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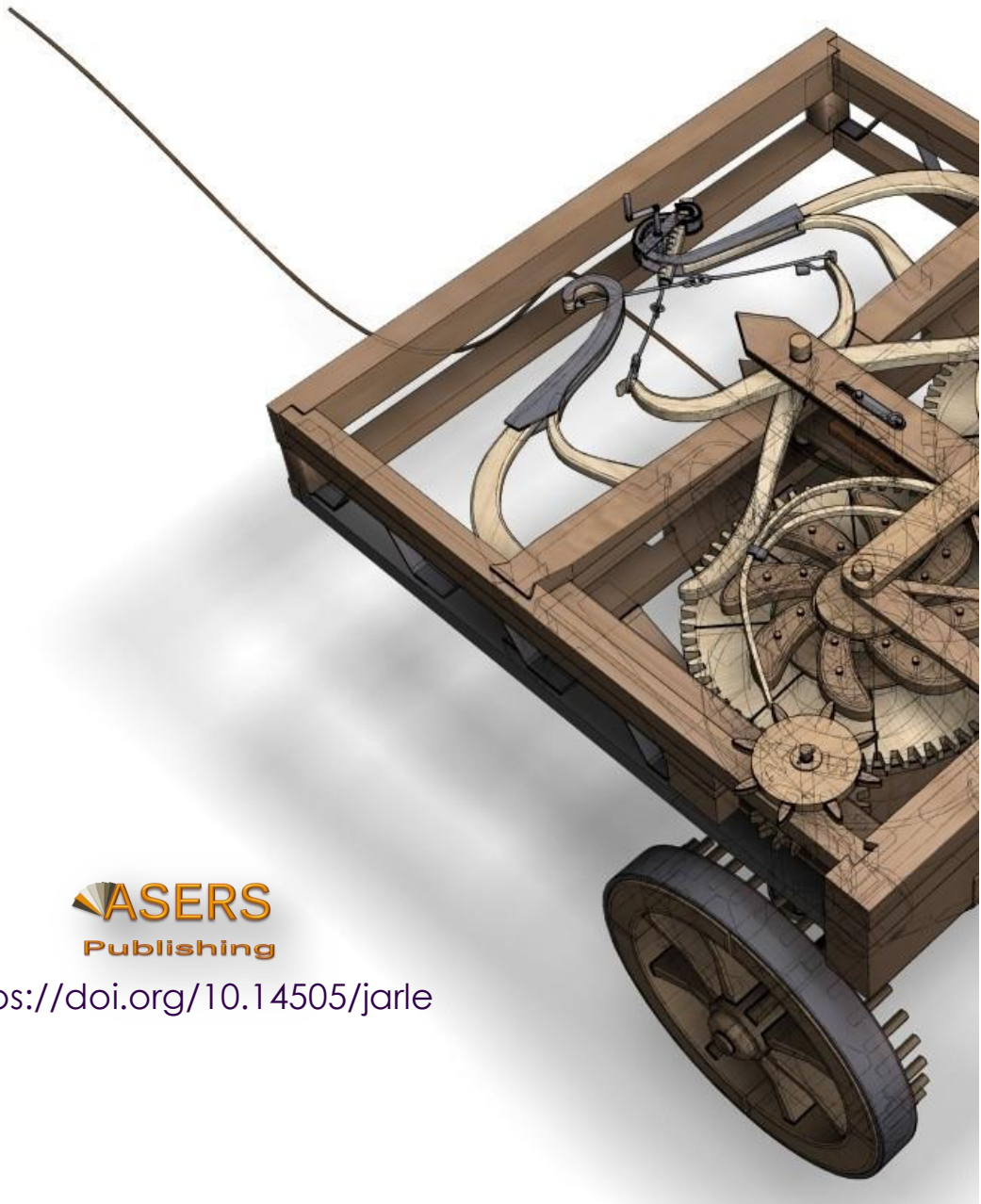

Quarterly

Volume XI
Issue 4(50)
Summer 2020

ASERS Publishing

ISSN: 2068-696X
Journal's DOI: https://doi.org/10.14505/jarle

Summer 2020
Volume XI, Issue 4(50)

Contents:

Summer 2020
Volume XI, Issue 4(50)

ASERS Publishing

http://journals.aserspublishing.eu
ISSN 2068-696X
Journal DOI: https://doi.org/10.14505/jarle
Journal's Issue DOI:
https://doi.org/10.14505/jarle.v11.4(50).00

