THE ROLE OF COURTS IN THE RE-ESTABLISHMENT OF CONTRACTUAL BALANCE

THE ADAPTATION OF THE CONTRACT IN THE CHILEAN CIVIL CODE

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Abstract
This article reflects upon the amplitude of jurisdictional attributes surrounding the adaptation of contracts. By way of interpretation, there is an underscoring of the role that fairness, good faith, and morals play as elements of contract adaptation, which facilitate, expand and enrich the work of the courts in the re-establishment of contractual balance.

Key Words: *Contractual balance, role of the courts, contract adaptation.*

1. INTRODUCTION

During the time in which the codification phenomenon occurred, the will began to be seen as synonymous with liberty, and mutated until it became the now known "dogma of the autonomy of the will".[2]

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2 As per the theory of the will – or dogma of the will – as a base for the law of contracts in codes, it becomes expedient to review Daniela Accatino's interesting work. She explains that there are various recent historiographic studies showing that the dogma of the will constitutes more of a legal myth of sorts, given that in the nineteenth-century codes, neither the sources that inspired them, nor the preparatory works written by their draftsmen, show any evidence of a will-based conception. According to the author, what does exist is a "clear continuity with a theory of contracts that sinks its roots in the late scholastic period, and in which the notions of virtue and commutative justice continue to have a meaningful presence." [Accatino Scagliotti (2015) p. 42. In a similar sense, Pizarro Wilson (2004), pp. 228 y 229]. Thus, with regards to the French Civil Code, the concept of autonomy of the will would have been completely absent from the thinking of Domat and Pothier, and from the formulations of the drafters of this code. As per the Chilean Civil Code, an elaboration of the concept of autonomy of the will was also absent, as well as in Claro Solar, Alessandri, and Somarriva. In summary, the autonomy of the will was not a concept introduced by the "classical" authors, but rather, and in a paradoxical fashion, they seem to have been introduced by the scholars that presented the first critical analyses of these approaches, during the end of the XIX century, and in the beginning of the XX century. [Cfr. Accatino Scagliotti (2015), pp. 39-42; Pizarro Wilson (2004), pp. 225-237].

Given the liberalism's influence, freedom of contract –which is to be understood, essentially, as the power to enter into obligations and to determine the content of contracts[3]– gives way to a legal asset that deserves the maximum level of protection.[4] A concrete manifestation of this is that the Civil Codes abandoned formalisms as well as formalities, that had previously been a fundamental part of the concurrence of wills, in order to give way to a spiritualist principle in the conclusion of contracts: what truly matters is that two or more people agree on the carrying out of a business, and not the form in which this agreement comes to fruition.[5]

On the other hand, the legal voluntarism contained in the law –as an expression of the sovereign parliament's will and as a base of the codification movement –also introduced a distrust in judicial discretion. They were times in which legal positivism and the principle of legality prevailed, giving priority to the Constitutions and to the Codes as a main source for the Law, which turned the latter in rather rigid regulatory bodies. This legal positivism and the search of norms' guarantee of legal certainty, yielded the effect of limiting the freedom that the judge has before the written law.[6]

However, this voluntarist vision that can be found in the nineteenth century civil codes have been mitigated, by virtue of the opinions that have sought to recompose the conflictive and tense relationship between judicial discretion and what has been set forth in the law. This is nothing other than an important discussion with the avid opponents against any possibility for judicial intervention in the content of contracts that do not directly emanate from the law.[7] Just as Bemmelen said, "we are too accustomed to represent law as a set of rules that completely exhaust the subject

3 In Chile, López has expressed that the principle of contractual freedom: "comprehends the freedom to conclude and the freedom of internal configuration of contracts. With the base of freedom of conclusion, it is affirmed that the parties are free to execute or to not execute, and in the affirmative case, to choose the co-contractor on the base of liberty or internal configuration, the parties may establish the clauses or the content of the contract that they deem necessary [Lopez Santa María (2010), p. 213]. As a complement to the foregoing, the same author has also added that "at the heart of contractual liberty, three sections are distinguished: freedom of contract or freedom from contract; freedom to choose the co-contractor and the freedom to establish the clauses of the act, determining its legal effects (freedom of internal configuration)" [Lopez Santa María (2003), p. 109].

4 See Martín Pérez (1995), p. 25. In the scope of Chilean scholarship, it has been acknowledged that the respect that our Civil Code professes for freedom of contract is in perfect agreement with legal, economic, and social thought of the time [see Lira Urquieta (1956) p. 72].

5 See Lasarte (1991), pp. 269 and 270.

6 See Robles Velasco (2013), pp. 304 and 305; Caro Gandara (2014), p. 95.

7 In Chile, a faithful representative of this position is Abeliuk, who stated that "if the contract is found in some way protected before the very legislator, that is all the more reason why we reject that the judge may begin to review it for causes other than those foreseen in the legislation at the time of its conclusion. Against judicial intervention, all of the reasons that (…) defend contractual security as essential for the proper execution of legal transactions are mobilized. Thus, it is not strange that our courts have acknowledged that they do not have the power to modify contracts" [Abeliuk Manasevich (2014), Volume I, p. 153].

matter that they regulate; and that the judge does nothing other to administer justice than apply the law, save for a little interpretation. This occurs under the regime of our legislation and codification, but during its origins, things happened in a very different way".[8]

2. JUDGES AND CONTRACT ADAPTATION

If a premise is adopted stating that the rules that give form to the content of contracts should not always exclusively come from the initiative of the contracting parties, a possibility opens up by which judges may have control over the adaptation of contracts in those cases where it is deemed necessary, in light of a certain interest.[9]

