



Research Article



'Good Faith' in Land Transaction: A Comparative Analysis of the USA and Netherlands Law

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Abstract: The lack of uniformity among judges in interpreting the criteria for buyers' good faith in land sale and purchase cases results in less favorable outcomes for buyers. This study aims to compare the regulations and implementations of the principle of good faith in land transactions in the United States, the Netherlands and Indonesia. Utilizing a statutory and conceptual approach, supplemented by comparative analysis, this research examines the relevant laws and concepts, including contractual rules and regulations governing sales and purchases. The findings indicate that the legal system significantly influences how countries regulate the principle of good faith—either concretely or abstractly. This influence is closely tied to the concepts of written legal sources, jurisprudence, and the practical application of the principle in statutory regulations. Generally, Indonesia, like other countries, faces challenges in implementing the principle of good faith, particularly for buyers, due to the lack of a definitive benchmark to assess whether agreements are executed in good faith and fairness. To address this issue, the regulation of good faith and its criteria should be clearly articulated in written laws. Ensuring that the principle of good faith is applied throughout the entire land buying and selling process—from pre-contractual stages to contract execution—is crucial for providing adequate protection for buyers acting in good faith.

Keywords: Contract; Good Faith; Land Transaction



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INTRODUCTION

The types of disputes are increasingly complex, along with the increasing population, but not for the amount of land availability. Land disputes arise, among others, due to land sale and purchase disputes, where the original land owner must fight against a good-faith buyer to fight for ownership rights or land rights. Theoretically, a land sale and purchase dispute between the original owner and the good-faith buyer can be assumed as a dispute between the doctrine of "*nemo plus iuris transferre (ad alium) potest quam ipse habet*." It means that a person cannot transfer something more than what he owns, which defends the original owner's lawsuit against the principle of "*bona fides*," namely the principle of good faith that protects good-faith buyers. The legal position of the two parties in the case is a dilemma because it places two parties who are innocent to face each other in court and ask to win due to the actions of the other party (the seller), who may have bad

intentions.¹ In case the argument of the buyer as a “good faith buyer” is accepted, then the good faith buyer will be considered as the (new) owner, even though the sale was carried out by a party who (should) not be authorized. On the other hand, if the argument of the “good faith buyer” cannot be justified, then the transfer of land rights will be considered invalid, and the original owner will remain the legal owner.²

Good faith is the awareness that one can legitimately obtain ownership of something free from fraud and other crimes. In transferring ownership rights, good faith is the basis for accepting goods from a person who can transfer them, and there is no fraud or other crime in the act or contract.³ A buyer in good faith is a buyer who is completely unaware that there is dealing with someone who is not the owner. Someone who buys goods with complete confidence that the seller owns the goods being sold. A buyer in good faith is an honest person who is unaware of the defects inherent in the goods that be bought.⁴ However, law enforcement by judges in court regarding good faith buyers who are in dispute with the original owner is still a legal problem. The absence of uniformity in the meaning/interpretation of judges and comprehensive rules has caused conflict in Indonesia. The development of the interpretation of “good faith buyers” in judicial practice in Indonesia is reflected in the variety of court decisions in the General Court environment, namely, the District Court (PN), the High Court (PT), and the Supreme Court (MA), identified into three categories: First, the buyer will be considered to be in good faith when the buyer purchases land rights as the object of the dispute that has been certified before the Land Deed Making Officer (PPAT), as per the legal principle in Supreme Court Decision No. 2318 K/Pdt/2009, Supreme Court Decision No. 2416 K/Pdt/2009, and Supreme Court Decision No. 176 K/Pdt/2011. Second, the buyer is in good faith when the sale and purchase of land can be legally proven through authentic evidence regarding previous land ownership, as per the legal principle in Supreme Court Decision No. 765 PK/Pdt/2009, Supreme Court Decision No. 710 PK/Pdt/2011, Supreme Court Decision No. 561 K/Pdt/2012, and Supreme Court Decision No. 1090 K/Pdt/2013. Third, the buyer acts in good faith through auction, namely when an auction report is marked with the verdict that can be executed, as per the legal principle in Supreme Court Decision No. 2609 K/Pdt/2003.

Looking at the regulations for land sale and purchase in several developed countries, Indonesia has several differences. Different legal systems also influence the enforcement of the principle of good faith in various countries. For example, the United States only generally regulates the principle of good faith in its civil code. In other words, the principle of good faith is not regulated for implementing land sale and purchase contracts (specifically). For example, America regulates how the principle of good faith is regulated, interpreted, and implemented, but only in

¹ Woo Pei Yee, ‘Protecting Parties’ Reasonable Expectations: A General Principle of Good Faith’, *Oxford University Commonwealth Law Journal*, 1.2 (2001), 195–229 <https://doi.org/10.1080/14729342.2001.11421393>

² Talya Uçaryılmaz, ‘The Principle of Good Faith in Public International Law’, *Estudios de Deusto*, 68.1 (2020), 43–59 [https://doi.org/10.18543/ed-68\(1\)-2020pp43-59](https://doi.org/10.18543/ed-68(1)-2020pp43-59)

³ Martijn W. Hesselink, ‘The Principles Of European Contract Law: Some Choices Made By The Lando Commission’, *Global Jurist Frontiers*, 1.1 (2001) <https://doi.org/10.2202/1535-1653.1011>

⁴ Zhong Xing Tan, ‘The Proportionality Puzzle in Contract Law: A Challenge for Private Law Theory?’, *Canadian Journal of Law & Jurisprudence*, 33.1 (2020), 215–44 <https://doi.org/10.1017/cjlj.2019.36>

commercial contracts, not in land sale and purchase transactions. The good thing is, America is a common law country so that the application of the principle of good faith in land sale and purchase transactions can be referred to judges' decisions. Meanwhile, the Netherlands regulates it in general law but provides more rules on how this good faith is interpreted in sale and purchase transactions. It is not explicitly regulated in land sale and purchase but in more general sale and purchase. However, at least the judge knows what the law means by good faith, so it can be a limitation of interpretation.⁵

This article compares the regulations and implementations of the principle of good faith in land sales in the United States and the Netherlands with the rules in Indonesia. The rationality of choosing a comparative country in regulating good faith in the sale and purchase of land rights is based on the legal system applied and the substance of the regulations that have been enacted and implemented. This basis is then explicitly linked to how the principle regulation affects the judge's ratio decidendi on land sales disputes. Good faith in implementing contracts is a legal institution (*rechtsfiguur*) originating from Roman law, which was later absorbed by civil law, such as in Indonesia and the Netherlands. However, the principle of good faith has recently been applied to contract law in countries that adhere to common law, such as the United States. The United States considers it the most essential contract principle and binds the parties to the agreement.⁶

Indonesia tends to adopt a civil law system, in which statutory regulations are the legal basis for judges to decide a case.⁷ However, Indonesia still uses judges' decisions as the basis for deciding a case, even though they are not binding. Compared with the Netherlands as a civil law country and the United States as a common law country, the three countries only generally regulate the principle of good faith in their civil code. The advantage for common law countries is that they can freely apply the principle of good faith in land sale and purchase transactions, which can be referred to in a judge's decisions, but this is not the case with civil law countries. This is understandable, considering jurisprudence is a non-binding source of law in Indonesia.⁸ Different legal systems also relate to selecting land registration system methods in the three countries used for comparison. Positive and negative land registrations have other impacts that affect the implementation of the principle of good faith in land sales and purchases. Therefore, the article was chosen for comparison with the Netherlands, the United States, and the Netherlands. In previous research on land issues, Krishnapriya S. 2020 said there were many land registration problems. It was vulnerable to fraud by individuals who targeted the community and