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Call for Papers
Volume XI, Issue 5(51) and 6(52), Fall 2020
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DOI: https://doi.org/10.14505//jarle.v11.4(50).07

Implementation of Good Faith Principle as Efforts to Prevent the Business Disputes

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Suggested Citation:

Butarbutar, Elisabeth Nurhaini. Implementation of Good Faith Principle as an Efforts to Prevent the Business Disputes, *Journal of Advanced Research in Law and Economics*, Volume XI, Summer, 4(50): 1131 – 1136, DOI: https://doi.org/10.14505//jarle.v11.4(50).07. Available from: http://journals.aserspublishing.eu/jarle/index

Article's History:

Received 14th of March, 2020; Received in revised form 6th of April, 2020; Accepted 15th of May, 2020; Published 30th of June, 2020.

Abstract:

This study seeks to analyze the principle of good faith as a preventive measure in business disputes by comparing international perspectives on good faith and regulations in Indonesia. This study was conducted with normative means that in analyzing data used by observing the applicable regulations, logical means in analyzing the data always uses logic and should not conflict between one data with another data. Systematic means, in analyzing analyzed data must remain in the applicable legal system. The study results show that the implementation of the principle of good faith in a credit contract can prevent business disputes, if the terms and achievements/obligations that arise in the contract are formulated in a balanced way between the interests of the bank and the consumer so that the wishes agreed upon in the contract are truly realized and desired by the debtor and the right of the lender to collect the credit repayment can be fulfilled in accordance with goodwill.

Keywords: Good Faith, Business Contract, Business Disputes, Preventive Efforts.

JEL Classification: K00; K30; A20; I21.

Introduction

Business relations is one form of legal relationship that gives birth to rights and obligations in the field of legal property that occur due to contracts or agreements. The contract starts from the differences of interests that are reunited which are then framed by legal instruments so that it binds the parties (Hernoko, 2008; Hernoko, 2016). As a system, contract law is built on the existence of several legal principles. The position of the legal principle is the basis for strengthening the strength of the contract law. Juridically, the principle of contract law is recognized in Article 1338 paragraph (1) of the Civil Code which states that all contracts made legally apply as laws for those who make them. Based on these provisions, contract law contains the principle of consensuality, the principle of freedom of contract and the principle of binding (pacta sunt servanda). These three principles become the main pillars of the establishment of contract law buildings.

Contract between two parties raises the rights in one party and its obligations on the other party which can be assessed with money. In the context of credit contract, it is a business activity that raises rights and obligations between the bank as a creditor and consumer that the recipient of the credit facility. As it is known that one of the functions of the bank is to distribute funds to the community through credit. In standard contracts, tend to abuse the condition (undue influence) of consumers who are in a bargaining position under the creditor, so that it often causes disputes in the business contract. A standard contract is an agreement in which the content is determined by a priory party. Standard contract or also known as law quasi or particuilere because it has binding strength that inevitably must be obeyed.

In terms of its benefits, the standard contract is aimed at cost and time efficiency efforts, especially in making complex contracts. The tendency to justify all means to bring profit into problems in business relations, because business people often do not pay attention to the principle of good faith in carrying out its activities only to achieve the goal is profit, which could cause harm to the other party. Unbalanced circumstances or unequal circumstances

between the two parties have the potential to be used (undue influence). Unbalanced circumstances occur when one of the parties has an unbalanced position either economically, or psychologically potential to misuse the stronger party's position in the contract. This study seeks to analyze the principle of good faith as a preventive measure in business disputes by comparing international perspectives on good faith and regulations in Indonesia.

Literature Review

1. Contract as the Basis for Business Relations

Business contracts can be said to be lawful if they meet the legal requirements of the agreement stipulated in Article 1320 of the Civil Code, which is agreed to those who commit themselves, are capable of making an agreement, a certain thing and a reason that is lawful. Business relations is one form of legal relationship that gives birth to rights and obligations in the field of legal property that occur due to contracts or agreements. The contract starts from the differences of interests that are reunited which are then framed by legal instruments so that it binds the parties (Hernoko, 2008).

Article 1313 of the Civil Code, states that a contract is an act in which one or more people tie themselves to one or more people. According to classical theory, a contract is a two-sided legal action (een tweezijdige overeenkomst) based on an agreement to cause legal consequences. A two-sided legal action is defined as a legal act which includes an offer (aanbod) from one party and acceptance (aanvaarding) from the other party.