An example of the reassessment of the judge's role "has started to be formulated in contemporary contract law. The strengthening of principles such as good faith, commercial loyalty, and solidarity, have come to balance contractual freedom and the binding force of contracts, authorizing judicial intervention with the purpose of avoiding and correcting abuse, derived mainly from situations of asymmetry between parties, that are reflected in serious disequilibrium in the structure and in the execution of the agreement".[10]

In the specific case of rescission due to *laesio*, the powers of assessment that judges possess are more ample than they seem to have at first glance, given that in all instances of possible rescission established by the law, the judge will be under the duty to ponder issues such as the amount assigned to the *laesio*,[11] the existence of fraud or absence thereof, the scope of *reductio ad aequitatem*,[12] the concurring circum-

8 Van Bemmelen (1923), p. 29. Within this same line of thought, it has been expressed that the role of the judge has been limited mainly to verify that the will has been declared in a free and spontaneous manner, or to examine the concurrence of requirements for nullity or contract resolution. In this sense, until fairly recently it was thought that if formal or procedural justice is guaranteed for the agreements contained in the contract, the substantial justice of the same is also guaranteed. Demonstrations of the foregoing include the idea of nineteenth century code rejections to judicial revision of contracts due to change of circumstances, of partial rescission, and the consideration of *laesio enormis* as a defect in consent [see Momberg Uribe (2014), p. 278].

9 See Martín Pérez (1995), p. 55.

10 Momberg Uribe (2014), p. 279.

11 Even in the cases of rescission for which the law has established objective limits, as is the case with art. 1889 of the Chilean Civil Code, the evaluation of the judge will always be necessary with regards to certain factual circumstances related to the establishment of *laesio*. In the aforementioned particular case, the existence of *laesio* depends on "fair price", which is the axis upon which the possibility of reestablishing lost balance in the respective obligations of the contract lies; however, regardless of its importance, the law neither defines nor grants greater parameters for its determination. The concept of fair price is understood today as real estate's market value [See Planiol and Ripert (1946), p. 264; Gordley (1981), p. 1604; De la Maza Gazmuri (2011), p. 478]. This value must be proved in the respective rescission trial for *laesio enormis*.

12 *Reductio ad aequitatem* is the possibility of enervating the rescission action by complementing or reducing the price with the purpose of reestablishing lost contractual balance that came as a result of the conclusion of a transaction with conditions that were detrimental for one of the parties. This

stances, etc. All of these issues present a strong benchmark component, wherein the judge may only evaluate correctly if it is performed with due prudence.[13]

Indeed, the possibility that the judge gives way to the direct control of *laesio* depends not only on that which has been set forth by the law, but also on the acknowledged role of the intervention that courts have in contracts.[14] In this regard, it may always be argued that this intervention supposes a threat for legal certainty, given that judicial discretion may operate beyond the law, but it is also true that there are many particular cases where an adequate solution is not found within the general norm, giving way, therefore, to the need to adapt the immovable text of the law to the socio-economic reality.[15]

In this pursuit of administering justice, the judge cannot consider interests other than those established by the parties, without disregarding the will of the same.[16] But in those cases where the contract has been concluded at the expense of its internal economic equilibrium, and where it has been deprived of its purpose, it becomes expedient to ask if the system provides suitable means for, at the very least, mitigating this kind of situation, allowing for the distribution of risks associated with the contractual initiative, in a more rational manner.[17]

The aforementioned idea, which at a first glance may appear to be excessive or dangerous, is nothing more than the requirement of adapting contractual regulations, conditioning its efficacy to the concurrence of objectively indispensable assumptions, such as fairness, good faith, respect for the law, etc., so that the contract may satisfy all of the parties' interests, so long as their tutelage is warranted. Accordingly, it is not possible to summarize or explain the content of a contract solely by the concurrence of wills that gave rise to it.[18]

In a traditional sense, the integration of the contract by way of sources external to it presupposes the existence of a gap in the same, leading to inducing a hypothetical will of the parties, or to find supplementary criteria. However, "its use has been

possibility is given to the party that has been defeated in a trial of *laesio enormis*, according to the provisions contained in art. 1890, paragraph 1, of the Chilean Civil Code.

13 See Martín Pérez (1995), p. 55.

14 Regarding this point, Baraona has expressed that it is not the case that in Chile "case-law is never creative, but rather, it is much less so than it should be, given the legal culture (normative) that moves us. Such defect is not exclusively attributable to judges, it is also the responsibility of the lawyers, who are in charge of 'making judges speak' [Baraona Gonzalez (2010), p. 434].

15 See Martín Pérez (1995), pp. 56 and 57.

16 See Tapia Malis (2015), p. 543.

17 See Martín Pérez (1995), p. 60.

18 Domínguez Hidalgo (2010), p. 253. This is a reaction to the tenet of the intangibility of contracts – based, according to the classical doctrine, on art. 1545 of the CC – establishing that "neither parties (with the obvious exception of mutual consent), nor the judge may vary the terms of a validly executed contract, regardless of how much the conditions that were present of the conclusion of the same have changed, or if there has been an increase in hardship or difficulty of compliance for one of the parties" [Momberg Uribe (2010), p. 45].

extended both to the situation in which parties have established an incomplete or insufficient rule, as well as when the contractual regulations contradict some heteronomous principle or rule that cannot be disposed of by the parties, given that it is imperative in its application".[19]

In modern contract law, the content of the contract is not determined merely by the concurrence of wills, but may also be governed by other sources that establish requirements on objective conduct for the parties, that bind them in a sense just as important as contractual will.[20]

Contract adaptation differs from integrative interpretation by the medium used, not by the objective, which is the very same and which we may intuit: fair regulations. Thus, interpretation looks to unravel the true will of the parties upon entering into the contract, and adaptation[21] sustains, as a premise, the impossibility of finding within that which has been bargained, the rules that the parties are to follow for the efficacy of the contract, applying in light of this objective, not only a concrete legal norm, but also those according to custom or good faith.[22]

