Good Faith (Bona fide)
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A. The Notion of Good Faith: Historical Dimensions, Philosophical Implications, and Comparative Aspects

1. History and Philosophy

The Latin term *bona fides*, often also used in the inflected forms *bonae fidei* and *bona fide*, means good faith. The very wording already discloses a broad intent because of which the *bona fides* principle—even though being fundamental to more or less every legal system on a world scale—has often been criticized as ambiguous if not amorphous or elusive. However, limiting *bona fides* to a vague moral dimension or to its self-evident spirit of reasonableness would fall short of comprehending the principle’s historically and philosophically diversified content (see also → Ethos, Ethics, and Morality in International Relations; → Reasonableness in International Law).

As early as 1659, good faith was mentioned in an international peace treaty: the Treaty between France and Spain (signed 7 November 1659) [1659] 5 CTS 325, signed to end the Franco-Spanish War that had begun in 1635. Before that, in 1625, Grotius had referred to the Aristotelian parameter that if ‘good faith has been taken away, “all intercourse among men ceases to exist”’ (*De Jure Belli ac Pacis Libri Tres* Book III Chapter 25, 1). Grotius also referred to Cicero’s famous observation according to which ‘in good faith what you meant, not what you said, is to be considered’ (Book II Chapter 16, 1, 1). For Isocrates the good faith principle was common law of all mankind. Aristotle’s philosophy of the good and fair, of equality and justice, especially his Nicomachean Ethics, clearly describes all social intercourse as being based upon the requirement of good faith. Since its Greek—and even earlier—origins, good faith is an expression of *ius aequum* rather than *ius strictum*. As an intrinsic requirement of justice, *bona fides*-thinking is strictly opposed to mere legal formalism over-emphasizing the written law and formal structures instead of keeping the very ideal of a just legal order in mind.

The concept of good faith has been a key element of ancient Roman law, in particular contract law but also public law (*fides publica*). Originally, *bona fides* contracts were to be distinguished from *stricti iuris*, that is to say formal, contracts. *Bona fides* was conceived as a material source of law from which new rules could be derived. Closely related to the divine sphere, breaching good faith also meant acting against the will of the gods and sacred obligations stemming therefrom. More rationally, Cicero qualified good faith as a foundation of justice, and the principle was held to be an indispensable prerequisite for trustworthy, honorable, and conscientious conduct. Consequently, good faith worked as the principle to bind a foreigner and a Roman citizen to their agreement (*pactum nudum*).

Governing the performance of contracts, *bona fides* outlived the Imperium Romanum and appeared again in early medieval mercantile law and practice. For Bynkershoek, → consent-based public international law would have been impossible without its *bona fides* foundation: ‘Pacta privatorum tuetur Jus Civile, pacta Principium bona fides’ (Bynkershoek 251; ‘Agreements between private parties are governed by civil law, agreements between sovereigns by bona fide’ [translation by the author]). Throughout both civil and common law regimes, good faith gained high validity as a ‘governing principle ... applicable to all contracts and dealings’ (Lord Mansfield in *Carter v Boehm* (1766) 3 Burr 1905, 97 ER 1162 at 1164).

Furthermore, the notion of *bona fides* being an indispensable means to attain fair and just results is deeply rooted in Christian as well as secular natural law doctrine (→ Natural Law and Justice). Early modern classics of public international law, including Grotius, Suárez, de Vattel, Pufendorf, or Wolff, are among the most important representatives of this natural law concept. Nature was closely linked to reason. Particularly in the age of enlightenment, the strong trust in human reason became what one could describe as an
epoch-making paradigm. Good faith and, to some extent as a prerequisite, to some extent a consequence thereof, → \textit{pacta sunt servanda} were to create a spirit of respect for the legal order and hence legal, political, and economical stability as progress for all mankind (Kolb (2000) 86–92). Thus conceived, good faith formed an obligation of any nation to take into account the reasonable expectations of all other members of the → international community. This led to a rule of reason-based method of treaty interpretation long before the → Vienna Convention on the Law of Treaties (1969) ("VCLT") excluded unjust—or at least unjustified—outcomes of a strictly literal interpretation. In this natural law tradition, John Rawls’ philosophy of justice as fairness, comprising procedural as well as substantive elements, relies not only on general principles of justice, but also on reason. In post-modern legal theory, however, ‘reasonableness’ is challenged by diverse ‘critical legal studies’ approaches (→ International Legal Theory and Doctrine).

