

## GOOD FAITH AND ITS NORMATIVE FOUNDATIONS\*

### LA BUENA FE Y SUS FUNDAMENTOS NORMATIVOS

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#### Abstract:

This article shows the complexity that characterizes the normative structure of contractual good faith. Even though the law of contracts is usually understood as uniformly grounded on individualism, this is not entirely correct. Good faith conspicuously reveals the dual normative structure of contractual law. This contemplates claims based on a form of individualism, as well as exigencies derived from a certain way of understanding altruism. By breaking down the duties of the contractor in good faith, it is possible to reveal that individualism, not even in its vigorous version, is able to account for them thoroughly. The contractor in good faith must, in certain occasions, act positively in favor of the interest of the other, and an appropriate normative foundation for those requirements must challenge the predominance of personal interest. It is analyzed in what sense good faith answers to individualistic, as well as to altruistic basis. Although it is not necessary for the contractor to really be altruistic, but for her acts as if she were, just as it is the case regarding objective good faith as standard of conduct.

**Keywords:** *Contracts; Good Faith; Normative Foundations; Individualism; Altruism*

#### Resumen:

Este trabajo muestra la complejidad que caracteriza la estructura normativa de la buena fe contractual. Pese a que el derecho de contratos suele entenderse como uniformemente fundado en el individualismo, ello no es del todo correcto. La buena fe muestra conspicuamente la composición normativa dual del derecho contractual. Esta alberga tanto demandas de una forma de individualismo como exigencias de una determinada manera de entender el altruismo. Al descomponer los deberes que le competen al contratante de buena fe es posible develar que el individualismo, ni aun en su versión más vigorosa, logra fundamentarlos acabadamente. El contratante de buena fe, en

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ciertas ocasiones, debe actuar positivamente a favor del interés ajeno y el sustento normativo que es adecuado para cubrir tales exigencias debe desafiar el predominio del interés personal. Se analiza en qué sentido la buena fe responde tanto a fundamentos individualistas como altruistas. Pero no es necesario que el contratante sea verdaderamente altruista, sino que actúe como tal, del mismo modo en que opera la buena fe objetiva como estándar de conducta.

**Palabras clave:** *contratos; buena fe; fundamentos normativos; individualismo; altruismo*

## I. INTRODUCTION

Good faith constitutes one of the fundamental principles of contract law and it is a cornerstone of the private legal system. Its meaning and scopes have been carefully analyzed by the scholarship in the fields of general private law and contract law in particular. Nevertheless, an issue still pending to be explored lies in the normative foundation of good faith. It is not altogether clear if good faith answers uniformly to just one normative parameter or if its demands can be tied in with more than one. It could be that good faith constitutes a conspicuous indicator of the complexity of the normative structure of contract law, being necessary to call for different arguments from the traditional ones in order to substantiate some of the duties of contracting parties derived from good faith.<sup>1</sup>

This article is aimed at showing in what sense the requirements derived from good faith made to contracting parties answer to varied normative grounds. Whereas the fundamental duty of contractors to act in good faith and the duty derived from not damaging the other party fit with a basis of individualistic character, the justification of the positive sub-duty to act in favor of the other party requires calling for an altruistic model. The article is structured in three sections. In the first section, I review some approaches on contractual good faith. In the second one, in turn, I review two models of normative substantiation of the rules, institutions and practices of private law. In the third one, at last, I evaluate the pertinence of these arguments regarding the requirements that good faith imposes upon those who take part in the contractual relationship. As it shall be argued, good faith has a hybrid normative structure in which requirements based on selfless

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1 I am well aware that the thesis argued here assumes that good faith occupies a central role in contract law, and this situation is entirely the opposite in the case of the legal systems based on common law. Of course, this paper is based on the continental law tradition, and in this context, it is for sure pertinent to say something relevant *on* contract law *from* the notion of good faith.

individualism are conjugated with others connected to moderate altruism. When *something more* than just not damaging the other contracting party comes into play, the individualistic paradigm will be insufficient. This captures a decisive feature of contract law: the complexity regarding its normative foundations.<sup>2</sup>

## II. SOME NOTES ON GOOD FAITH

The presence of good faith extends to diverse concerns of private law, serving as support for numerous institutions and criterion of correctness for the conduct of participants in private legal relations. In the Chilean private legal system, for instance, it is considered one of the principles that inform private law and the Civil Code currently in force.<sup>3</sup> According to Corral Talciani, good faith refers to “[...] the need that every society has that its members act loyally, as persons of righteous conduct who do not look to deceive or take advantage of the mistakes of others”.<sup>4</sup> This would explain why civil legislations presume that individuals conduct themselves in good faith, demanding that this is proven not be the case when they behave disloyally, incorrectly or dishonestly. Good faith possesses both a protective and a prescriptive face.<sup>5</sup> While the former expresses itself in the justification that private law has for benefiting a person who finds herself subjectively in the belief of behaving correctly, even though that is not the case, the latter displays a clear normative dimension by serving as a behavior criterion for individuals, demanding them to act according to good faith canons.

The protective modality of good faith takes place in absolute legal relations, as it is the case regarding proprietary and possessory ones. In these cases, we speak of subjective good faith. Its prescriptive manifestation, in turn, governs legal relationships, as it occurs concerning contracts. The latter determines the manner according to which an individual should conduct herself and, to that end, a comparison is drawn between “[...] his behavior and the conduct expected from a man in ‘good faith’, that is, from an average man that acts loyally and righteously. This is the so called objective good faith (it is not a belief, but rather

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2 In what follows, by ‘normative foundations’ of contract law I understand the moral or philosophical foundations of this field of law. Each area of law is committed to substantive values that justify their corresponding rules, institutions and practices. Therefore, it is part of the theoretical reflections’ agenda to reveal these foundations.

3 For instance, CORRAL TALCIANI (2018), pp. 31-32; DUCCI (2005), pp. 28-31. As fundamental principle of contracting, in LÓPEZ SANTA MARÍA (2010), pp. 337-360.

4 CORRAL TALCIANI (2018), p. 31.

5 CORRAL TALCIANI (2018), p. 32.

a norm of conduct deducted from experience)”.<sup>6</sup> Contractual good faith offers a fertile terrain for inquiring the evaluative foundations of its requirements for contracting parties, since this criterion directly affects the behavior manner of contracting parties. In what follows, the analysis shall focus exclusively on the contractual dimension of good faith. The justification for this lies in the fact that only regarding this face there are genuine normative considerations. Possessory good faith protects the one who *believes* to be acting licitly, whereas contractual good faith imposes duties on contractors for them to *act* in that manner. Therefore, the protection granted by the first one lies on something valuable which satisfies the person that enjoys legal protection.<sup>7</sup> However, there are differentiated normative considerations in the demands of a certain manner of behavior according to the direction and intensity of the respective requirement.