If the contract, despite being valid, is not the result of that which has been freely agreed upon, looking for the concurring will of the contracting parties would not make sense. In this case, the most useful thing would be to verify that its content lies within the realm of equity and good faith; and with this objective, the judge may intervene realigning the contract in order for it to have just and balanced content, with the only limit of not being enabled to completely replace that which the parties have determined, unless there is an express norm that allows it.[23] On the other hand, we acknowledge the possibility of replacing certain contractual provisions due to other consequences set forth by the legal system, or the proceeding with a declaration of invalidity of some of its clauses.[24]

19 Martín Pérez (1995), pp. 60 and 61.

20 See Ravazzoni (1974), pp. 125 and 126; Martín Pérez (1995), p. 61; Soto Coaguila (2004), pp. 1148, 1175 and 1176, 1185. In this same sense, and with a direct reference to art. 1545 of our Civil Code, it has been said that the "definitive drafting of art. 1545 of the CC is simply equivalent to mentioning that consent binds in the measure that it respects the contract structure" [Barcia Lehmann (2010), p. 694].

21 With regards to this, Betti has stated that "upon this same line of the distinction of interpretation and legal assessment, the differentiating criteria between interpretation and adaptation of the transaction is also established (…). The criteria that we are referring to is also configured differently according to the manner in which the task of interpretation is conceived. For those whose work consists of determining the 'true will' of the parties, the interpretation ends when there is no room for discussion regarding that true will, and adaptation begins there. However, for those who consider the task of rebuilding the objective meaning of the act, the interpretation goes beyond that, and is also extended to those aspects of the transaction that do not constitute an object of conscious reflection (…), for which it becomes useless and irrelevant to go in search of 'supposable' or 'presumed' will, that in reality did not exist [Betti (1975), pp. 367 and 368].

22 See Martín Pérez (1995), p. 61; Tapia Malis (2015), pp. 553 and 554.

23 See Martín Pérez (1995), p. 61 and 62; Tapia Malis (2015), p. 543.

24 See Lasarte (2006), Volume III, p. 127.

In summary, the query presented herein is if the judge, beyond that which has been expressly regulated in the law as per the circumstances subject to nullity, he or she may perform an adaptation of the contact beyond that which has been expressly regulated and resolved by the law, for those cases in which there has been a manifest injustice. It is clear that in such case, if the judge were to decide to reestablish contractual balance this way, and thereby correct the *laesio*, he or she would have to look for solutions subject to the established system of integration.

3. CONTRACT ADAPTATION IN THE CHILEAN CIVIL CODE

In Chilean legal system, the system of integration is based on the premise that a contract is executed in good faith, and that at the same time involves recourse to elements such as fairness, common-use clauses, and custom.

Indeed, contract adaptation in Chile is erected and built upon two rules that are common among all nineteenth century codified systems: a) article 1546 of the Civil Code, which states that "contracts are to be executed in good faith, therefore they obligate not only with respect to that which is expressed in them, but also all things that precisely emanate from the nature of the obligation, or that are understood to belong to it under the law or custom"; and b) article 1563 paragraph 2 of the same body of law, which establishes that "common use clauses are presumed even though they are not expressed".[25]

These are two rules that are not original to our Civil Code. Rather, Bello adopted them from the regulations of the *Code Napoléon*, which in turn did nothing other than collect the twelve rules of interpretation of the legal transaction that Pothier had taken from Domat, and that the latter extracted, in turn, from the Roman texts. Thus, the model established in the *Code* was followed by all Latin Civil Codes, with the exception of Argentina.[26]

Article 1546 of the Chilean Civil Code contains the essence of the provision contained in article 1135 of the *Code*, according to which: "pacts obligate not only to that which is expressed in them, but also all of the consequences that fairness, use, or the law assign to the obligation, according to the nature thereof".[27] In turn,

25 See Domínguez Hidalgo (2010), p. 252. What we gather here is an opinion that continues being shared by the minority in Chilean scholarship, just as it is acknowledged by the author ([ee Domínguez Hidalgo (2010), pp. 251 and 252]. Traditionally, the norms contained in articles 1546 and 1563 of the Civil Code have been considered as norms of interpretation of contracts [see López Santa María (2010), pp. 401-407]. Regarding this point – and in support of the doctrinal minority – it has been stated that the good faith mentioned in art. 1546 of the Civil Code allows for the adaptation of the contract in order to reestablish a reasonable balance between the contractual obligations, when these have been altered by the abusive imposition of unilateral conditions [See Werner and Nehme (2010), p 658].

26 See Domínguez Hidalgo (2010), p. 252. The author refers to the now derogated Civil Code, but the same applies to the Argentinian current Civil and Commercial Codes, enacted on October 7th, 2014.

27 Code of Napoleon (1809), pp. 207 and 208; Domínguez Hidalgo (2010), p. 252.

the drafters of the *Code* were inspired by the rule set forth by Domat in his work *Les loix civiles*, which states that "the conventions obligate not only with regards to that which is expressed in them, but also all that which is demanded in light of the nature of the same, and all of the consequences that fairness, laws, or custom have given".[28] Subsequently, Pothier repeated the same principle contained in Domat's ideas, and the ideas of both went on to be contained in the *Code*, and consecutively, to all codes that adopted the French model as their main model.[29]

In order for articles 1546 and 1563 of the Chilean Civil Code to be applied, and in order for the effects of adaptation to arise, the following is required: a) the existence of a valid contract, and consequently, that the contract is respected by the Law; b) that such contract does not contain all of the effects that emanate from the same; c) that parties have not expressly excluded some consequence that may be obtained from adaptation; d) the presence of the law, use, or fairness, as complementary factors; and e) that the assigned consequences are congruent with the concurrence of wills, without the same becoming its essence, and that the adaptation corresponds with the type of contract that the parties have sought to conclude, or in the absence of type, that the contract does not contradict the purpose of the concluded atypical contract.[30]

