

The Essence of the Principle of Good Faith in the Agreement For The Parties

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ABSTRACT

The purpose of this research is to analyze the nature of the principle of good faith in agreements from various countries with different legal systems. This type of research is descriptive research with the type of normative research by examining various library materials related to the principle of good faith in agreements, especially for the parties. The results showed that 1). There is no standard definition of the principle of good faith used in various legal systems in the world, which makes the contractual behaviour and understanding of each person different, so that the principle of good faith can provide justice as well as benefits and legal certainty, 2). several laws and regulations in Indonesia have been made based on the principle of good faith such as Law no. 11 of 2020 concerning Job Creation, and Law no. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, as well as several other laws and regulations, 3). The implementation of the rights and obligations of the parties based on the principle of good faith is to carry out all contractual processes properly by the laws and regulations and values that are considered appropriate in society, which in reality does not understand much about the principle of good faith and how it is applied in contractual habits. Public,

Date of Submission: 02-08-2022

Date of Acceptance: 15-08-2022

I. Introduction

In the classical theory of contract law, the principle of good faith can be applied in situations where the contract has fulfilled certain conditions.^[1]As a result, this teaching does not protect the parties who suffer losses in the pre-agreement stage or the negotiation stage, because at this stage the agreement has not fulfilled certain conditions. It is different from modern theory, which holds that the agreement is no longer "*een tweezijdige rechtshandeling*" (a legal act that is two-sided) but "*twee eenzijdige rechtshandeling*" (two single-sided legal acts). Furthermore, the agreement is not *rechtshandeling* (legal action) but has changed as *rechtsverhouding* (legal relationship).

According to Agus Yudha Hernoko, As is well known, Article 1338 (1) of the BW summarizes the principle of freedom of contract, the principle of consensualism and the binding power of the agreement.^[2] The understanding of the article does not stand alone, the principles contained in the article are in a unified and interactive system with other provisions. Regarding the binding power of the agreement, it acts as law for the parties who make it (*pacta sun servanda*), in certain situations its power of effect (streking) is limited, among others by good faith.

Article 1338 (3) BW states that "agreements must be carried out in good faith" what is meant by good faith, the legislation does not provide a strict and clear definition of Article 1388 paragraph 3 BW stipulates that agreements must be carried out in good faith, which This means that the agreement is carried out according to propriety and justice.^[3]

In negotiations or agreements between the parties, the two parties will be faced with a special legal relationship that is controlled by good faith and this special relationship has the further consequence that both

parties must act keeping in mind the reasonable interests of the parties involved. other parties.^[4] For each potential party to the agreement, there is an obligation to investigate within reasonable limits of the counterparty before signing the contract or each party must pay sufficient attention to closing contracts related to good faith.

As we know, *pacta sunt servanda* is the principle of legal certainty in an agreement related to the consequences of the agreement. The principle of *pacta sunt servanda* gives a signal that the judge must respect the substance of the contract made by the parties, as befits a law. They are not allowed to intervene in the substance of the contract made by the parties, so if there is a dispute in the implementation of the agreement, the judge with his decision can force the party who violates it to carry out their rights and obligations according to the agreement.

The principle of good faith implies an inner state of the parties in making and implementing the agreement, to be honest, open and trusting each other. The inner state of the parties must not be polluted by the intent to deceive or cover up the actual situation. Furthermore, the opinion of Subekti, shows that if the implementation of the agreement according to the letter, it will cause injustice, the judge has the authority to deviate from the contents of the agreement according to the letter. and obligations contained in the agreement.^[5]

There are many concepts regarding the meaning of the principle of good faith put forward by scholars such as that proposed by Professor Goode from England, who said that in England we have difficulty adopting the general concept of good faith, we do not know its meaning, London which is the world's leading financial centre places legal decisions more important than absolute justice. Professor Bridge adds that good faith and honesty are imperfect understandings of ethical standards to a legal ideology or rule of law. Acceptance of the concept of good faith in treaties in English law is limited and debated.

In its development, various forms and types of agreements were born as a result of the increasing dynamics of human life from the aspect of civil relations, especially in the field of agreements, agreements made as a form of effort to fulfil interests and needs, the community was then encouraged to make various forms of agreements, not all of which had an equal value in it. , the impulse of need forces the community to be bound in agreements that are made unilaterally, benefiting certain parties, the determination of clauses by one party who has advantages in terms of position and capital, for example in various forms of credit agreements, in which there are standard clauses, most of which are detrimental. one of the parties. This is of course very contrary to the concept of Islamic law which puts forward equality and the common good, in good and proper ways, not only profit-oriented.