Based on the objective character of contractual good faith, what is relevant is the objective behavior of the contractor and not her motivations. It is therefore demanded that the contractor *acts* according to good faith and not *to be* in good faith, in her contractual relations. As previously stated, the behavior according to good faith is generically conceived as loyal or correct conduct. Francesco Galgano, for example, argues that good faith expresses a wide duty of conduct: “[...] the duty of the contracting parties to behave correctly or loyally”.<sup>8</sup> Therefore, this general duty requires different specifications in order to establish what conduct conforms to good faith or what is contrary to it in a certain scenario. For that effect, the endeavor of the judge becomes fundamental. In this sense, according to Franz Wieacker, good faith remits the judge to an “[...] elemental requirement of juridical ethic, that is, to the juridical virtue of honoring promises, trust and loyalty”.<sup>9</sup>

Traditionally, it has been established that good faith governs the entire contractual *iter* and, thus, the parties are to adjust their conduct to its standards, since the precontractual phase onto the post-contractual stage, going through the stages of conclusion, execution and performance of the contracted obligations. Good faith, then, governs the entire life of the contract, which explains its strong incidence on the activity reciprocally displayed by the contractors. Karl Larenz has explained its scope of application in the following terms:

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6 CORRAL TALCIANI (2018), p. 32.

7 A systematization of the uses of good faith in the contractual field in SCHOPF OLEA (2018), pp. 109-153.

8 GALGANO (1992), p. 453.

9 WIEACKER (1982), p. 49, n. 39.

[i]n the law of contracts, the execution of the contracted obligations in particular is enforced, but it also determines the origin of several and various ancillary duties imposed due to the end of the contract or *out of respect for the interests of the other party*, as well as duties to assist and duties of loyalty. And that is also the case before concluding the contract, in the stage of preliminary negotiations, of bargaining and preparation of the contract.<sup>10</sup>

Authors such as Luis Díez-Picazo have argued that good faith is endorsed by the legal system in relation with three modalities. First, it operates as a cause of exclusion of culpability of a formally wrongful act, acting as cause of exoneration or attenuation of the respective sanction. Secondly, good faith is provided for by law “[...] as a cause or a source of creation of special duties of conduct that are to be demanded in each case [...]”.<sup>11</sup> These depend on the character of the juridical link between the parties as well as on the objectives set by them for concluding it. According to this second modality, the parties are not only reciprocally obligated to what they have expressly agreed upon or to the services established by the legal order, but to “[...] everything that good faith requires in every particular situation”.<sup>12</sup> Thirdly, at last, good faith is understood as a cause for delimitating the exercise of a subjective right, as well as of any other legal power.

Views of this sort are interesting, because they reveal that the good faith governing contractual relations does so in virtue of duties that go in opposing directions and also entail differentiated requirements. So, while in the second field of action good faith possesses a positive facet generating special duties for contractors that are not prescribed neither by their will nor by legislation, in the third one good faith operates in a negative manner, that is, by restricting the exercise of a subjective right of the individual who can cause damages or injure rights or interests of other. The determination of the requirements entailed in acting according to good faith contributes to make transparent its complex normative structure, since there is no unity as to what is required, in the contracting practice, for a conduct to be deemed in accordance to good faith. The crucial point lies in the difference that exists between the *restriction* exercised by good faith in order to avoid the abusive deployment of subjective rights in the third modality

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10 LARENZ (1985), p. 96. Added emphasis. Said duties, which are additional to those expressly agreed upon by the parties, are especially relevant to show, as Larenz suggests, the influence of the respect for the interests of the other contractor in the area of good faith requirements.

11 Díez-PICAZO (1982), p. 19. Here, secondary duties of conduct play a decisive role since many of them are closely related to the interest of the other party in the contract. In this regard, see SOLARTE RODRÍGUEZ (2004), pp. 282-315.

12 Díez-PICAZO (1982), p. 19.

presented by Díez-Picazo, and its force for *bringing about* the formulation of special duties of behavior on the part of contracting parties within the framework of the second modality in which good faith is established by law.

The existence of duties that urge a contractor to abstain from injuring the expectations or rights of the other one, as well as of other requirements that promote the deployment of behaviors favoring the other party in the contractual agreement, reflects the pertinence of resorting to differentiated normative basis, thus foregoing the uniformity of justification with which both private law in general as well as contract law in particular are generally viewed. Even though a model of normative foundation could reach the negative dimension of good faith, it is not always the case that it also provides a basis for the positive action of a contracting party in favor of the other party in the contractual relation. In what follows, I shall review two foundation frameworks that can provide a basis for justifying the requirements -derived from objective good faith- to be fulfilled by the contracting parties.

### III. TWO POSSIBLE FOUNDATIONS: INDIVIDUALISM AND ALTRUISM

The philosophical foundation of the rules, institutions and legal practices of private law has been traditionally formulated in the terms of individualism. The individualism of private law in the continental legal tradition largely originates in its modern conformation. As it is known, the nineteenth-century codification embodied the enlightened ideas in legal matters and individualism was established with the grounding philosophy of the Napoleon Code of 1804. With regard to this, Gioele Solari rightly argued that

[t]he codification means much more than the formal unification of private law: it is the positive expression of a philosophical system, and during the 18th century it was the implementation of the individualistic idea in the area of civil relationships. Regarding this aspect, the European codification is the counterpart in the sphere of private law of what declarations of rights and constitutions represented in the sphere of public law, that were also expressions of certain philosophical creeds.<sup>13</sup>

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13 SOLARI (1946), p. 78. Concerning the French text, Díez-Picazo and Antonio Gullón have noted its affinity with individualistic beliefs that exalt human free will and the economic tenets of *laissez faire* which affect the way of understanding contractual relations. According to them, “[t]he Napoleonic Code is faithful heir of these ideas, which captures in a set of provisions based on the liberal view of social and economic organization”. DÍEZ-PICAZO y

This individualism had a strong influence over the legislations inspired by the Napoleon Code, which accounts, for instance, for the assertion according to which the Chilean Civil Code has an individualistic spirit expressed by the ideologies of liberty, equality and free will.<sup>14</sup> Contract law, in particular, would represent a strong manifestation of this character due to the preponderant role played by the principle of free will in this field.<sup>15</sup> According to this principle, persons are free to bound themselves or not and, by freely deciding to do it, they must comply with what is agreed.<sup>16</sup> Naturally, a party in the contract must comply with the stipulations agreed with the other party, but the former has no duty to look after the satisfaction of the interests of the latter. Free will lies on an individualistic basis by virtue of which the personal interest of the contractor prevails over the interest of the other.<sup>17</sup> Therefore, the contractor is bound to comply with the agreed obligations, but from that does not follow that she must perform acts aimed at achieving the interest of the other party if that is not part of the core of arranged obligations.