The principle of freedom of contract is based on the assumption that law grants humans or individuals to freedom to determine what they want to agree on. Freedom to contract is the "spirit" of a contract, which is based on the awareness that only the parties know their need to make contractual or contractual relationships. The principle of consensuality determines the momentum of birth and the binding of the contract, that is, when the contract is reached or the agreement of the content and terms of the contract is reached. If the parties have reached an agreement of intentions, the contract made becomes binding as a law for those who give an agreement, therefore the principle of binding force of the ontract as a law is basically a consequence and implementation of the principle of consensuality. As a result, the contract cannot be withdrawn, except by agreeing to both parties. However, if it is connected with Article 1321 of the Civil Code, then the agreement or agreement becomes flawed if the agreement occurs because of three factors that cause a disability, namely, oversight or error (dwaling), coercion (duress), or fraud (bedrog). In the Law of Contract, there are four factors which cause disability, namely mistake (durability), duress (coercion), fraud and undue influence (misuse of circumstances.

2. Principle of Good Faith in Business Contracts

The legal principle is a basic norm that is general in nature, so that it should not be considered a concrete legal norm but must be seen as general basics or instructions for applicable law. This means that the formation of law must be oriented to the principle of law. Scholten simply stated in his book Mertokusumo (2007), the principle of law is the tendencies required by the view of decency on law as general characteristics with all its limitations as a general disposition, but should not necessarily exist.

The principle of good faith in contractual relations is regulated in Article 1338 paragraph (3) which says "the contractt must be carried out in good faith." The meaning of this good faith is related to Article 1339 of the Civil Code which states " That the contract is not only binding on matters expressly stated in it, but also for everything that according to the nature of the contractt is required by propriety, custom or law ". Normative rules regarding good faith in Article 1338 paragraph (3) jo. 1339 of the Civil Code basically regulates the implementation of contracts not solely based on what is explicitly agreed in the contract, but must pay attention to propriety, customs and laws. According to Yahya Harahap (1992), proper contract implementation means carrying out obligations (see also, Fu-min, 2003; Peng, 2015; Lian-heng, 2010)

Good faith is one of the most important joints in contract law which is defined as implementing contracts by relying on the norms of decency and decency (Subekti, 1996; Sewu, 2019). The obligation to implement contracts based on good faith has been universally recognized in the principles of international contract law. International recognition is the consideration of the 1969 Vienna Convention which determined that ”the principles of free consent and of good faith and the principle of pacta sunt servanda rule are universally recognized” (see, Villiger, 2009; Linderfalk, 2007; Aust, 2006). Also, inside of The International Institute for the Unification of Private Law (UNIDROIT) article 1.7. determined that “each party must act in accordance with good faith and fair dealing in international trade” and “the parties may not exclude or limit their duty” (see, Peters, 2017; Burman, 1995).

Methods

In general, the aim of the research is to obtain answers to the problems raised. This research is a normative legal research, namely research in the field of law that aims to find a legal method or das sollen, which in this study aims to find how the good faith principles are formulated in a credit contract, and know that the implementation of the principles of good faith in business contracts can avoid dispute occurrence.

The secondary data needed in this study is sourced from a banking credit contract which is always made in written form by for the sake of the efficiency and effectiveness and also in the credit contract, containing all the wishes of the parties, their rights and obligations as well as the conditions for fulfilling these rights and obligations. In this study, two types of credit contracts are determined, namely credit contract of the Bank Mandiri as a state-owned bank, and credit contract of the Bank Bukopin as a privately-owned bank.

Secondary data collection is done by studying documents, namely by identifying and collecting and systematizing all regulations relating to the problem. The data obtained were analyzed normatively, logically, systematically. Normative means that in analyzing data used by observing the applicable regulations, logical means in analyzing the data always uses logic and should not conflict between one data with another data. Systematic means, in analyzing data analyzed must remain in the applicable legal system.

Results

1. Formulation of the Good faith Principle in the Credit Agreement

As a legal system, the legal structure of the agreement contains a number of legal principles which are fundamental to the building of the treaty law. Therefore, the study of treaty law cannot be separated from the existence of principles or legal principles that underlie the building of the legal contract. The definition of good faith is objectively formulated in Article 1338 paragraph (3) of the Civil Code, that an agreement must be carried out in good faith, because this principle refers to unwritten objective norms, namely what constitutes a general presumption of proper behavior in the implementation of the contract.