⁵ Caroline Cauffman, 'The Principle of Proportionality and European Contract Law', *SSRN Electronic Journal*, 2013 <https://doi.org/10.2139/ssrn.2204984>

⁶ Daniel Markovits, 'Good Faith as Contract's Core Value', in *European Contract Law and the Creation of Norms* (Intersentia, 2021), pp. 47–72 <https://doi.org/10.1017/9781839701412.002>

⁷ Choky Ramadhan, 'Konvergensi Civil Law Dan Common Law Di Indonesia Dalam Penemuan Dan Pembentukan Hukum', *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada*, 30.2 (2018), 213 <https://doi.org/10.22146/jmh.31169>

⁸ Oly Viana Agustine, 'Keberlakuan Yurisprudensi Pada Kewenangan Pengujian Undang-Undang Dalam Putusan Mahkamah Konstitusi', *Jurnal Konstitusi*, 15.3 (2018), 642 <https://doi.org/10.31078/jk1539>

even the government. The implementation of land registration using blockchain offers a 99% reduction in manual effort spent on recording.⁹

In line with Krishnapriya, Shreyas Dubey (2023) discusses the problem of overlapping, incorrect, or unsynchronized land registration, which can be overcome by using blockchain for the land registration system.¹⁰ Registration problems have implications for the issuance of land ownership certificates. Therefore, there is an obligation of good faith from the transacting parties (buyers) so that if problems arise, there is protection for buyers with good faith. Daniel Markovits (2021) wrote a book discussing the obligation of good faith in implementing general contract law. The obligation of good faith in implementation does not add to the obligations stipulated by the contract or change the substantive provisions of the actual agreement to suit any ideals. Good faith in contract law is also generally interpreted as respecting freedom of contract and establishing contractual relationships.¹¹ In previous research on land sales and purchases conducted by Zaldi Putra (2020), it was explained that dual certificates are one of the problems in land law in Indonesia, which is closely related to legal protection in the land sales and purchase system. The issuance of dual certificates causes land buyers to lose the certificate of ownership purchased by another party as a buyer in good faith. Thus, buyers who make sales and purchases follow the correct legal procedures. The study discussed dual certificates a lot, while this article highlights the rules of good faith in various countries and how they are interpreted in court.¹²

The problem of legal certainty and protection for buyers in good faith must be solved through the construction of comprehensive regulations. Without a strong legal basis or regulation, in the end, the position of good faith in contract law is ambiguous and difficult to enforce in court. The problem of the absence of a uniform definition of good faith and the unclear nature of how this obligation is included in the contract raises additional issues regarding exceptions.¹³ This uncertainty can be seen as a weakness in a legal system that uses a bottom-up legal reasoning method. The disadvantage is that different courts have different views on a doctrine because the highest court does not clarify the doctrine. Legal uncertainty will undoubtedly arise from the differences in the perspectives of these courts. Based on this, it is worth considering whether similar problems occur in a legal system without precedent, namely, a system that uses a top-down thinking method. Another problem occurs because good faith is considered a principle or doctrine, so it does not need to be regulated in a statutory regulation. Its abstract nature is left so that law enforcers have the freedom to interpret. This is in line with Sudikno Mertokusumo's opinion that legal principles have an abstract nature and are not stated in the form of concrete

⁹ Krishnapriya S and Greeshma Sarath, 'Securing Land Registration Using Blockchain', *Procedia Computer Science*, 171 (2020), 1708–15 <https://doi.org/10.1016/j.procs.2020.04.183>

¹⁰ Shreyas Dubey and others, 'Secure Land Registration Management via Ethereum Blockchain', in *2023 International Conference on Intelligent Data Communication Technologies and Internet of Things (IDCIoT)* (IEEE, 2023), pp. 185–91 <https://doi.org/10.1109/IDCIoT56793.2023.10053494>

¹¹ Markovits.

¹² Zaldi Pratama Bagus Putra, 'The Basics of Good Faith and Good Intention in Land Purchase System in Indonesia', *Journal of Law and Legal Reform*, 1.4 (2020) <https://doi.org/10.15294/jllr.v1i4.39782>

¹³ Hans-Bernd Schhfer and HHseyin Can Aksoy, 'Good Faith', *SSRN Electronic Journal*, 2014 <https://doi.org/10.2139/ssrn.2495312>

regulations but are generally dynamic. Principles develop following legal rules. However, legal rules will change following the development of society. This means that legal principles will be affected by time. Legal principles are generally not stated directly in regulations but function to resolve conflicts in rules and to see the validity of regulations hierarchically.¹⁴ Legal principles are not concrete legal norms but are the strongest and broadest foundation for the birth of applicable legal regulations. Legal principles are the basics or directions in the formation of positive law.¹⁵

Meanwhile, in the debate between Esser and Dworkin. Esser states that a principle implies greater freedom for the judge because he is the one who must form the principles. Esser sees principles as justification for decisions. At the same time, Dworkin argues that principles limit judicial discretion. Dworkin sees them as instructive (legally binding guidelines). In addition, Esser typically excludes ethics from the analysis. Still, Dworkin considers principles to be ethical principles, whose presence in the legal order is evidence of the untenability of the positivistic division between law and morality. Furthermore, according to Esser, legal principles are only created through their use in judicial decision-making. Legal principles are valid because they are just.¹⁶ Esser and Dworkin debate whether a principle gives judges more or less discretion; the answer depends on the moment of analysis and whether the principle is positivised. When dealing with positive (or 'positivised') principles, that is, when found in normative texts (such as statutes), the moment of analysis makes no difference. Here, interpretive discretion is more significant than rules because higher general principles allow more room for interpretation.¹⁷

The concretization of principles is still a matter of debate among scholars, but it can be mediated by not necessarily regulating the principles in regulations.¹⁸ However, the indicators and definitions of the scope are essential to complete so that they are not interpreted haphazardly. Moreover, in countries that adopt civil law rather than common law, written rules are very influential in implementing a provision. Based on the issue of buyers in good faith, the views of experts, and previous research, this research is essential. The comparison of countries is intended to provide another picture of the regulation and enforcement of cases of buyers in good faith in land sale and purchase transactions.

METHOD

This research is normative research using a statutory and conceptual approach. Data sources were collected by analyzing laws related to sales and purchase contracts in general and land sales and purchases. While conceptually, this study analyzes the

¹⁴ Ben Fernandez, 'Transactional Drafting: Introduction to Contract Drafting and Transactional Practice', *SSRN Electronic Journal*, 2022 <https://doi.org/10.2139/ssrn.4294001>

¹⁵ Yong Wook Cheong, 'Law, Theory, and Principle: Confusion in the Normative Meaning and Actual Usage', *Journal of The Korean Association For Research In Science Education*, 34.5 (2014), 459–68 <https://doi.org/10.14697/jkase.2014.34.5.0459>

¹⁶ 'Principles as Norms Logically Distinct from Rules?', in *European Constitutional Language* (Cambridge University Press, 2016), pp. 368–86 <https://doi.org/10.1017/CBO9781316442678.017>

¹⁷ Ralf Poscher, 'The Principles Theory How Many Theories and What Is Their Merit?', in *Institutionalized Reason The Jurisprudence of Robert Alexy* (Oxford University Press, 2012), pp. 218–47 <https://doi.org/10.1093/acprof:oso/9780199582068.003.0010>

¹⁸ I Dewa Gede Atmadja and Ketut Adi Wirawan, 'Legal Principles in Legal System', 2023, pp. 583–90 https://doi.org/10.2991/978-2-38476-180-7_62



concept and principles of good faith. The comparative method compares the regulation¹⁹ of the doctrine of good faith in land sales and purchases in several countries, such as the Netherlands and the United States. This comparison is based on the differences in the legal systems of each country. This legal system is closely related to the concepts of written legal sources and the concept of jurisprudence, as well as the meaning of the concretization of principles in statutory regulation. This research was analyzed and concluded deductively to form a new prescription to determine the regulation and use of the principle of good faith in land buying and selling transactions, which can guarantee protection for buyers in good faith.

