

# 1. The trust mechanism in private law: fiduciary duty and good faith as examples

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## 1. INTRODUCTION

Humans' social lives and personal relationships cannot work without trust. In modern China, trust deficiency, an increasingly social problem, has caused great negative effects and even led to some violent events. Some doctors have been beaten or even killed by their patients who think they have taken advantage of their vulnerability to make profits for themselves irrespective of the patients' heavy costs and suffering. Some local governments are besieged because of people's long-term distrust and belief in certain rumors. Some specialists have lost their authority and creditability in their areas of their expertise as the masses question their trustworthiness.

Selfishness, indifference and various conspiracy theories bubble up inside a society lacking trust, within which lack of communication, cooperation and safety occur, while high levels of autonomy and a stable order cannot be facilitated over the long term. Although trust is a highly discussed topic in sociology, it has not received enough attention in legal research. In law, especially in private law calling for autonomy, the importance of trust should be considered thoroughly. In order to enhance and protect trust, the private law internalizes trust between persons into specific legal systems, such as property, contract and tort. Meanwhile, trust, as an informal social system, can supplement law, which has its own disadvantages as a formal social system, and they act together in civil society with instant interactions. Given the wide scope of trust issues, this article chooses fiduciary duty in common law and good faith (*bona fide*) in continental law as examples to analyze trust mechanisms in private law via comparative research.

## 2. MULTIPLE VISIONS OF TRUST AND TYPICAL RESEARCH ACHIEVEMENTS

Trust, consisting of both emotional and rational elements, draws special attention in sociology, psychology, politics, economics, biology and other subjects. Hence, research about trust embodies interdisciplinary and multiple dimensions, beyond the gap between social science and natural science. In the following, we will try to examine some typical achievements.

Georg Simmel (1858–1918), one of the first generation of German sociologists, explored the trust issue at an early period in history. He realized that trust is kind of comprehensive social force used to deduce the unknown from the known, and it can be conceptualized as a ‘thread spun of weak inductive knowledge and faith’.<sup>1</sup> Accordingly, he thought that trust lies between the known and the unknown, and both the completely known situation and completely unknown situation will reduce the demand for trust.

Half a century after Georg Simmel’s research, Morton Deutsch (1920–2017) designed a non-zero sum game through the prisoner’s dilemma to study trust from the perspective of conflict resolution. According to him, trust, frequently referring to the future, is always linked with expectation, predictability, and risk-taking behavior. For the trusting individual, it is even worse when the trusted person breaches their confidence than when they have placed no trust in anybody from the outset. Deutsch’s experiment also demonstrates that people will tend to trust somebody when they believe that the trusted one cannot serve their own interests from the breach of trust, and at the same time that they are able to control or impact the trusted one’s action. In addition, Deutsch also explored mutual trust issues and pointed out that mutual trust is easily created when the well-being of both parties is positively correlated. However, even without this correlation, mutual trust can be formed if some special requirements are met.<sup>2</sup>

Niklas Luhmann (1927–1998), famous for his special contribution to social systems theory, enjoyed great success in trust research. He thought of trust as an important tool to reduce the complexity of the world.

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<sup>1</sup> Guido Mollering, ‘The Nature of the Trust: From Georg Simmel to a Theory of Expectation, Interpretation and Suspension’ (2001) 35 *Sociology* 403, 407.

<sup>2</sup> Morton Deutsch, ‘Trust and Suspicion’ (1958) 2 *The Journal of Conflict Resolution* 265, 279.

Through the screening of trust mechanisms, the complex world can be divided into two categories: the things or people we can trust, and the others we cannot trust. Thus, the decision-making process will be simplified and some risks can be filtered out. Nonetheless, it should be noted that, to some extent, trust can reduce complexity, not eliminate it absolutely, and a trusting process is also a sort of risk investment.<sup>3</sup>

James Coleman (1926–1995), an important scholar of rational choice discipline, considered trust as one type of social capital resting in diverse social relations that can boost human capital. He further indicated that three factors contribute to the launch of trust: (1) the possibility of whether the individual is trustworthy; (2) the loss that can be caused by the trusted person's breaches of confidence; (3) the gain the trusting person can get from the performance of trust. He used P, L, and G respectively to represent these factors. According to Coleman, when someone thinks  $PG > L(L - P)$ , the individual will choose to trust others.<sup>4</sup>

Through the work of James Coleman, Francis Fukuyama believed that, as the social capital of a country, trust has special impacts on a nation's economy. In this regard, the level of trust has a direct bearing on the type and scale of economic organizations. Based on observation, he found Chinese society has low trust. In Hong Kong and Taiwan, family enterprises are rather common and often of small size because high trust levels only lie between family members, and the scope of trust is obviously limited. By contrast, in societies of high trust, such as Japan, Germany, and America, large companies run by professional managers are more popular. In contrast to Coleman, he believed that not all human behavior arises out of rationality, and in terms of the degree of trust, the dissimilarities in various societies stems from memes which are subject to religion, ethics, history, morality, customs and so on.<sup>5</sup>

Since trust is closely bound up with cooperation, competition, reciprocity and other significant issues of evolutionary process, it can be studied via evolutionary game theory. Although Robert Axelrod believed 'The foundation of cooperation is not really trust, but the durability of the relationship' and '[w]hether the players trust each other or not is less important in the long run than whether the conditions are ripe for them to

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<sup>3</sup> Niklas Luhmann, *Trust and Power* (Qu Tiepeng and Li Qiang trs, Shanghai renmin Press 2005) 30.