According to JM Van Dunne, the power of good faith covers the entire process in the agreement or is likened to "*the rise and fall of the contract*", thus good faith includes three phases of the contract journey, namely, the pre-contractual phase, the contractual phase, and the phase after the contract. In each of these phases, the parties must pay attention to the course of the contract so that the purpose of the contract itself is realized. In practice, many civil cases are found related to agreements, which are indicated by a lack of public understanding of the meaning of good faith, ways that are considered good according to decency and decency, then how a judge understands the concept of good faith, will judges only become the mouthpiece of the law, by simply accepting the various cases that are brought before him without trying to make considerations that provide maximum justice in his decisions.

II. Research Methods

Legal research is conducted to generate arguments, theories or new concepts as prescriptions for solving the problems at hand. Therefore, the choice of one or several research methods is closely related to the formulation of the problem, the object under study and the scientific tradition itself. The legal approach used is 1). Legislative approach (*statute approach*); This approach is used to see the principle of good faith, namely its existence in the current legislation. 2) Analytical approach (*Analytical approach*); This approach is used to analyze and understand more deeply the Nature of Good Faith Principles from various legal systems in the world 3). (*comparative approach*); This approach is used to compare, namely by looking at the similarities and differences regarding the nature of the principles of good faith from various legal systems in the world.

III. Discussion

According to Article 1234 of the Civil Code, the contents of the engagement consist of giving something (*iets te geven*), doing something (*iets te doen*), and not doing something (*iets niet te doen*). Giving something in a juridical sense is transferring the rights of a movable and immovable object from the debtor to the creditor.^[6] In this transfer, there can be a complete transfer or a transfer of enjoyment only. In an agreement to deliver an object of a certain type, there is only a transfer of ownership, which means there is a *volledige overdracht*.

In all engagements where the content is not giving up something, then the content is doing something or not doing something.

1. Good faith in pre-contract

The principle of good faith must exist during the negotiation and contract preparation process, first, the parties must not negotiate or draft contracts in bad faith in the form of not being serious about entering into a contract, abusing privileges to thwart negotiations, making a contract with the intention of not implementing it, being dishonest in explaining the condition of the goods or objects agreed upon, and taking advantage of the weak bargaining position of the other party in the contract.^[7]

Article 1330 paragraph (3) of the Civil Code itself does not mention the principle of good faith in the pre-contract stage but focuses on the implementation of the agreement only. The pre-contract stage, which includes the negotiation process, seems to have been interpreted by various parties. Negotiation is the first step, at this stage, a person usually defends his interests to obtain the maximum profit, this usually occurs in business contracts.

Modern covenant theory recognizes the doctrine of *promissory estoppel* which means that a person cannot withdraw his promise, if the party who receives the promise (promisee) because he believes in the promise has done something or has not done something, so he (promisee) will suffer losses if (promisor) i.e. the party who gives the promise is allowed to withdraw his promise.^[8]

Estoppel is taken from the word *estop* which the *Oxford Dictionary* calls *stop up*. *Estoppel* or estoppel by *Black Law Dictionary* defined as;

"1. A bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true. 2. A bar that prevents the relitigation of issues. 3. An affirmation defence alleging good faith reliance on a misleading representation and an injury or detrimental change in position resulting from that reliance waiver".

In Robert Sidauruk, it is stated that there are several elements for someone to use the promissory estoppel doctrine, including;

- a) What is considered agreed upon must be clear;
- b) The existence of the trust or basing trust in the promise and carried out fairly (*reasonably*).
- c) Losses suffered due to trust in the promise.

In essence, this estoppel concept is a prohibition to break a promise by cancelling or preventing any form of argumentation that contradicts what someone has done or said even though it is not explicitly agreed upon because based on that action, the other party can make an assumption or believe in the existence of an agreement. or in other words, a breach of promise lawsuit can only be made after the agreement, but the possibility of losses that occur still exists, then this doctrine can help the argumentation of the parties who were harmed during the pre-contract period. But on the other hand, the doctrine of good faith is usually interpreted as a principle that curbs personal interests using having to pay attention to the interests and expectations of others, as social beings, therefore many experts have refuted this, arguing that it is very difficult to place the interests of others above personal interests. that it is not a negotiation if the name is not fighting for personal interests and also not a contract if there is no interest there.

Therefore, Lord Acker, in the case of *Walford VS Miles* (1992), decided on a dissenting opinion with the consideration that the concept of negotiating with good intentions is awkward, according to him in the negotiation process it is appropriate for the parties to fight for their interests. It is in the negotiation stage that a person must pursue his or her interests, as long as they do not misrepresent. Therefore, Lord Acker said that the principle of good faith is not a must in the negotiation process because it is contrary to the principle of bargaining.