RESULT AND DISCUSSION

The Significance of Good Faith Principle in Land Purchase Transactions in Dutch Law

In the early 19th century, during the French annexation, the system of recording deeds of conveyance, *cadastre*, and land registration was introduced as a basis for levying property taxes. The Dutch recording system, therefore, has similarities with the French deed system. The deeds of conveyance are recorded in the public register under a unique document identification. In the Netherlands, the judge decides whether or by whom the right was acquired based on the entry in the public register, the validity of the contract, and the competence towards the delivery.²⁰ Kadaster Valt onder Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, in Land Transaction and Registration Process in The Netherlands, states that because the registration system is public, everyone can judge for themselves through consultation who is entitled to land ownership. According to the initial arrangement, the entire series of deeds that have ever been recorded must be checked to allow for land ownership rights. The last deed cannot provide ownership rights if defects are related to previous deeds or acquisitions before the earlier acquisition. However, only the previous deed has been investigated to trace the last owner's name. Furthermore, in good faith, it is also used to trust the validity of the previous agreement (Article 3:25 Dutch Civil Code). An authorized notary guarantees competence for this land registration. The original land registration records only include the names of people entitled to pay taxes. However, this inclusion as a taxpayer does not provide any rights. To facilitate updating land registration, it is stipulated that deeds recorded in the general register must contain the plot number used in land registration. It was then decided that the same official should be responsible for the land and public registers. This official was called "*hypotheekbewaarder*" or "mortgage keeper" in English. The responsibilities of this official illustrate the integration of land and public registration. This integration was expanded over the years. Mentioning the entitled person in the cadastral registration thus acquired a meaning beyond that of a mere taxpayer. Therefore, the Dutch registration is similar to the registration of rights.

¹⁹ Ketut Sukewati and others, 'Industrialization of Election Infringement in Simultaneous Elections: Lessons from Sweden', *Journal of Human Rights, Culture and Legal System*, 4.2 (2024), 477–509 <https://doi.org/https://doi.org/10.53955/jhcls.v4i2.170>

²⁰ Willem Wakker, Paul van der Molen, and Christiaan Lemmen, 'Land Registration and Cadastre in the Netherlands, and the Role of Cadastral Boundaries: The Application of GPS Technology in the Survey of Cadastral Boundaries', *Journal of Geospatial Engineering*, 5 (2003), 3–10. See Jan Veuger, 'Dutch Blockchain, Real Estate and Land Registration', *Journal of Property, Planning and Environmental Law*, 12.2 (2020), 93–108 <https://doi.org/10.1108/JPEL-11-2019-0053>

All payments pass through the hands of the notary, who keeps the money under the title from before the signing of the deed of transfer until the registration of the deed, and the registry has confirmed that no seizure has been made by third parties between the signing of the deed and the registration. If the parties agree, the payment will be postponed until after ownership has been transferred. In practice, the seller's position will be guaranteed by a clause that the sale will be dissolved if the purchase price has not been paid before a specific time. As a result of the causal system, ownership will revert to the seller. The buyer must pay a sum (usually 10%) to show good faith. This money is deposited into the notary's office account. In some instances of breach of contract, the injured party can keep this money. The rest must be in the hands of the notary at the time of signing. Likewise, the bank (or other creditor) will deposit the loan money into the notary's account. Insurance for the risks inherent in the payment and transfer of property is not required. It can be implied in the notary's function (and in his fees).

In the Dutch Civil Code, the regulation of land rights is based on the principle of *numerus clausus*.²¹ This principle ensures certainty regarding the rights that can be held about something. It prevents the owner from being hampered in his ability to trade in the property by unnecessary encumbrances. The *numerus clausus* principle is thus a restriction on the autonomy of the right holder. Adherence to the *numerus clausus* principle in Dutch property law, therefore, lends credence to the Dutch understanding of legality. Since only the legislature can introduce new types of rights and adjust the content, the legislature is responsible for adjusting the system when changes in modern practice so demand.²² The Dutch Civil Code follows the ancient Roman distinction between personal rights only applicable against the counterparty to a contract and absolute rights generally enforceable. There are "rights in rem" and "rights in persona," that is, rights to property as opposed to personal rights to enforce obligations. In contrast to personal rights, property rights are absolute to the extent that they are expressly recognized in the Dutch Civil Code. The most common absolute rights to real estate are ownership and limited rights to leases, building rights, easements, and mortgages. Common personal rights in real estate are rents, agricultural leases, beneficial ownership, and rights arising from sale contracts. Personal rights cannot be asserted against third parties; however, personal rights can also have absolute characteristics.

The number of these "rights in rem" is limited. Ownership or ownership rights are "rights in rem" but also some encumbrances in rem rights. Mortgages can be divided into independent rights and additional rights. Rights in rem are usufruct rights, lease rights, and building ownership. Accessory rights are mortgages and easements. Mortgages are accessories in claims against a particular person. If the claim is paid off or the loan term is renewed, the mortgage ends, and a new mortgage must be

²¹ B. Akkermans, 'The Principle of Numerus Clausus in European Property Law' (Maastricht University, 2008) <<https://doi.org/10.26481/dis.20081017ba>>. Also see Magdalena Ossowska, 'The Numerus Clausus Issue in Property Law – European Private Law and the Polish Perspective', *Studia Iuridica*, 82 (2020), 211–26 <https://doi.org/10.5604/01.3001.0013.9788>

²² Leon Verstappen and Hanri Mostert, 'Practical Approaches to the Numerus Clausus of Land Rights: How Legal Professionals in South Africa and the Netherlands Deal with Certainty and Flexibility in Property Law', *Modern Studies in Property Law*, 8 (2014), 351–71 <https://doi.org/10.2139/ssrn.2572838>

established. Easements are accessories in the ownership of a specific plot of land. Dutch ownership also regulates so-called apartment ownership. This right provides joint ownership and the right to use certain building parts. The rights to the land mentioned above can be mentioned as follows: *Eigendom* (ownership), *Erfpacht* (building rent: *emphytheusis*), *Opstal* (building rent: superficies), *Vruchtgebruik* (usage of the usufructuary), *Recht van gebruik en bewoning* (*usus et habitatio*) *Appartementsrecht* (apartment ownership), *Mandeligheid* (joint ownership), *Erfdienstbaarheden* (servitude, easement), and *Hypotheek* (mortgage). However, for most of these rights, only several mandatory regulations are included in civil law, making it possible to create many variations through contracts. The type of rights of a valuable object (land) certainly influences its economic value. Valuable rights give more power to the owner, which increases its value. If land rights give less power, its value will be lower. In Dutch law, a long leasehold (*'erfpacht'*) of a house provides its owner (leaseholder) less power and fewer possibilities than full ownership (*'eigendom'*) of the same house. The ownership right represents, for this reason, a higher value than a long lease, especially if the long lease is established for a limited period.

