

Legal Review On The Consensuality Principle Of Buy And Sale Contract In Property Rights Object (*Comparison Between The Civil Code And Islamic Law*)

Sutriyono

Master of Law University 17 Agustus 1945 Semarang, Indonesia

*Corresponding Author:

Email : sutriyono@walisongo.ac.id

Abstract.

The purpose of this study is first, to examine and analyze the sale and purchase contract in the Civil Code. Second, to examine and analyze the similarities and differences between the Civil Code and Islamic law on the principle of consensuality in buying and selling contracts. This research method uses a normative juridical approach. This study emphasizes the steps of normative and qualitative juridical analysis. Based on the theme of this study, and the formulation of the problem, the researchers used a normative juridical approach. The specification of this research is descriptive analytical research. The results of the study show that 1) In the Civil Code, consensuality is the main cause of buying and selling. At the moment of agreement, the sale and purchase has occurred. Likewise in Islamic law, the agreement is an element of buying and selling, but it is not enough just to agree, but the terms and conditions of sale and purchase must be fulfilled. Therefore, Islamic law adheres to the principle of consensuality accompanied by other requirements. 2) The implications of applying Article 1458 of the Civil Code are positive and negative. The positive is that people will easily make a sale and purchase agreement. But along with that there is a negative that is very easy for fraud or fraud from one party.

Keywords: *Principle of Consensuality, Civil Code, Islamic Law*

I. INTRODUCTION

One of the important principles in contract law/agreement is the principle of consensualism, in addition to the principle of binding power of the agreement and the principle of freedom of contract and other principles which are quite numerous. Article 1338 of the Civil Code places the principle of consensualism as the first principle in contract law, and the first basis in the validity of a contract as regulated in Article 1320 of the Civil Code is the agreement of those who bind themselves.¹ Agreement is the conformity of the statement of will between one or more people with another party. The principle of consensualism can be concluded in Article 1320 of the Civil Code. This principle is a principle that states that agreements are generally not held formally, but only with the agreement of both parties.² The existence of contract law that gave birth to the principle of consensual cannot be separated from an event where humans generally interact with others, and why should they be in society. As is known, the first human, namely Adam, was destined to live together with another human, namely his wife named Eve.³ In this case, Allah SWT has made each human being in need of another, so that they help each other, exchange needs in all matters of interest in their respective lives, both by buying and selling, renting, farming, both in their own affairs and in their own affairs. for the public good. The information above is an indicator that humans have needs which to fulfill them need other people. One of the needs that requires interaction with other people is a buying and selling contract. This event occurs in everyday life that has legal consequences, namely the result of a legal action.⁴

In relation to buying and selling, that the main elements of a sale and purchase agreement are goods and prices. In accordance with the principle of "consensualism" (the principle which states that the sale and purchase has occurred at the moment there is an agreement) which animates the law of the Civil Code agreement, the sale and purchase agreement has been born the second the "agreement" on goods and prices is reached. Once both parties have agreed on the goods and prices, a valid sale and purchase agreement is

born.⁵ In the Civil Code the sale and purchase agreement also adheres to the principle of freedom of contract or an open system. Article 1493 of the Civil Code reads: "Both parties are allowed with special agreements, to expand or reduce the obligations stipulated by this law; even they are allowed to enter into an agreement that the seller will not be obliged to bear anything." From the article above, it appears that there is freedom of the seller and the buyer in making a sale and purchase agreement. This is as a result of the open system adopted in contract law, meaning that people can enter into agreements regarding anything, whether there are already rules in the law (namely the Civil Code, KUHD, special regulations or those that have no regulations at all. In this connection Sri Soedewi Masjchoen Sofwan said Article 1493 of the Civil Code implies that it is permissible for people to enter into agreements regarding anything, in other words, recognizing the principle of freedom of contract. However, this freedom also has limitations, namely as long as it is not prohibited by law, does not conflict with decency and order general.⁶