<sup>4</sup> James Coleman, *Foundations of Social Theory* (Deng Fang tr, Social Sciences Academic Press 2008) 93.

<sup>5</sup> Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (Peng Zhihua tr, Hainan renmin Press 2001) 93.

build a stable pattern of cooperation with each other',<sup>6</sup> the foundation and operation of durable relations and stable patterns in itself can be considered as a process of trust building and implementation. Hence he still mentioned the issue of trust in *The Evolution of Cooperation*, albeit unconsciously.<sup>7</sup> He adapted the iterated prisoner's dilemma game to be played on a computer and found that the 'tit-for-tat' strategy showed the best performance. Compared with others, this strategy is more easily recognized and understood, as it pays back others' cooperation or betrayal in time. Meanwhile, since the present choice has a great influence on future steps, this strategy has specially high robustness in repeated games and long-term relations, and thus can be thought of as an evolutionarily stable strategy (ESS).

In natural sciences, biologists used functional MRI (fMRI) to examine the hemoglobin flow rate in the brains of participants in trust experiments and found out that some specific areas of their brain nerve centers were activated. Another test showed a certain specific Pitocin called 'Oxytocin' has great effects on trust behavior.<sup>8</sup> Thus it has been concluded that in the process of evolution trust plays a special role and leaves a biological imprint in humankind's bodies. In other words, trust is not only a cultural or social phenomenon, but has a physiological basis.

In summary, the above viewpoints of trust vary in terms of perspectives and methods. On one side, they reflect the function and significance of trust, and on the other side they show that trust can be fostered through special ways. For these two dimensions, private law has unique associations and interactions with trust.

### 3. INTERACTIONS BETWEEN SPECIFIC TYPES OF TRUST AND LAW

The concept is a node of the cognitive network, and law, especially continental law systems, has high requirements in terms of the precision of concepts. But it is notably difficult to provide a widely accepted concept for trust. Although Francis Fukuyama believed that Chinese society is one of low trust, Confucianism lays great stress on trustworthiness ('Xin'), which is even recorded as the core of Five Constant Virtues

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<sup>6</sup> Robert Axelrod, *The Evolution of Cooperation* (Wu Jianzhong tr, Shanghai Century Publishing Group 2007) 126.

<sup>7</sup> Zheng Yefu, *On Trust* (China Radio Film & TV Press 2001) 55.

<sup>8</sup> Hu Yu, 'Cognition, Brain and Evolution: The New Research about Trust' (2011) 3 *Monthly Theory* 73, 75.

(‘Wuchang’) in traditional society. In China, Xin has become a highly condensed and reductive cultural symbol, which can cover the meaning of the English words trust, confidence, reliance, and belief. As trust (Xin) has such various implications and plenty of linked norms, it is a more reasonable to choose to classify it into specific types rather than conceptualize it, which can help us to explore its relations with law, especially with private law.

Firstly, it can be divided into special trust and general trust, with the former meaning that between family members and relatives based on blood bonds, and the latter referring to that founded on ethical and religious beliefs. This division comes from Max Weber, and he pointed out that in Western society the religious ethic, especially the Protestant ethic, facilitates general trust, whereas only special trust can exist under the Confucianism ethic in Chinese society.<sup>9</sup> In addition, it can fall under either cognitive trust or emotional trust according to its source.<sup>10</sup> This is a relative classification, and in the specific relationship of trust, usually both cognitive and emotional elements exist, just making up different proportions. Meanwhile, these two types can be mutually transformed. Based on the target or object of trust, trust can be divided into personal trust and trust in systems. The former is rooted in intimacy, and emotion is reflected as the trust of individuals’ personalities, while the latter stems from the credit of some social rules and systems, such as laws, banks, currencies, and other systems.<sup>11</sup>

Special trust, emotional trust and personal trust have something in common, that is, all of them have obvious emotional characters. In every society, it is a general fact that trust naturally occurs between people with emotional and/or blood ties, such as couples and parents. But in relations without blood bonds, purely forming out of nurture, such as couples and friends, trust comes together with the existence of these relations, and it is not easy to separate their causation. Without trust, couples would not proceed toward marriage, and at the same time greater trust would most likely be created after marriage, while, going forward, for any marriage to persist there needs to be ongoing trust. So they have reciprocal causation. The importance of emotion and personality in civil society is

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<sup>9</sup> Max Weber, *Confucianism and Taoism* (Wang Rongfen tr, The Commercial Press 1999) 289.