Second, also in the negotiation process in carrying out the principle of good faith is not to impose the will on the other party, usually, the act of coercion is caused by an unequal bargaining position as is often the case in work agreements, a sense of coercion from one party can be considered a defect in the element of 'agreement'. ” in the agreement so that it can be asked to be cancelled.

Third, the parties must also provide honest and non-manipulative information about the facts about themselves and the object to be agreed upon, such as the provisions in various countries in the *Civil Law* that the negotiation stage is the stage of examining material facts on the subject of the agreement, meaning that the parties It is considered good faith when the parties have transparency by notifying and or explaining the main material facts of the agreement because in many cases dishonesty is one of the triggers for the failure of the agreement, dishonesty itself is a moral standard that cannot be measured but can be enforced when there are real regulations in the legislation. -invitation.

In addition to the negotiation process, the contract preparation process is still a pre-contract stage, in this process, the parties need to implement it based on the principle of good faith, one form of implementing this principle is to make a written agreement, to avoid denial, change of intention or speech. from one party which can ultimately harm the other party.

The Civil Code itself does not provide an obligation for the parties to make it in written form. The principle of freedom of contract is very clear in the Civil Code by looking at the provisions of article 1338 paragraph (1) that gives the parties the freedom to:

- a) Make or not agree;
- b) Agreeing with anyone;
- c) Determine the contents of the agreement, its implementation, and its requirements;
- d) Determine the form of the agreement, namely written or oral.

In contrast to the Islamic Law system, which implies that the agreement should be made in writing, as contained in Surah Al-Baqarah verse (282).

"O you who believe! If you pay debts for a specified time, you should write it down. And let a writer among you write it correctly. Let the writer not refuse to write it as Allah has taught him, so let him write. And let the debtor dictate, and let him fear Allah, his Lord, and let him not reduce anything from him. If the debtor is a person who lacks reason or is weak (his condition), or is unable to dictate by himself, then his guardian should dictate it properly. And bear witness with two male witnesses among you. If there are no witnesses, two men, then (permissible) a man and two women from among those whom you like from the (existing) witnesses, so that if one forgets, the other reminds him. And don't let the witnesses refuse when summoned. And don't be boredwrite it down, for the time limit whether (the debt) is small or large. That is more just in the sight of Allah, more able to strengthen testimony, and closer to doubt unless it is a cash trade that you carry out among yourselves, then there is no sin for you if you do not write it down. And take witnesses when you are buying and selling, and do not make it difficult for the writer and also the witness. If you do (that is), then indeed, it is an act of wickedness against you. And fear Allah, Allah teaches you, and Allah is Knowing of all things."

It is clear in this verse that in the Islamic legal system an agreement should be made in writing, mentioned by the parties themselves or their representatives, and witnesses appointed to avoid doubts between the parties so that the parties are restrained from dishonest acts or lies.

2. Good faith in the implementation of the contract

Article 1338 paragraph (3) of the Indonesian Civil Code states that the contract must be carried out in good faith, furthermore, in article 1375 of the Civil Code, it states that the contract is not only binding on what is expressly stated therein, but also on everything that according to the nature of the contract, required by propriety, custom and law.

Ridwan Khairandy then concluded that the order in which the contract was binding was as follows:

- a) The contents of the contract itself;
- b) Propriety or good faith;
- c) Habit;
- d) Constitution.

An engagement usually aims to abolish itself, meaning that with the fulfilment of the required achievements, what is the goal of the parties has ended. The performance of the performance will erase the existence of the engagement. Payments as a form of fulfilling the achievements required in contractual relationships, generally burden the debtor, by the *Schuld and haftung* in the law of engagement.

The above provisions indicate that there must be good faith in the contract implementation phase by the parties. However, the standards used in interpreting this good faith depend on certain assessment standards. So that the use of these standards is based more on the attitude of the court and the doctrines developed by legal experts.

Good faith in contract execution refers to objective good faith. Standards used in objective good faith are objective standards that refer to an objective norm. That the behaviour of the parties must be tested based on unwritten objective norms that develop in society in society. The provisions of good faith refer to unwritten norms that have become legal norms as a separate source of law. These norms are said to be objective because behaviour is not based on the assumptions of the parties themselves, but the behaviour must be by general assumptions about good faith.

Before discussing the standards of the rights and obligations of the parties, first discuss the consequences arising from not implementing good faith, namely disputes, several potential disputes can arise in the contractual process, therefore the parties need to pay attention to these potentials for later find causes and workable solutions.