In the Civil Code, the sale and purchase agreement adheres to the principle of freedom of contract or an open system *the principle of consensuality*. In the Civil Code, a sale and purchase agreement is a consensual agreement. This can be seen in Article 1458 of the Civil Code: "The sale and purchase has taken place between the two parties immediately after the people have reached an agreement (consensus) about the object and its price, even though the object has not been delivered and the price has not been paid". Thus, for the sale and purchase according to the BW system, nothing else is needed except the agreement of the will between the parties regarding the goods (zaak) and the price.⁷ In other words, sales and purchase agreements and agreements in general according to the BW system are consensual. In this system applies a principle called consensuality. This word comes from the word "consensus" which means to agree.⁸ The meaning of the principle of consensuality is that basically the agreement arises because of an agreement and has existed since an agreement was reached.⁹ In other words, the agreement is valid if there is an agreement on the main matters and therefore no formality is needed.¹⁰ In Islamic law, the conditions for a valid sale and purchase are the existence of a seller and a buyer; existence of money and things purchased; there are benefits; the condition of the goods can be delivered; The condition of the goods belonging to the seller and the goods are known by the seller and the buyer, clearly the substance, form, content (size), and characteristics. So that nothing will happen between the two of them. Whereas in the Civil Code the sale and purchase has occurred when there is an agreement between the two parties. In the Civil Code, the conditions for a valid agreement are agreement, competence, a certain object and a lawful cause.¹¹

In the Civil Code, consensuality is the main reason for buying and selling. At the moment of agreement, the sale and purchase has occurred. Likewise in Islamic law, the agreement is an element of buying and selling, but it is not enough just to agree, but the terms and pillars of buying and selling must be fulfilled. Therefore, Islamic law adheres to the principle of consensuality accompanied by other requirements. In Islamic law, the Maliki, Shafi'i and Hanbali scholars provide an understanding, buying and selling is exchanging property for property in the form of transfer of property and ownership. This definition emphasizes the ownership aspect, to distinguish it from the exchange of property/goods that does not have the effect of ownership, such as renting. Likewise, the property in question is property in a broad sense, it can be goods and can be money.¹² The problem is how the principle of consensuality in buying and selling according to Islamic law is viewed from the Civil Code. Based on this information, it encourages the author to choose this theme with the title: Legal Overview of the Consensual Principle of the Sale and Purchase Agreement in the Object of Property Rights (Comparison between the Civil Code and Islamic Law).

A. Formulation Of The Problem

Based on the background of the problem above, the formulation of the problem is as follows:

1. How is the sale and purchase contract in the Civil Code?
2. What are the similarities and differences between the Civil Code and Islamic law on the principle of consensuality in buying and selling contracts?

II. RESEARCH METHODS

This study uses a normative juridical approach, namely legal research that uses secondary data sources, namely data sources obtained from library materials. This study emphasizes the steps of normative and qualitative juridical analysis.¹³Based on the theme of this study, and the formulation of the problem, the researchers used a normative juridical approach. The specification of this research is descriptive analytical research, namely as a problem solving procedure that is investigated by describing / describing the state of the research subject / object (a person, institution, community, etc.) at the present time based on the facts that appear or as they are.¹⁴

III. ANALYSIS AND DISCUSSION

1. Sale and Purchase Agreement in the Civil Code

In the Civil Code, buying and selling is an agreement, whereby one party binds himself to submit an object and the other party pays the promised price. From this information, it shows that buying and selling in the Civil Code is the result of an agreement. The agreement is an agreement between two parties to bind themselves in carrying out a legal act. The legal act itself is an act that has legal consequences. Another thing that can be revealed from the article above implies that buying and selling puts rights and obligations on buyers and sellers. These rights and obligations must be carried out properly. If these rights and obligations are not carried out, the sale and purchase transaction can prevent failure because one of the parties may object to entering into the sale and purchase contract. The word buying and selling implies that it includes two reciprocal actions, namely buying and selling. In this regard, the goods that are the object of sale and purchase can be determined in what form and amount it will be at the time the property rights will be handed over to the buyer.

Thus, in the Civil Code system, buying and selling according to law is legal, for example: buying and selling of crops that will be obtained at a time from a certain plot of land. Unlike the case with Islamic law, the sale and purchase as exemplified is considered invalid because the goods are not clear and there is no certainty whether the quantity and quality are the same as the previous agreement. In the Civil Code system, buying and selling has the main elements, namely goods and prices. In relation to goods and prices, the Civil Code system adheres to the principle of consensuality, meaning that the sale and purchase agreement has been born at the moment the agreement is reached. Here it can be seen that the Civil Code places great emphasis on agreement because the agreement is the main cause of the sale and purchase agreement even though the goods have not been delivered and the price has not been paid. In the Civil Code system, the measure of reaching an agreement is the statements that have been made by both parties. The law is based on the principle of consensuality, but in order to assess whether a consensus has been reached (and this is very important because it is the birth of a binding agreement like a law), we are forced to rely on statements made by both parties, and this is also a demand for legal certainty.