With regards to resorting to custom as an element of contract integration –incorporated in article 1546 of the Civil Code– the law itself provides its applicability in article 2 of the same Code, giving utility for those cases in which the law remits itself to it (custom).[31] On this point, traditional doctrine has understood that the application of custom in Civil Law is rather restricted, being allowed only in the cases of "custom in accordance to law".[32] However, article 1546 broadens its scope of influence, given that it expressly contains one of the cases in which there is an express reference to custom, which allows for its inclusion in the content of the contract, making it mandatory. Therefore, the same may be applied to the generality of contracts without probative limitations.[33]

With regards to common use clauses – mentioned in article 1563 paragraph 2 of the Civil Code – the law does not define them, and our scholarship has interpreted them as being synonymous with a contract's implied terms; this is to say, legal clauses that are understood to be included in the contract without the need of an express manifestation of will in such sense.[34]

28 Domat (1697), p. 78, Domínguez Hidalgo (2010), p. 252.

29 See Domínguez Hidalgo (2010), p. 252.

30 See Domínguez Hidalgo (2010), p. 257; Tapia Malis (2015), p. 543.

31 For example, among others we have art. 2117 of the Civil Code, which allows for counting on custom in order to establish remuneration for the agent.

32 See Tapia Malis (2015), p. 552.

33 See Tapia Malis (2015), p. 552.

34 See López Santa María (2010), p. 402.

As has been previously stated, rules of adaptation allow for the judge to go beyond that which parties have agreed upon, in order to complete the contract with all of the details implied by the concluded convention,[35] enabling an understanding of all of the limitations for the type of contract that the parties have concluded, or in absence thereof, those necessary to achieve the purpose intended by them.[36]

In accordance with that which has been set forth, we shall hereby continue by examining those sources that, through a complementary process of interpretation and integration,[37] serve as a foundation to give an adequate solution for the problem of *laesio* or contractual disequilibrium.

3.1 Good faith

In the first phase of the so-called dogmatic voluntarism, the requirement of good faith in contracts only had the function of bolstering the principle of *pacta sunt servanda*, establishing that the contracting parties are to respect and faithfully comply with the commitments acquired by them.[38] Subsequently, when private law allowed itself to be influenced by moralizing currents in contract law and incorporated social values, good faith – beyond serving as a foundation for the binding force of a contract – served to detach from the literalness of words, by introducing a series of duties and values that were to be respected in legal relations, independent of the terms of the contract.[39]

This historical consequence was nothing more than a forgetting of the remote past, given that it was an already trodden path for ancient Rome. Indeed, if we examine the historical evolution of Rome, we will notice that at first, the *oportere ex fide bona*[40] served as a legal justification for non-formal (or consensual) in international

35 Johow is of the opinion that against this, for whom the scope of application of art. 1546 – capital norm for his subject matter – would be limited by the principle of autonomy of the will [see Johow Santorio (2005), p. 222].

36 Paraphrasing of that which has been expressed by Flour in Cours de Droit Civil [see Domínguez Hidalgo (2010), p. 253].

37 Interpretation precedes the time of integration, given that only through an interpretative process can we determine if there is a legal gap that is necessary to fill, as a result of a gap left by the contracting parties [see Domínguez Hidalgo (2010), p. 255].

38 See Martín Pérez (1995), p. 65.

39 See Martín Pérez (1995), p. 66.

40 The *oportere ex fide bona* is a legal construction of Roman case-law, which dates back to the III century b.C. Essentially, it consists of the legal effect acknowledged in agreements typified in commercial relationships, based on certain socioeconomic causes, and in light of the application of the *Ius Gentium* they were under tutelage of the Praetor (*emptio, venditio, location conductio, mandatum, societas*) [see Facco (2013), p. 21]. In this sense, the *ex fide bona* clause played an important role in the conservation of reciprocity of obligations expressed in the idea of *sinalgama*. This implied that an action could be conceded in cases where rigor did not apply, but it also allowed to limit the consequences of actions when, being fully exercised, they would have produced a situation of contractual unbalance [see San Martín Neira (2015), p. 69].

relationships, and subsequently, as a parameter for the determining of the extension of obligations that emanate from said contracts.[41]

Historically, the primordial meaning of *fides*[42] – although not the only one – manifested itself with regards to respecting the promised word; "in this primary function that compelled parties to fulfilling their promises, *fides* has led to the acknowledgment of a legal base that consequently enables the possibility of attempting action in certain contracts unknown by the ancient *Ius Civile*".[43] The need for legal acknowledgment for such non-formal transactions arises in international commerce between Romans and foreigners, to which the *Ius Civile* naturally did not apply.[44]

Having arrived to this point, and specifically in relation to the extension of the parties' duties, it is necessary to emphasize that even in these contractual relationships, based on the *oportere ex fide bona*, the judge was limited by the contract's tenor. Only when there was no doubt that these contracts had Pretorian tutelage, the *oportere ex fide bona* went on to assume a new function: not only was it useful for pointing out the source or foundation for the due conduct, it was also useful for resolving conflicts dealing with its content, extension, and regulations.[45]

The innovation lies in that the differing function consists of the incorporation of certain enforceable duties that were not explicitly manifested by the parties to the contract. Thus, the expression *bona fides* not only indicates fulfilling the promised word, it also assumes greater complexity, broadening its content to include the possibility of demanding the contracting parties, the observance of behavior that is based on a pattern of loyalty.[46]

41 See Mohino Manrique (1998), pp. 413 and 414; Facco (2013), p. 36. Yet, good faith in Rome not only allows the adaptation of the contract by broadening the obligations accepted by the parties, but it also was a mitigating mechanism of the same, when its requirement in literal terms was contrary to the very balance of the contracts of good faith [see San Martín Neira (2015), p. 47].

