The Good Faith Principle in the Drafting and Implementation of the Agreement's Law

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Abstract

This article does not offer a novel theory of good faith in treaty law, but rather presents a consistent definition and method for comprehending and interpreting the notion of good faith in globally uniform law. Good faith is an exception to these rules since, in some situations, a party acting in bad faith may be required to pay damages to the aggrieved party and the contract may be amended, modified, or even cancelled if the parties' balance is disturbed. The concept of good faith is one of the most fundamental tenets of contract law in the majority of legal systems, including continental and civil law in Europe. This article was written using a normative juridical research technique, namely a qualitative and comparative approach. This normative juridical approach also encompasses studies on the philosophical underpinnings of contracts, most notably those concerning the philosophical underpinnings of the theory of good faith. The conclusion of this article reflects the consensus of the majority of legal professionals about the many definitions of good faith in terms of time, location, and person. The majority of specialists agree that good faith is an intangible and abstract characteristic devoid of technical or legislative definition. This includes, but is not limited to, sincere belief, the absence of malice, and a lack of intent to mislead or seek unjustified advantage. The parties are required to carry out their agreement in good faith by executing it. The term "good faith" in the context of agreement execution refers to objective good faith. The objective good faith standard is an objective standard, which also refers to an objective norm.

Keywords*: Good faith, Implementation, Agreement.*

Introduction

Every rule of law or norm has a philosophical underpinning (Hernoko, 2008). A rule or norm essentially has a philosophical foundation and a basis for principles, which serve as its spirit. The principle, according to Black's Law Discourse (1990), is "a fundamental truth or doctrine, as of law; a comprehensive rule of doctrine which furnishes a basis or origin for others." In essence, principles are teachings or fundamental truths that serve as the basis or origin for the formation of comprehensive legal rules (Paton, 1972). Legal principles serve as the foundation for the creation of legal rules. Paul Scholten had a similar position: "Legal principles are the basic ideas contained in and behind the respective legal systems formulated in statutory rules and legal decisions relating to provisions and decisions of individual which is seen as its elaboration."

Theo (1995) defines legal principles as principles that are regarded as the basis or foundations of law. These principles may also be referred to as the concepts and values that serve as the foundation for thinking about the law. These cover the basis for the formulation of laws and their interpretation. According to Van Eikema Hommes, these legal principles should not be regarded as specific legal norms, but rather as broad principles or guides for the application of law (Notohamidjojo, 1975).

Practical law must be structured around these legal concepts. In other words, legal principles serve as the foundations or guiding principles for the development of positive law. To summarize, the legal principle is the fundamental value/thought that serves as the philosophical foundation for the rule of law. It is abstract, broad, and dynamic, and serves as a source of legal norms that are concreted into the legal system via legislation and court judgments. According to Mariam Darus (1993), the BW implicitly includes the concepts of contract law such as contract freedom, binding as law, consensuality, and good faith.

According to Article 1313 of the Civil Code, an agreement is an act in which one or more individuals commit themselves to one or more other individuals. This implies that the agreement creates rights and responsibilities for the parties that enter into it (Subekti, 1992). In every agreement, the parties want that it be carried out in

good faith, as stated in Article 1338 paragraph (3) of the Civil Code, which states that all agreements must be formed in good faith. When it comes to contracting, good faith entails honesty. Individuals with excellent intentions place their whole confidence in the opposing party, whom they believe is honest and does not conceal anything negative that may create future problems (Subekti, 1987).

The term "good faith" has two connotations. (1) Good faith in its objective meaning implies that an agreement must be carried out in accordance with decency and moral standards, which means that the agreement must be executed in such a manner that neither party suffers damage. (2) Good faith in a subjective sense, that is, the concept of good faith is inherent in an individual's inner attitude. This good faith may be regarded as honesty under the law of matter. In a subjective sense, good faith may be defined as someone's honesty in carrying out a legal act, or as the inner attitude of a person while a legal act is held. Article 531 of Book II of the Civil Code regulates good faith in this subjective meaning.

Article 1338 paragraph (3) of the Civil Code contains the definition of good faith in an agreement, which stipulates that contracts must be carried out in good faith. The article, on the other hand, does not define "good faith" specifically. As a consequence, individuals will struggle to comprehend what constitutes good faith. Since good faith is an abstract concept that refers to what a person's mind contains (Gary, 2017). According to Munir Fuady (2001), the formulation of Article 1338 paragraph (3) of the Civil Code establishes that, contrary to Article 1320 of the Civil Code, good faith is not a necessary requirement for the legality of an agreement. The element of good faith is inferred only when an agreement is "implemented," not when it is "made." Since the element of "good faith" in the context of contract formation is already addressed by the "legal cause" part of Article 1320. (Fuady, 2001).