Nevertheless, individualistic thought possesses different variants, as well as ways of being understood. In other works, I have formulated a distinction that I would be interested in taking up.<sup>18</sup> There are at least two ways of understanding the individualistic foundation. On one side, *selfish* individualism, on the other side, *selfless* individualism. The common feature shared by both versions lies in the difference of interests between individuals and, in particular, the predominance of self-interest over the interest of the other. Individualism asserts the greater

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GULLÓN (2016), p. 21. Against the connection between the Napoleon Code and individualistic ideals and revolutionary absolutism, see GORDLEY (1994), pp. 459-505.

14 TAPIA RODRÍGUEZ (2008), pp. 240-242.

15 Naturally, the individualistic normative thesis is committed to the traditional understanding of contracts, which faces problems of fitness with the way in which the contemporary contractual practices are developed, making less plausible to speak of a possible ‘death of contract’. On this point, see PEREIRA FREDES (2019), pp. 261-306.

16 On the normative foundation of the contract’s binding force, see PEREIRA FREDES (2016).

17 According to Andreas von Tuhr, the law, by admitting legal transactions of the parties, “[...] recognizes subjects of law the possibility of regulating for themselves their relationships. On this possibility, which is usually designated as *private autonomy*, lies the economic and legal regime; regime that, regardless of the ever more accentuated socialization trends, *still has a markedly individualistic character*”. TUHR (2007), p. 80. Added emphasis. On their part, authors such Louis Josserand have stressed the connection between free will and liberal thought, noting that this principle “[...] indisputably dominates the entirety of our law and imprints on it an essentially liberal sense”. JOSSERAND (2019), p. 91.

18 In this sense, PEREIRA FREDES (2020), pp. 219-227; Part of the connection between individualism and contract law is analyzed in PEREIRA FREDES (2018), pp. 143-147.

relevance of personal interest vis-à-vis the interest of other individuals, which is received by its diverse versions. In this sense, the central point of individualism is not so much the ontological dimension of the difference among interests, but the normative question at stake thereof, which is the preeminence of personal interest. That said, the point of discrepancy between both forms of individualism is expressed in the way in which each one of them handles the interests of others. Whereas the selfish version establishes the maximization of self-interest without regard to the expectations or interests of others, the selfless version acknowledges in the rights and interests of others a limitation for attaining one's interests. The selfless view of individualism makes the predominance of personal interest over the interest of others compatible with the respect for the latter. It is not admissible that, in order to satisfy self-interest, the agent overlooks the interest of the other.

This consideration has been highlighted by Duncan Kennedy while unveiling the core of the individualistic claim. In his terms,

[t]he essence of individualism is the making of a sharp distinction between one's interests and those of others, combined with the belief that a preference in conduct for one's own interests is legitimate, but that one should be willing to respect the rules that make it possible to coexist with others similarly self-interested.<sup>19</sup>

According to his view, the fracture between one's interests and others' interests is accompanied by the preponderance of the former over the latter. Nonetheless, this normative appeal can be perfectly conciliated complying with the rules that allow the coexistence of interests, establishing others' interests as a barrier for exercising and pursuing the self-interest of the individual. The individualistic privilege in favor of personal interest neither involves neglecting the interest of other nor it implies an authorization for injuring them. Kennedy offers, in my opinion, a selfless version of individualism that steps aside from the selfish view. This consideration is expressly articulated by the author, who claims that "[i]t is important to be clear from the outset that individualism is sharply distinct from pure egotism, or the view that it is impossible and undesirable to set any limits at all to the pursuit of self-interest".<sup>20</sup> It is possible to find, therefore, two ways of understanding individualistic claims. The relation of the agent with the interests of others is crucial to determine on which type of individualism we find ourselves.

19 KENNEDY (1976), p. 1713.

20 KENNEDY (1976), pp. 1714-1715.



Why selfless individualism allows to conciliate the predominance of personal interest with the respect of the interest of others? Its appellative strength lies in the respect for autonomy. Autonomy constitutes a demanding regulative ideal, not only since it claims the self-government of individuals, but also because it advocates in favor of the respect for interests and decisions that forge the personal life plans of others. Selfless individualism, in contrast with the selfish dimension, is sustained in autonomy and this value “[...] has a strong affirmative moral content, the demand for respect for the rights of others”.<sup>21</sup> Hence, the respect for the interest of others is a naturally pertinent requirement for this sort of individualism, and it represents no obstacle whatsoever for preserving the separation between the interests of individuals or the preference that yields in favor of personal interests. The selfless version of individualism, therefore, is strongly committed to the value of autonomy.

The attachment to autonomy explains why individualistic schemes have advocated for the respect of the interest of others, bringing it together with the harm principle. In Mill’s theory, for example, a strong defense of individual autonomy is presented and, at the same time, it favors the respect for the interests and rights of others. Beyond the relevancy given by Mill to the free development of individuals, state intervention is fully justified if there is “[...] damage, or probability of damage, to the interests of others [...]”.<sup>22</sup> The requirement not to injure or damage the rights or interests of third parties in the exercise of our liberties and pursuing the projects that we configure is a consequence of autonomy. Thanks to this, it is possible to reconcile personal interest with giving relevance to the interest of others. In virtue of the former, it is not justified causing damage to the latter.

In altruistic philosophy, as I have previously shown elsewhere, there are also different ways of understanding its thesis.<sup>23</sup> In the same way as it is the case regarding individualism, there is not just *one* form of altruism. An interesting aspect is that the version of altruism which is usually considered for evaluating the relevance of this philosophy to legal matters is the most demanding and least suitable one for the aforementioned context. A less demanding version of its claims, however, could be better suited for legal discourse. I have designated these two typologies of the altruistic view as *strong* altruism and *moderate* al-

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21 KENNEDY (1976), p. 1715.

22 MILL (1989), p. 94.

23 PEREIRA FREDES (2018); PEREIRA FREDES (2020a); PEREIRA FREDES (2020b).

truism.<sup>24</sup> Strong altruism is linked to the ideal of the good Samaritan, that claims from the individual to resign to her own interests with the aim of satisfying the interests of others. Such version of altruistic thought demands an unrestricted renouncement of the individual in favor of others, sacrificing herself for their wellbeing.<sup>25</sup> This dimension of selfless conduct presents significative difficulties for embedding itself in the legal field, since it seems supererogatory to adjust our every act according to the good of others. In the case of the law of contracts, specifically, demands of behavior made to a contracting party in favor of the other could be deemed as exogenous to the rationality of the contractual relationship. Contract law neither requires nor could require from a party to sacrifice the expectations, interests, and revenues that she could legitimately foresee at the time of concluding the agreement. To conceptualize the contract in terms of an unlimited waiver of the contractual interests of a party in favor of the other one, leads to distort the rationality of the contractual relationship as well as how we ordinarily understand it.