<sup>10</sup> J. David Lewis and Andrew Weigert, ‘Trust as a Social Reality’ (1985) 63 *Social Forces* 972.

<sup>11</sup> Zheng Hongge and Zhang Yanmin, ‘On the System Trust: The Research about China’s Trust Issue’ (2008) 1 *Jianghuai Tribune* 116.

self-evident, and these relations with special trust in civil society generally operate autonomously. So in most cases such relations do not need the strong intervention of law, and law should admit this autonomy and show restraint in these domains.

Obviously, social life is various, and social interactions should be encouraged to go beyond those between relatives and acquaintances. Therefore, we should break through the limited scope of special trust and advocate general trust. By contrast, if a society is highly dependent on special trust, emotional trust and personal trust, which shows trust only exists within families, relatives and friends, it will be difficult to enhance general trust, and, what is more, trust in systems, an important one of which is the legal system, will be damaged by reliance on other trust types. When most people in a society rely on joining special interest groups or building personal relationships, few will trust the legal system, and will even use personal relationships to circumvent it – thus its authority will be reduced or even lost. Through the ages, the Chinese traditional legal system relied on major figures from patriarchal clans, but at the end of the Qing Dynasty China began to import the Western legal system, and since then the progression of the rule of law has not gone smoothly. So it is true that the prevalence of special trust and a shortage of general trust and trust in systems have a cultural and historical basis, and the opinions of Max Weber and Francis Fukuyama are partially rational.

With the Industrial Revolution the age of the windmill ended, and industrial mass production made the division of labor increasingly meticulous and professional. In the face of various technical issues, the individual was not able to make a reasonable choice merely based on their own experience and knowledge, and seeking help from professionals became common. In benefiting from the scientific and technological achievements brought about by the division of labor, people need to handle and endure more risks than those in traditional society, and hence the demand for security arises. At the present time, people have to make investments of trust, and the importance of trust in systems starts to stand out. Law, a highly abstract system, surpasses the barrier of personal relationships and emotion, providing institutional expectations and protection for individuals. Given its wide application and publicity, individuals can arrange their lives properly and engage in social interactions in accordance with their recognition of law, and thus the trust of law is one of cognitive trust. As a system of rules and regulations backed by the coercive power of the state, law is much more reliable than personality, emotion, and other non-systematic factors, and thus, in general, law has more power in terms of risk prevention and control. Taking a medical

procedure for example, in this risky procedure patients and their families usually have no professional knowledge, and they have to rely on a doctor, while the latter's advice and decisions make great sense. As the parties have an asymmetric information capacity, the involvement of trust in the system is necessary. In terms of the assistance given by the law system, rights and obligations between parties in medical procedures, especially the informed consent of patients, can be defined clearly through medical service contracts, and meanwhile rules about medical damages in tort law can provide safeguards for ex-ante prevention and ex-post solution of medical disputes. If trust in the system fails to work, patients will tend to build personal relationships with their doctors or bribe them with money, in an attempt to establish special trust and personal trust to replace the disabled trust in the system, and in modern China this has become a frequent phenomenon.

Apart from considering law as an object of trust and examining the relationship between law and trust through the perspective of system trust, we can place them at the same level and observe their relationship from a macro viewpoint since both of them are considerable systems for integrating society and promoting social interactions, and their functions in constructing social order are both indispensable. But their working mechanisms are different. According to Professor Ji Weidong, law deals with concrete issues, while trust refers to non-objective matters; law pays attention to the past, while trust looks to the future; law depends on state power, while trust hinges on individuals.<sup>12</sup> In essence, trust is an informal system highly relevant to individuality, lying between emotion and reason, while law is a formal system linked to integrality and marching to rationalities. Consequently, they can complement each other and act together on society and the individual. In fact, on the basis of the past and tradition, both of them can confront and guide the future in that they can provide protection for individuals' concerns regarding uncertainty. As a virtue pursued and encouraged by society and individuals, trust constitutes a basis of value for law, especially for private law, which should not breach such value or support anything against it. Furthermore, compared with law, trust, an informal system, has its original advantages. To Anthony Giddens, trusting others is an enduring and frequent psychological demand.<sup>13</sup> To a great extent, we can say trust derives from

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<sup>12</sup> Ji Weidong, 'Rule of Law and General Trust System: Theory about the Reconstruction of Chinese Social Order through Legal Sociology Perspective' (2006) 1 *Archives for Legal Philosophy and Sociology of Law* 155.