2. Law Comparison

5 Good faith belongs to the very few legal principles which do find resemblance in more or less all legal systems and legal cultures. It might very well be characterized as an anthropological proposition of contractual legal conduct. In Europe, good faith is a central area for the contract law of all European Union (‘EU’) Member States. Examples stemming from the French civil law tradition can be found, for example, in the \textit{Code civil} (French Civil Code; in particular Art. 1134, furthermore Arts 201-02, 220, 491-2, 510-3, 549-50, 555, 1378, 2265, 2269), in the \textit{Code de la sécurité sociale} (R243-20 al. 3) or in the \textit{Code de commerce} (French Commercial Code; Arts L225-102-1, L235-12, L622-3, L670-1). For Germany, Art. 242 \textit{Bürgerliches Gesetzbuch} (German Civil Code) has to be mentioned. Beyond the EU, for example, Art. 5 (3) Constitution of the Swiss Confederation provides for an innovative clause binding private as well as public actors to the principle of \textit{bona fides}: ‘State and private organs must act in accord with good faith’. Russian civil law also emphasizes \textit{bona fides}-obligations.

6 Moreover, common law countries rely on the notion of good faith. Regarding the United States of America and their attempt to unify common law rules in statutory provisions, the Uniform Commercial Code (‘UCC’) gives an example. Art. 1-201 (20) UCC states: “Good faith” ... means honesty in fact and the observance of reasonable commercial standards of fair dealing’, while Art. 2-103 UCC, applicable to merchant sales in transaction, more specifically speaks of ‘honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade’. Deeply rooted in Chinese cultural traditions, especially in Confucianism, the principle of \textit{chengshi xinyong} is an expression of honesty and trustworthiness forming an equivalent of the English good faith (Cao 167). Finally, in the context of Islamic legal cultures, Art. 246 Civil Code of the United Arab Emirates can be seen as another indication of the universal nature of \textit{bona fides} (→ see also Islamic Approach to International Law).

B. Good Faith and its Sources in Public International Law

1. The Charter of the United Nations

7 Among good faith rules, Art. 2 (2) → United Nations Charter qualifies as the most wide-ranging, binding not only the → United Nations Member States but also the UN organs. Its predecessor, Art. 13 Covenant of the League of Nations ([signed 28 June 1919, entered into force 10 January 1920] [1919] 225 CTS 195; see also → League of Nations), had assured: ‘The Members of the League agree that they will carry out in full good faith any award or decision that may be rendered, and that they will not resort to war against a Member of the League which complies therewith.’ Compared to this standard, Art. 2 (2) UN Charter is much more general: ‘All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2015. All Rights Reserved.date: 08 August 2019
accordance with the present Charter.’ During the San Francisco Conference, the delegate of Columbia famously requested: ‘The United Nations ... must proclaim that international life requires a minimum of morality as a normative principle of conduct for peoples. This minimum cannot be anything else than full good faith’ (‘Documents of the United Nations Conference on International Organization’ (United Nations New York 1945–55) vol 6 Doc 1123 I/8 [20 June 1945] 8). Art. 2 (2) UN Charter was installed to facilitate the balancing of the different political interests, influences, weights, and powers of the Member States. It furthermore constitutes a flexibility clause abandoning a strictly positivistic or legalistic interpretative avenue to the UN Charter based on its mere wording (see also → Interpretation in International Law; → Legal Positivism; → Methodology of International Law). Not just the letter but also the spirit and telos of the law have to be taken into consideration. Where, eventually, the lack of treaty law would cause a legal vacuum, the good faith provision assumes a gap-filling function.

