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A Rightful Thinking Legal Mind-Set In Good Faith Contract Implementation: A Necessary Principle Required In Business Contracts

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ABSTRACT

Putting a contract in real business situation requires trust and faith between parties involved. It is therefore important, to understand the principle of a rightful thinking legal mind-set or trustworthiness, when it comes to contract signing. Having faith in contracts is one of the principles that facilitates its implementation. In this paper, the author examines two legal concepts that is the rightful legal mind-set towards contracts and contract implementation. The research is basically a review one, which analyses the varying online data and documents regarding a rightful thinking legal mind-set in relation to the signing of contracts between parties and the implementation of such contracts from an Indonesian perspective. It has been established that an understanding of a legal mind regarding contract signing varies from individual to individual and also it varies from company to company depending on the form of collaboration. However, there is one thing noted, that is all contracts have one characteristic, which is faith or trust in contracts signed. This means having rightful thinking legal mind-set is a binding working basis for the smooth execution and or implementation of contract between two parties and or more entities.

Keywords

Policies and Regulations, Consumer Protection, Social Choice, Contract Principles, Contract Execution, Implementation, Business

JEL Classification:

E61; D18; D71; E3

Contribution/Originality: The present study, aims to contribute the understanding of contracts as a basis for the smooth running of a cooperation between individuals, parties and or entities intending to have cooperation based on legal leaning in a business transaction. The paper strengthens and proposes that having a rightful thinking legal mind-set can be a strong foundation for business cooperation in Indonesia as one example of the developing countries.

INTRODUCTION

In today's rapidly changing world (Mullen, 2019), the legal field is faced with new development challenges (Junshik, 2016), making legal experts to start moving away from the in-house legal way of doing things to a seller to buyer way of helping its clients (Marotta-Wurgler, 2009). The changing world is making things appear complex (Hadfield, 2008; Norton, 2017), the legal experts are meeting challenges depending on people's skills (Urciuoli, 2008; Djumadi and Barkatullah, 2019) brought about as a result of the changing business environment (Sullivan, 1987). Marotta-Wurgler (2009) notes that business such as those conducted via e-commerce systems and via telephone have become common and payments are made before the contract is seen, hence benefiting sellers at the cost of buyers. According to Allen and Overy (2019) among the challenges to be faced is the self-serve, where the legal world has decided to empower business owners to be more active in conducting business with the direct engagement of legal expert, in a measurable way following the set legal guidelines, probably established within the contract.

This means that even though the legal practice field and the in-house legal specialisation is comprised of many legal wordings which need proper interpretation before implementation, they are simplified through contracts. Indonesia, when it comes to contract designing and signing, there is need for clarity and being careful because mistakes are unlikely to be tolerated (Cikendo, 2020). This applies to both the supplier and client or customer, to ensure that cooperation is smooth and the transaction is well protected as per the existing laws. There is need for good faith in implementing any contract (Girth, 2014) between parties. Because the term good faith has been adopted as a legal term used in law derived from the Roman laws since it sets root for trust in business transactions (Gosfield, 2003). The concept was first absorbed by the Civil Law (Dick and Cohen, 2004) for its implementation in the effort to boost and strengthen cooperation made between two or more parties involved in a transaction (Trakman and Sharma, 2014).

Though there might be breach of contract, the principle of good faith, sets the ground leveled for both parties involved in a dealing (Wright, 2021) to be as honest as they can for the smooth cooperation. The parties are expected to play their roles and perform their tasks in a honest way, prudently and avoid

unpredictable behaviors as long as the contract continues to exist (Lowenstein, Code and Carson, 2014).

Indonesia's laws regarding good faith were developed following the court verdicts and legal proceedings in relation to breach of contract among parties (Suharnoko, 2012). It means that the scenario that led to development of regulations supporting contracts based on good faith principle in transactions arose due to the rampant cases on the breach of contracts (Robinson, 1996). However, Suharnoko (2012) argues that contracts in Indonesia are based on customary laws and also civil laws issued by the government. This has most of the time overcome contract breaching, hence hindering being unfaithful. For instance, some of the laws that facilitates good faith contracts, include the e-commerce regulation that is embedded in Law Number 8 of 1999 regarding Consumer protection (Widaningsih, 2019). Good faith is also regulated by the Indonesian Civil code policy (Widaningsih, 2019), which is Numbered Article 1338(3). This article stipulates those agreements should be implemented in a reasonable and equitable manner. In Article 1338(3) it is emphasized that all contracts should be executed in good faith by both parties.

Even though good faith as a legal principle required in the execution of contracts is an important foundation of any contract (Horwitz, 1974), it still creates several controversies or challenges (Khairandy, 2012). According to Khairandy (2012) there are mainly three questions raised when it comes to discussing contracts developed with the assumption that they are based on good faith: firstly, there is the notion of good faith as not being universal; secondly, the benchmark (i.e., legal test) used by the judge to assess whether there is good faith or not in the contract; and finally, understanding the function of good faith in the execution of a contract.

