 88.

[46] BVerfG, Judgment of 27.1.1983, 1 BvR 1008/79 et al., juris, note 94, with further references.

[47] BVerfG, Judgment of 28.2.1980, 1 BvL 17/77 et al, Federal Law Gazette I

1980, 283, juris, note 161.

[48] BVerfG, Judgment of 28.2.1980, 1 BvL 17/77et al., juris, note 161.

[49] BVerfG, Judgment of 28.2.1980, 1 BvL 17/77 et al., juris, note 189, with a further reference.

[50] BVerfG, Judgment of 25.10.1966, 2 BvR 506/63, BVerfGE 20, 323.

[51] Not in private-law context, however, is the judgement of 28 May 1996 (1 BvR 927/91), where the BVerfG confirms an already previously formulated statement that the "principle of culpability under the rule of law" requires, that "no penal sanctions be imposed without fault" (juris, note 2). Although the term "fault" used is a civil law term (as opposed to the criminal law term of criminal "culpability"); the context is a sovereign one, "punishment-like" in the context of (civil) enforcement law.

[52] BVerfG, Judgment of 5.8.1994, 1 BvR 1402/89.

[53] See in this regard already Adomeit, Heteronome Gestaltungen im Zivilrecht? (Stellvertretung, Weisungsbefugnis, Verbandsgewalt), in: Festschrift für Hans Kelsen zum 90. Geburtstag, Vienna 1971, 9, 18 f.

[54] For social law, see, for example, Landessozialgericht Niedersachsen-Bremen, Judgment of 20.7.2023, L 14 U 117/22, juris, note 42, on the objection of limitation by the social authority against the needy person.

[55] See Kemmler, Geldschulden im öffentlichen Recht, Tübingen 2015, p. 527, in favour of the primacy of a derivation from the rule of law requirement of legal certainty.

[56] For a fundamental discussion, see Auer, Materialisierung, Flexibilisierung, Richterfreiheit: Generalklauseln im Spiegel der Antinomien des Privatrechtsdenkens, Tübingen 2015.

[57] Cf. Kemmler, Geldschulden im Öffentlichen Recht, Tübingen 2015, p. 517: "The principle of good faith applies between individual legal participants within a concrete legal relationship. It provides rules that shape the content of an individual legal relationship".

[58] BFH, Judgment of 9.8.1989, I R 181/85, Bundessteuerblatt II 1989, 990, on the question of whether an unlawful favourable tax assessment can be withdrawn.

[59] BFH, Judgment of 9.8.1989, I R 181/85, juris, note 15, with further references from tax case law.

[60] Schmitt, Nationalsozialismus und Rechtsstaat, Deutsche Verwaltung, 11. Jg.,

Nr. 3, 20.3,1934, pp. 35–42; re-published in: Gesammelte Schriften 1933 – 1936, Berlin 2021, p. 131, 132.

[61] Schmitt, loc. cit., p. 131, 142.

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