Along with the increasingly popular concept of laissez-faire economic thinking in the nineteenth century, contract freedom became a general premise in favor of free competition. Contract freedom evolved into the legal manifestation of the free market concept (Cheeseman, 1995).

Any intervention by the state in contractual relationships violates the free market concept (Horwitz, 1992). The freedom of contract is a novel paradigm of contract law that has received widespread support from philosophers, legal scholars, and courts. In its judgments, the court places a premium on contract freedom above justice principles. Even contract freedom has a tendency to grow into limitless (unrestricted contract freedom) (Callamand & Perillo, 1977).

Indeed, contract freedom and the pacta sunt servanda concept may result in injustice. Contract freedom is predicated on the premise that the contracting parties have a balanced negotiating position (Guest, 1993), although this is not always the case (Atmaja, 1992).

Contractual good faith is a legal institution (rechtsfiguur) originating from Roman law and later incorporated into civil law. It is also recognized under contract law in many common law nations, including the United States, Australia, and New Zealand (Bendel, 1980). Not only is good faith recognized in different national legal systems, but it is also recognized in Article 1.7 ANDROIT and Article 1.7 of the Convention on International Sales of Goods.

While good faith is a critical concept of contract law in the different legal systems discussed above, it does not resolve all issues. These issues are connected to the abstract concept of good faith, resulting in many interpretations of good faith depending on the context, time, and location. Apart from the fact that there is no universally accepted definition of "good faith," there are also practical difficulties with the standard and function of good faith. As a consequence, the definition and standards of good faith are largely established by the judges' attitudes or opinions on a case-by-case basis (Ebke, & Steinhauer, 1995).

Research Method

This article was written using a normative juridical research technique, namely a qualitative and comparative approach. The normative legal technique utilized in this research is to evaluate data pertaining to legislative standards. This normative juridical approach also encompasses studies on the philosophical underpinnings of contracts, most notably those concerning the philosophical foundations of the theory of good faith.

Discussion

(1) There are problems with understanding the meaning of "good faith" in Covenant Law.

Good faith is a fundamental aspect of contractual interactions that is generally recognized and included in many international agreements (Burton, 1980). Apart from national laws and regulations, the concept of good faith is not defined uniformly. It is not incorrect to assert that there are as many good faith definitions as there are interested jurists in this concept. It is employed in a variety of situations due to its structure, and its meaning changes depending on the context. As for the contemporary concept of good faith, as stated before, there are many definitions that place a greater emphasis on one element of good faith than on others (Lücke, 1987). It is obvious that defining good faith in a complete and specific manner is virtually difficult. Nonetheless, many efforts to define good faith have been made.

As a result, it is preferable to include all definitions here and to comprehend them in context. Several of them are included here. Good faith is defined in Black's Law Dictionary (1990) as "an intangible and abstract characteristic devoid of technical or statutory meaning, which encompasses, among other things, honest belief, the absence of malice, and the absence of an unjustifiable intent to mislead or seek unfair benefit." Additionally, the following concepts have been proposed to describe good faith: indifference, fairness, fair behavior, reasonable norms of fair dealing, decency, fairness, appropriate conduct, common sense, spirit of solidarity, communal standards of justice, and genuine honesty.

O'Connor defines good faith as "a fundamental principle derived from the 'pacta sunt servanda' and other legal rules that are specific and directly related to honesty, fairness, and fairness, and whose application is determined at certain times by the standards of honesty, fairness, and fairness that apply in society and are deemed appropriate to be formulated in or revised legal rules." Good faith is a fundamental concept of contract law that is also included in the Civil Code. This idea is drawn from the Roman covenant law concept of bona fides. Modern contract law theory asserts that the application of the concept of good faith does not begin when the agreement is signed; rather, it must have been carried out (existing) from the negotiating period (pre-agreement/contract). This contemporary theory of contract law has been used in nations with a Civil Law legal system, including France, the Netherlands, and Germany. We are all aware that the French Civil Code impacted the Dutch Burgelijk Wetboek, which was then incorporated into the Indonesian Constitution-Indonesian Civil Law on the basis of the concept of concordance (Kusumaatmadja, 2002).