<sup>13</sup> Anthony Giddens, *The Consequences of Modernity* (Tian He tr, Phoenix Publishing & Media 2011) 86.

humanity. Generally, trust cannot work well without factors of emotion and the mind. Thus, it is much softer and more flexible than law in consideration of its characters of abstraction and reason, and it also applies to wider domains than law. In other words, it is unnecessary for all social relationships to involve law, which is such a formal system. When trust has been sufficiently strengthened, its effects are not weaker than law, and the former can even substitute for the latter and form some special bonds. The long-term existence of mafia organizations in many communities is just one example. Of course, in a normal society, it would be a justified desire that trust functions as a supplement for law to promote its implementation, especially in situations where this formal system does not work well or has gaps. Usually, trust can lower the costs of the creation and operation of legal relations. In the domain of contracts, trust between the parties can reduce unnecessary hesitation, field surveys and repeated bargaining, and the offer-promise process will become simple and fast. The performance of contracts will be carried out more smoothly. Thus the information costs, contracting costs and enforcement costs will be lowered simultaneously.

Law also has great impacts on the trust system. Different from law, trust is a self-sustaining informal system and in most cases is a closed-loop system. In effect, it needs formal systems to make up for its weaknesses. Although a breach of trust can be condemned morally and cause negative effects on future communication and cooperation, a trust system does not have a formal and powerful punishment mechanism for actions of breach, which occurs as a prominent issue in one-off dealing. The tit-for-tat strategy favored by Robert Axelrod only works well in long-term relationships and repeated games. In short-term relations and limited games, as the future holds no or fewer elements of the present, immediate gain is perceived as in the individual's best interest, with breach of trust a reasonable choice for the trusted people, and hence parties in the prisoner's dilemma tend to betray others' trust. But the intervention of outside mechanisms can change the result. For example, gang members usually have strict punishments for informers, which increases the costs of betrayal and reduces its benefits sharply. Similarly, law can provide reliable and powerful protections for trusting persons through lowering or eliminating the trusted ones' motivations to breach their trust. Moreover, if the trusted people have professional and information advantages, the trusting persons are unable to carry out the tit-for-tat strategy via self-assistance. For instance, when patients highly trust doctors' professional ethics and capacities but the latter show gross negligence in practice, so that patients suffer irrecoverable physical and

mental damage, it is necessary for patients to initiate the legal system to trace accountability for breach of trust.

Microscopically, law functions as social norms regulating subjects' actions, and the process of trusting can be described as 'A believes B will do X',<sup>14</sup> so both A and B eventually refer to specific acts, and they have objects in common that are being processed. At this level, they are both 'realistic'. Law, especially private law, draws uniform and abstract rules from various relations with special terms such as the juridical act (*Rechtsgeschäft*) in continental law. In this process, most trust relations are imported into law after their attributes have been stripped away. Nonetheless, some specific systems in private law still keep certain characters of trust, such as reliable liability (*Vertrauenshaftung*), which can be called a 'trust mechanism in private law'. Fiduciary duty and good faith, as discussed in the following part, are also typical systems.

#### 4. FIDUCIARY DUTY: A STANDARD OF CONDUCT IN COMMON LAW

In common law systems, fiduciary duty, an important concept originating from the law of trusts, plays a special role in equity. Trust is thought of as a fiduciary relationship based on trust or confidence between parties, and the key character of such a relationship is fiduciary duty.

In medieval times, the crusades stimulated knights' and land-holding peasants' desires for wealth, and they joined this risky activity impulsively. In their absence, their land was to be managed by others, otherwise their wives and children would lose their basic living income. Meanwhile, people participating in overseas exploration encountered the same problem. Besides, while Britain remained feudal in structure, there were some strict limits on the transfer and inheritance of land, and under the land tenure system, tenants held heavy feudal dues with some personal attachment to lords. These people created 'use' to transfer their land to someone they trusted (i.e. a trustee in the law of trusts) and let them manage the land for their wives and children (i.e. beneficiaries in the law of trusts), and this tool was also designed to circumvent feudal

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<sup>14</sup> Li Yanxia, 'What Kind of Trust and Why Do We Trust: An Empirical Analysis on the Status and Origin of Chinese Political Trust' (2014) 2 *Journal of Public Management* 16, 18.

dues and the limit of the transfer of land to churches.<sup>15</sup> After complex processes, usage was finally legitimate and became the trust.

Although the chosen people were those trusted by landowners, some of them still breached the confidence placed in them and possessed the land for themselves. Given the fact that courts of common law laid stress on forms at that time, they thought of trustees as real owners and ignored beneficiaries' losses. Besides, the main remedy method in common law was damage, which was obviously insufficient in these situations. Thus, more and more conflicts occurred, and people had to appeal to Chancellors, who dealt with such cases as courts of common law did not handle them, or where the results were unfair. In this history, on behalf of the King, Chancellors, using principles such as justice and conscience, gradually formed a system distinguished from common law at their discretion, i.e. equity. As an old rhyme goes, 'these three give place in court of conscience, fraud, accident, and breach of confidence'.<sup>16</sup>

Based on the above background, it is notable that imposing fiduciary duty on trustees aims at protecting trust and punishing the breach of confidence, and that fiduciary duty has deep roots in morality. In the practice of Anglo-American legal systems, the fiduciary relationship is considered as the premise of the application of fiduciary duty. Specifically, when applying fiduciary duty, judges compare the relations to be treated with the typical existing fiduciary relationships via analogy and thus identify some of them as new ones. Through this process, the application scope of fiduciary duty has been greatly expanded, which became a frequent practice in the 20th century, and a legal domain called fiduciary law came into existence.