8 Art. 2 (2) UN Charter underlines that the UN System creates a bond based on reliance. Being a general principle of international law and objective in nature (see also → General International Law [Principles, Rules, and Standards]), the bona fides clause has been purposefully integrated into UN Charter law to support the shift from a voluntarist to a constitutional approach of public international law. The standard of reasonable expectation belongs to the core elements of such a constitutional perspective. International courts in particular rely on the specific effects of this standard in arbitral or boundary adjustment procedures, in vassalage relationships, or when it comes to duties of co-operation, eg in environmental law (Müller 22, 43, 48, and 63 ; see also → International Courts and Tribunals; → Arbitration). Moreover, the good faith clause is also of importance for the institutional infrastructure of the UN. Since, unlike a State with a unitary structure and clearly defined enforcement mechanisms, conflicts between the organization and its organs cannot be resolved by a supreme organ in the last instance (according to Art. 96 Statute of the International Court of Justice, the political organs of the UN can only request an advisory opinion of the → International Court of Justice (ICJ); see also → Advisory Opinions), conflict resolution requires loyal co-operation between the organs concerned. An analogous conclusion can be made as to the relationship between the UN and the Member States.

9 Numerous decisions and recommendations can be found in UN practice, where organs such as the UN General Assembly or the UN Security Council invoked the principle of bona fides. The early UNSC Resolution 59 (1948) of 19 October 1948 (SCOR 3rd Year 26) concerning the → Palestine question, for example, reminded the governments and authorities concerned that all the obligations and responsibilities set forth in UNSC Resolution 54 (1948) of 15 July 1948 (SCOR 3rd Year 22) and UNSC Resolution 56 (1948) of 19 August 1948 (SCOR 3rd Year 24) had to be discharged fully and in good faith. A recent example gives UNSC Resolution 1747 (2007) of 24 March 2007 (SCOR [1 August 2006–31 July 2007] 18), regarding the non-proliferation of nuclear weapons and Iran’s nuclear programme: ‘to allow for negotiations in good faith in order to reach an early and mutually acceptable outcome’ (para. 13 (a); see also → Nuclear Weapons and Warfare). The → Friendly Relations Declaration (1970) (Declaration on Principles of International Law concerning Friendly Relations and cooperation among States in Accordance with the Charter of the United Nations [UNGA Res 2625 (XXV) (24 October 1970) GAOR 25th Session Supp 28, 121]) belongs to the most important UNGA resolutions emphasizing that the bona fides principle is to cover the entire structure of international law and international relations.
2. The Friendly Relations Declaration

10 The Friendly Relations Declaration can be understood as an authoritative interpretation of Chapter VII UN Charter, since it was adopted without opposition by the UNGA (→ Interpretation in International Law). Besides its capacity to construe the main aspects of recognized actions with respect to threats to and breaches of the peace (→ Peace, Breach of; → Peace, Threat to), as well as acts of → aggression, it refers to good faith in its → preamble as being of ‘greatest importance for the maintenance of international peace and security and for the implementation of the other purposes of the United Nations’. The operative part of the Friendly Relations Declaration elaborates this statement even further and emphasizes the aforementioned essence of Art. 2 (2) UN Charter by not limiting the bona fides principle to the fulfilment of UN Charter obligations, but rather expanding it to the generally recognized principles and rules of international law and all international agreements valid under public international law.

3. Treaty Law and Other Documents

11 The bona fides principle is also reflected in a number of other treaties, resolutions of international organizations, or statements of prominent international actors. Arts 18, 26, and 31 VCLT have to be mentioned in the first place (see paras 18–20 below). The Charter of Economic Rights and Duties of States (UNGA Res 3281 [XXIX] [12 December 1974] GAOR 29th Session Supp 31 vol 1, 50), UNGA Resolution 1803 (XVII) of 14 December 1962 on permanent sovereignty over natural resources (GAOR 17th Session Supp 17, 15; → Natural Resources, Permanent Sovereignty over), or the Manila Declaration on the Peaceful Settlement of International Disputes (UNGA Res 37/10 [15 November 1982] GAOR 37th Session Supp 51, 261; → Peaceful Settlement of International Disputes) give further illustrative examples. Art. 86 Rome Statute of the International Criminal Court (→ International Criminal Court [ICC]), which requires the Member States to ‘cooperate fully with the Court in its investigation and prosecution of crimes’, describes this full cooperation as a good faith requirement in criminal law-based dispute settlement.