The concept of ownership in Dutch law is generally defined as the most comprehensive property right a person, the 'owner' has for (in) something. The owner is free to use the thing to the exclusion of others, provided that the owner respects the rights and rights of others to the thing and obeys restrictions based on written and unwritten legal rules. In addition, the owner of the thing becomes the owner of the separated fruits and benefits unless someone else has the right to it. Ownership of immovable objects, one of which is land ownership, is also a factor. The Scope of the right of ownership of land is defined in Article 5:20. This article explains that land ownership consists of (as long as the law does not specify otherwise) topsoil, a layer of soil below the topsoil, groundwater that appears to the surface naturally or through installations; water above the ground unless it has an open connection with the water covering the land of another person; buildings and structures that are permanently attached to the land, either directly or through connections with other buildings or constructions, unless they are part of the immovable property of another person; plants (vegetation) and trees related to the land. However, contrary to paragraph 1, the ownership of the network, which is made up of one or more cables or pipes used to transport fixed, liquid, or gaseous substances, energy, or information, which is or will be installed on above or on land owned by another person belongs to the person who legally installed it or his legal successor. Moreover, the regulation of the land and the use of the principle of good faith in the Netherlands is regulated in the Dutch Civil Code Book 3 Property Law in General, Dutch Civil Code Book 5 Real Property Rights, and the New Netherlands Civil Code Patrimonial Law.

Meanwhile, the principles used in regulating ownership rights in the Netherlands are in Article 3:11, Good Faith. The principle of good faith is explained as a person not acting in 'good faith' as a condition for an unavoidable legal consequence if he knows or, in reasonable circumstances, should have known the facts or rights from which his excellent faith depends. The impossibility of conducting an investigation does not prevent a person with good reasons to doubt from being considered as

someone who should have known the relevant facts or rights. It is stipulated that A person has not cited in good faith as a condition for a specific legal effect if he knew or, in the circumstances, reasonably ought to have known the facts or rights from which his excellent faith depends. The impossibility of conducting an inquiry does not prevent a person who had good reason to doubt being regarded as someone who ought to have known the relevant facts or rights.

Article 3:12 The principle of reasonableness and fairness. The principle of reasonableness and fairness is essential in determining what the principle of reasonableness and fairness demands in a given situation. The parties must consider the generally accepted legal principles, the fundamental conceptions of law in the Netherlands, and the relevant social and personal interests involved in the given situation. It is stated that to determine what the principle of reasonableness and fairness demands in a specific problem, one has to consider the generally accepted legal principles, the fundamental conceptions of law in the Netherlands, and the relevant social and personal interests involved in the given situation. Article 3:13, the principle of abuse of rights is explained into three parts, namely if: 1. A person who has the right may not use the power given to him to the extent that this means that he abuses the power; 2. A right can be abused, among others, if the right is used for no other purpose than to harm others or for a purpose other than what the right was given for or if it is used, considering the difference in interests served by its implementation and the interests harmed by it, for all reasons must be stopped or postponed. 3. The nature of the right can imply that the right cannot be abused. Article 3:14, the principle of not violating public law, explains that a person's rights or powers based on civil law may not be exercised in violation of written or unwritten rules of public law. A right or power that someone has by civil law may not be exercised in defiance of written or unwritten rules of public law.²³

Good faith is often said to be related to moral standards. On the one hand, it is said to be the moral standard itself, the ethical-legal principle; good faith means honesty, frankness, loyalty, etc. Therefore, it is often said that the standard of good faith means that a party must pay attention to the interests of the other party. In addition, good faith is said to be the gateway for moral values to enter the law. Therefore, good faith is considered one of the most essential principles in private and contract law. Good faith is also the highest norm of contract law, the law of obligations, or all private law. Therefore, objective good faith is referred to as the norm for the behavior of the parties to the contract: acting following or contrary to good faith. Finally, many provisions in the code that do not explicitly refer to good faith are said to be based on it. The European civil law tradition assumes that the principles of good faith and fair dealing constitute good faith in the objective sense, which introduces fair elements into the law by requiring the courts to assess the conduct of the parties from the perspective of specific extra-legal models (fairness, honesty, morality). In other words, it plays the role of a "safety valve" in private law.

²³ Martijn W Hesselink, 'The Concept of Good Faith', ed. by Charles Edgar du Perron, *Towards a European Civil Code* (Kluwer Law International BV, 2011), pp. 619–49. Also see J. W. Carter and Wayne Courtney, 'GOOD FAITH IN CONTRACTS: IS THERE AN IMPLIED PROMISE TO ACT HONESTLY?', *The Cambridge Law Journal*, 75.3 (2016), 608–19 <https://doi.org/10.1017/S0008197316000507>

Many general clauses in continental European law require the courts to apply a specific assessment pattern (often good faith and fair dealing).²⁴

In the Netherlands, as stated in Article 3:11. The absence of good faith is defined as a party who has obtained registered property cannot put forward that it has acted in good faith as far as this appeal is based on the argument that he was not aware of the existence of specific facts of which existence it could have been aware if he had consulted the public registers for registered property. In most legal systems in Europe, good faith is said to have three functions: (1) concretization/interpretation (*adiuvare*); (2) addition (*supplere*) (especially duties, for example, the duty to be loyal, to protect, to cooperate, to inform); and (3) correction/limitation (*corrigere*) (prohibition of abuse of rights; Fallgruppen includes: *venire contra factum proprium non valet*; and *dolo agit qui petit quod statim redditurus est, tu quoque* (prohibition of excessive disproportion). Good faith implementation in the Netherlands is applied in succession, company, bankruptcy, property, and international private law. Patrimonial rights are rights that, individually or with other rights, can be transferred; rights intended to obtain material benefits for the holder; or rights received in return for actual or expected material benefits. Likewise, some things need to be considered for the agreement's validity in buying and selling. Where a valid agreement is, if the deal is required not under the influence of deception, coercion, or error, there is knowledge that the rights will be obtained based on this. The judge can cancel the agreement if these conditions are not met. As a result, even though the transfer deed has been recorded in the general register, it can be decided later that no rights have been obtained. However, this is unfair if ownership has been transferred to a third party. Therefore, in 1992, the Dutch Civil Code determined that if the property has been transferred to a third party in good faith, the transfer cannot be canceled based on an invalid mandatory agreement (Article 3:88 Dutch Civil Code). In the case of good faith land sale contracts, an acquirer of registered property cannot plead good faith if, by doing so, he would be declaring ignorance of facts that he would have known by consulting the register.

A particular application of good faith under Dutch law is the notion of pre-contractual obligations where one party breaks off negotiations. Under a doctrine introduced by the Dutch Supreme Court, a party can be ordered to pay damages for the costs incurred by the counterparty or even for lost profits where he unlawfully breaks off contractual negotiations. The possibility of awarding compensation for lost profits (loss of expectation) due to the break-off of the talks and not only for the costs incurred (loss of reliance) is unique to Dutch law. It is generally not accepted in any other jurisdiction.^{25,26} For example, when A sells his property to B, who pays the purchase price, and the transfer is registered in the land register? Only later, it was discovered that A was not the owner, whereas B, in good faith, believed A to be the

²⁴ Jan Halberda, 'The Principle of Good Faith and Fair Dealing in English Contract Law', *Pravovedenie*, 64.3 (2020), 312–25 <https://doi.org/10.21638/spbu25.2020.301>

²⁵ R A Dudok van Heel and R.P.J.L. Tjittes, 'The Netherlands Commercial Court and Business Certainty in Dutch and English Commercial Contract Law', 2020, pp. 1–18. Also see Eddy Bauw, 'Commercial Litigation in Europe in Transformation: The Case of the Netherlands Commercial Court', ed. by Xandra Kramer, *Erasmus Law Review*, 12.1 (2019), 15–23 <https://doi.org/10.5553/ELR.000110>