The present paper has been written based on normative research (Shelton, 2006); the authors conducted a desk-top literature review by analysing data from the different sources (Algozzine, Browder, Karvonen, Test and Wood, 2001) basically, on contracts. The paper examined the varying concepts regarding good faith and rightful legal mind-set in regard to handling contracts. This stand is supported by is supported the 1914 argument of George Washington (1914), who argues that good faith and rightful thinking should be applied, in the execution of contracts, within varying transactions. The argument of George Washington (1914) led to an investigation of records probably with the intension of understanding how good faith works in regard to contracts.

The paper further looks at the good faith principle in the perspective of the Indonesia policies and regulations regarding contracts, conducted between parties. Contracts are either private-that is individual to individual contract and or public investment contracts (Widaningsih, 2019), between individuals and big firms or either firm to firm contracts. Basing on this, specifically, the current paper aims to contribute to the understanding of contracts as a basis for the smooth running of a cooperation between individuals, parties and or entities intending to have

cooperation based on legal leaning in a business transaction within Indonesia. The authors expect that through this writing, it can help to strengthen and also emphasize that by having a rightful thinking legal mind-set, is a strong foundation for business cooperation to do business in a developing country

1. Conceptual Review

The implementation of contracts in Indonesia depends on the type of contract, if it is private contract, it happens to be conducted faster, but when it comes to public contracts, there performance is challenging because there are delays in costs and budgetary. Such delays affect a project or transaction's completion and or realization. Khairandy (2012) is of the view that although there is good faith in the execution of most contracts, there are several challenges affecting the smooth implementation of these contracts within the country. Research shows that funding issues, politics and the economic environment (Haqq and Gultom, 2021) are the most influential factors that affect the implementation of contracts in Indonesia.

1.1. Contract

In legal terms, a contract refers to legally sanctioned understanding between parties or entities that establishes, stipulates and governs agreed upon rights and obligations (Parks, 1927). According to the Rule of Law Education Centre (2018) for a contract to be an essential understanding among parties or entities, it should be established based on a number of legal components, which include: making an offer by one entity, accepting the offer by another entity. there should be the intention to have a legal cooperation by both entities or parties involved and lastly, the parties make some contemplations regarding the contract, this involves costs and tangible benefits. The contract acts as a basis for determining a case when it comes to court proceedings, of course if one of the parties fails to fulfill the agreed upon points mentioned by the agreement. However, taking issues to courts of law is always the last option, since a contract is mostly, carried out based on good faith between parties. The contract law has been constructed based on the principle of honoring agreements (Wehberg, 1959). Wehberg (1959) is of the view that the principle of honoring contracts has roots in religion that is the reason, it promotes good faith. For instance, for the case of Muslims, they must honor their made promises or commitments (Wehberg, 1959).

1.2. The Principle of Good Faith in Laws

The principle of good faith is an agreed upon principle in contract law, required to be executed by the contracting parties based on good faith (Eisenberg, 2018). Studies have revealed that even though contracts are designed based on good faith, there several controversies involved in there implementation (Khairandy, 2012; Trakman and Sharma, 2014; Eisenberg, 2018). A study, in

majority Muslim countries, reveals confusing outcomes regarding the use of most rights and objectives established in relation to contracts, the studies emphasize and encourages the application of the principle of good faith, which lays down substantiated and specified measures (Fayyad, 2014). This discovery is supported by Eisenberg (2018) who argues that having faith in the implementation of the principle of good faith in executing contracts, is the best option, since it is based on sound standards of fair transactions.

To further emphasize the importance of good faith in dealings, Collins (1994) suggests that for markets to perform to the people's expectations, there should be harmoniously leveled rules to follow. Because without established rules built based on the principle of good faith, there can be unfair terms regarding consumer protection (Collins, 1994). In relation to this view Wood (2017) mentions that since consumer service delivery is the sole outcome and intention of production, there should be protection of both parties in any dealing. This means that Wood (2017) very much understands the importance of good faith by all parties and or entities involved in a Transaction.

Though the concept of good faith is promoted and widely used in law, it is still considered an abstract thing, so it is considered difficult to develop and execute in concrete terms (Muliarta, 2022). The parties involved should therefore be realistic and understand that the already attached values and norms established are a strong foundation that can applied in a real-life situation. This implies that structure of the law of contracts recognizes the comprehension and practical implementation of a contract as legally binding agreement among entities or parties, intending to cooperate in a dealing (Rule of Law Education Centre, 2018).