Moderate altruism faces a different prospect. Although this interpretation has a point in common with strong altruism, it diverges from it in the way of embodying this requirement. The demand shared by both classes of altruism is to defy the predominance advocated by individualism in favor of self-interest vis-à-vis the interest of others. Both versions of altruism call this individualistic assumption into question. However, each version expresses their rejection of the normative primacy of personal interest in a different manner. Whereas strong altruism postulates that the entirety of a person's actions necessarily should serve the good of others, according to moderate altruism this is not entirely so. The demands of the latter are less exacting for the agent and do not require a selfless behavior that renounces that to which the person is entitled in favor of others. This feature contributes to its suitability for the legal context in general and the contractual one in particular.

I have presented the propositional content of moderate altruism by means of three premises.<sup>26</sup> These are the following: (i) the prevalence of self-interest over the interest of others is not necessarily effective. From the difference between self-interests and the interests of others does not follow that the former

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24 A different way of systematizing the variants of altruistic thought is available in JENCKS (1990), pp. 53-67. For its conceptualization and different typologies, see WOLFE (1998), pp. 36-46.

25 About the moral demands of the Good Samaritan parable can be seen on THIBAUD (2003), pp. 13-24. A proposal for recognizing claims for reimbursement for Samaritan acts within the law can be found in DAGAN (1999), pp. 1152-1200.

26 PEREIRA FREDES (2020), pp. 228-231.

are normatively predominant; (ii) to attend and care for the interests of others is a permanent demand for the agent and, lastly, (iii) it is necessary that, under certain circumstances, the individual acts positively in favor of the interest of others.<sup>27</sup> It is on the basis of these premises that the moderate version of altruism is structured, version that seems more interesting to examine in relation with contractual relationships, since it steps aside the rigor manifested by the requirements of strong altruism. Naturally, moderate altruism challenges the individualistic preference for the agent's self-interest, but it advocates for a less stringent commitment for the person that behaves according to its parameters. This variant shows itself sensitive to the concrete circumstances that call on the agent to deploy positive acts in favor of others, without that becoming a duty that can be predicated of her every conduct. Hence, individuals must act directly in favor of others only in some particular occasions.

If a comparison is drawn between the expressions of individualism and moderate altruism, it is possible to note some observations. Selfish individualism and moderate altruism are informed by irreconcilable perspectives. The entirety of the tenets of this view of the altruistic approach are opposed to the selfish dimension of individualism, that not only privileges personal interest, but does not acknowledge the interests of others as an unbridgeable limit to the pursue of self-interest, rejecting that the individual is to carry out actions in the exclusive interest of others. However, if we compare selfless individualism and moderate altruism, the differences logically attenuate. Tenets (i) and (iii) strengthen the contrast between both versions of these models of justification. The challenge to the preeminence of self-interest and the requirement of carrying out -in certain occasions- positive action solely in the interest of others, differentiate selfless individualism and the moderate view of altruism. Nevertheless, tenet (ii) can fit more or less easily to selfless individualism. Its commitment to autonomy involves the encouragement of the agent to develop her expectations and carrying out her decisions, but also the respect for the interests and rights of others. This is revealed by the requirement not to injure them or causing them harm in the pursuit of one's interests and rights. Of course, this implies considering the interests of others as well as showing some degree of concern. It is not possible to avoid that our actions damage others without taking into account their expectations, as well as their interests and rights. But, as it will be explained, the requirement to abstain from injuring the interests of others is certainly different from the demand to deploy actions in their favor.

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27 The demand of considering and caring for the interests of others is a nuclear element of altruistic philosophy. This demand is highlighted on FLEW (1984), p. 11; NAGEL (2004), p. 89; and SCHMIDTZ (1993), pp. 52-53. In this sense, see also PEREIRA FREDES (2018), pp. 140-142.

I would like to add a last consideration regarding moderate altruism. It presents a *behavioral* character as opposed to the *motivational* dimension raised by philosophical literature.<sup>28</sup> Concerning this point, the discussion is focused on clarifying whether it is required or not that the agent has a real motivation to benefit the other for its action to be considered altruistic.<sup>29</sup> In this respect, motivational altruism considers that an action can only be deemed altruistic if the agent is effectively motivated to benefit the other, whereas behavioral altruism, in the words of Daniel Bar-Tal, “[...] focuses on the behaviors’ outcomes: the rewards of the recipient and helper’s costs”.<sup>30</sup> For the behavioral approach is indifferent whether the agent that performs the action in favor of others has a genuine motive or not. Its attention is focused on the consequences that follow from the actions of a person. Regardless of the existence of an effective motivation of achieving the interests of others, the behavior that favors them can be understood as altruistic. Therefore, it is possible to deploy altruistic actions even if there is no real motivation for carrying them out in the sole interest of others.

Moderate altruism, then, presents a behavioral character in the sense that it is concerned with the effects of actions rather than with the actual motivation of the agent. Even though this is not really motivated to benefit the other person, if the outcome of her action favors the interests of the other, then it shall be deemed an altruistic conduct. This is significant, since what is required is not for the contractors to actually be altruistic, but for them to behave *as if they were*. This is an indirect way of obtaining results of an altruistic character even if the contracting parties are not really of such character. When we speak of altruism as a normative ground, it is indispensable to resist the temptation of asserting that it is possible to implement motivations on the participants in juridical practices. Of course, this would not be possible. But the success of the altruistic proposal in its moderate version does not depend on the fact that the parties in a contract are altruistic, but on their behavior *as if they were* individuals that share such morality.

In this section we have analyzed two normative foundations that are available for substantiating the rules, institutions and practices of both private

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28 PEREIRA FREDES (2018), p. 156; PEREIRA FREDES (2020a), pp. 232-234; and PEREIRA FREDES (2021).

29 The behavioral version of altruism can be found in RUSHTON (1982), pp. 425-466 and the motivational dimension is developed in KREBS (1970), pp. 258-302.