So far, apart from the law of trusts, applications of fiduciary duty have been expanded into relations between agents and principals, directors and company, bailees and bailers, physicians and patients, guardians and wards, employees and employers, schools and students, brokers and investors, union representatives and laborers, executors and inheritors, lawyers and clients, and even into the domains of public law.<sup>17</sup> Therefore, fiduciary relations, lying in agency, healthcare, education, guardianship, labor, succession, company governance and other important fields, with regard to personal and property factors in civil society, highly correlate

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<sup>15</sup> Paul Todd, *Textbook on Trusts* (3rd edn, Blackstone Press Limited 1996) 3–6.

<sup>16</sup> F. W. Maitland, *Equity: A Course of Lectures* (rev. edn, J. Brunyate ed, A. H. Chaytor and W. J. Whittaker, 1st edn, Cambridge University Press 1949) 7.

<sup>17</sup> Evan J. Criddle, 'Fiduciary Foundations of Administrative Law' (2006) 54 *UCLA L. Rev.* 117.

with both individuals and organizations. In essence, this trend emerges out of practical needs in society.

Henry Sumner Maine described the development of human society as 'the movement from status to contract',<sup>18</sup> but some new characters and problems arise in modern society which go beyond the classical contract theory based on free will and abstract personality. So law should prepare to meet these challenges from both fundamental ideas and technological means in order to realize social justice. Some think our modern society is neither a status society nor a contract society, but a fiduciary society consisting of numerous interlaced fiduciary relations. A status society seeks safety as its primary value and generally makes sure one party has higher social class than another in certain relations through special legal design, which is attributable to prevalent personal reliability and outstanding unfairness. As a consequence, its social structure has usually been highly consolidated and cannot easily be changed through normal channels. But to maintain persistent exploitation and avoid excess pressure, the advantaged party tends to take the vulnerable side's welfare into account moderately and exercise power reasonably. Compared with a status society, a contract society shows much more respect for personal freedom and equality, as its laws provide protection for self-determination and encourage individuals to maximize their personal interests. However, since bargaining abilities vary between individuals, some people actually have power over others. Meanwhile, parties' interests are usually in opposition, and the generation of cooperation and security emerges as an issue. Hence the fiduciary society is put forward, which is thought more adaptable for the trend of social evolution. The fiduciary society tries to reach a balance between freedom and security through regarding some important relations formed by autonomy as fiduciary relations and imposing fiduciary duty on the parties holding power in reality. As individuals have different knowledge and professional backgrounds, everyone can be powerful in certain relations, a situation which has become increasingly prevalent in the trends of modernization and globalization, and eventually mutual restrictions emerge between social individuals. The research of some sociologists supports this view, for example Anthony Giddens associates the trust

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<sup>18</sup> Henry Sumner Maine, *Ancient Law* (Cosimo Inc, 2005, originally published by J. M. Dent & Sons and E. P. Dutton & Co. in 1861) ix.

issue with modernity and points out that the latter has close link with the trust mechanism in abstract systems, especially in professional systems.<sup>19</sup>

Generally, analogy functions on the premise of likeness to realize special legal purpose. The relations mentioned above are marked as fiduciary relationships, as they are all linked with trust issues. In these relations, out of trust, the trusting people have reasonable expectations for the trusted ones to act in their best interests, instead of the latter's own interests, and thus they entrust properties and affairs key to their welfare with fiduciaries. Accordingly, fiduciary relations are distinguishable from arm's-length relationships, as fiduciaries should dedicate their professionalism to serve the best interests of the trusting people. In other words, these relations show some characteristics of altruism. In evidence, if there were no legal protections or remedies for the trusting people, their position would be very vulnerable, which justifies fiduciary duty in return.

It is widely accepted that fiduciary duty consists of two parts, one is the duty of loyalty, the core content; the other one has different names according to courts and scholars, such as the duty of care, duty of prudence or duty of diligence. In specific fiduciary relationships, these two parts can be subdivided in detail.<sup>20</sup> Fiduciary duty, in most cases implied by law, only binds fiduciaries, and usually parties cannot exclude its application via agreement. Nowadays, theories and practice of fiduciary duty experience great development, and finally it has evolved from some kind of duty or liability into a standard of conduct, that is, a general standard of action by which all sorts of fiduciaries in various fiduciary relations should abide.