12 Since → international law and domestic (municipal) law inspire each other in manifold ways, eg by the mutual reception of legal standards, good faith clauses in national regulations deserve attention. Art. 7 (1) UN Convention on Contracts for the International Sale of Goods ([concluded 11 April 1980, entered into force 1 January 1988] 1489 UNTS 3) stipulating the ‘observance of good faith in international trade’, may have been strongly influenced by civil law bona fides commitments. The same can be said with respect to the UNIDROIT Principles of International Commercial Contracts (→ Commercial Contracts, UNIDROIT Principles). Last but not least, the controversially discussed → lex mercatoria has a longstanding tradition of fair dealing in good faith.

14 *Bona fides* reference is, to a greater or lesser degree, made in all fields of public international law and thus qualifies as one of the very few constitutional elements to overcome the → fragmentation of international law. Attention has to be paid, for example, to Art. VI Treaty on the Non-Proliferation of Nuclear Weapons ([adopted 1 July 1968, entered into force 5 March 1970] 729 UNTS 161; → Non-Proliferation Treaty [1968]; Chapter 1 Charter of Economic Rights and Duties of States; Art. 300 UN Convention on the Law of the Sea [concluded 10 December 1982, entered into force 16 November 1994] 1833 UNTS 396; → Law of the Sea) contextualizing good faith and the → abuse of rights. On a regional level the Conference for Security and cooperation in Europe respectively → Organization for Security and Co-operation in Europe (OSCE) documents, the Agreement on a Comprehensive Political Settlement of the Cambodia Conflict (→ Cambodia Conflicts [Kampuchea]), or Chapter 9 North American Free Trade Agreement ([adopted 17 December 1992, entered into force 1 January 1994] (1993) 32 ILM 289; → North American Free Trade Agreement [1992]) are of importance. In sensitive fields such as → arms control treaties, good faith is of utmost importance to overcome mistrust. In the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms ([signed 18 June 1979] (1979) 18 ILM 1138; → Strategic Arms Limitation Talks [SALT]) the US and the Soviet Union expressly wanted to safeguard themselves against the circumvention of mutual obligations in bad faith.

4. Good Faith as Dealt with by International Courts and Tribunals

15 Good faith is a consistent argument in the rulings of the ICJ and other international tribunals. Already in its → Admission of a State to Membership in the United Nations (Advisory Opinions) ([1948] ICJ Rep 57), concerning the admission of two new Member States to the UN, the ICJ expressly held that the principle of good faith limited the admissible exercise of discretion (at 63-4). Reference to good faith is also made in the → Certain Expenses of the United Nations (Advisory Opinion) ([1962] ICJ Rep 151). In the → North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) the ICJ recognized the principle of → estoppel establishing an obligation of the parties to act in good faith. In its → South West Africa/Namibia (Advisory Opinions and Judgments) the ICJ dealt with a burden of proof question. It was decided that, before assuming a breach of its obligations under the mandate regime, South Africa’s not acting in good faith when exercising its legislative and executive powers, had to be proved.

16 The substantive impact of good faith was outlined in the Nuclear Tests Case (Australia v France) (→ Nuclear Tests Cases): ‘One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith’ (para. 46). Another often quoted phrase can be found in the → Gulf of Maine Case (Delimitation of the Maritime Boundary in the Gulf of Maine Area [Canada/United States of America] [1984] ICJ Rep 246) where it is held that the parties are not only under a duty to negotiate but also ‘to do so in good faith, with a genuine intention to achieve a positive result’ (para. 87). Recently the ICJ discussed the scope and content of good faith as laid down in Art. 31 (1) VCLT in the → Israeli Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory) (para. 94). In the Aerial Incident of 10 August 1999 (Pakistan v India) (Jurisdiction of the Court) ([2000] ICJ Rep 12 para. 53), the ICJ derived from the general Art. 2 (2) UN Charter obligation a more specific procedural duty to settle disputes in good faith (see also → Aerial Incident Cases before International Courts and Tribunals). A parallel development can be found in the case-law of specialized UN courts such as the → International Criminal Tribunal for the Former Yugoslavia (ICTY) and
the → International Tribunal for the Law of the Sea (ITLOS), which use good faith arguments to compel States to co-operate in dispute settlement.