42 The term *fides*, alludes to "doing what one says", "comply with what one says or promises", "to have the word", as a certain condition that generates 'trust', "a state of confidence", as long as it is maintained or prolonged in relationships among men, with regards to the subject, the titleholder of the *fides*, and as a result, a "man of his word", "keeper of his commitments" [Castresana (1991), p. 14. In a similar sense, Wacke (1995), p. 322]. For Rampelberg, towards the end of the Republic, the term acquires a demystified and purely ethical sense, becoming the term *bona fides* [see Rampelberg (2014), p. 777].

43 Facco (2013), pp. 36 and 37.

44 See Facco (2013), p. 37.

45 See Facco (2013), p. 37.

46 See Facco (2013), p. 39. The *bona fides* notion is an original intellectual product from ancient Rome, the content of which was explored with great detail by the jurists of the time [see Foldi (2014), p. 313]. From Roman sources, we can conclude that good faith protects the confidence that the agreements will be finalized, and constitutes a primal guarantee that the word will be respected, preserving the expectations created with the contractual declaration [see Neme Villarreal (2012), p. 178].

As a consequence of the evolution described by way of a short synthesis, the invocation of *bona fides*[47] would imply the demand upon the contracting parties to not only execute the promises literally, but also the demand that such execution is to be done without malice (*dolo*).[48] In other words, that the execution of the contracts is verified in a coherent manner with the criteria of loyalty and honesty.[49]

Just as Larenz stated, "the principle of 'good faith' means that each person must be 'faithful' to the given word, and to not defraud the trust given or to abuse the same, given that it is the indispensable base of all human relationships; it supposes conducting oneself as is expected with honorable thinking, intervening in relationships as contracting parties or participating in the same by virtue of other legal bonds".[50]

This is the sense given to good faith in article 1546 of the Civil Code, where it states that contracts "set forth obligations not only with regards to that which is expressed in them", also submitting the parties' acts and the content of the contract to other elements worthy of respect, beyond that which is expressly concluded. Indeed, article 1546 of the Civil Code is the "positive expression of a general principle of the Law, from which a universal legal consideration follows: all rightsholders must exercise their right in good faith, and are also to execute their obligations in good faith. Such act, both in its active aspect (the exercising of the right), and in its passive

47 In order to explain the transit of the concept from *fides* to *bona fides*, Castresana makes the following distinction: the basic meaning of the word *fides* can be summarized as "loyalty to the given word", on the part of the holder. Such meaning remains unaltered both with regards to the Roman people with other peoples, as well as with private relationships among those who were Roman citizens, or among the latter and those who weren't. Thus, *fides* serves as a base for a whole series of legal relationships that, beyond facilitating the formation of the agreement itself, serves as an ineludible reference point in the fulfillment of obligations that emanate from the agreement. The simple *fides* becomes *bona fides* when subject to the fulfillment of commitments assumed in the convention, to the sincerity of the given word, and the absence of deceit or fraud in them [Castresana (1991), pp. 56, 57, and 58]. What can be extracted from the *fides bona* is "the same *fides* to which loyal fulfillment was subject to, as per the word given in the convention, though with some caveats at this point, once a conflict arises *inter partes*, and in the area of process, for the necessary measure of responsibility in which the party that has not complied with the bond of fidelity, were to eventually incur. The *fides*, therefore, taken to the field of the Law, becomes in the process *fides bona*, and the latter, in the corresponding jurisdictional area, becomes the – *bona fidei iudicia* – does not generate obligations, but it does generate responsibilities [Castresana (1991), pp. 65 and 66].

48 In the same sense, Castresana's affirmation is complementary, in that the locution of *bona fides* is to be interpreted in contrast with its opposite term: *mala fides*, *dolum malum*, since it is only in this way that the expression acquires its own legal sense, manifested in the area of process; in this manner, the sincerity of the commitments adopted by parties in the *conventio*, that is to say, the absence of bad faith or deceit, become decisive elements at the time of establishing content and the extension of the obligations born from the agreement, in the order of faithful compliance of the same. This implies that the *iudex* must require, from the parties, that all that they do be done in an honest manner, and at the same time repress deceitful or disloyal acts in the execution of the agreement of fidelity [see Castresana (1991), p. 68].

49 See Facco (2013), p. 39.

50 Larenz (1958), pp. 142 and 143.

aspect (the fulfillment of the obligation), suppose that consideration be given to the counterpart's legitimate interests".[51]

Thus, good faith contributes to the definition of the exercise of subjective rights, in order to impede that they be exercised infringing on its socio-economic function, and provoking unjust results, giving way to the tenets of commutative justice.[52]

In this process, the formation of a principle of good faith with a clear, objective profile is decisive, "understood as an ethical and legal rule or model of loyal behavior in relationships, which in and of itself constitutes a source of enforceable duties in any event, in the terms of the nature of the relationship and of the sought after result, both in the interpretation and in the execution of the contract, as well as in its conclusion".[53]

In this context, each party is obligated to abstain from any behavior that may be detrimental to the interests of the other; and in a positive sense, to remain loyal, avoid errors and misgivings, etc.; ultimately, to collaborate with the other party in the satisfaction of their reciprocal expectations.[54]

Consequently, under the presupposition that good faith must govern throughout the Law of Contracts,[55] protection for the contracting party that trusted that the

51 Johow Santoro (2005), p. 221.

52 See San Martín Neira (1995), p. 66. Regarding this point, Zimmermann indicates that "a contract cannot be an instrument of fair regulation when one of the parties does not have freedom of choice: for example, if the party cannot make do without what is offered by the other party, or when he or she depends on the goods or services that need to be administered in any other way. The contract does not comply with its normal function also, for any other reason, when neither one of the parties carries out a correct and balanced evaluation of the consequences of the transaction. Therefore, if the legal community admits that the contract is the result of the self-determination of the subjects, a certain level of control must also be exercised so that, effectively speaking, the contract may be the fulfillment and expression of self-determination of both contracting parties [Zimmermann (2008), p. 240].