## 5. GOOD FAITH: A BLANKET CLAUSE IN CONTINENTAL LAW

Good faith (*bona fides*; *bonne foi*; *Teu und Glauben*), originating from Roman law, played an important role at its birth. After evolving in theory and practice, it gained special treatment in civil law, even being called the 'king of provisions or royal standard [*Königsnorm*]'. Its high position surely comes from the practical demand of legal techniques, but what is more important is that good faith is a common ethical virtue pursued by

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<sup>19</sup> Anthony Giddens, *The Consequences of Modernity* (Tian He tr, Phoenix Publishing & Media 2011) 73.

<sup>20</sup> Leonard I. Rotman, 'The Vulnerable Position of Fiduciary Doctrine in the Supreme Court of Canada' (1996) 24 *Man. L. J.* 62.

civil society, that is, the value underlying good faith contributes decisively to its significance.

In Roman times, good faith (*bona fides*) had special roots in Roman philosophy and religion. Marcus Tullius Cicero quoted ideas of the Stoic school to emphasize that the basis of justice is good faith, and *fides* refers to the performance of promise.<sup>21</sup> At that time, Romans believed in many deities, one of whom was *Fides*, who came from Greece. October 1st was officially recognized as the festival of *Fides*, and temples were built for this goddess in which treaties signed with foreigners were kept. The Romans thought *Fides* could secure the performance of treaties, as all breaches of trust were insults to this goddess and would be condemned, and revenge taken for them, by her.<sup>22</sup>

On the basis of the heritage of Roman law, typically continental law countries all accepted good faith in their civil codes. At the beginning, good faith only applied in the performance of contracts, and such laws include Article 1134 of the French Civil Code and Article 242 of the German Civil Code. But the Switzerland Civil Code was the first to expand the application of good faith into every kind of civil relations via Article 2. Japan reformed its civil code after World War Two and set up good faith as the basic principle of the whole code through Article 2. Thus the status of good faith has been highly improved. The General Principles of Civil Law of the People's Republic of China also defined it as a basic principle via Article 4, and the new General Provisions of the Civil Law of People's Republic of China, which came into force on the 1st of October 2017, retain this concept and set it out in Article 7.

Good faith refers to *bona fides* in Latin, which covers both subjective good faith and objective good faith. But common law scholars pay more attention to the latter branch. Usually, objective good faith was thought to be imported from continental law, and in America it was introduced by Karl N. Llewellyn from German law. British law generally does not think bargaining or performing in good faith is a basic obligation. In some international conventions and uniform regional legislation, such as the Principles of European Contract Law (PECL); the Draft Common Frame of Reference: Principles, Definitions and Model Rules of European Private Law (DCFR); Principles of International Commercial Contracts

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<sup>21</sup> Marcus Tullius Cicero, *On Duty* (Wang Huansheng tr, China University of Political Science and Law Press 1999) 23.

<sup>22</sup> Xu Guodong, *Interpretation of the Basic Principles of Civil Law: A Historical, Practical and Jurisprudence Study of Good Faith* (Peking University Press 2012) 91.

(PICC); the United Nations Convention on Contracts for the International Sale of Goods (CISG); and so on,<sup>23</sup> there are also specific provisions of good faith.

The development of good faith in German law has a unique and clear doctrinal path, especially in legal methodology. Article 242 of the German Civil Code with respect to good faith initially merely applied to the performance of obligations, which was identical with the literal context of this provision. But afterwards, a bunch of new disciplines and judicial practices were made through expanding its original content and application scope. In essence, this provision is seen as a blanket clause (*Generalklausel*). Although it can be called a 'basic principle' in theory, Article 242 is the normative basis which can be quoted in judicial process. A legal norm usually contains both action patterns and legal consequences, so it can be used as the premise of deductive reasoning in judicial process. The blanket clauses are exceptions, since they are constructed from some undefined or abstract concepts, such as good faith, good custom and fault. Given the complexity of society, legislators cannot predict everything or provide relevant plans for any specific situation, so the design of blanket clauses is necessary, which coincides with legislators' intentions against the background of written laws and especially codification movements. In return, from the perspective of functionalism, the abstract nature and vagueness of blanket clauses just brings in flexibility and adaptability for statutory laws.

As blanket clauses only refer to some value orientations with undefined concepts, they should be concretized in specific cases via legal methods. There are three opinions about the essence of this process in legal methodology (i.e. Hermeneutics, *Rechtsdogmatic*): (1) it is a special legal interpretation; (2) it is a method to fill in the legal loopholes; and (3) it is a unique legal method combining the characters of the above two types. Anyhow, this operation in specific cases should be driven on the basis of value choice as justification. In legal practice, this work is accomplished by judges. In fact, the blanket clause provides a legitimate way to construct law after the completion of legislation so that judges actually share the legislative power. In continental law, judges usually have no such power, but to solve the conflicts between the rigidity of codes and the evolution of society, it is necessary to allow judges to do this. Confronted with legal loopholes (*Gesetzluecke*), judges need to discover justifications for their sentences, and fitting a specific value

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<sup>23</sup> PECL, § 1.106(1), § 1.201; DCFR, § I.102(3)(b), § I.103; PICC (2010), § 1.7; CISG, § 7. (1).

choice into the blanket clause provides a possible way. Of course, this operation can only be triggered in cases where legal loopholes occur, or the present norms could result in evident injustice; otherwise judges would have too much discretion, and this is called 'No escape to blanket clauses'.