²⁶ Jeroen A. van der Weide, 'The Netherlands Commercial Court (NCC): Its Challenges and Perspectives', 2020, pp. 81–108 https://doi.org/10.1007/978-3-030-42974-4_4

owner. (This can happen when the elder is believed to have inherited the property from his uncle by will, but a subsequent will is discovered in which the uncle leaves the entire asset to the charity. In this case, then, B is not protected because he did not (could not) acquire ownership. A user can only rely on a unilateral decision if he acts in good faith. Acting in good faith means the user believes and does not need to doubt that he is the owner. It is sufficient for the user to hold this belief with reasonable grounds at one point during the decision-making period. Once the user is in good faith, he is deemed to have continued to act in good faith. Thus, it is irrelevant if the owner later takes (or should have taken) note that the thing or asset belongs to someone else.²⁷

Dutch Civil Code Article 3:23 stipulates that a user will never act in good faith if he claims to be ignorant of the information in the public register. If the land being traded borders on someone else's land, the buyer needs to check to ensure the boundaries so that he can act in good faith. The land register provides maps based on the information contained in the public register and survey records. However, the user is not obligated to check the land register. Only if there are indications in the physical environment of the land that the user is using someone else's land, he must consult the land register or otherwise not act in good faith. It can be said that the regulations in the Netherlands have not succeeded in creating a publication system that can protect property rights because often information if an object is burdened with fundamental property rights or to whom the rights are owned cannot be accessed by a third party (the buyer). In addition, sometimes the publication system incorrectly indicates that there is no natural property right or indicates the wrong person as the owner or limited owner. Due to incorrect or incomplete publication, the buyer may act on the mistaken assumption with someone claiming to be the owner. For this situation, the law must also provide a solution. Who should be protected: the person who, according to law, is the valid owner and has been deprived of his rights by an unauthorized person or a third person. When the purchaser acts in good faith, he enters into a transaction with an unauthorized person, relying on available publication data, but the publication data is incorrect.

Dutch law has chosen to protect the third person, provided that he has taken a valuable countermeasure to obtain his rights. The third party, who in good faith acquires the property from the unauthorized person, is protected by law at the expense of the valid owner whose property rights were not properly declared. However, if the valid owner can prove that the third person knew the publication was incorrect, this third person did not act in good faith. Therefore, he does not deserve protection by law. It is the only way the true owner can prove that his rights are valid and can reclaim his rights, which in this case is the purchaser not acting in good faith. In practice, however, the actual owner can rarely prove that the third person, who points to the incorrect publication, can defend himself. This principle of good faith is an abstract rule, which may lead to unfair results in some instances, and good faith may provide a basis for exceptions in the facts of a particular case. However, the abstract standard of good faith must be concretized in order to be

²⁷ Björn Hoops, 'Legal Certainty Is Yesterday's Justification for Acquisitions of Land by Prescription. What Is Today's?', *European Property Law Journal*, 7.2 (2018), 182–208 <https://doi.org/10.1515/eplj-2018-0008>



applicable. The court determines what good faith is required for a specific case (*einzelfallgerechtigkeit*). Karl Larenz argues that judges are not allowed to decide in a way that seems fair to them. Instead, judges must determine the requirements of good faith in the most objective way possible.²⁸ In Dutch legal doctrine, judges react more to court decisions and try to regroup them, building a system (a more inductive approach) regarding the application of the principle of good faith.²⁹

The Criteria for Deciding the Existence of Good Faith in Land Transactions in the United States

The United States has a different set of laws than the Netherlands. Currently, federal, state, and local governments regulate growth and development through statutory law. As a federal state, each state has a separate and relatively self-contained body of general contract law (such as regulations). In some states, the law primarily comprises general legal opinions from the highest court. The United States has fifty bodies of general contract law.³⁰ Regarding the principle of good faith in land sales and purchases, the United States has no regulation. However, the regulation of the principle of good faith in America can be found in two legal instruments: the Uniform Commercial Code (UCC) and the Restatement (Second) of Contracts. Each state legislature has adopted the UCC, a comprehensive law regulating all commercial transactions in the United States. Therefore, although drafted in 1950, the UCC has become one of the primary sources of commercial law in America. The UCC regulates contracts for the sale and purchase of goods, negotiable instruments, specific relationships between banks and between banks and depositors, letters of credit, bulk sales, warehouse receipts, bills of lading, investment securities, and security interests in personal property. In addition, each state legislature has adopted various separate provisions that deal with one or more aspects of contract law. Several federal laws also deal with contract law issues.³¹

Before the 1960s, it cannot be said that the American states recognized a general obligation of good faith in their contract law. In the 1960s, American state legislatures introduced and adopted the Uniform Commercial Code. The code includes sections 1-203, stating that every contract or obligation under this Act imposes an obligation of good faith in its performance or execution. However, this provision only applies to contracts covered by the UCC. It can be said that the requirements of the UCC do not apply to contracts in general and, therefore, do not apply to construction contracts, land sales contracts, real estate mortgage contracts, insurance contracts, and many other types of contracts. Of course, the specifics of the UCC cannot be implemented when discussing the protection of the parties in a land sale transaction related to the principle of good faith. However, the general matters relating to the principle of good faith and the UCC are not prohibitions to be used as examples of how the principle of good faith is regulated and enforced in the United States. The New

²⁸ Stefan Grundmann, *General Clauses and Standards in European Contract Law: Comparative Law, EC Law and Contract Law Codification*, ed. by Denis Mazeaud (Kluwer Law International, 2006).

²⁹ J H Baker, *An Introduction to English Legal History*, 4th edn (Butterworths, 2002).

³⁰ Robert E. Scott, 'The Uniform Commercial Code and the Ongoing Quest for an Efficient and Fair Commercial Law', *SSRN Electronic Journal*, 2022 <https://doi.org/10.2139/ssrn.4212754>

³¹ Robert S Summers, William G McRoberts, and Arthur L Goodhart, 'The Conceptualization of Good Faith in American Contract Law', *Essays in Legal Theory* (Springer, Dordrecht, 2000), pp. 299–319 https://doi.org/10.1007/978-94-015-9407-3_13



Restatement of Contracts adds that good faith is violated by dishonest conduct in enforcing contractual rights, such as creating a feigned dispute, asserting an interpretation contrary to one's understanding, or falsifying facts. Good faith is also violated by honest but unfair dealings, such as taking advantage of the other party's necessary circumstances to extort a contract modification for the sale of goods without a legitimate commercial reason. Good faith is also violated by breach of a performance warranty, refusal of performance for unstated reasons, willful failure to mitigate damages, and abuse of power to dictate compliance or terminate a contract.

Good faith has been recognized in Anglo-American law. At least in property law, a bona fide purchaser for value acquires ownership even though the seller has no authority to dispose of it. Therefore, to be a bona fide or reasonable faith purchaser, one must be genuine. Good faith is a principle of contract law that states that a party to a contract must perform his contractual duties in good faith. The meaning of the duty of good faith is complex. At the very least, to be in good faith, one must act in a way that one believes is proper, and this is something subjective. This subjective matter is overlaid with several objective issues. First, it is not enough that an actor genuinely believes that his conduct is proper; his belief must be honest in the sense of having a basis in morality. Further, although one's belief is not reasonable enough to be in good faith, it must at least be rational. Finally, the duty of good faith involves compliance with reasonable standards of fair dealing—another objective test.³² Good Faith and Fair Dealing Primary is an implied obligation that assumes that the parties to a contract will act in good faith and deal fairly with each other without breaking their word, using cunning means to evade obligations, or denying what the other party clearly understands to be generally fair dealing.