Good faith must objectively be understood as the implementation of the contract not only depends on the clause that has been formulated but must also be done properly and reasonably (redelijkheid en billijkheid) (see, Hesselink, 2010). For reasons of efficiency and effectiveness, the standard agreement grows as a form of credit contract has been standardized in the form, and printed in large quantities so that it is easy to provide at any time if needed. The credit agreement arguably has been standardized into a standard agreement fulfill the element of agreement which is one of the legal requirements to make an agreement in Article 1320 of the Civil Code. Similar to the Law of Contracts, this is a legitimate element of the agreement, in addition to the existence of considerations given in exchange for the promimises of the parties, legally competent parties to the agreement and a legal subject matter (Raphael, 1962).

Conformance of will is an essential principle for the occurrence of an agreement and has a relationship with the principle of binding (principle of pacta sunt ser vanda) and the principle of good faith (see, Davison-Vecchione, 2015). This means, only contracts that are made legally in the sense that they are made in agreement that are binding as a law, or only agreements that are desired together can be carried out in accordance with good faith. In contrast to Article 1320 of the Civil Code, it only mentions the legal element of making a contract, whereas in The Law of Contracts, it determines every contract must begin with an offer, which is a proposal to enter into a contract, made by offeror, and acceptance, which shows the willingness of the person to whom the offer is made to take the terms offered so that the four elements are legitimate the contract must have existed since the bargaining terms (Raphael, 1962).

In connection with that, Darus (1990) once stated, that a standard agreement in juridical-theoretical terms does not have binding power because it does not fulfill the element of agreement as specified in Article 1320 of the Civil Code in conjunction with Article 1338 paragraph (1) of the Civil Code, the consequences of which are related to the principle of itika is good in Article 1338 paragraph (3) of the Civil Code. The standard agreement cannot be carried out in accordance with the good agreement. F.A.J. Gras (1984) stated that standard contracts grow and develop in modern societies that use organization and planning as a pattern of life, which the contents of the standard agreement, have been planned by interested parties so that what they want becomes reality.

The principle of civil law recognizes legal subjects as supporters of rights and obligations. Therefore, according to the principle of balance, there are no legal subjects known to have rights without obligations. Accordingly, treaty law considers that the parties making the agreement must jointly consider the rights and obligations between the parties. This causes the demand for good faith in carrying out the contract must always be concreted together by both parties. Therefore, good faith must always be in personal mind, before making a contract, but as it should be a contract must be agreed in the sense that there is a match between the parties offering credit with credit users, so that such contracts that can be implemented in accordance with good faith. The

principle of good faith should be formulated as an attitude or behavior to uphold the agreement to give the opponent the promise of what is his right and not look for loopholes to break away from what has been promised based on propriety and rationality.

Associated with the consideration requirements as an element of contract validity in The Law of Contracts, which is interpreted as a person's consideration to surrender legal rights by one of the parties in exchange for promises from the other party as a will, the good faith as a basis for the consideration required must be fulfilled before giving the will to make a contract. Thus, although it is mentioned in Article 1338 paragraph (3) that the contract must be carried out in accordance with good faith, but good faith should be carried out before making the contract as a form of consideration to make or not make a contract. Thus, the formulation of the principle of good faith in a contract must be interpreted in two ways, namely the formulation of good faith before making a contract in the subjective sense which is an inner attitude or a state of the human spirit, in the form of honesty to make contracts and good intentions in an objective sense which refers to the norm applicable, in the sense that the contract is carried out in accordance with the norms that have been agreed in the contract as well as those applicable based on propriety and suitability in the community.

2. Good Faith Principle as an Effort to Prevent Business Disputes

The nature of good faith meant here is that in carrying out the contract, the parties take into account the interests of the opposing party. The requirement to take into account the interests of the opposing party is seen from the exercise of the rights and obligations arising from the contract. In case of banking contracts, the results of the study showed that credit contracts in the standard form often did not include the interests of consumers because they were considered to be in conflict with the interests of the banks. Standard contracts compiled unilaterally by the bank often contain promises that are very detrimental to the consumer because the contract is made without the rights of consumers and disputes that occur in the fulfillment of their achievements are basically always submitted to the court that has been determined by the bank so that it tends give an impartial verdict.