30 BAR-TAL (1986), pp. 4-5.

law and contract law, revealing a crucial aspiration for private law philosophy.<sup>31</sup> Of course, alternative accounts can be conceived, v.gr. solidarity, which also flows in a direction opposed to individualism and its normative preference for self-interest.<sup>32</sup> Notwithstanding the formulated delineation of two versions of individualism and two versions of altruism, this catalog of foundation models is far from exhaustive. In the next section they will be evaluated in light of the requirements of good faith. As it will be seen, objective good faith describes a substantive part of the law of contracts, namely, that its normative composition is dual and does not answer to a single ground. Individualism, not even in its selfless version, is unable to account for all the duties of contracting parties that arise from good faith.<sup>33</sup>

#### IV. THE NORMATIVE COMPLEXITY OF GOOD FAITH

The dominating presence of individualism in private law invites us to consider the existence of a uniform position of this scheme in the normative structure of all its areas and institutions. The law of contracts would only be an expression of this and, in particular, the institute of good faith should replicate this commitment to uniformity. Nevertheless, the eventual inclusion of moderate altruism in the foundation of some duties derived from contractual good faith, could be understood as an indicator that the normative structure of this area of law is somewhat more complex. Its complex normative structure answers to its

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31 On the aspirations of the philosophy of private law related to the analysis of the foundations and purposes of the different parcels of this area of law, see LUCY (2007), especially pp. 1-12; PEREIRA FREDES (2017a), especially pp. 193-242; and ZIPURSKY (2004), pp. 623-655. On its methodology PAPAYANNIS (2016b), pp. 439-448, can be consulted. An intellectual reconstruction of the *modern* philosophy of private law can be found in PAPAYANNIS & PEREIRA FREDES (2018b), particularly in pp. 15-25.

32 For example, within the Italian legal scholarship good faith has been interpreted based on solidarity. In this sense, GRONDONA (2004), pp. 727-744. It is also important to take into account the controversy between Giuseppe Stolfi and Emilio Betti about the sufficiency or not of free will and its need to meet the demands of solidarity. An assessment of this debate can be found in GRONDONA (2018), pp. 37-75.

33 It is not frivolous to claim that altruism can be found in the foundations of contract law, despite the fact that it could be argued that contract law along with property law are the areas in which individualism is particularly prevalent, and there is a strong hostility to altruistic considerations. The strategy is precisely to locate altruism where individualism has its more comfortable place. A similar scheme to defend the relevance of distributive issues in the law of contracts can be found in PAPAYANNIS (2016a), pp. 303-368. The presence of altruism -in its moderate version- within the normative composition of good faith and property law in the field of easements can be found in PEREIRA FREDES (2020), especially pp. 264-292.

lack of uniformity and the existence of (at least) a duality of foundations. This would imply that the justificative task cannot be exhausted by resorting to *one* of these models, even though we are dealing with the most vigorous version of individualistic thought.<sup>34</sup> Well then, according to what parameters do we articulate the normative foundations of good faith?

At first glance, good faith is connected with the moderate understanding of altruism. A party in the contract must act according to the demands of objective good faith taking into consideration the interests of the other party. Therefore, the interests of the latter cannot be completely indifferent to the former. Nevertheless, what does this imply? Behavior in good faith is certainly incompatible with a disloyal, incorrect, or dishonest conduct on behalf of the contracting party, even if such conduct answers to the maximization of her self-interest. Of course, causing damages to the other party or injuring her contractual interest also infringes good faith. These considerations are indicators that selfish individualism is not easy to match with good faith. The point of greater discrepancy is that satisfying the requirements of good faith demands considering the interests of the other party and not just our own. This interpretation of individualism encounters difficulties in adapting to the requirements of good faith, since selfish individualism intends, on the contrary, to maximize the satisfaction of the agent's self-interest, thus sharpening the breach between self-interests and the interests of others, by categorically giving preeminence to the former.

However, as explained above, the sort of individualism that possesses greater interest is not the selfish version, but the selfless one. Considering that good faith demands from the party to act rightfully and loyally towards the other party, its effectiveness necessarily requires to *take into account* the expectations, needs and interests of the other party. This is, in my opinion, the basic duty that derives from good faith in contractual matters. It is not possible to behave in a rightful and loyal way with the other party without considering her interests.<sup>35</sup> Although, as previously stated, good faith involves the duty of not damaging the other party, as well as, on occasions, the obligation to act directly in her favor.

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34 Of course, a version of contract law that is able to explain its altruistic normative components establish a more robust image than the one based solely on individualistic grounds, including its uninterested dimension. Hence, from Stephen A Smith's perspective, this interpretation fits with an interpretive theory of contract law, seeking to "increase the understanding of the law, emphasizing its importance or meaning". SMITH (2004), p. 5.

35 Especially important is the Draft Common Frame of Reference which in its article I.-1:103: *Good Faith and Fair Dealing* expresses the following: "(1) The expression 'good faith and fair dealing' refers to a standard of conduct characterized by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question". JEREZ DELGADO (2015), p. 481. Added emphasis.

From this point of view, these duties *derive* from the main duty of taking the interests of others into account. In order to avoid injuring the interests of the other party, it is necessary to have previously considered them and, in turn, acting in favor of the interests of the other party supposes that these have been taken into account. Hence, the main duty goes hand in hand with the behavior with which the contracting party in good faith must abide, requiring her to permanently consider the interests of the other party during the contractual relationship. The duties derived from this or from other sub-duties of contractual good faith, in turn, allow to show the double foundation that good faith receives in contractual practices, in the way in which we know them, and, moreover, the different level of demand imposed on the contracting party by the requirements of good faith.

In this respect, acting in good faith involves the prohibition of causing damages to the other party or injuring her interests. When exercising her rights and fulfilling her obligations, the party cannot damage the other party without deviating from contractual good faith. Nonetheless, the requirements derived from good faith are more demanding than just avoiding damages to the other party, since, under certain circumstances, it is also necessary for the party to act positively in favor of the contractual interests that the latter has entrusted in the contractual relationship. Certainly, that the party *takes into account* the interests of the other party does not necessarily leads to a duty to directly favor them. But she cannot ignore them either nor completely disassociate herself from them if her conduct abides with good faith. Therefore, good faith involves considering the contractual position of the counterparty in the agreement. This point sheds some light on the complexity that characterizes the requirements of good faith, inasmuch as they go beyond the duty to abstain from damaging the other. However, taking into account the interests of the other party involves a much lighter demand than acting directly in their favor. At this stage in the analysis, then, objective good faith is the foundation for two sorts of duties derived from the duty to take into account the interests of others: (i) not to damage the interests of the other party and, sometimes, also involves (ii) acting in favor of the other party. There are requirements of good faith that urge the party to carry out positive acts in the interest of the other party, thus directly favoring her contractual position.<sup>36</sup>

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36 This diversity on the demands of good faith presents obstacles to defend Dori Kimel's thesis, according to which the intrinsic value of the contract lies in the detachment among the parties. This feature is problematic not only in the case of relational contracts, but also with the fundamental duty of taking into account the other party's interests, as well as other duties derived from this duty. The place that the objective concept of good faith occupies in contract law offers serious challenges to Kimel's detachment thesis. This critical point is made in PAPANANNIS & PEREIRA FREDES (2018a), especially, pp. 43-46. Kimel's proposal can be found in KIMEL (2018), pp. 151-161.