Anita Kolopaking said the potential for disputes that need to be considered by the parties are:

- a) From the very beginning the contract was made to contain problems;
- b) The existence of miscommunication contained in the contract is not realized by the expectations desired by one of the parties;
- c) Contracts made are not clear and not specific;
- d) Opening opportunities for problems in the contents of the contract made;
- e) Do not immediately address the initial problems that arise;
- f) There is no attempt to consult on the causes of problems that arise and to resolve them immediately before disputes arise; and
- g) Another potential.

Anita also added several causes for the dispute, including:

- a) Not researching carefully what is contained in the contract;
- b) Lack of knowledge of the work being carried out both in terms of knowledge, expertise, and or no/lack of work experience for the work being collaborated;
- c) Lack of knowledge of the contract language/legal language contained in the contract;
- d) Lack of communication from both parties to discuss potential issues that could become problems in the future;
- e) Do not try to conduct deliberation to resolve existing problems when signs of problems/disputes begin to occur;

- f) Refusing to negotiate or compromise concerning the matter;
- g) Involving own interests without looking at the interests of each party;
- h) Not trying to make compromises between the parties;
- i) Maintaining a false belief in the emergence of an existing dispute;
- j) Tends to have great difficulty in imagining a *win-win*;
- c) There is a wrong view of injustice in a problem that arises; a sense of injustice often motivates aggression or revenge;
- l) Being indifferent / not too concerned about potential opportunities that can become problems in the future.

At the national civil law symposium held by the National Legal Development Agency (BPHN), good faith should be defined as follows:

- a) Honesty when making contracts;
- b) At the stage of making a contract carried out in front of an official, the parties are considered to have good faith;
- c) As appropriate in the implementation stage, which is related to a good assessment of the behaviour of the parties in fulfilling what has been agreed, to solely prevent inappropriate behaviour in the implementation of the contract;

According to Corbin in Ridwan Khairandy, the interpretation or interpretation of the contract is a process where someone gives meaning to a symbol from an expression used by another person. The symbols used are words either one by one or in groups, oral or written.

The current understanding that in the interpretation of the contract is no longer distinguished between the contents of the contract which are clear and which is not clear, but also the words that appear clear, can be interpreted by directing it to the will of the parties or the relevant special circumstances to determine the meaning they mean. The principle of good faith plays an important role in the interpretation of the contract. If the contract is to be interpreted in good faith, then each of the contents of the contract must be interpreted *fairly* or properly.

The second function is the function of adding, that good faith can add to the contents of a certain agreement and can also add words or provisions of the law regarding the agreement. This function can be applied if some rights and obligations arise between the parties that are not expressly stated in the contract.

The third function, namely the function that limits and eliminates, this function is mentioned by several experts who say that a certain agreement or a certain condition in the contract can be set aside, if since the contract was made the situation has changed so that the implementation of the contract causes injustice. Therefore, in such conditions, contractual obligations can be limited or even eliminated based on good faith.

Implementation of the principle of good faith in contract execution by the parties, some experts refer to adherence to *reasonable commercial standards of fair dealing*, or in other words acting by *reasonableness and equity*.

Some experts discuss *equity*, such as Aristotle's "*epieikeia*" (*equity*; *billijkheik*, propriety) as the guardian of the implementation of the law because *equity* lies outside the law (law) which demands justice in certain circumstances and situations. *Equity* is the notion of *fairness* in the implementation of the law, thereby providing an opportunity for judgment that complements the general nature of the law. Due to the existence of *equity*, the value of justice in the relationship between individuals is returned to a reasonable proportion, so that good faith is nothing but propriety and justice that underlies the legal relationship of the parties.

Based on the above study, the rights and obligations of the parties in a Contractual Relationship or Agreement can be described:

1. In the pre-agreement phase, the parties must know the state of all aspects that will be agreed upon, therefore the parties are obliged to explain the actual state of the situation or the state of the object to be agreed

upon, it is important to explain the condition of the parties so that mutual understanding arises. Telling the truth about the condition of the object to be agreed upon is one of the actions that reflect good faith in the pre-contractual phase.

2. The agreement made then must be prepared in detail so that it includes the interests of the parties, the parties or their representatives must mention the things to be regulated in the agreement. The agreement should be witnessed by people who are considered worthy by both parties.

3. The agreement should be made in writing to prevent doubts and prevent the parties' positions from being unstable. In some types of agreements regulated in legislation, the validity is determined by the maker such as a public official, so it should be made before a public official.