Depending on the precise setting, good faith may require honest belief or purpose, faithful performance of duties, adherence to standards of fair dealing, or absence of fraudulent intent. Good faith, therefore, characterizes the form of contractual obligation and identifies the attitude toward contractual obligations. Good faith supports the parties' contract completion to carry out the intention of the parties or to protect the reasonable expectations of the parties. Thus, in essence, an attitude of respect for the contractual relationship and the measure of good faith is the contract itself. Good faith establishes the character of the contractual relationship. It involves a distinctive form of contractual recognition and respect and improves the character of contractual collaboration. Good faith explains, directly and without reference to other theory-laden terms, how contracting parties should balance themselves and each other when they interpret, fill in, and apply their contractual arrangements.³³ Meanwhile, Bad Faith is defined as dishonesty or fraud in a transaction. Depending on the exact setting, bad faith can mean dishonest belief or purpose, untrustworthy performance of duties, disregard for fair dealing standards, or fraudulent intent. It is often associated with a breach of the obligation inherent in all contracts to deal with others in good faith and with fair dealing.

³² Melvin A. Eisenberg, *The Principle of Good Faith in Contract Law* (Oxford University Press, 2018), 1 <https://doi.org/10.1093/oso/9780199731404.003.0052>

³³ Steven J Burton, 'History and Theory of Good Faith Performance in the United States', in *Comparative Contract Law* (Oxford University Press, 2015), pp. 210–19 <https://doi.org/10.1093/acprof:oso/9780198728733.003.0023>

Returning to the principle of good faith, Emily Hough states that the doctrine of good faith can be interpreted as an implied obligation in two different ways: first, vis-a-vis its application to bad faith behavior in contract negotiations (this is certainly not a new idea, but it deserves serious reconsideration). Second, in the context of performance. Although there is currently more emphasis on good faith in executing a contract, the common law obligation of good faith applies not only to negotiating a contract but also to what obligations must be performed. Negotiation is the act of discussing a matter between two or more parties with competing interests to reach an agreement. It is a process by which. General Services Administration that the seller of a property attempts to reach an amicable agreement on the terms and conditions of the sale of the property. An offer may be made to purchase the property in person or by mail, and the offer is discussed with the owner. While the rationale for the idea that good faith in the execution of a contract (performance) is "protecting the reasonable contractual expectations of the parties against ex post profiteering" cannot fix the limits of good faith in a way that can decide the case that is closed is that good faith is required precisely because the parties' contractual intentions, and therefore their reasonable expectations, are not complete or precise. Some other experts provide four prerequisites to determine bad faith: 1) bad faith in negotiating and forming a contract, 2) bad faith in performance, 3) bad faith in raising and resolving a contract dispute, and 4) bad faith in taking corrective action. All of these prerequisites consider cases where judges would feel comfortable using their discretionary and equitable authority to find a breach of good faith where the express language of the contract may not support a lawsuit for breach of contract.³⁴

The United States, as a country with a standard legal system of law, has procedures for protecting the parties to the transaction if the seller does not act in good faith in the sale and purchase of land. The common-law system of legal institutions in the United States, which allows judges to make legal rules in response to local demands, helps ensure property rights. A strong and polycentric legal system offers many ways for individuals to defend their legal rights.³⁵ The case of a property purchase in Louisiana, USA, suggests that good faith has two components in the context of property law. One component concerns honesty. A person acts in good faith in the context of property law when he honestly believes that he is the rightful owner of the thing he owns or honestly believes that his ownership extends to all the land occupied by his improvements. Honesty is a fundamental requirement for a good faith agent in property law.³⁶

Suppose a person knows that he is not the lawful owner of the land or chattel, that he has no lawful basis for resting his occupation or possession, or that his improvements exceed the limits of his actual ownership. In that case, he must be an

³⁴ Heru Setiawan and others, 'Digitalization of Legal Transformation on Judicial Review in the Constitutional Court', *Journal of Human Rights, Culture and Legal System*, 4.2 (2024), 263–98 <https://doi.org/https://doi.org/10.53955/jhcls.v4i2.263>

³⁵ Mark T. Kanazawa, 'Possession Is Nine Points of the Law: The Political Economy of Early Public Land Disposal', *Explorations in Economic History*, 33.2 (1996), 227–49 <https://doi.org/10.1006/exeh.1996.0010>

³⁶ Emily Sipiorski, "'Defining Good Faith", *Good Faith in International Investment Arbitration*, in *Oxford International Arbitration Series*, 2019, pp. 20–47 <https://doi.org/https://doi.org/10.1093/law/9780198826446.003.0002>

owner in bad faith. The second component of good faith in Louisiana property law is due care. A good faith actor in property law not only honestly believes that he is the lawful owner or occupant of the thing in question but also uses at least a high degree of care when he constructs the improvements or takes possession of the chattel or immovable property. Unlike due care, however, due care is a relative criterion. The standard of due care varies widely in real estate transactions. In some cases, the presumption of good faith protects a plaintiff in good faith simply by requiring that he fail to ignore obvious red flags. In addition to these cases, a plaintiff must establish that there is a written instrument stating his ownership—for example, a written deed of sale, donation, or exchange—and that he was unaware of any significant defects in the title. Finally, in the context of an acquisition prescription, the plaintiff's link to the written deed must also be reasonable, considering all the objective circumstances.³⁷

In the negotiation process to make the contract, looking at the Uniform Commercial Code, it is essential to guarantee that the title the seller gives to the buyer is arranged in good faith. In Uniform Commercial Code § 2-312(1), it is stated that if the contract does not specify otherwise, the seller guarantees that the title is good. When the transfer is valid, the buyer will not be subject to unfair litigation based on third-party claims or interests in the goods. Likewise, good faith requires the seller to disclose known but hidden material defects in the goods sold. This is regulated in Uniform Commercial Code § 2-314 Comment. 4. In Disclosures in Real Property Transactions, the State of California Department of Real Estate states that to ensure good faith in land transactions, a statement is needed stating that the transaction carried out is based on good faith. In other land cases, if the court finds someone as a settler, acquirer, buyer, or owner in good faith, the other party is usually not too careful with the goods they own. Good faith helps the court determine whether a landowner must make room for an innocent trespasser. It allows the court to decide whether the original owner of a lost or stolen movable must pay a subsequent purchaser to regain possession or whether the owner of a physical movable has entirely forfeited his right to recover the movable from the subsequent transferee. It determines when an owner must reimburse an owner for his contribution to something owned without the owner's consent. At its most fundamental level, it indicates when an owner of immovable property can acquire ownership or other basic rights only by continuous possession for ten years.

Another case involving Judge Posner involved the good faith requirements concerning a shopping center sale and leaseback contract. According to Frey, providing good faith in terms of “full knowledge” and “zero” contract costs is essential in the negotiation process. In this case, the shopping center sale and leaseback contract expressly contemplated further negotiations regarding financing to support additional improvements and provided that, if these negotiations failed, the lessee could repurchase the property at approximately the same original contract price. However, the price was meager in the local real estate market. The lessee initiated financing negotiations without notifying the lessor of the repurchase option; the lessor refused to finance; the lessee attempted to exercise the repurchase option;

³⁷ Tikhon Podshivalov, ‘Protection of Property Rights Based on the Doctrine of Piercing the Corporate Veil in the Russian Case Law’, *Russian Law Journal*, 6.2 (2018), 39–72 <https://doi.org/10.17589/2309-8678-2018-6-2-39-72>

and the lessor refused to surrender the land because the lessee's failure to inform the lessor of the option when initiating refinancing negotiations constituted bad faith.³⁸