53 Martín Pérez (1995), p. 66

54 In this direction, the example of the Dutch Civil Code is noteworthy, on topics of the requirements for acting in good faith between contracting parties. This Code has introduced an important innovation in its article 6:2. The norm requires that the creditor and the debtor must adjust their behavior to the mandates of loyalty and fairness. But also, it categorically affirms that a rule established by the parties should not be applied if it is deemed inadmissible according to the criteria of loyalty and fairness [see Zimmermann (2010), p. 155]. On this same path, "one of the most significant and interesting precepts from the point of view of comparative law is to be found in the general section (chapter 1) of the PECL. It is a general clause in article 1106, according to which the exercise of rights and in fulfillment of obligations, each contractual party must behave according to the mandates of good faith and loyal negotiation. It is an imperative norm". [Zimmerman (2010), p. 154].

55 The fact that the influx of good faith reaches all of the Law of Contracts does not mean that it is the only element to be considered. On the contrary, the recourse to *bona fides* depends on a series of factors; one of which is the existence of other doctrines that are guided by justice, and that require a scope of application reserved to them. Among these doctrines, we find, by way of example, the *culpa in contrahendo*, information duties, abuse of the law, interpretation of contracts, force majeure, and of course, *laesio enormis* [see Zimmermann (2009), p. 81].

other party would behave in accordance with good faith cannot be denied. This does not mean, however, protection for the negligent, but for those that trust, acting in good faith, that the others will be equally respectful with that which has been set forth in the legal system.[56]

Therefore, in the application of good faith, one may start from the premise that all contracts contain the pursuit of capturing a fraction of the future. However, this objective, for evident material reasons, cannot be obtained in a perfect and thorough manner. For this reason, one of the contracting parties will have no choice but to deposit his/her trust in the counterpart's good faith, given that an exhaustive prevision of the exchange would be impracticable.[57]

In summary, just as it was done in Roman Law, good faith has contributed a significant amount of flexibility, convenience, and informality required by the constant demands of commercial exchange.[58]

In this way, it would not be difficult to conclude that contractual *laesio* is provoked by an infraction of the principle of good faith that must preside in all negotiations; since behind every detrimental contract, there is conduct that exceeds the limitations imposed by the law, and breaks the contractual *fides*; which would explain why *laesio*, devoid of an autonomous foundation, has sometimes ended up being absorbed within the scope of contractual consent; and others, within the illicit behavior that turns away from the rules of good faith and contractual correction.[59]

Good faith offers a tool to justify the relevance of *laesio*, and to guarantee the just equilibrium of mutual obligations,[60] because "as a general principle, it allows to identify other demands and objectionable attitudes other than those foreseen in the law; and it is used to fill gaps that the legal system may have before the variety

56 See Rojo Ajuria (1994), p. 246.

57 Facco (2012), p. 166.

58 See Whittaker and Zimmermann (2000), p. 18. In the area of Chilean consumer law, it has been stated that contractual good faith is a "transversal principle of the law of contracts; therefore, it is valid for legal acts of consumption, being also accepted among us in a general manner, by way of art. 1546 of the Civil Code, and in particular in article 16 paragraph letter g of the Law on Protection of Consumer Rights [Isler Soto, (2013), p. 104].

59 See Martín Pérez (1995), p. 67. Among the first group of concepts on *laesio* (which is considered to be a defect in consent), we find, for example, Louis-Lucas: "*laesio* is a defect in the freedom of consent, which is a result of the imperious need of the contracting person, and translates into a purely excessive nature of the obligation that has to be acquired [Louis-Lucas (1926), p. 87]. In the second group (concepts that consider *laesio* contrary to contractual correction), we find the concept of Demontés, who considers *laesio* to be "the harm that a party undergoes, when in a commutative contract, he or she does not receive from the other party, worth equal to that which he or she has given" [Demontés (1924), p. X].

60 During the past years, some scholars have elevated the notion of contractual equilibrium to the category of a legal principle. This principle is differentiated from other ends, such as fairness, good faith, or unjust enrichment. This is what, in Chile, is argued in López Díaz (2015), pp. 115-181.

of situations in economic and social life, imposing to the judge the duty to establish concretely what is pursuant to, and contrary to, good faith".[61]

This is one of the numerous points of convergence between good faith and the principle of consent, insofar as in a consent-based system, the formation of the contract is built upon the base that all contracts are good faith agreements; and, consequently, all contractual agreements devoid of forms, are necessarily based on reciprocal trust between parties, and upon the presumption of good faith. Consequently, the principle of consent, insofar as it goes together with good faith, fulfills an integrating and interpretative function for the law. And, naturally also, it serves as a resource for the judge should there be gaps in legal regulation.[62]

3.2. The moral norm

The study of the evolution of rescission due to *laesio enormis*[63] necessarily implies examining the influence that morals have on contract law. Thus, we can affirm that the remedy arose as a requirement that was ethical in nature, and its greater development was undoubtedly verified by the work of canonists and scholastics, in a time when a distinction between moral and legal rules could be hardly made.[64] [65]

According to Ripert, the most serious problem evinced by the relationships between the Law and morals as per contracts is that of *laesio*; he also states that it is the most well-known, and quite possibly, the most insoluble. According to him, it is not surprising that after a century of liberalism and a frenetic admiration for the contract seen as an expression of free will, that there would be a return on the part of the doctrine to the thinking of ancient jurists, imbued with the moralizing ideas of the canonists. That was the moment in which the law asked if it was wrong to disdain the teachings of old morals that substantiated contracts on justice, and not justice upon the contract.[66]

61 Martín Pérez (1995), p. 67. In a similar sense, Federico (2011), pp. 344 and 345.

62 See Ordoqui Castilla (2011), pp. 202 and 203.

63 For a summary of the historical evolution of *laesio enormis*, and its reception in the Chilean Civil Code, see Walker Silva (2012), pp. 297-312.