4. In the implementation of the agreement, the parties must be serious about fulfilling all the promised achievements, not being serious in carrying out all the contents of the agreement is part of bad faith.

5. That in the agreement, the parties are not solely bound by what is expressly written in the agreement but more than that must act by the norms that live and apply in society.

6. The parties in carrying out the agreement do not act arbitrarily. That even if one party is in a dominant position compared to another party, they must not make it difficult for the other party or even harm the other party. Because the agreement is made based on mutual need.

7. Good faith is propriety, so the parties in the entire series of agreements must behave properly, that is, that attitude is considered appropriate in society.

8. In the event of a breach of promise (default) in the agreement, the parties must consider the condition of the other party due to the reason for the default, providing convenience to the other party is also good behaviour that can be done.

This is based on the principle of respecting the contract when there is difficulty *UNIDTROT*, that the article that is quite important in the chapter on the implementation of the contract is the provision on difficult circumstances. This provision is distinguished from *force majeure* which is regulated in the chapter on performance.

The arrangement regarding hardship is regulated in Article 6.21 of the UNIDTROT principle, which stipulates that if the performance of the contract becomes more difficult for one of the parties, however, if it is bound to carry out its engagement subject to the provisions on hardship. This provision determines two main things, namely first, the binding nature of the contract as a general rule, and secondly the changes in circumstances relevant to long-term contracts.

The principle that the nature of the contract is binding, therefore it must be carried out fully, without regard to the burden that can be borne by the executing party. Even if there is a possibility of loss to one of the parties, the contract must be carried out.

The phenomenon of difficulty has been known in various legal systems using other terms, but the meaning is the same. Such as frustration of purpose, *wegfall der geschäftsgrundlage*, *imprevision*, *accessiva onerosita soprvenuta* and so on. The term hardship was chosen because it is widely recognized in international trade practice. Is reinforced by the inclusion in various international contracts called hardship clauses.

In her dissertation, Nurhidayah Binti Abdullah stated that there are nine good faith main labels, namely:

1. *Honesty* (honesty)
2. *Reasonableness*
3. *Fairness*
4. *Standards of Appropriate Behavior*
5. *Parties' Reasonable Expectations*
6. *Cooperation*
7. *Loyalty*
8. *Having Regard To The Other Interest*
9. *Excludes any form of bad faith or "excluder."*

IV. Conclusion

The essence of the principle of good faith is honesty in the will, there is no intention to mislead other parties, and act according to the decency that applies in society with the aim of the common good. The principle of good faith is the most fundamental in the agreement, it is also recognized in various countries with different legal systems, the application of good faith is still based on the knowledge of the parties, but in the legal context, the principle of good faith is widely interpreted as propriety and is a standard of behaviour. respect that must exist in every contractual relationship, the principle of good faith can also be interpreted negatively, namely that good faith is the absence of bad faith.

Bibliography

- [1]. Asnawi, Muhammad Natsir. "Protection of Contract Law in the Perspective of Contemporary Contract Law." *Legal Matters* 46.1 (2018): 55-68.
- [2]. Mokodompit, Muhammad Fahri. "Conceptual Freedom of Contract and Protection for the Parties to a Credit Agreement." *Lex Privatum* 7.6 (2020).
- [3]. Bukido, Rosdalina. "Urgency of Agreement in Civil Relations." *Al-Syir'ah Scientific Journal* 7.2 (2016).
- [4]. Moertiono, Raden Juli. "Ketentuan Hukum Terhadap Pelaksanaan Iktikad Baik Dalam Kerja Sama." *Prosiding Seminar Nasional Hasil Penelitian*. Vol. 2. No. 2. 2019.
- [5]. Arifin, Miftah. "Membangun Konsep Ideal Penerapan Asas Iktikad Baik Dalam Hukum Perjanjian." *Jurnal Ius Constituendum* 5.1 (2020): 66-82.
- [6]. Sinaga, Niru Anita. "Implementasi Hak Dan Kewajiban Para Pihak Dalam Hukum Perjanjian." *Jurnal Ilmiah Hukum Dirgantara* 10.1 (2020).
- [7]. Yuanitasari, Deviana, and Hazar Kusmayanti. "Pengembangan Hukum Perjanjian dalam Pelaksanaan Asas Itikad Baik pada tahap Pra Kontraktual." *ACTA DIURNAL Jurnal Ilmu Hukum Kenotariatan* 3.2 (2020): 292-304.
- [8]. Irianto, Sigit. "Hukum Kontrak dan Perkembangannya." *Jurnal Spektrum Hukum* 10.1 (2013).