Under these facts, Judge Posner held that the lessee's duty of good faith required only that its silence regarding the repurchase option did not arise from a subjective intent to deceive the lessor into unwittingly inducing the exercise of the repurchase option. In conclusion, imposing an affirmative duty on the lessee to fully disclose the option would likely be efficient since if the would-be seller provided complete information, it would save the parties from duplicative effort in tracking down the terms of their agreement. Todd Rakoff argued that the subjective (non-deceptive) good faith standard decided by Judge Posner was inefficient since making a good faith assessment would require extensive and expensive fact-finding and would dramatically increase the costs of ex-post litigation. In other cases, which may not be as similar to the issue of good faith in land transactions, it is illuminating how familiar law judges have considered the various considerations in enforcing good faith in the United States—the case of stolen and misappropriated property. The laws of the central commercial states are less efficient than they should be. This is especially true of United States law. In the United States, the owner can always recover stolen goods for those who are less than thorough in taking precautions but do their best to find the goods. In turn, the buyer of the goods does a less-than-optimal job of investigating the property because the owner may never see it.³⁹

Schwartz and Scott, therefore, propose that an owner should be allowed to recover goods only if there is a negligence standard set at the socially optimal level of deterrence. This would enhance his position to take precautions while maintaining his efficiency in search. Because the owner's search and the buyer's investigation are complementary, current law provides that an owner who voluntarily disposes of his goods cannot recover them from a good faith buyer. This rule reduces the owner's position to search and thus reduces the buyer's position to investigate. Therefore, the negligence standard should be applied to owners in general. Developments in North America further suggest that good faith can exist in common law jurisdictions. In the United States, good faith is limited to the performance of contracts and is defined by the UCC. In Canada, judicial activism has led to recognizing a contract law principle requiring honesty. However, the restatement is only persuasive, whereas the UCC is enforceable in court. It is important to note that the interpretation of the UCC is left to the states.

Pre-contractual Good Faith Arrangements to Enhance Buyer Protection Guarantees

In the Netherlands, the regulation of land and the use of the principle of good faith are generally regulated in the Dutch Civil Code Book and the New Netherlands Civil Code Patrimonial Law. It is the same as in Indonesia, where the regulation of sale and purchase is regulated in the Civil Code, and several laws regulate matters concerning land. However, both in the Netherlands and in Indonesia, neither

³⁸ 'Acquisitive Prescription', in *Property Law* (Cambridge University Press, 2023), pp. 125–59 <https://doi.org/10.1017/9781009236553.008>

³⁹ Alan Schwartz and Robert E Scott, 'Rethinking the Laws of Good Faith Purchase', *Columbia Law Review*, Forthcoming; *Yale Law & Economics Research Paper No. 429*; *Columbia Law and Economics Working Paper No. 398*, 2011, 1–64 <https://doi.org/https://ssrn.com/abstract=1823366>

specifically restrict the principle of good faith in the sale and purchase of land. In the Dutch legal concept, good faith has a complementary function and a limiting function. In addition, good faith plays a role in interpretation. Previously, the enactment of the Dutch Civil Code in 1992 on limiting effects and the function of good faith was debated among legal scholars. Some authors favor the broad interpretation of good faith and consider '*beperkende werking*' excessive; others emphasize the need for a separate limiting or corrective function. The Hoge Raad takes the latter view, as does the legislator who explicitly recognizes '*beperkende werking*' in the new code. The new Dutch Civil Code combines the concepts of good faith and fairness into objective good faith. Therefore, in the Netherlands, the law provides specific provisions that must be considered in determining what good faith requires in a particular case. For example, Article 3:12 of the Dutch Civil Code states that in deciding what fairness and equity require, reference must be made to generally accepted legal principles, current legal views in the Netherlands, and the particular public and private interests involved.⁴⁰

Meanwhile, with a common law legal system, the United States has procedures for protecting the parties to the transaction if the seller does not act in good faith in the land sale and purchase transaction. The standard law system of legal institutions in the United States, which allows judges to make legal rules in response to local demands, helps ensure property rights. Good faith in the subjective sense has been recognized in Anglo-American law. At least in property law, a *bonafide* purchaser for value acquires ownership even though the seller has no authority to dispose of it. Commercial law is replete with references to good faith. The Uniform Commercial Code itself uses the phrase ninety-seven times in its official text and uses the Latin equivalent *bonafide*. Some courts, relying on the dictionary, interpret the phrase bona fide to require or mean authenticity in various contexts. Regarding the principle of good faith in land sales, the United States has no regulations on this matter. However, the regulation of the principle of good faith in America can be found in two legal instruments, the UCC and the Restatement (Second) of Contracts. Each state legislature has adopted the UCC. This is also the same as the regulations in Indonesia. The regulations are given in general. It should also be noted that the UCC does not generally apply to contracts.

The UCC imposes a mandatory obligation of good faith in implementing every contract within its scope. The New Restatement of Contracts 2nd, Article 205, stipulates that every contract imposes on each party an obligation of good faith and fair dealing in its performance and enforcement.⁴¹ Good faith means honesty in the act or transaction in question. The Restatement and the UCC mandate an obligation to act in good faith. However, it only 'arises from the contract itself and therefore cannot be applied before the contract is made.' This is because other doctrines apply at the stage of contract formation. Indeed, good faith must be distinguished from the related notion of dishonesty that applies when forming the contract. Both focus on

⁴⁰ Peter P.C. Haanappel and Ejan Mackaay, 'Netherlands Civil Code - Transport Law (French & English)', *SSRN Electronic Journal*, 2011 <https://doi.org/10.2139/ssrn.1778425>

⁴¹ Brian H. Bix, 'Philosophical Foundations of Contract Law. By Gregory Klass, George Letsas, and Prince Saprai (Eds.) [Oxford: Oxford University Press, 2014. Viii + 391 Pp. Hardback £75. ISBN 978-0-19-871301-2.]', *The Cambridge Law Journal*, 74.3 (2015), 619–21 <https://doi.org/10.1017/S0008197315000744>

protecting the weaker party against the stronger party. It differs from the German and French civil law approach, where *treu und glauben* and *bonne foi* have been extended to the contract negotiation stage. However, it should be noted that the Restatement is only persuasive, while the UCC is enforceable in court. It is important to note that the interpretation of the UCC is left to the states. However, what can be learned from the regulation in the United States is that the Restatement provides an overview of how to resolve sales and purchase cases, which Indonesia does not have.

In conclusion, the Netherlands and Indonesia adhere to the principle of good faith in implementing contracts. The regulations provided by the Netherlands regarding the sale and purchase of land are not far from the regulations established by Indonesia.⁴² However, considering judges in their decisions, the two countries above have different criteria. Looking at the principle of good faith in other countries, this principle is also applied to contract law in the United States. In a comparison of the countries that have been discussed in the previous sub-chapter, it can be concluded that Indonesia and other countries have the same problem in implementing the principle of good faith, especially for buyers, namely that until now, there has been no single word to provide a proper basis as a benchmark for whether the agreement has been implemented based on good faith and decency or not. In countries with a civil law legal system, the practice of good faith in general, and buyers with good faith in particular, are left to the judge to assess. The same is true in common law countries. Judges in common law countries do not yet have standards/criteria that have been agreed upon to measure this principle. In general, the phrase good faith and decency is always associated with fairness, reasonable standard of dealing, and a common ethical sense.⁴³ For example, in several decisions, various criteria for good faith can be identified:

Table 1. Criteria for Good Faith in Court Decisions

| No | Decision | Criteria |
|----|------------------|---|
| 1 | 1237 K/Sip/1973 | If the sale and purchase meet the legal requirements, then the sale and purchase is deemed to have been carried out in good faith. |
| 2 | 47 K/Pdt/2011 | Good faith is deemed to exist because the transfer of rights is considered to have occurred with registration at the Indonesian National Land Office. |
| 3 | 1669 K/Pdt/2012 | Good faith is deemed to exist because the purchase was made through a legitimate auction. |
| 4 | 1802 K /Pdt/2012 | Good faith was not explained in this case because the cassation panel considered that what was at issue here was the assessment of the facts. |
| 5 | 176K/Pdt/2011 | Good faith is deemed to exist if the buyer purchases land with a land ownership certificate from the seller in the presence of a Land Deed Officer. |