Since the content and scope of good faith are both uncertain, when filling in specific values, judges can draw some social ethics in accordance with legal orders into their interpretations and thus find judicial bases for specific cases. With the development of judicial practice, more and more cases relevant to good faith occur and finally develop into case groups (*Fallgruppen*). The legal professionals categorize them and summarize some disciplines from them, and therefore make abstract good faith show certain clear dimensions. In terms of practice in Germany, during the First World War, good faith was used as the legitimate foundation of compulsory contracting and price control. After the First World War, because of the grave economic situation, the continuous performance of some reciprocal contracts appeared as big problems. German courts created *Unerwartete* theory and caused the disappearance of the basis of bargaining theory via the interpretation of Article 242 of the German Civil Code. In Nazi times, in order to realize the ideology of state socialism, the alienation of good faith arose, as it was interpreted as justifying anti-Semitic policy. Some famous legal scholars played contemptible roles in this history. After World War Two, this chaos was corrected, and until now good faith has evolved fluently in practice and theory.<sup>24</sup>

There is no unanimity with regard to the meaning and content of good faith, but most disciplines are associated with trust issues. In essence, it is a legalized moral norm, and its application has close linkages with ethical standards in society. In a specific case handled with good faith, questions of whether one party should impose a certain trust on the other and whether expectations arising out of such a trust are reasonable and worthy of protection, as well as whether obligations can emerge from this trust instead of any agreement, are beyond the domain of written laws and should be examined comprehensively by a combination of social ethics, business customs, public order, and so on. Therefore, the application of good faith is not a purely legal issue. There is no doubt that the construction of the legal order is highly associated with the moral order.

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<sup>24</sup> Ren Chao, 'General Clause in German Civil Law: Definition of Connotation and Historical Process: Illustration by Example of "Treu und Glauben" Clause' (2016) 2 *Hebei Law Science* 116.

Furthermore, law should draw the key and the bottom line of social morality into its system, as such morality constitutes the foundation of common belief in values and the endogenous dynamics of the whole social system, not just law. In a word, the position of good faith being named as ‘the king of provisions is determined by the significance of trust in civil society.

## 6. COMPARATIVE RESEARCH BETWEEN TWO TRUST MECHANISMS

Fiduciary duty and good faith can be seen as typical trust mechanisms in the two legal systems respectively. They can be further compared in both specific system building and abstract legal culture.

### 6.1 Similarities

Firstly, in terms of their origins, they perhaps both stem from Roman law. The English words ‘fiduciary’ and ‘fidelity’ come from the Latin ‘*fide*’/‘*fidere*’. Good faith (*bona fides*) surely comes from Roman law, and fiduciary duty also has some links with Roman law. In Britain, there are some controversies about the birthplace of trusts. Some people think use, the early form of trusts, was learned from *fiducia* or *fidei commissum* in Roman law, and was not a British invention. Specifically, although use or trust was designed to circumvent the law, early Chancellors had ecclesiastical backgrounds, were familiar with Roman and cannon law, and might have imported some systems from Roman law in order to protect the Church’s interests.

Secondly, in terms of their application scope, both fiduciary duty and good faith exist in certain relationships with reasonable trust, and the two mechanisms aim at protecting the trusting people and therefore display unidirectional characteristics. Fiduciary duty covers several significant relations from birth to death, including trust and trust-like or quasi-trust ones. In German law, although good faith is a blanket term and its judicial practice goes beyond the performance of obligations, in fact its application requires special links between parties (*Sonderbeziehung*).<sup>25</sup> To be specific, only in relations with reasonable trust can we ask one party to act upon this moral norm and hold some duties beyond contracts, as trust and expectation caused by it should be given protection.

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<sup>25</sup> Yu Fei, ‘Distinguishing between the Principle of Public Order and Morality and that of Good Faith’ (2015) 11 *Social Sciences in China* 146, 153.

Otherwise, if there is no trust in certain relations or the trust is not rational, the application of good faith cannot be justified, or the unrealistic expectation caused by irrational trust is not worth protecting. Risks arising from the unreasonable trust and the corresponding aftermath should be undertaken by the party who holds the unreasonable trust. Besides, these two mechanisms are both expanded into public law. In common law countries, the relation between government and citizens is considered as a fiduciary relationship. In continental law countries, for the official, both specific administrative acts and abstract administrative acts should be performed in good faith.