The conditions contained in the credit contract further highlight the obligations of the consumer by negating his rights as a party to the agreement. Therefore, good faith from the bank are considered non-existent, because they are related to the implementation of consumer obligations.This can be seen from the conditions stated in the contract, such as the debtor's obligation to authorize creditors to use funds obtained from disbursing credit facilities, the obligation to provide all data and information and become the property of creditors, the obligation to prioritize payments in accordance the agreed amount includes fines and other obligations arising from the agreement, as well as the creditor's right to adjust payments arising from the occurrence of monetary policy

Related to the will in Article 1320 jo Article 1338 paragraph (1) of the Civil Code, the occurrence of conditions that have been formulated unilaterally by the bank, basically are not always in accordance with the wishes of consumers, but only in accordance with the wishes of banks as credit providers. Consumer obligations arising from the credit agreement are formulated by the bank without prior discussion with the consumer, but consumers are only required to sign at the place prepared in the contract form prepared by the bank which is considered as a formal requirement that there has been a will.

The definition of conformity of the will in the contract should be described as a statement of the will of the party offering the offer and the recipient of the acceptance jointly providing his will. According to classical theory, an agreement occurs, is when an agreement occurs. Regarding this matter, it is often questioned at the moment of agreement between the two parties. One of the free elements contained in Article 1338 paragraph (1) of the Civil Code, is free to make the terms of the agreement, and free to choose which law applies to the parties in the event of a dispute in the future. Theoretically, the principle of freedom to give will is formally fulfilled by signing an agreement. But is materially if based on interests or considerations before making a credit contract basically, the freedom to give the will does not exist, because the will that has been formulated in the credit contract, more regulates the interests of the bank.

The tendency of the banking does not provide an opportunity for consumers to give their will freely in a standard contract, can lead to disputes in the contract. If related to Article 1321 of the Civil Code, error and misuse (undue influence) that grows and develops in jurisprudence as a factor that causes the disability of the will, it is assumed that there is an error/error and the abuse of the state (undue influence) causes no fulfillment of the agreement element that is not fulfilled as an element of validity of the contract (see, Nievod, 1993; Chen-Wishart, 1994).

Errors occur when a person in making a covenant does not get a clear/real picture of his desires. So an error assumes a state of ignorance. The assumption of ignorance at the time of the contract but known after the contract can occur if the debtor is not given the freedom to determine his will in the sense of not understanding the rights and obligations arising from the agreement signed. In relation to the standard conditions in the credit contract, the terms that arise in the contract that have been formulated previously by the bank, are not always understood

by consumers. Debtor's lack of understanding of the performance that arises in the contract is one of the factors causing defaults as a cause of business disputes.

Undue influence known in the Law of Contract, and in jurisprudence by using the term misbruik van omstandingheden occurs when one party has a superior situation. This superior situation can be seen in terms of psychological or economic terms of the parties that are not balanced. Psychologically and economically, the debtor is generally in a lower position than the bank, because the interests of the debtor are in dire need of credit while the bank providing credit facilities is in a superior position so that it has the potential to be abused by an opposing party whose position is superior.

Therefore, it is often said that in a standard contract, it tends to cause undue influence, because the consumer cannot not always consider the obligations arising from a contract which tends to burden the consumer even though from the bank, it is always said that the birth of the contract, in a standard contract there is no abuse of circumstances, because consumers are given the freedom to accept or reject the conditions specified in the contract.

Undue influence as defects in the will or agreement are realized after the agreement occurs. It becomes a problem if it has been given the will according to Article 1320 of the Civil Code, the contract is valid and has binding power to the consumer in accordance with the principle of panda sunser vanda, as a result the contract must be implemented in good faith.

In practice, basically, the judge makes decisions in the face of error/misguidance and undue influence as a factor in the cause of the defect of the will given by completely ignoring the conditions in the standard contract, or rejecting all the conditions, or also adjudicating cases based on good faith and decency. The formulation of the principle of good faith is not always formulated concretely through the fulfillment of the rights of the creditor with the exercise of rights by the debtor, but as a principle it is abstract in nature. It must be interpreted as an attitude and honesty to produce conformity between parties. As an absolute requirement for make a contract, the will can be implemented in accordance with what has been mutually agreed upon, and must also be carried out in accordance with local customs and propriety as mentioned in Article 1339 paragraph (1) of the Civil Code. Thus, the principle of good intention to carry out the contract as mentioned in Article 1338 paragraph (3) of the Civil Code, should have existed before entering into the contract as well as the requirement for consideration as an element of contract validity in The Law of Contracts, which is interpreted as a basis for considering making a contract. Such considerations form the basis of a contract that engenders the will to make or not make a contract.