⁴² Melkianus Ndaomanu, 'Claims for the Rights of Third Parties in Good Faith Against Confiscation of Goods in Corruption Criminal Decisions', *Unnes Law Journal*, 9.2 (2023), 357–76 <https://doi.org/10.15294/ulj.v9i2.75565>

⁴³ James Gordley, 'Ius Commune: The Medieval Jurists', *The Jurists* (Oxford University Press, 2013), pp. 28–81 <https://doi.org/10.1093/acprof:oso/9780199689392.003.0002>

Based on the table above, the judge still has many criteria to determine whether the buyer is acting in good faith with a wide range of meanings. While, honesty is a core element of good faith. The United States has several more elements, but depending on the context, it can expand or contract depending on the relevant background and the expectations of the parties.⁴⁴ Based on the comparison of the implementation of good faith in various countries, two things can be highlighted: the land registration system to guarantee the protection of good faith second how the common law country (the United States) explains good faith with the assumption that a conflict occurs, where this explanation of good faith is standardized in a concrete regulation. The practice of good faith is still abstract, so in judicial practice, the interpretation is left to the judge; for example, if the provisions are unclear, the judge, with his function, can make legal discoveries. Legal discoveries have been regulated but are vague, or there are actual actions. It concerns the interpretation of good faith in judicial practice.⁴⁵ The judicial practice begins with a civil dispute over land ownership rights between buyers and sellers, which will later be developed into a doctrine. The discovery of the legal context of the trial is left to the judge as part of court decisions. Therefore, a legal certainty basis regarding the criteria for good faith needs to be emphasized so that the judge can provide written legal reasons that are appropriate and correct. The analysis the researcher will answer next is at what stage good faith must exist. Good faith is not only carried out when implementing the agreement. Before that, good faith must appear from the negotiation stage in the land sale and purchase transaction and when the land sale and purchase process is carried out.⁴⁶

Negotiation by the parties involves a bargaining process to reach an agreement. Before acceptance occurs, of course, the party bargain for their respective interests. The most crucial activity in the pre-contractual stage is the offer and acceptance, reflected in the negotiations between the parties. Negotiation is a bargaining process between the parties to explore the achievement of an agreement (consensus) between the parties regarding the object and substance of the contract. The object in question includes the title of rights and obligations that will be attached to the parties in the contract.⁴⁷ This will be in line with the doctrine of good faith, which requires that a buyer in good faith who will be protected is a buyer who seeks to know and be truthful about the object that will be bought. It is certainly done during the negotiation process. The reason is to obtain comprehensive information about the

⁴⁴ Celina Esther V Cua, 'Towards a General Notion of Good Faith in English Contract Law', 2013 <https://doi.org/10.2139/ssrn.2297037>

⁴⁵ Dedy Muchti Nugroho, 'Penemuan Hukum Oleh Hakim Dalam Perkara Perdata Berdasar Asas Peradilan Yang Baik', *Jurnal Ilmiah Ilmu Hukum QISTIE*, 10.1 (2017), 9–25 <https://doi.org/http://dx.doi.org/10.31942/jqi.v10i1.1962>

⁴⁶ M.Kn. M.BA, Dr. Winny Wiriani, S.H., 'Techniques in Drafting Contracts', *International Journal of Social Science and Human Research*, 7.05 (2024) <https://doi.org/10.47191/ijsshr/v7-i05-47>

⁴⁷ 'Principle of Proportionality as a Reflection of the Theory of Justice and Its Application by Judges in the Resolution of Business Contract Disputes', *DE LEGA LATA: Jurnal Ilmu Hukum*, 7.1 (2022), 163–69 <https://doi.org/10.30596/dll.v7i1.7816>

specifications of the land object and its owner. The negotiation process of the parties is essential because they are trying to resolve different and conflicting problems.⁴⁸

The implementation of the principle of good faith at the pre-contractual stage can be explained by the fact that if the implementation of a contract causes an imbalance or violates the sense of justice, the judge can adjust the rights and obligations stated in the contract. In practice, the judge does use his authority to interfere with the contents of the contract so that it seems that good faith must exist not only at the pre-contract, contract (signing), and post-contract (implementation) stages but also at the pre-contract (draft) stage. The design begins and is carried out with negotiations to seek agreement between the parties. In this process, the buyer has good intentions to seek data and facts regarding the land object. In negotiations, the adequacy of information will determine the next steps. Good faith will apply during the agreement process. Thus, good faith covers three phases: the pre-contract phase, the contract phase, and the post-contract phase. The teaching of good faith is increasingly influential, where good faith is not only present in the implementation of the contract but must also exist when the contract is made.⁴⁹ This needs to be regulated in regulations so that there is a common interpretation of good faith and its criteria, and there are provisions on when good faith must be carried out so that protection for buyers in good faith can be increased.⁵⁰

CONCLUSION

The position and existence of good faith in Indonesia are regulated in the Civil Code. Thus, according to Indonesian contract law, all agreements must be decided in good faith, even though the obligation of good faith itself has not been rigidly regulated for land sales and purchases. Thus, there is no similarity between judges in interpreting buyers in good faith, causing land sales and purchases to favor buyers less. In addition, the meaning of good faith and its criteria are not yet similar. In addition, good faith is only regulated when making a contract. The comparison shows that the legal system influences countries to regulate the principle of good faith in concrete terms or to place it as a more abstract principle. This legal system is closely related to the concepts of written legal sources and the concept of jurisprudence, as well as the meaning of the concretization of the principle in a statutory regulation. In the United States, good faith is limited to the implementation of the contract and is determined by the UCC. However, the practice of good faith is still abstract, so in judicial practice, the interpretation is left to the judge; for example, if the provisions are unclear, the judge, with his function, can make legal discoveries. In the Netherlands, the principle of good faith is an abstract rule, which can lead to unfair results in some instances, and good faith can provide a basis for exceptions to the facts of a particular case. The

⁴⁸ Datuk Ary Adriansyah Samsura and others, 'Negotiation Processes in Land and Property Development: An Experimental Study', *Journal of Property Research*, 32.2 (2015), 173–91 <https://doi.org/10.1080/09599916.2015.1009846>

⁴⁹ Fathul Laila and others, 'Application of Good Faith Principles in Transition and Registration of Land Rights with the Deed of Land Deed Making Officials as the Embodiment of Article 33 Paragraph (3) of the 1945 Constitution', *International Journal of Multicultural and Multireligious Understanding*, 7.10 (2020), 44–48 <https://doi.org/10.18415/ijmmu.v7i10.2036>

⁵⁰ Rina Arum and Ridhima Sharma, 'Establishing Consumer Trust Through Data Protection Law as a Competitive Advantage in Indonesia and India', *Journal of Human Rights, Culture and Legal System*, 4.2 (2024), 354–90 <https://doi.org/https://doi.org/10.53955/jhcls.v4i2.200>

court determines what good faith is required for a specific case. In general, Indonesia and other countries have the same problem in implementing the principle of good faith, especially for buyers, namely that until now, there has been no one word to provide the proper basis as a benchmark for whether the agreement has been carried out in good faith and decency or not. Thus, the regulation of good faith and its criteria must be stated in written rules to have a common interpretation for judges. The use of the principle of good faith in land sale and purchase transactions needs to be carried out both in contracts starting from the pre-contractual period until the contract is implemented so that it can guarantee protection for buyers with good faith.

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