

The Meaning of Good Faith Philosophy in Sale and Purchase Agreement of Land Rights Drawn up Before a Notary/Land Deed Conveyancer

I Gusti Ngurah Muliarta

University of Warmadewa

Corresponding author. Email: muliarta.gading@gmail.com

ABSTRACT

This study examined and analyzed the philosophical meaning of the good faith principle in legal provisions in Indonesia, like contract law. The principle regarding good faith is often debated, and this is because the parties to the agreement are often dragged into legal problems. The parties having good faith are no exception. Good faith should exist from the pre-contract phase, where the parties start negotiating until reaching an agreement, and the contract implementation phase. Every person should have good faith. This study raised the following problem: What is the philosophical meaning of the good faith principle in legal provisions in Indonesia, especially in Contract Law in the land sector? This research applied normative legal research, namely by using primary and secondary legal materials. The approaches used are the statutory approach, concepts and philosophy, comparative law approach, and legal history. The findings of this study are that the good faith principle is honesty and propriety, which shows trust, transparency, autonomy, obedience, coercion, and also deceit. The core of the good faith principle is about permanent and unchangeable. While, the meaning of good faith is dynamic and constantly changing according to society's complex and dynamic legal awareness.

Keywords: *Contract Law, Good Faith, Sale and Purchase Agreement of Land Rights.*

1. INTRODUCTION

Nowadays, the business development is essential in our everyday life. Business is very closely to agreement. Thus, it is necessary to understand the essential points with regard to the agreement, including what is an agreement, the terms of the validity of agreement, the principles of agreement, the object of the agreement, the period of the agreement, the form of agreement, the parties involved, the rights of the parties involved, and obligations of the parties, the structure, and also the anatomy of agreement production, the settlement of disputes and termination of the agreement.[1] One of the conditions in an agreement is about the existence of good faith that should be fulfilled.

Good faith has abstract meaning and so difficult to formulate. In the implementation of an agreement, good faith is related to the issue of courtesy and appropriateness. The good faith principle can be divided into subjective and objective of good faith.[2] Good faith is very much needed in the implementation of agreements both related to agreements required in legal provisions in the field of civil law and the field of agrarian law in the land sale and purchase agreements.

Good faith in an agreement should exist since an agreement will be agreed upon. In other words, good faith exists at the time of pre-agreement negotiations to make and/or draft an agreement. Ridwan Khairandy stated that "good faith should exist since pre-contract phase where the parties start negotiating until reaching an agreement and the contract implementation phase" [3] In the article 1338 paragraph (3) on civil code, the agreement should be carried out in the good faith. There is no further explanation related to what is meant by good faith. Therefore, more concrete legal certainty relating to good faith is necessary to provide clarity and to avoid hesitation in implementing what is meant as good faith.

In addition, there is no uniformity in the laws and regulations relating to good faith. Therefore, it does not provide any legal certainty and justice. Since it is undeniable that no law is perfect or complete, there are bound to be flaws or weaknesses. In general, it can be stated that there are two main potential weaknesses in the legislation. *first*, in terms of formulation, sometimes incomplete, precise, and concrete. *second*, it is sometimes irrelevant (again) with social reality from the aspect of material contents.[4] This principle of good

faith should provide or reflect the principle of expediency (*beneficence*) which is translated as the necessity to do good (*bona fidel*), that living together should bring benefits (benefit) and should never harm others. Everyone is obliged to assist others or cooperate in meeting their needs as a legal subject.[5] This principle of *justice* requires that everyone is treated equally by fair rules and according to objective criteria and may be accounted for.[6] In general, good faith should exist at every stage of agreement so that the other party always considers the interests of one party.

In contrast, in practice, implementing a sale and purchase agreement occurs various shortages due to parties having bad intentions in the agreement only for the benefit of personal interests, thereby causing harm to other parties having good intentions. In practice, various cases are found related to the land sale and purchase agreement or land ownership disputes between one another. For instance, there is often dual ownership in one plot of land, meaning that one party has a deed on behalf of himself. However, the other party also claims that the land is theirs, which is generally shown in inherited land disputes. Namely, one of the heirs committed illegal expropriation of rights over parts of the land inherited to their children by their older brother due to evil intentions. Moreover, this dispute may be detrimental to investors who have purchased the land in good faith. based on the description above, the author intends to examine deeply the principle of good faith contained in the legal provisions in indonesia, including the provisions of civil code and agrarian law, especially in the sale and purchase agreement of land rights.