In Indonesia, the concept of good faith has not evolved much from past decades. Economic globalization has facilitated the growth of commercial transactions and resulted in the formation of many new agreements, but obviously not on the basis of the agreement's principles. In Indonesia, the development of the principle of good faith in contract law has concentrated on the application of Article 1338 paragraph (3) of the Civil Code, where the scope of the agreement is still limited to its implementation, as if the Civil Code had not recognized the existence of good faith at the pre-contractual stage. In contrast, contemporary agreement theory holds that parties that incur losses during the pre-agreement/contract stage or during the negotiating stage also need to have their rights protected, ensuring that pre-agreement/contract commitments have legal consequences for those who breach them (Rajagukguk, 1994).

There are two distinct definitions and functions of good faith. In terms of logic, good faith is seen as a technique for moralizing contractual agreements and mitigating inequities that may arise as a consequence of autonomy theory's dogma. In a subjective sense, good faith seeks to preserve one of the contracting parties' incorrect assumptions and to have an impact on appearance. Even though the objective/subjective distinction is present in a variety of legal systems, this first effort at rationalization is insufficient to eliminate ambiguity about the meaning and function of good faith.

Even now, the primary source of confusion is the lack of a definition. The notion of good faith seems to be more interesting in terms of its function than its definition: "Good faith is therefore often described as an open norm, a standard whose content cannot be defined abstractly but must be created through concretization.

Given the importance of good faith in a system, one would agree that this theoretical divergence is insignificant. What counts is how the judges exercise their good faith. The greatest approach to illustrate the nature of good faith is to see how it works (Hesselink, 2004). More than a rule, good faith is sometimes referred to as a standard, a general concept based on certain characteristics of good faith, or norms, rules, phrases, duties, and obligations based on others.

This terminological and conceptual contradiction may be explained in large part by the widespread and anarchic usage of good faith in different national and international laws. However, this inaccuracy results in more than only losses. Indeed, substantive analysis demonstrates that good faith is an open standard whose substance cannot, or should not, be defined abstractly in order to allow for adaptation to changing circumstances. Is that to

imply that the substance of good faith is determined only by the personality of the judge who concludes the trial? Not always. By giving direction to judges, it seems feasible to objectify the concept of good faith without freezing the concept or diminishing its fundamental characteristic: adaptability.

As has been explained, until now there was no single meaning of good faith in the contract. Until now, there are still debates about what the true meaning and meaning of good faith is. Although the doctrine of good faith is accepted, the definition of good faith remains a point of contention, and it is difficult to define (Gordley, 2000).In fact, E. Allan Farnsworth noted that in England, the principle of good faith is still somewhat controversial, because the courts have not yet found a concrete meaning of good faith in the context of contract law, and the doctrine of good faith remains a threat to the principle's sanctity in the absence of a clear meaning of good faith, legal certainty and predictability. Consequently, the meaning of good faith is still part of the court's intuition activities, whose results are sometimes unpredictable and inconsistent (Burton, 1980).

The phrase "in good faith" is usually paired with "fair dealing." Good faith is also often associated with the meaning of fairness, reasonable standards of fair dealing, decency, reasonableness, common ethical sense, and a spirit of solidarity and community (Stack, 1998). Given that good faith in covenant law is derived from Roman law, to get a better understanding, it is necessary to seek an understanding of good faith from the developing Roman legal doctrine. The doctrine stems from the doctrine of ex bona fides. This doctrine requires the existence of good faith in a treaty and it has a long history in the course of Roman law.

The development of good faith in Roman covenant law is inseparable from the evolution of contract law. At first, Roman covenant law only recognized the iudicia strigas tect, a contract that was born from an act according to law (negotium) which was strictly and formally referred to as "ius civile." When a judge faces a case of this kind of agreement, the judge must decide according to the law. Judges are strictly bound to what is stated in the agreement or known as the express term.

Making and executing contracts must be in good faith. Thus, Roman contract law recognizes two types of contracts, namely Iudicia stricti and Iudicia bonae fidei. Domat and Pothier, as adherents of the Roman natural law school which dominates the substantive thought of the contents of the French civil code, do not agree with the distinction between stricti iuris and bonae fidei contracts. He stated that natural law and customary law require that every contract be bonae fidei, because honesty and integrity must always be present in all contracts that require that contacts be fulfilled in accordance with propriety.