17 Good faith review is also a common topos in the argumentation of other international tribunals. In Kingdom of Greece v Federal Republic of Germany ([26 January 1972] 47 ILR 418), the Arbitral Tribunal for the Agreement on German External Debts stated: ‘Both sides would make an effort, in good faith, to bring about a mutually satisfactory solution by way of a compromise, even if that meant the relinquishment of strongly held positions earlier taken’ (para. 62). A case concerning fishery rights in the Gulf of St. Lawrence region was at stake in the Dispute Concerning Filleting within the Gulf of St Lawrence (Award) ([17 July 1986] 82 ILR 590; → La Bretagne, Arbitral Award) between France and Canada. The Arbitral Tribunal, being very well aware that good faith may include the stricter doctrine of ‘no abuse of rights’, spoke of ‘the principal of good faith which is of necessity a principal factor in the performance of treaties, as affording a sufficient guarantee against any risk of the French Party exercising its rights abusively’ (para. 27).


C. Good Faith and Treaty Interpretation

19 The basic rules concerning international agreements between States are laid down in the VCLT. Art. 18 VCLT contains the bona fides obligation not to defeat the object and purpose of a treaty prior to its entry into force. Art. 26 VCLT constitutes the introductory article of the part on the interpretation of international agreements and expresses the most general paradigm of international treaty law: ‘Pacta sunt servanda; every treaty in force is binding upon the parties to it and must be performed by them in good faith.’ The → International Law Commission (ILC) itself emphasized that the expression was not only a moral, but a legal one ((1964) vol I UNYBILC 29). Bona fides therefore is a baseline structure of international treaty law aimed to underpin and effectuate the universally recognized pacta sunt servanda rule, as can be seen in the preamble to the VCLT. Moreover good faith is the very foundation of the pacta sunt servanda principle. When parties enter into an agreement, they are expected to willingly commit to its content. Thus, their will
must produce the effects it has openly sought, and they must be considered effectively bound, in accordance with their declarations’ (Virally 132).

20 Considering the position of Art. 26 VCLT within the system of the VCLT, it is apparent that good faith has an immanent meaning for the interpretation of international agreements. It requires the parties to a treaty, contract, or any other kind of international transaction to deal honestly and fairly with each other. Each party shall act reasonably, taking into account the just expectations of the other party/parties, truthfully disclosing all relevant motives and purposes. Each party shall finally refrain from taking unfair advantage due to a literal interpretation, if the mere focus on the wording would fall short of respecting the objects, purposes, and spirit of the agreement. However, not only the parties of a treaty themselves have to act in good faith. The same obligation is directed towards third-party interpreters such as international or domestic courts and tribunals, arbitrators and mediators, or any other relevant actor.

21 Also Art. 31 (1) VCLT makes references to the *bona fides* principle and provides: ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ Art. 18 VCLT (see para. 18 above) gives proof that good faith shall not only apply during the performance and enforcement of a treaty but also at an earlier stage of its formation, the pre-ratification period. Once the executive branch has signed the treaty through its agents, it is obliged to obtain the consent of the (parliamentary) sovereign and not to be obstructive as to its own given consent in the meantime. Beyond Art. 18 VCLT, the reciprocal application of a treaty not yet in force between States which have already ratified it, might be another consequence of good faith. Arbitrator Mohammed Bedjaoui in his Guinea-Bissau and Senegal Arbitration dissent stated: ‘Ratification represents a final and definitive commitment which, in all good faith, makes it incumbent upon the two States to consider themselves bound with respect to each other by the Convention’ (86; → Maritime Boundary between Guinea-Bissau and Senegal Arbitration and Case [Guinea-Bissau v Senegal]).