1.3. Private Contracts

A private contract is mainly a contract between two or more entities (Dickinson, 2007), it may involve many things which range from individual to communal ownership (Willems, Arseneau, Jean, Schleuning and van Schaik, 2015), so it may involve only two people or more groups of people. Merrill (1987) observes that the modern interpretation of laws related to clauses regarding contracts, led to a dual way of the legal categorization of contracts as either private or public. Indonesia being a developing country characterized with continuously changing laws, it has developed two categorizes of private contracts, they are both domestic contracts and international contracts (Amalia, Yunita and Dian, 2018).

In addition to categorization of contracts, the Indonesian regulations also accept freedom of contracts (Rahmansyah, 2018). This is mainly in private contracts. The freedom of contract concept is supported by Civil code Article 1338 (3) which stipulates that contracting parties have liberty to put whatever points they need in an agreement (Rahmansyah, 2018), but knowing that the final judgement will always be held based on the Indonesian Laws. This implies that whoever is entering an agreement should ensure the adherence to national regulations, established within the constitution of the country.

Some researchers may argue the basis of private law may be embedded with the foundations of private law (Graziadei, 2010). In the view of Graziadei (2010) it is the private law that establishes fair views regarding the concept of private ownership, hence leading to private contracts between individuals and or institutions.

1.4. Public Contracts

It has been noted that because of the Asian crisis, which swept across Asian countries (Engel, 2012), including Indonesia, the Indonesian government decided to undergo reforms (Omori, 2014), to transform and power the economy. In the process, there was need to reestablish and redesign regulations (Lothian, 2017). Because there was need to engage legal experts and legal framework (Roy, 2016), that could later lead to the contribution of business players from the private sector in the form of public-private partnership (OECD, 2012). According to OECD (2012) report, setting regulations and operating under the umbrella of the institution, lays a foundation for the participation of the private sector in public projects, such as construction, finance and other such sectors. This calls for signing of private public contracts.

Public contracts, are needed basically when it comes to the implementation of Public-Private Partnerships (PPPs) cooperation, because it intends to provide services to the public in the areas of public infrastructure assets and communal social assets (OECD, 2012) provision. Public contracts are mainly for creating a fairly competitive, free and a regulated environment for business to thrive among parties (Custos and Reitz, 2010). For the USA, the term public private partnership which is the basis for public contracts, came into use in the late 1990s and became widely used in 2000 (Custos and Reitz, 2010). According to Custos and Reitz (2010) public private partnership was used to refer to government contracts, where the private sector is given more chances to participate.

Indonesia's Public Private Partnership (which is abbreviated as "PPP") is much more about the provision of public infrastructure, in cooperation with private parties or entities (Smartlegal.id, 2019). According to Smartlegal.id (2019) back in 2005 public private partnership was first regulated by the Presidential Regulation Number 67 of 2005 regarding Public Private Partnership and later on revised basing on the issuance of the ratified Presidential Decree No. 38 of 2015 also about public private partnership cooperation. Such initiatives have been made to ensure a smooth cooperation between partners in business.

1.5. Right Thinking Legal Mind-set

According to Read (1986) the perspective under which individuals think most likely influences the way each person acts. However, in a grown-up mindset, people start to see things differently, and they believe that for change to occur, they must be serious, committed and be able to work depending on targets, this

helps to set in the legal way of viewing things for life accomplishment (Crisp, 2022). To understand the importance of a right thing legal mindset, Pike and Lickona, T. (2021) advise people to be careful of the way they think, because thoughts can become words and of course words may turn into action and before one knows it, they can become habits. Of course, it might be difficult to fight a habit which at the end may turn into character (Murray, 2015), which shapes personality.

This means that having a rightful thinking legal mindset is very important in contracts, because people know the importance of good faith in dealings. A Legal mindset very well understand normative statements which are based on norm and often describes what might take place, being contra to statements based on facts, they describe what has happened and might most likely happen (Read, 1986). In other words, normative statements tend to anticipate what may happen or take place.

Laird, Morris, Rynkiewicz, Tashea and Ward, (2018) liken a legal mindset to a construction site, where each employee should be willing to think outside the box, to fix the building. It believed that the world is changing, hence affecting law. According to Birnhack, Toch and Hadar (2014) in their practice to invent legal privacy mindset in technology, they indirectly encourage people to have a right legal mindset when it comes to technology consumption because, people are either directly or indirectly affected by the said technologies, hence calling for understanding of legal processes and issues, which of course needs legal mind for all stakeholders.

2. Methodology

In this paper, the authors examine two legal concepts that is the rightful legal mind-set towards contracts and contract implementation, which is categorized as either private contract or public contract. The concept of good faith and rightful legal mindset have also been explained. The research is basically a review one, which analyses the varying online data and documents (Widaningsih, 2019) regarding a rightful thinking legal mind-set in relation to the signing of contracts between parties and the implementation of such contracts from an Indonesian perspective.