The doctrine of good faith above developed along with the recognition of informal consensual contracts which initially only included contracts of sale and purchase, leases, civil partnerships, and mandates. The doctrine of good faith is rooted in the Roman social ethic of a comprehensive obligation of obedience and faith that applies to both citizens and non-citizens. It is agreed that spying based on ius gentium is a netural obligation which is different from a civil obligation.

Later, at the time of Emperor Justinian (6th century AD), the doctrine of good faith as an important principle in contract law was growing. Roman courts recognized the legal consequences of consensual contracts. The commercial growth and evolution of society created a need for more practical and non-ritualistic contract making, and the binding power of contracts was based solely on consensual. It is enough to make an agreement based on the agreement of the parties, without having to carry out certain rituals, or be explicitly determined to pour it in a certain form.

The trend throughout the history of Roman contract law to move from formalistic to consensual, and recognition of the importance of good faith in contracts developed through the discretion of the courts. The concept of good faith was expanded in such a way through the discretion of the Roman court. This discretion allows people to make contracts outside the prescribed formalisms and recognizes ex fide bona, namely in accordance with the requirements of good faith.

In general, the term "good" in a contract refers to a minimal moral norm, not to high moral standards and aspirations. Apart from the aforementioned dispute, the Supreme Court, or hoge Paad in the Netherlands, has elevated the unwritten law of good faith to a greater degree than the coercive written law through a series of jurisprudence.

Good faith represents the notion that fairness requires that one not disappoint. He established well-founded expectations, since it is not so much that rules are certain as it is that men's behavior is certain. It acknowledges that such an approach demonstrates legal and moral identity, since stability is a feature of moral behavior that

enables prediction of future moral action today. Contractual interactions must be moral in nature. Contractual morality incorporates good faith. However, according to the law of contact, good faith in contact is not synonymous with moral good faith.

(2) Good Faith in the Implementation of the Agreement Using Objective Standards.

Although good faith in the implementation of the agreement has developed for a long time, it still raises a number of problems that require resolution. At the very least, good faith in the agreement raises two issues: the first is the legal standard (legal test) that judges must use to determine whether there is good faith in the contract, and the second is the function of good faith in the implementation of the agreement.
The French Civil Code is a law book in the modern era that adheres to the principle of good faith in the implementation of contracts. Article 1134 paragraph (3) of the French Civil Code states that contracts must be executed in good faith. (contract doinent etre executes de bonne foi). The content of this article refers to the context of good faith (bonne foi) as an attitude in which the parties are expected to carry out their contract. Thus, France hereby obliges the parties to be bound not only by what they expressly agreed upon but also to propriety, custom, or law which provides an obligation to demand the nature of their contract.

The article in the French Code was adopted by the (old) Dutch BW. Article 1374 paragraph 3 of the Dutch (old) BW (Article 1338 paragraph 3 of the Indonesian Civil Code) states that contracts must be executed in good faith (zij moten te together trow worden ten uitvoer verklraart). This obligation is then continued by Article 1337 (article 1339) of the Indonesian Civil Code, which states that the contract is not only binding on what is expressly stated in it, but also for everything which, according to the nature of the contract, is required by propriety, custom or law (Prodjodikoro, 2000).
In relation to Article 1347 of the Civil Code, it is stated that things that are traditionally agreed upon are considered secretly included in the agreement even though they are not explicitly agreed upon. From the above provisions, it can be concluded that the order of the binding force of the contract is as follows (Bertens, 2000): (1) Contents of the contract; (2) Property and good faith; (3) Habits; (4) Laws.

Good faith in the implementation of the agreement refers to objective good faith. Standards used in objective good faith are objective standards that refer to an objective norm. The behavior of the parties to the contract must be tested on the basis of unwritten objective norms that develop in society. The provisions of good faith refer to unwritten norms that have become legal norms as a separate source of law. The norm is said to be objective because the behavior is not based on the assumptions of the parties themselves, but the behavior must be in accordance with the general assumption of good faith.

Regarding the terms of the validity of the agreement according to the Criminal Code. regulated in the provisions of Article 1320 of the Criminal Code. consisting of: a. agree that those who bind themselves; b. the ability to enter into an engagement; c. a certain thing; d. and a lawful cause. Specifically regarding agreements, the KUHPdt does not clearly specify what form it will take, so that in practice it gives rise to various interpretations or interpretations of the agreement. Agreement is often equated with the term "agreement", or equality of opinion between the parties who entered into the agreement, but it is also often interpreted as a mutual agreement between the parties who entered into the agreement (Hernoko, 2008).