With regard to the form in which this catalog of requirements of good faith are formulated -that derive from the basic duty of taking the interests of the other party into account- they can be classified in *negative duties* and *positive duties*. According to the classification of duties proposed by G. H. von Wright, those that derive from good faith are *duties toward third parties*, meaning that the duties are aimed at the wellbeing of a being other than the agent, such as the other party.<sup>37</sup> Their difference lies in that negative duties are duties of omitting something, whereas positive duties are duties of performing an action. From the perspective of the agent that is bound by the duty, von Wright argues, “[...] positive duties are (mainly) duties to *promote* the wellness of other beings, whereas negative duties are duties to *respect* the good of beings”.<sup>38</sup> Therefore, from good faith derive sub-duties aimed at fostering the good of the other party in the contract and, furthermore, duties associated with respecting the contractual interest of the latter. In the context of the many situations covered by good faith in contract law, the cases in which sub-duty (i) takes place comprises the entirety of contractual relationships, whereas (ii) operates on rather particular occasions.

However, I would like to pay attention to the dual structure that possesses the requirements of contractual good faith. Its duties answer to, at least, a negative as well as to a positive character. Therefore, the contracting party must respect the expectations and interests entrusted by the counterparty in the contract, omitting to carry out actions that cause harm and, in turn, must foster the contractual interest of the other contractual party in order to obtain her good and greater satisfaction. This way, objective good faith possesses a two-faced organization regarding its requirements. This cannot be correctly described by observing merely *one* dimension of its requirements. This difficulty for classifying good faith under some category of duties is an aspect that is also present in contractual law. Hence, a feature revealing the complexity of the law of contracts is replicated when it comes to the principle of good faith. Here the complexity is reflected in the fact that the way in which the catalog of requirements imposed on the parties by good faith is structured, cannot be accounted for by a common view without losing sight of one of its two faces.<sup>39</sup>

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37 VON WRIGHT (2010), p. 202.

38 VON WRIGHT (2010), p. 202. Emphasis in the original.

39 Likewise, but without directly suggesting the pertinence of altruism, Daniel Markovits has shown that the individualistic prism is insufficient for capturing the community of collaboration and respect which develops between the parties in the context of a contractual relationship. Even regarding discreet and purely transactional contracts, the exclusively individualistic scope is unable to account for that moral community. On this issue, see MARKOVITS (2004), pp. 1417-1518.



Well then, if we compare the demands imposed on the contracting parties by objective good faith with the tenets of selfless individualism and altruism, the results thus obtained preserve this duality as well. Selfless individualism can substantiate the basic duty of taking into account the expectations and interests of the other party and, in the same way, the duty -that derives from the latter- to abstain from causing damages or injuring the interests of the other party. In what sense does selfless individualism allow for such demands? On the basis of its tenets, notwithstanding the predominance that self-interest has over the interests of others, this version of individualism acknowledges that the harm caused to third parties is a limit for pursuing the satisfaction of self-interest, thus being able to easily reconcile this restriction with the duty to omit acts that can lead to harmful consequences for the other party. This is a primary aspect of good faith in the contractual relationship, since behavior in good faith by a party is incompatible with the conduct that, in order to satisfy self-interest, harms the interest of others. In contrast with selfish individualism, therefore, selfless individualism can provide justification for sub-duty (i).

Regarding the fundamental duty of taking into account the interests of others, its pertinence to this way of understanding selfless individualism is clear, since the party must *respect* the of the other party's interests in order not to deviate from the standard of conduct required by good faith.<sup>40</sup> Taking into account the interest of the other party, as previously stated, is the main duty. From it derives the negative duty of abstaining from doing harm to the other party. The latter has as a natural requisite that the contractor *has taken into account* the interests of the other, thus avoiding harmful conduct.<sup>41</sup>

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40 This issue is highlighted by Larenz when he remarks that, besides the principle of trust, good faith requires "[...] a reciprocal respect above all in those juridical relationships that require a long and continuous collaboration, *respect to the other in the exercise of the rights as well* and, in general, the behavior that can be expected between subjects that intervene honestly in trade". LARENZ (1985), p. 96. Added emphasis.

41 Article 1546 of Chilean Civil Code, as it is well-known, establishes contractual good faith demanding the parties to behave according to its demands performing her obligations. However, recent studies in private law legal scholarship have emphasized the operation of the demands of good faith in the context of enforcing contract remedies for breach of contract. This has been reflected in the control of the right to unilaterally terminate the contract. From this point of view, the plaintiff must claim her right to terminate the contract *taking into account* the other party's interests, and at the same time, *refraining from harming* the debtor's interests. Both good faith duties that take place here can be founded on uninterested individualism. On this incidence of good faith and the limits of the execution of this contractual right, AEDO BARRENA (2019), pp. 73-96 and SEVERIN FUSTER (2018), pp. 303-340 can be consulted. I thank one anonymous reviewer for making this point.

However, sub-duty (ii) exceeds the considerations of selfless individualism. Acting in favor of the interest of the other party involves *something more* than not damaging her interests and expectations. To act in favor of the interest of the other is more demanding than omitting actions that may harm her.<sup>42</sup> And this requirement can only be satisfied if, even though there is a difference between self-interest and the interest of the other party, the latter does not always prevail. This does not deny that both interests are, in fact, different. Its concern lies in rejecting the normative question at stake; namely, that self-interest constitutes a dominant value for the conduct of the agent. If the agent carries out an action directly aimed at benefiting the interest of the other, such predominance is discarded. Therefore, in order to accept the positive demand to perform an act for the benefit of the other party's interest, it is necessary to resort to altruistic philosophy.<sup>43</sup>

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42 This consideration can be illustrated through a judicial decision taken in the Chilean context. In a lease of immovable property in which the lessee has as contractual purpose to install and manage a minigolf field, the lessor omitted to point out that although it was in perfect condition, the property was not fit to be used for minigolf, because of administrative constraints that impeded this use. Based on contractual good faith, the Court of Appeals of Santiago sentenced the lessor to pay damages to the lessee, decision that was upheld by the Chilean Supreme Court. How can we understand such omission on part of the lessor? By neglecting to provide that information, the lessor thwarted the contractual purpose of the other party, thus infringing the requirements of good faith. It is not so much about avoiding the causation of damages to the other party, but rather about acting directly in favor of the obtention of the objective underlying the celebration of the contract. Omitting to inform about such circumstance prevented the lessee from obtaining the pursued benefit, thus justifying the payment of damages. Naturally, the justification can fit into the parameters of moderate altruism. Due to the specific circumstances of the case, acting according to good faith demanded the lessor to take into account the interests of the lessee and, moreover, to perform positive actions in her exclusive benefit, such as informing the situation that would prevent the lessee from obtaining her contractual interest. Such considerations reveal the challenge to the predominance of self-interest embodied by the altruistic prism. See, *Glide Diversiones Limitada con Compañía de Inversiones y Desarrollo Sur S.A.* (2007) and its confirmation by the Chilean Supreme Court in *Glide Diversiones Limitada con Compañía de Inversiones y Desarrollo Sur S.A.* (2008).