To be specific, the study applied a normative research method in the effort to examine the implementation of the concept of good faith and rightful legal mindset in business transactions among parties or entities in Indonesia. The normative research method is used in legal studies as a proven scientific research methodology, because it seeks to establish the truth regarding a logic legal framework constructed based on normative perspective (Muliarta, 2022).

To obtain the relevant data, the author borrowed the approach from Muliarta (2022) who mentions that collecting data for a study of this kind may, include gather legal material from the respective offices and databases. Then a literature analysis is conducted on the obtained information of course regarding contracts. Finally, a qualitative descriptive literature examination is conducted on the gathered legal material.

3. Results And Discussions

The study aimed to contribute the understanding of contracts as a basis for the smooth running of a cooperation between individuals, parties and or entities intending to have cooperation based on legal leaning in a business transaction. The paper strengthens and proposes that having a rightful thinking legal mind-set can be a strong foundation for business cooperation in Indonesia as one example of the developing countries.

The concepts examined in the paper consist of contracts, the principle of good faith, private contracts, public contracts and legal mindset. The study established that the principle of good faith in the implementation of contracts in Indonesia is accepted and institutionalized when it comes to government-private partnership. However, it has been argued that the concept is still implemented in its rudimentally way like it is described in the Roman laws, its has just been adapted by the local laws and legal experts, hence penetrating Indonesia's civil law (Khairandy, 2008).

Contract regulation is now accepted by the Indonesian legal system (Hairudinor and Barkatullah, 2020). It adheres to common law (Khairandy, 2008) and it is in line with Article 1338(3) which emphasized that all contracts should be executed in good faith by both parties based on the regulations of the land (Smartlegal.id, 2019). This is regarded as a fundament adherence to existing principles, placed as the most strategic way influencing the increasing signing of contracts among parties between local business owners and the international investors.

Indonesia encourages vividly, the importance of good faith, to the extent that government promotes freedom of contracts. However, in the process of execution of such contracts, the transacting parties are encouraged to avoid controversies and advised to try to minimize challenges which could lead to failure or court proceedings. On this note, Khairandy (2008) suggests that avoid controversies and avoid the unwanted challenges, the is need to answer the question whether good faith principles are followed, evaluate contract to establish any loopholes to good faith, and also clarify whether the good faith trust principle can be followed with ease.

By using freedom contracts approach development, there is a challenge when it comes to implementing contracts based traditional laws. Unlike in civil law courts which have an obligation to interpret contracts based on the content of the contract to determine the intentions of the parties, the contracts developed based on customary norms are executed differently. This is common in villages and small towns of Indonesia. In such a situation principle of good faith may still the values and norms sett by existing society. Therefore, there are domestic contracts and international contracts. Basing on this, it is therefore, very important to note that parties are not only bound by the terms of the agreement, but also by all terms based on norms and values of the society.

This implies that good faith does not only refer to the cooperation between parties, but must also entail the values that develop and evolve in society, because good faith is part of society itself. This good faith ultimately reflects the community's standards of justice. With such an interpretation, it makes the standard of good faith a universal social force that regulates the social relations among people (Murray, 2015). This means that each citizen has the obligation to act in good faith towards others (Rahmansyah, 2018).

It has been established that after the economic crisis in effort to facilitate the growth of the commercial sector, the Indonesian government laid out a working framework, which involved rules and regulations. In the process businesses called for a regulation of working cooperation to ensure security of their investments and safe in dealing with one another. Their focus was on government establishing policies and regulations regarding fair exchange of commercial transactions between parties or entities which then manifested into a balanced distribution of profits and responsibilities. This makes the principle of good faith become a core in business law within indonesia.

It has been confirmed that the principle of good faith in the execution of contracts is based on the ideal situation under which parties establish legal relationships, where they both understand the conditions set within the contract and agree entirely. This means that the attitude associated with the character of reciprocal trust and consideration in accordance with the objectives of legal norms must be taken seriously (Khairandy, 2008). In this case, the moral components and postulates of society are embedded within the concept of good faith as the foundation for actions which require respect for the good of law.

4. Conclusions And Implications

Based on the views presented in the paper it is clear that establishing the legal framework which guides contract intends to set a fair environment for business people and contractors both from the private sector and government in a situation where by the parties involved are required to carry out their obligations, especially those born from contracts developed in good faith. The existence of a contract helps to shape the behavior of the parties in carrying out the agreement whose basis is the unwritten contract with objective to be fulfilled.

These provisions established in the contract between parties involved binds them as people in a cooperation, conducting business agreed upon in good faith, understanding all legal implications. From the engagement (which also regulates the engagement that arises from the contract), the parties to the contract are not only bound by what they agreed to, but also to the existing regulations set within the constitution of the country as the supreme law of the land. From the above observation, it is therefore concluded that the current trend in various legal systems is to link good faith in the implementation of contracts with rationality and humanity among individuals. So, this is an objective good faith.

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