Thirdly, from the perspective of legal methodology, analogy, categorization, and demonstration of typical cases are usually used in the application both of fiduciary and good faith. Fiduciary duty comes from the law of trusts, an important part of equity, which focuses on the real intentions instead of forms. When equity came into existence, common law was rather a defective system, and equity made up for its shortcomings by virtue of its flexibility. Afterwards, equity evolved into its own system and also insisted on *stare decisis*. So fiduciary duty experienced a development from the law of trusts to other domains via analogy, and new fiduciary relations were continuously recognized through specific cases. Likewise, as a blanket term, given its uncertainty, good faith should be materialized in every single case, and through this process analogy and categorization have been widely used. Based on the amount of cases, a number of specific theories were summarized. To some extent, the application of good faith develops the character of case law made by judges at their discretion.

Eventually, fiduciary duty and good faith may have something in common with regard to their contents and functions. In China, the English term 'fiduciary duty' is sometimes translated as 'duty of good faith'. In common law, some scholars think fiduciary duty has no distinctiveness and can be replaced by good faith, and the duty of loyalty and duty of care can be fitted into the frame of good faith. In addition, these two mechanisms can be seen as implied terms in law, which can be applied directly by judges with no need for the advance agreement of parties.

## **6.2 Distinctions**

First of all, although their spheres of application are both rather wide, in continental law, good faith can be applied in any legal relation with trust, much more widely than is the case with fiduciary duty. Besides, as the king of provisions, good faith has a high position in the whole of civil

law. As a standard of conduct, fiduciary duty only applies to fiduciary relations and regulates special actions. Thus, these two mechanisms have different statuses in each legal system.

Secondly, although they both apply to relations with trust and aim at protecting the reasonable expectations of the trusting people, they are based on the distinct criteria of human nature. The morality of good faith is set a relatively low level, such as is described in the sayings '*Honeste vivere, alterum non laedere, suum cuique tribuere*' and 'Love your neighbor as yourself'. It is a baseline morality for common people. Moreover, it can be seen as a common moral level under the market economy, that is, people are encouraged to pursue their personal best interests and not to realize this by harming others, which justifies the wide use of good faith as the primary provision. However, fiduciary duty sets a high standard of morality for fiduciaries. In terms of the duty of loyalty, fiduciaries should avoid conflicts of interest, that is, in order to maximize beneficiaries' interest, sometimes they need to sacrifice their own interests. So fiduciary duty embodies characteristics of altruism. By contrast, good faith is still based on individualism.

Moreover, the clarity of their contents is different. The content of fiduciary duty is relevantly clear, while the content of good faith is rather vague. Although its scope of application is being expanded, the duty of loyalty, the core part of fiduciary duty, has a largely explicit meaning. Of course, the meaning of duty of prudence needs crystalizing in specific cases according to fiduciaries' abilities and experience. Nonetheless, except for some specific mature theories originating from it, good faith is still an open-ended concept wreathed in great uncertainty. This constitutes the obvious distinction between them.

Finally, as they come from different legal systems, the legal reasoning and legal culture represented by them are dissimilar. Fiduciary duty should be understood within the division of common law and equity. In order to solve breaches of confidence, fiduciary duty was created by equity, which was driven by Chancellors. Specifically, its framework was summarized from various cases into general principles. This process reflects the induction tradition of legal reasoning in common law countries. Besides, in many cases, lawyers would like to advocate that legal relations in dispute are fiduciary relations, and the opposite side should hold fiduciary duty, in order to protect their own party's interests. This strategy is frequently used, and therefore the application scope of fiduciary duty is greatly expanded. In continental law, good faith, as a blanket clause, emerged to solve the rigidity of written law through providing judges with more discretion. This process is mainly one of deductive reasoning in which a conclusion is derived from two premises,

and the major premise comes from the interpretation of the blanket clause. Judges play key roles in this practice, while lawyers' work is not prominent.

## 7. CONCLUSION

The special role of Xin in China's traditional society is self-evident, and nowadays honesty is still thought of as one of the core socialist values advocated by officials. But the deficiency of trust in modern China is a reality, which ironically shows the gap between tradition and the present, between theory and practice. Although the ideas of Max Weber and Francis Fukuyama that a trust problem is ascribed to cultural and ethical factors seems persuasive, it only provides a descriptive perspective, not a constructive theory. In addition, culture and ethics are huge and uncertain concepts which seemingly can cover and justify everything, regardless of quantitative analysis. This perspective, reverting to such extensive concepts, is in essence some kind of reductionism. According to Marxism, the economic basis determines the superstructure; so the self-sustaining, isolated and self-sufficient peasant economy in China's traditional society only led to a wide and strong special trust, instead of general trust and system trust.

Today, the special trust prevalent in traditional society still works in China, although it has been damaged by some political events. Furthermore, the general trust and system trust, which are in accordance with the development of the reform and change policy, the market economy, and even the background of modernity, are still being formed, so that trust deficiency arises. The formation of, and investment in, trust are self-motivated actions, and no state, civil society, entity or individual can force A to trust B. Thus the feasible strategy is to provide enough protection for A's reasonable trusting behavior to enhance the whole trust level of the society. In this endeavor, law, especially private law, plays a pivotal role.