43 The idea of cooperation has been used in order to account for this positive face of the requirements derived from good faith. Emilio Betti, for instance, formulated a concept of good faith and its impact in the general theory of obligations as a duty of cooperation in favor of the interest of others. In his terms, contractual good faith consists in “[...] an attitude of active cooperation that leads to achieving the expectation of the other via a positive conduct *displayed in favor of an interest of other*”. BETTI (1969), p. 77. Added emphasis. On this matter, the BGB, in its §241 II, provides “[...] An obligation may also, depending on its contents, oblige each party to take account of the rights, legal interests and other interests of the other party”. The requirement of respect for the interests of the other contractor, as suggested, conforms with a demand of selfless individualism, which does not mean that acting in compliance with said demand involves benefiting those interests directly. This reveals that the requirement of

Moderate altruism, which is the version defended here, accomplishes to give an adequate foundation to the positive duties involved by contractual good faith, which derive from the basic duty of taking the interests of the other party into account. This version appeals to the agent permanently showing concern for the interest of her counterparty and, likewise, that she performs positive actions aimed at favoring them if that is deemed necessary, precisely considering the good of the individual benefited by such actions. These actions are more demanding than the negative duties associated with the abstention of causing harm to others. Naturally, moderate altruism is also pertinent when it comes to provide foundation for the basic duty of taking into account the interests of others, but here it is also required that the contractor displays actions for achieving them. For that purpose, it is indispensable to put attention in the relevancy that the interest of others has, and, in this sense, moderate altruism captures that importance and provides a solid foundation for acting directly in favor of the other party. This *something more* that is involved in the positive sub-duty derived from good faith fits naturally in the altruistic normative foundation, in its moderate dimension.<sup>44</sup>

A distinguishing aspect of moderate altruism when compared with its strong version lies, as previously argued, in that only in the latter version the renunciation of self-interest and the measureless sacrifice in favor of the interest of others, are pertinent. Good faith is sensitive to this consideration. Acting in favor of the interest of others, in the field of contractual relationships, cannot mean a limitless sacrifice of both self-interest as well as of the benefits and advantages provided by the framework of contractual cooperation. Otherwise, the way in which this

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respect for the interests of others is the main commitment both of contract law and of general private law, whereas the duty of benefiting them has a lesser presence. For this reason, selfless individualism constitutes a valid parameter for providing foundation to the greater part of the normative spectrum in said areas, but not to account for *its entirety*. Regarding those aspects in which the interests of others are taken into consideration by demanding direct action in their favor, it will be necessary to complete the normative structure with the requirements of moderate altruism.

44 A positive duty derived from good faith, for instance, is the contractor's duty to communicate where her former tenant has relocated once the lease of the commercial premises by which they were bound had expired. Even though this duty is required in the post-contractual stage, this is a positive duty directly aimed at favoring who was the counterparty in a contract now extinct. This does not mean that all duties imposed on the parties -when the contractual relationship is no longer in force- are intended for directly benefiting the other. Thereby, the duty of confidentiality or discretion, even though it shares its post-contractual character, is not directed towards benefiting the other contractor, but to avoid that the divulgation of information and its knowledge by third parties may harm the interests or rights of the former counterparty. Therefore, the first duty answers to a foundation based on moderate altruism, whereas the second one can very well be tied in with selfless individualism.

usually develops could be distorted, together with the rationality to which it answers. A strong version of altruistic requirements confronts an obstacle that is particularly hard to overcome if, in order to make them fit into the contractual link, it is necessary to radically redefine our understanding of contracting. The moderate version of altruism, on the contrary, does not entail putting our current contracting practice to the test. It only illuminates an aspect of it and provides justification for the contracting party to validly perform an action in favor of the contractual interest of her counterparty. It is not correct that personal interest is necessarily predominant over the interest of the other party. Its appealing is useful for substantiating positive duties which exist in contractual relationships governed by objective good faith.

Neither does this vision of altruism assume that the parties deploy these positive duties to perform actions in favor of the other party genuinely motivated by achieving the interest of the latter. Its position as normative foundation of the positive duties derived from good faith is committed to the results of these actions rather than to the actual reasons that motivated the agent. When the party in good faith fulfils a positive duty, she acts therefore as an altruistic individual *would*, thus indirectly achieving an altruistic outcome that is reflected in the benefit and in the crystallization of the other party's interest. Such consideration is in harmony with the objective character of contractual good faith which is commonly associated to *act* in good faith rather than to *be* in good faith.

In light of the above, good faith and moderate altruism are not placed at the same level. The way this image of altruistic philosophy finds its space and scope in the law of contracts, considering good faith, is from the quest for the justification of positive duties of conduct.<sup>45</sup> When deriving from objective good faith duties in favor of the other contractor for achieving her best interest, it is necessary to resort to the tenets of moderate altruism to provide a proper foundation for them. In this sense, it is not correct to ask whether a certain duty is a matter either of good faith or of moderate altruism. All these duties derive from the validity of good faith as a fundamental principle of contracting. Whereas the basic duty of taking into account the interest of the counterparty and sub-duty (i) -which derives from the former- can be grounded on selfless individualism, sub-duty (ii) requires resorting to the directives of moderate altruism in order to adequately articulate its foundation.

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45 On affirmative duties in the private law and in the law of contracts, see DAGAN & HELLER (2017), in particular, pp. 41-47. The defense of positive duties based on the value of altruism in private law in the contexts of tort law and *negotiorum gestio*, is developed in KORTMANN (2005).

For that reason, moderate altruism arises when we ask ourselves how to provide foundation to the demands of performing positive action that are imposed by good faith on the party. The action deployed by the party to directly favor the interest of the other party is justified by objective good faith. Furthermore, here the question is to determine what, in turn, justifies this dimension of good faith. Within that space, the claim of moderate altruism displays part of its impact in the foundation of contractual institutions. Of course, this view of altruism neither intends nor requires to justify good faith *thoroughly*. I have already argued that both the duty to omit a conduct that causes harm to the other party, as well as the duty to take into account her expectations and interests can be accounted for by selfless individualism. Nonetheless, the demands to act positively in favor of the interest of others exceed the tenets of individualism, being therefore necessary to put forward a justification based on the canons of moderate altruism, inasmuch as the predominance of the party's self-interest is challenged. Thanks to this dimension of the requirements of contractual good faith, a facet of the altruistic foundation is revealed, in its moderate version.