2. METHOD

This research is normative legal as to find the truth based on the logic of legal science from the normative point of view. In this respect, the law is as the positive norm that applies at particular time and made of specific legitimate of political power. Several approaches used are the statutory, conceptual, legal history, and also philosophical.

3. RESULT AND DISCUSSION

3.1 Philosophical Thoughts on Good Faith

We can find good faith in various legal literature. However, no law or doctrine provides clear boundaries regarding the meaning of good faith as a legal norm/rule. Rule of law has philosophical foundation. Agus Yudha Hernoko [7] stated that a rule or norm has a philosophical foundation and a principle as its spirit. The principle, according to *Black's Law Dictionary*, is "fundamental truths or doctrines, as laws; comprehensive doctrinal rules providing a basis or origin for others" [8], which essentially means, principles are teachings or truths that are fundamental to the formation of a comprehensive rule of law. Philosophically, good faith is divided into 2, namely subjective good faith and objective good faith.

3.1.1 Subjective Good Faith

Goods holder (*bezitter*) in good faith, buyers having good intentions are as good faith with subjective elements. Buyers of goods refer to good intentions who buy goods completely with confidence that the seller owns the goods they buy. He did not know if he was purchasing from someone reserving no right. That is why he is called an honest buyer.

3.1.2 Objective Good Faith

There is a diversity between good faith in the validity of legal relationship and in the terms of implementing rights and obligations in a legal relationship. The first good faith lies in the state of soul of human being at the time, namely when the legal relationship comes into force. It is different from good faith in the implementation of rights and obligations in the legal relationship. In this respect, good faith can be seen in the actions taken by parties, primarily actions as the implementation of agreement. Good faith should run in one's heart continually remembering that humans as society should be far from harmful to other parties by using words blindly when people agree.

While, the nature of honesty at the time the legal relationship comes into force is more static.[10] This comes from Roman law. In Roman law, this principle is known as the principle of *Bonafides*. BW uses the term of good faith in two understandings. The first understanding of good faith is the understanding of good faith in the subjective sense as 'honesty'. The definition of good faith in the subjective/honest sense is contained in Article 530 BW, which governs the position of power (*bezit*). The subjective meaning of good faith is the inner attitude of the soul.[11] Then, the good behavior of the debtor and creditor should be tested based on verbal objective norms. Good faith in Article 1338 paragraph (3) BW is good faith in an objective sense.

The aim refers to the fact that the parties' behavior should be the general assumptions of good faith and not solely based on the parties' opinions.[12] Honesty in Article 1338 paragraph (3) BW does not lie in the state of the human soul, but in the actions taken by both parties in keeping promises. Thus, honesty here is dynamic; in the sense of dynamics or appropriateness is rooted in the role of law in general, namely an effort to balance various interests existing in a society. In a legal system, the interests of others should not be suppressed or ignored at all. Society should constitute a balance standing upright in a state of balance. Regulations on Land Law in Indonesia are regulated in the UUPA (Principle of Agrarian Law). However, before the enactment of UUPA, the Indonesian Land Law was dualistic, meaning that in addition to recognizing the application of customary land law originating from customary law, regulations concerning land based on western law were also recognized. Then the era of dualism in land law prevailing in Indonesia was terminated, which became the unification of land law.

3.2 Good Faith in the Land Right Transfer

The transfer of land rights through sale and purchase means the legal act of transferring rights from the seller to the buyer and payment of the price, either wholly or partly from the buyer, is carried out on clear and cash terms. In general, the sale and purchase arrangement in Indonesia is still plural as the sale and purchase in the community is still based on 3 (three) different laws according to the agreement of each party. The 3 (three) applicable laws in sale and purchase are: The provisions of Customary Law concerning the sale and purchase of movable and immovable objects including land (Customary Law Provisions). The Provisions of Law Number 5 of 1960 concerning Agrarian Principles (UUPA) concerning immovable objects, especially land (Provisions of the Agrarian Law); The Provisions of BW concerning the sale and purchase of movable and immovable goods as long as they are not on the land (BW Provisions).