D. The Scope and Functions of *bona fides* beyond Treaty Interpretation

1. Substantive Law

22 *Bona fides* takes a most prominent place among the → general principles of law as specified in Art. 38 (1) (c) Statute of the International Court of Justice. It can be qualified as an equally fundamental and universal structure of any legal order regardless of its social, political, economical, development-related, or cultural particularities. And, by its very nature being an extra-legal respectively pre-legal element within a legal structure, it combines moral standards such as trust, honesty, conscientiousness, and loyalty with strict or at least more precise legal contents, eg the principle of → reciprocity, the objective and purpose-oriented method of interpretation. It owes its present authority to natural law, to the aforementioned treaties, to → customary international law, and especially to its global implementation in more or less all legal systems and cultures. Even though good faith may not be part of → *ius cogens*, it nevertheless is fundamental to any legal system and so are the good faith related principles or concepts of pacta sunt servanda, estoppels and → acquiescence, equity and fairness (→ Equity in International Law), the so-called clausula rebus sic stantibus (→ Treaties, Fundamental Change of Circumstances), and not least the prohibition of *abus de droit*. 
23 The proximity between good faith, on the one hand, equity and justice, on the other, is obvious. Nevertheless, the abstract *bona fides* principle can be concretized in specific applicable rules such as acquiescence, estoppel, or duties of information and disclosure. The closer the relationship between international actors becomes, the more important becomes mutual confidence in common endeavours to achieve common objectives. Thus a norm like Art. 10 Treaty Establishing the European Community, on the duties of loyalty and cooperation between the EU and the Member States, is an expression of good faith. Within an international organization, the willingness to co-operate in good faith might be most important to overcome institutional inadequacies. The same can be said regarding the question of law enforcement, if and when a central enforcement authority as well as uniform sanctions are lacking. In the practice of all UN organs there are manifold decisions and recommendations recalling the *bona fides* principle. Even unilateral statements of governments or other international actors can be attributed a binding effect if, given the concrete circumstances, *bona fides* requires so. The demand for acting according to a ‘democratic *bona fides*’ might help to compensate democratic deficits of international organizations such as the WTO, the World Bank (see also → World Bank Group), the → International Monetary Fund (IMF), and others.

2. Procedural Rules and Standards

24 *Bona fides* is the most fundamental principle of substantive law also applicable to the proceedings before international courts and tribunals. The general duty of loyalty between the parties can be seen as a crucial good faith standard. However, *bona fides* has a ‘series of “concretizations” in the field of procedural law’ (Kolb [2006] 830). Among these are the prohibition to wrongfully abuse procedural means, the principle of *venire contra factum proprium*, or estoppel, and the maxim of *nemo ex propria turpitudine commodum capere potest*, the latter ones also having counterparts in substantive law. A party, having either acquiesced in a specific situation or taken an explicit position as to factual respectively legal questions, may not act inconsistently later on. In particular, a party relying on certain facts or claiming certain rights will be denied the benefits thereof, because of a previous fault committed by that very party and in that very context.

E. Conclusions

25 When discussing drafts of the Friendly Relations Declaration in the 1960s, committee members emphasized the high moral meaning of good faith and qualified the principle as a foundation of the international legal order. Both State and → non-State actors need to comply reliably with their binding international law obligations, whether they stem from customary law, conventional law, or any other source of public international law (→ Sources of International Law). Even non-binding recommendations, such as UNGA resolutions, or other forms of → soft law might, to a certain extent, require to be considered in good faith. For the international community as such, *bona fides* is a constitutive principle claiming validity with regard to both substantial and procedural law. Hence, good faith deploys a certain kind of constitutional quality within the international law scheme and beyond that is conceived to be the very foundation of all law.

26 *Bona fides* is a broad and value oriented concept. Due to its abstractness, it may inevitably contain the risk of an all too ambitious judicial activism. However, the predictability of a case’s outcome might not be that much at risk if the decision-making body keeps in mind that *bona fides* is about legitimate expectations of the parties. Moreover, the mutual duties and obligations of international actors (States, international organizations, other subjects of public international law, to some extent even private actors such as → non-governmental organizations) cannot be determined in a purely formalistic way. Treaties in particular are ‘living instruments’. A dynamic and evolutive interpretation is indispensable for their effective implementation. Especially if and where little
international law exists or rapidly changing economic conditions require flexibility, good faith assumes a gap-filling function. Good faith is a general and objective principle of international law. Given its consensual structures, the international community depends on persistently renewed consent in good faith. And so does its constitutional architecture.

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