Good faith, then, reproduces one of the indicators of complexity of contractual law. In this case, the duality of normative foundations that operate in the field of contract law and that are also apparent in the context of objective good faith. In the law of contracts, as well as in objective good faith, allegations based on selfless individualism coexist with requirements derived from moderate altruism. Even though the first model of normative foundation manages to account for a significant group of requirements derived from good faith, *it is not fit for accounting for all* the duties based on objective good faith. This sheds light upon the impossibility of reducing good faith to a common normative parameter, since neither selfless individualism nor moderate altruism are able to provide foundation for good faith separately. This conclusion applies to contract law in general, since individualistic standards are not sufficient for justifying its different rules, institutions, and practices, being indispensable to account for the altruistic directives that exist there as well.<sup>46</sup>

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46 Reinhard Zimmermann and Simon Whittaker wrote an influential study on the impact of good faith in different private legal systems, belonging both to the continental tradition and to the common law tradition, concluding that there are multiple indicators of a genuine departure from the classical paradigm centered exclusively on the autonomy of the parties -and obviously based on individualistic grounds- as well as of the incorporation of other sort of considerations. Their research led to the result that there is “[...] a growing significance given to party loyalty, the protection of reliance, (occasional) duties of cooperation, *the need to consider the other party's interest* or the substantive fairness of the contract, whether or not these are the terms in which this change of emphasis is put in any one system”. ZIMMERMANN & WHITTAKER (2000), p. 700. Added emphasis. What is interesting about the conclusion to which these authors arrive, is that *in virtue* of good faith they advocate for the need to take

In the contractual context, there is a set of institutions whose basis lies in good faith.<sup>47</sup> For instance, this is the case with hardship as well as with preliminary information duties. When there is no legal rule available establishing such duties, it is common to resort to good faith in order to base the admissibility of some duties, such as the duty to renegotiate contract terms or the duty of information in the pre-contractual stage aimed directly at benefitting the other party. In this sense, good faith can be used as normative base for other contractual institutions, which is accepted both in legal scholarship and in the field of case law.<sup>48</sup> Nevertheless, the issue is to establish which is, in turn, the basis of contractual good faith. The aforementioned institutions constitute, in my opinion, indicators of altruistic components, in its moderate dimension.<sup>49</sup> Yet the question remains of whether good faith also contemplates altruistic parameters and, if this is the case, if it is only compatible with moderate altruism or if there is a coexistence between demands based on moderate altruism and others based on selfless individualism.

Relatedly, I have endorsed here this last view, as can be seen. Good faith constitutes a reflection of the complexity of contractual law, which is, likewise, a shared feature within the general framework of private law. One of the facets in which the complexity of the different areas of private law is expressed, is the duality of normative foundations. Because of this, private law cannot be reduced to a single common basis without neglecting the foundation model that is precisely in dispute with the other one.<sup>50</sup> Such impossibility is transferred into the law of contracts. At least two foundations, that go in opposite directions, are

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into consideration the interest of the other party. Such requirement can be compatible with selfless individualism, but when *something else* is involved other than just taking them into account, as it is the case of acting directly in their favor, the relevancy of moderate altruism becomes clear.

47 Its recognition in the instruments for the harmonization of the law of contracts is wide. For instance, it is established in articles I.-1:103: *Good Faith and Fair Dealing* DCFR; 1:201: *Good Faith and Fair Dealing* PECL; 7. *Good Faith (Buena fe)* PLDC. It is also contemplated in articles 1.7 Good Faith and Fair Dealing of the UNIDROIT Principles and 7.1) of the Vienna Convention on Contracts for the International Sale of Goods.

48 However, not all of the legal institutions that derive from altruistic considerations arise necessarily from good faith. Hence, the fiduciary duties of administration of other's goods for the sole interest of the beneficiary's interest and in an uninterested way, are distinguishable from good faith. On the connection between these duties and altruism, see BIRKS (2000), especially, pp. 10-11, 20 ff.

49 For this analysis, see PEREIRA FREDES (2018), pp. 139-168.

50 A monistic understanding of private law is present in Ernest J. Weinrib's work. In light of corrective justice, Weinrib articulates a common structure that is a characteristic feature that private law exhibits internally. According to Weinrib, "my fundamental thesis is, then, that private law relationships have a *unifying structure*". WEINRIB (2017), p. 54. Emphasis added.

present. This takes place between selfless individualism and moderate altruism in the law of contracts and is conspicuously revealed in the case of good faith.<sup>51</sup>

## V. CONCLUSIONS

Contractual good faith has a decisive importance in the law of contracts. Traditionally, the doctrine of the civil law has resorted to it to justify duties of conduct that the contracting party that complies with this standard of behavior is to fulfill. Nevertheless, a theoretical dimension also offered by good faith is linked with its normative basis. This composition reveals, as above discussed, that the apparent individualistic uniformity as well as the common predominance of personal interest is not the case. Individualism, even in its selfless version, is unable to justify all the duties that derive from contractual good faith. Regarding the positive duty of acting in favor of the other party in her exclusive interest, the individualistic canon is simply not enough. Concerning this sort of good faith requirements there is something more involved that does not lie in abstaining from damaging the interests of the counterparty. Regarding these we are to resort to the altruistic model in its moderate version, since it accounts for requirements that reject the prevalence of self-interest over the interest of others, requiring the agent to attend to it permanently and, on occasions, to perform actions in favor of the latter.

If this is so, good faith replicates a relevant feature that is necessary to consider when attempting to provide a moral foundation for contract law. Its structure is dual, for it contains both individualistic considerations as well as others based on moderate altruism. Good faith reproduces the normative complexity of the law of contracts, since it is not possible to provide an homogenous foundation for all the rules, institutions, and practices concerning this field, without accounting for the role that moderate altruism plays within its normative structure. Of course, this does not mean that the aforementioned role is analogous to the role played by individualism. In fact, the contracting party in good faith, in most of her contractual relationships, must consider the interests of the other party and abstain from harming them. But when dealing with duties derived from good faith that are more demanding and aimed at favoring the other party in the contract, the altruistic foundation becomes crucial. This gains more strength considering the

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51 On the complexity of the law of contracts and the difficulties that face the projects of harmonization of the different contractual regimes currently in force in the Latin American context, for determining *a single* common identity on which to focus the efforts of equalization, see PEREIRA FREDES (2017b), pp. 79-114.

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mutual affinity that exists between the behavioral dimension of altruism and the objective character of good faith. Just as it is unnecessary that the party actually is altruistic for her to behave in an altruistic way, as an altruistic person *would*, it is also not required that the party in good faith really is in good faith, but it suffices that she *acts as if she were*.



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