The principle of good faith requires that in every agreement made, the parties basically have the freedom to determine the contents of the agreement and with whom they make it. However, every agreement should always be based on the principle of good faith, which means it does not violate the laws and regulations, and it does not violate the community interest. This requirement is intended to realize the justice of the parties in the agreement, so that there is no exploitation of the strong against the weak.

In order to create a sense of justice for the community, the government should form laws and regulations that can guarantee and provide balanced legal protection for the parties to the agreement, so that no one is harmed in the agreement. Therefore, laws and regulations concerning consumer financing should contain aspects of legal protection for the community. Furthermore, Arif Gosita stated that justice is a condition in which everyone can exercise their rights and obligations rationally, responsibly and usefully (Lotulung, 1999).

In Indonesia, the concept of justice cannot be separated from the values contained in the philosophy of the Indonesian nation, namely Pancasila, which in the fifth precept is formulated as justice for all Indonesian people, regardless of the existing theories of justice as described above. achieved by Indonesia is equal justice for all Indonesian people, but not in the same sense. Justice must truly be reflected in every legal product that is in direct contact with the interests of all Indonesian people, including regulations in the field of consumer

finance, which have been seen as one-sided and do not reflect the sense of justice that can truly be felt by everyone. The attachment to consumer financing agreements is due to the fact that the financial condition of consumers is not always sufficient while the need for goods that are the object of consumer financing has not been able to be met.

Misuse of circumstances is one indication of the lack of good faith in a contract. Abuse of circumstances in the common law system is a doctrine that determines the cancellation of agreements made based on improper pressure, but is not included in the category of duress. A misuse of circumstances is an act that is motivated by an imbalance between the parties in an agreement, and in such conditions, the strong party takes advantage of the position of the weak party. Weak parties do not have the opportunity to discuss everything that pertains to their rights and obligations in an agreement. Misuse of circumstances occurs when a person in an agreement is influenced by something that prevents him from making independent judgments about other parties, so he cannot make independent decisions.

Honesty in the implementation of the agreement is not only honest but must be realized in obedience to compliance in carrying out the contents of the agreement. Although there are sometimes weaknesses in the agreement, it must be returned to the intentions and objectives of the parties in making the agreement. One of the parties is not allowed to take advantage of the weakness of the agreement, meaning that the weakness cannot be used as a tool to harm the other party.

Subekti also stated that honesty is another form of good faith. It is stated that the buyer is full of trust in the person who sells the goods, believing that the seller is the person who really owns the goods he buys. He did not know that he was buying from someone who was not the owner. He is an honest buyer. Furthermore, it is said that a good buyer is an honest buyer. In the law of objects, the term "good faith" is hereinafter referred to as "honesty" or "clean". In line with the previous opinion, Subekti stated that good faith is a subjective element in the agreement as referred to in the provisions of Article 1338 paragraph (3) of the Civil Code that the agreement must be carried out in good faith, in the sense that the agreement must be carried out in accordance with or heed the norms of norms of decency and decency. So, the objective measures to evaluate the implementation of the agreement are that the implementation of the agreement must be on the right track, and the rails are norms that live and are maintained in society.

Conclusion

(1) Good faith in contracting is a legal institution (rechtsfiguur) derived from Roman law which was later absorbed by civil law. Although good faith is an important principle in contract law in the various legal systems mentioned above, good faith still leaves problems. These problems, among others, relate to the abstract meaning of good faith, so that most legal experts understand the meaning of good faith, which differs from the perspective of time, place, and person. Most experts understand that good faith is an "intangible and abstract form of quality without technical or legal meaning, and it includes, among other things, honest belief, the absence of malice, and the absence of design to defraud or seek unreasonable advantages.

(2) In implementing the agreement using the principle of good faith, the parties are expected to carry out their agreement. In addition, the obligations of the parties to be bound are not only bound to what they expressly agreed on but also to propriety, custom or law that provides an obligation to demand the essence of the agreement. Article 1338 paragraph 3 of the Indonesian Civil Code states that contracts must be executed in good faith. Good faith in the implementation of the agreement refers to objective good faith. The standard used in objective good faith is an objective standard which refers to an objective norm as well.

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