64 See Martín Pérez (1995), p. 68.

65 The distinction between law and morals, as well as the relationships that are generated in both, have been the subject of arduous theoretical discussions. Among the great efforts that have been made to achieve a conceptual separation and of content among the moral and legal norms, we can mention Hart (see, for these intents and purposes, chapter IX of his work, the Concept of the Law, entitled Legal and Moral Norms. Hart (2012), pp. 229-261.

66 See Ripert (1935), pp. 134 and 135. A thinker similar to the evidence of Ripert, in Chile is that of Lira Urquieta (1944), p. 258. We can find the same moralizing attempt of Law in Spota, who says: "every time that the titleholder of a subjective right attempts to exercise it for immoral purposes or purposes away from good customs, or from good faith – loyalty, or with good faith – belief, or reciprocal trust or collaboration among contracting parties, as well as in other similar cases, there is an abuse of right. The social mission of the Law is compromised. There is deviation from legal power that the norm grants when there is no concordance with the end for which such powers have been

The sanction of *laesio* is one of many cases in which a requirement that is extra-legal in nature – the ethical requirement, in this case, of not prospering excessively at the expense of the counterpart – pushes to obtain a properly legal sanction. In our case – and contrary to the opinions that attack the inclusion of a remedy in our Civil Code – it may be affirmed that such incorporation constitutes a clear triumph of morals over its antipodes: law based solely on economic criteria and business security.

With that being said, the fact that the rescission remedy comes from an ethical rule does not imply that there is no consideration for a rule that is truly economic or legal in nature. Thus, for example, in the emblematic case of the application of the remedy of rescission in Chile – the purchase and sale of real estate – the estimation for the detrimental price is not obtained from an ethical criterion, but rather, from an economic and objectively quantifiable parameter of the market price. This price corresponds to that which belongs to average transactions of goods, taking into consideration the particular characteristics that influence the value thereof.[67]

3.3 Fairness as an element of contract adaptation

Fairness, looked at as an element of contract adaptation, broadens its functions when jurisdictional activity intervenes in order to enrich and define the regulation that the parties have molded.[68] [69] In this sense, fairness imposes upon the judge the duty to go beyond those cases that are expressly regulated by the law, and to consider the problem submitted to his or her decision on the one hand, based on the

conferred. In these cases, the abuse of the right is presented, and it is the duty of the judge to put an end to the conduct that is at odds with the moral rule" [Spota (1947), p. 304]. In this same sense, it has been concluded that "the tendency to grant greater powers to the courts can be considered as a consequence of a greater moralization in contractual relationships, in which the contractual freedom and obligatory force of contracts have been moderated with an effective application of the principle of good faith, of duties of cooperation, of the principle of contract conservation, and protection of interests for the weak or disadvantaged party" [Momberg Uribe (2014), p. 300].

67 See Gordley (1981), p. 1604. Surrounding the concept of market value, traditionally called "fair price", it has been stated that "it is almost as old as the existence of commercial records, and probably, as old as economic exchange itself" [Baldwin, (1959), p. 8].

68 In this regard, it has been stated that it is in social conscience "where the feelings of piety, charity, and human fraternity are matured, and are the glory of modern society. It is also social conscience, where the legal feeling is elaborated, at least for that part of the Law that does not have a rigorously technical nature. Now: when these feelings are truly spread and mature, what necessarily happens is that in legal conscience, there is a respective modification. Noble and elevated, before this is the office of the jurist, who does not believe that his work in the narrow area of interpretation of Codes is exhausted. His role is to advert regarding this transformation of moral feelings into legal sentiments, and to indicate which private institutions must adapt to them, as well as the manner and in which part this is to occur". [Castejón and Martínez de Arizala (1911), pp. 155 and 156].

69 In Chilean doctrine, there are contrary opinions to the broadening of powers of the judge on matters of adaptation. For example, Abeliuk Manasevich (2014), Volume I, p. 153, and Johow Santoro (2005), p. 222.

general principles of the law; and on the other, to the criteria of justice that abide by the particularities of the concrete situation.[70]

One of the most evident functions that fairness fulfills, is that of adapting the abstract norm to the concrete case. We have records of this function from the times of Aristotle.[71] In this sense, fairness is referred to as the "justice of the particular case", since it is used to mitigate the rigor of the generality of the law; which could result as being unjust in its specific application, if it is interpreted in an excessively reduced manner.[72] As per this meaning, it becomes useful with regards to rescission, since it acts as a benchmark criterion with certain requirements and remedial effects, which are entrusted to the assessment of the judge.[73]

In any case, fairness is not limited to the concrete case, but rather, as a superior function, it imbues the benchmark for such justice, "until it constitutes an autonomous rule that the judge infers directly, from the social conscience, and which has not only a hermeneutic function, but also a correcting and integrating function for the gaps contained in the very legal system".[74]

A second function reserved for fairness is found present in the contractual sphere. Fairness has also had an influence on the autonomy of the will, playing a decisive role in the adaptation of this principle to social changes, being the only element that has been capable of filling the various existing gaps within the regulatory framework and the economic reality.[75]

In this second function, in principle, the fact that the judge may make use of fairness upon adaptation of contracts does not appear to be too problematic. The true conflict arises when we ask ourselves if the judge – in his/her pursuit of applying commutative justice and eliminating detrimental effects – could give solutions that move away from that which has been expressly accorded by parties: ultimately, he/she could set the unrestrained respect to the promised word aside, inasmuch as the exigencies of justice require it.