Conclusion

In a credit contract, which is standard in nature tends to formulate conditions that are more favorable to the bank and do not pay attention to the interests of the consumers appear by only formulating consumer obligations, without regulating their rights so that the obligation to carry out the principle of good faith is only borne by consumers. Therefore, achievements/obligations arising from the agreement even though it has been formulated in such a way, often cannot always be carried out by the debtor voluntarily. The implementation of the principle of good faith in a credit contract can prevent business disputes, if the terms and achievements/obligations that arise in the contract are formulated in a balanced way between the interests of the bank and the consumer so that the wishes agreed upon in the contract are truly realized and desired by the debtor and the right of the lender to collect the credit repayment can be fulfilled in accordance with goodwill.

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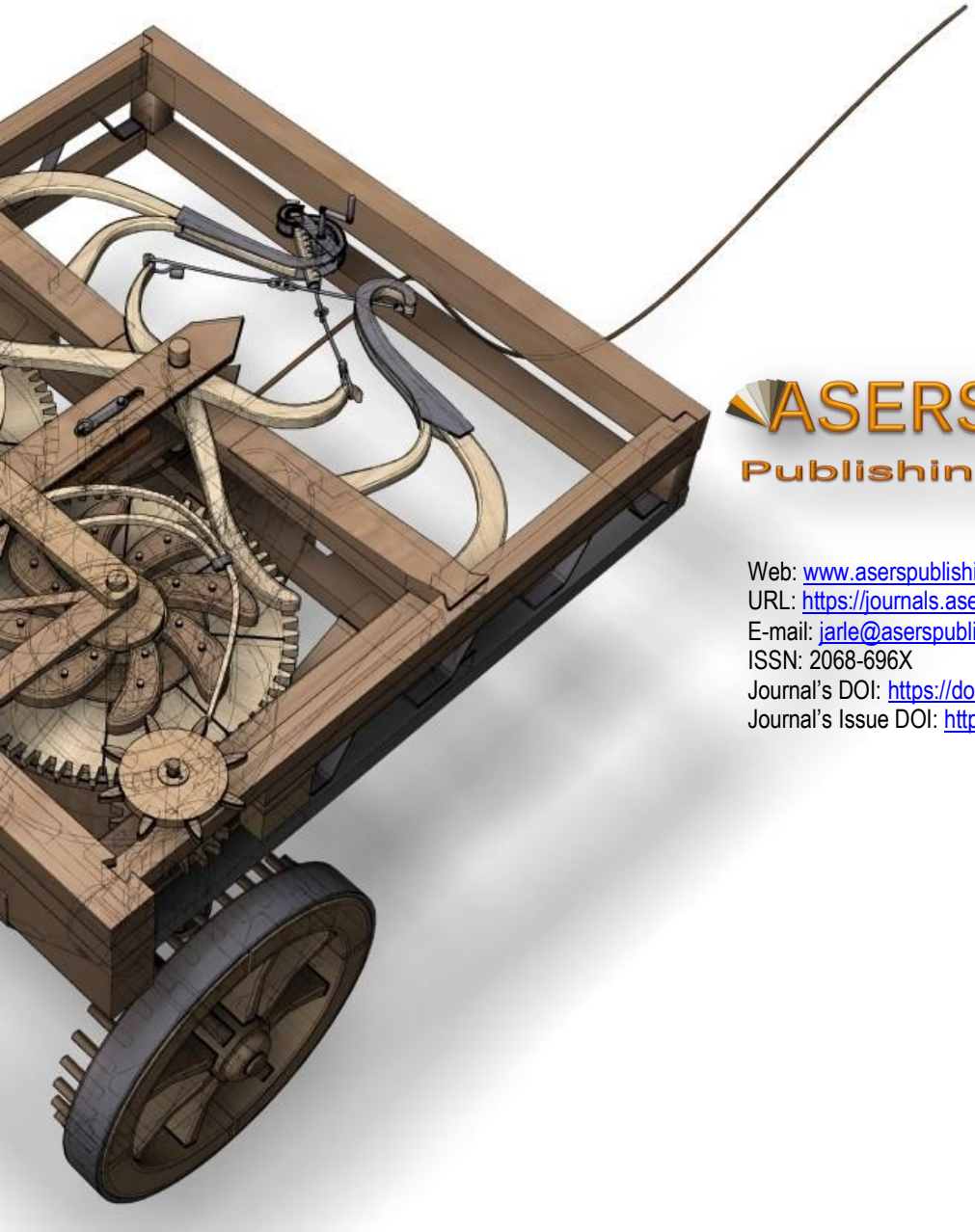

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