Good faith acts as the principle of contract law, consists of three functions in the contract implementation: (1) Good faith serves to add (*aanvullende werking van de goede trouw*) the contents of the agreement; (2) Good faith limits the implementation of the agreement (*derogorende werking van de goede trouw*); and (3) an act of good faith abolishes the implementation of the agreement. [13] Good faith as a legal principle is the natural element in the contract, like the contract, so it attaches to the contract implicitly. The function is to complete the contract by filling legal vacancies, completing/adding, and waiving the contents of the contract.

4. CONCLUSION

The realization of the principle of good faith in the binding of sale and purchase agreement of land rights refers to the content of the agreement that is appropriate. Good faith in the context of Article 1338 paragraph (3) BW (Indonesia) is based on the rationality and propriety. The standard used in assessing good faith in the performance of the contract is an objective standard. Under this standard, the behavior of parties in conducting the contract and assessment of the contract's contents are based on the principles of rationality and propriety.

REFERENCES

- [1] Niru Anita Sinaga Dosen Tetap Fakultas Hukum Unsuraya, Peranan Asas Itikad Baik Dalam Mewujudkan Keadilan Bagi Para Dalam Perjanjian, jurnal M Progress.
- [2] Raden Juli Moertiono, Ketentuan Hukum Pelaksanaan Itikad Baik Dalam Kerjasama, Prosiding Hasil Penelitian Seminar Nasional & Expo II dan Pengabdian kepada Masyarakat, 2019.
- [3] Ridwan Khairandy, Itikad Baik dalam Kebebasan Berkontrak, Jakarta: Program Pascasarjana Fakultas Hukum Universitas Indonesia, 2004.
- [4] Antonius Sudirman, Hati Nurani Hakim dan Putusannya, Bandung: PT Citra Aditya Bakti, 2007.
- [5] Antonius Sudirman, Hati Nurani Hakim dan Putusannya, Bandung: PT Citra Aditya Bakti, 2007.
- [6] Ariyanto, Perbandingan Asas Itikad Baik: Dalam Perjanjian Menurut Sistem Hukum Civil Law (Eropa Continental) Dan Common Law (Anglosaxon), Jurnal Komunikasi Hukum, ISSN: 2356-4164, Volume 2, Nomor 2, Agustus 2016, h.124 <https://ejournal.undiksha.ac.id/index.php/jkh/article/view/8409> diunduh pada hari Minggu tanggal 24 September 2017.
- [7] Agus Yudha Hernoko, 2014, Hukum Perjanjian, Prinsip Proporsionalitas dalam Kontrak Komersial, Prenadamedia Group, Jakarta.
- [8] Henry Campbell Black, Black's Law Dictionary, Definition of the Terms and Phrases of American and English Jurisprudence Ancient and Modern, West Publishing Co, St. Paul Min, h. 828.
- [9] Raden Juli Moertiono, 2019, Ketentuan Hukum Pelaksanaan Itikad Baik Bekerjasama dengan Universitas Bina Lingkungan Indonesia, Prosiding Hasil Penelitian Seminar Nasional & Expo II dan Pengabdian kepada Masyarakat.
- [10] Wiryono Prodjodikoro, 2006, Pokok-Pokok Hukum Perjanjian, Sumur, Bandung
- [11] S. E. Frost, Jr., Ph.D., Basic Teachings of The Great Philosophers, Bab IV, A Survey Of Their Basic Ideas, Anchor
- [12] P.L. Wery, 1990, The Development of Law on Good Faith in the Netherlands, Printing Republic of Indonesia, Jakarta, h. 10.
- [13] Wiryono Prodjodikoro, 2006, Pokok-Pokok Hukum Perjanjian, Sumur, Bandung.