Here, the key resides in the confidence in the judge's well-applied discretion and that "he/she makes an effort to apply fairness, understood as the assessment of the case in particular, in relation to the singular elements of the mandatory relationship; that is to say, the obligations and their balanced correlation."[76]

70 In our legal system, the recourse to fairness [*equidad*] in jurisdictional decisions is expressly established in article 170 of the Code of Civil Procedure, norm that incorporates the requirements that are to be contained in sentences of our courts in single or first instance, or second instance, that modify or revoke the dispositional part of other courts.

71 See *Ethics* of Aristotle, Book V, 10.

72 See Pedrals (2014), p. 422.

73 See Mirabelli (1951), p. 205.

74 Martín Pérez (1995), p. 63.

75 See Martín Pérez (1995), p. 64.

76 Chamie (2008), p. 136.

In this context, it becomes difficult to assume that the solution for an injustice would allow the judge to not only intervene should there be gaps in the regulations provided by parties, but also when there are abusive clauses or contractual content that violates the minimum requirements of commutativity in the respective obligations.

In order to assess the judge's function regarding this subject matter, it is necessary to bear in mind that the remedy of rescission due to *laesi*, has its origins in fairness. Thus, even in ancient Rome it acted as a corrective mechanism for those contracts that were deemed valid according to the *Ius Civile*, but caused unfair or undesirable effects to one of the parties. In this context, the function of the ancient magistrates was precisely that of overruling the express provisions of parties seeking to guarantee the prevalence of justice over pacts under unjust conditions. In this sense, the function of fairness during the times of Justinian was crucial –with such function remaining in place during the forthcoming centuries– and which transformed it into a kind of justice under Christian usage, and as a corrective mechanism for pagan justice.[77]

Therefore, the Justinian concept of fairness is key with regards to the subject matter of rescission due to *laesio*. This concept understands that *aequitas* is also *humanitas*, *benignitas, charitas, pietas,* all of the foregoing being ideas that allow for the mitigation of the rigor of the law based on different motivations that are ethical, social, political, etc. in nature, so as to avoid the absolute law from becoming a manifestation of utmost injustice.[78] Therefore, it is not strange that the prime source of rescission for *laesio enormis* points out that being able to rescind a contract of sale, when the seller has suffered negative impact by over twice as much as the price of the sold asset, is deemed "human".[79] Such resort to *humanity* of the adopted solution is due to the progressive reception in post-classic Law of Christian ideas focused on mitigating the excessive rigor of the Law;[80] if that rigor is not tempered, it would lead to manifestly unjust solutions; or what is worse, to an absolute indifference to the need for corrective justice.

77 See Biondi (1952), Volume II, pp. 38-40.

78 See Biondi (1952), Volume II, pp. 38-40.

79 There is abundant literature on rescission due to *laesio*, and although this is true, few others dissent on the fact that the origin of this institution is found in the Laws of *De rescindenda venditione*. The Laws of *de rescindenda venditione* are Imperial rescriptions. In other words, they are responses given by the Emperor to an individual's legal problem. Of both, the *Lex Secunda* is the most notorious one and the most quoted by scholars. Its translation is as follows: "If you or your father have sold at a reduced price a thing of greater value, it is human that you, by giving back the price to the buyers, recover the land by virtue of the judge's authority; or, if the buyer prefers so, you receive what is missing to complete the fair price. A reduced price seems to occur when it has not been paid even half of the true price".

80 With Justinian and the *Corpus Iuris Civilis*, both fairness and *bona fides* become prototype legal principles. Christian thought begins to conceive fairness as a discharge or derivative of a divine being, of which the man is merely an interpreter. In this way, the *benignitas*, the *pietas* and the *charitas* acquire a metalegal sense: a religious sense, called *sanctitas*. See Robles Velasco (2013), p. 302.

In summary, it can be stated that good faith, morals, and fairness function as important tools that enable the judge to perform the delicate work of administering justice. This work is not exhausted with a complete revision and interpretation of the express will of the contracting parties. It also – and primarily – requires the adequate composition of the interests of both parties, to achieve a truly fair contractual content, and not only (fair content) from a formal point of view.

4. CONCLUSION

Legal voluntarism set out in the law, and the codification phenomenon, introduced distrust to judicial discretion. Such legal positivism and the search for norms that guarantee legal certainty produced the effect of limiting the judge's liberty in front of the written law. However, this voluntarist vision present in the nineteenth century civil codes, has been mitigated, by virtue of the opinions that have sought to rebuild this conflictive and tense relationship between judicial discretion and the provisions of the law.

Regarding the specific subject matter of rescission due to *lesio enormis*, the powers given to judges for consideration are ampler than what could be seen upon first sight, given that in all cases of rescission permitted by law, the judge would find him or herself with the duty of pondering the facts that present a strong benchmark-based component that depends directly on the manner in which it is dealt.

Additionally, the possibility that the judge makes way for direct control of *laesio*, depends not only on that which is set forth in the law, but also the role that is acknowledged in the intervention of the courts in contracts. In this sense, the rules of adaptation allow the judge to go beyond that which the parties have agreed upon, in order to complete the contract with all of the details implied by the concluded transactions.

The strengthening of the role of good faith, fairness, and moral rule as elements of adaptation, have allowed to balance contractual freedom and the binding force of contracts, authorizing the judicial intervention with the purpose of avoiding and correcting abuses that, for the subject matter that we are reviewing, are reflected in an important unbalance in the structure and execution of the agreement.

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