2. The principle of consensuality (equality and difference) in Islamic law and the Civil Code

Islamic law and the Civil Code both adhere to the principle of freedom of contract. As proof that a contract in Islamic law must be based on the freedom of will and the voluntarism of each party entering into the transaction. Islamic law gives freedom to everyone to carry out the contract as he wishes, on the contrary if there is an element of coercion or deprivation of freedom, it will cause the legality of the resulting contract

to be invalid or invalid. This principle describes the basic principles of muamalah, namely permissibility (mubah) which means that Islamic law provides wide opportunities for the development of new forms and types of muamalah in accordance with the development of the needs of people's lives. However, this freedom of contract has limitations on things that are clearly prohibited in the Shari'a. The purpose of this limitation is to prevent mistreatment between human beings through the contracts they make. These limitations include the prohibition of ribawi transactions, the prohibition of gambling or chance, and the prohibition of gharar (uncertainty of risk, speculation or danger that can mislead other parties, which here also includes the prohibition of bonding (mukhabarah) or selling goods that cannot be delivered due to not yet mastered) in conducting transactions. In addition, there are also prohibitions related to technical transactions, such as the prohibition of monopoly, prohibition of hoarding goods to increase prices, prohibition of raising offers to trick other buyers not to actually buy, prohibition of confiscation or contracts that contain fraud and seize other people's property without permission. Likewise, exploitation and unfair dealings are prohibited and there are many other provisions in trading which are clearly prohibited from being implemented.¹⁵

In the Civil Code, the principle of freedom of contract is a principle which states that basically everyone is allowed to make a contract (agreement) that contains and of any kind as long as it does not conflict with the law, decency and public order.¹⁶ understanding shows that the Civil Code gives freedom to the parties to make agreements in any form. This is understandable because contract law adopts an open system, the parties are given the opportunity to make any agreement in accordance with the mutual agreement. The principle of freedom of contract is stated by the legislators in Article 1338 paragraph (1) BW. In civil law, the principle of freedom of contract adopted by Book III BW is an open (material) system as opposed to a closed (material) system adopted by Book II BW (Hukum Benda).¹⁷ As for the difference, that in Islamic law, the freedom in question must be interpreted as limited freedom, that is, being limited must not deviate or contradict Islamic law. This means that the sale and purchase agreement is allowed as long as the content and form are not prohibited by Islamic law. Whereas in the Civil Code, people are not only allowed to make sales and purchase agreements outside those stipulated by law, but are also allowed to deviate from the law as long as they do not conflict with decency and public order. Whereas in Islamic law, the freedom in question must be interpreted as a limited freedom, that is, it must not deviate or contradict Islamic law. This means that the sale and purchase agreement is allowed as long as the content and form are not prohibited by Islamic law.

Buying and selling in Islamic Law and Western Civil Law have similarities and differences.

The difference is :

In Islamic law, buying and selling, the goods must be delivered and accepted by the buyer.¹⁸ Whereas in the Civil Code, buying and selling, the goods may not be submitted and the price has not been paid. In Islamic law, the validity of buying and selling is not enough with just an agreement or the principle of consensuality, because there are pillars and conditions. In the Civil Code, the validity of buying and selling is enough with an agreement or the principle of consensuality. The legal basis is Article 1458 of the Civil Code. The similarities are: the two laws (Islamic Law and the Civil Code) both assume that the existence of a sale and purchase contract agreement has placed rights and obligations on a reciprocal basis. As for the advantages of Islamic law: that because the pillars and requirements are so strict, it can avoid any fraudulent attempts. The weakness is: because the conditions are too heavy, it does not launch a buying and selling transaction. While the advantages of the Civil Code: because the conditions are very light, it facilitates buying and selling transactions. Weaknesses: because it is too light, it is very easy for fraud to occur.

IV. CONCLUSION AND SUGGESTION

a. Conclusion

i. In Islamic law, the conditions for a valid sale and purchase are the existence of a seller and a buyer; the existence of money and goods purchased; there are benefits; the condition of the goods can be delivered; The condition of the goods belonging to the seller and the goods are known by the seller and the buyer, clearly the substance, form, content (size), and characteristics. So that nothing will happen between the two of them. Whereas in the Civil Code the sale and purchase has occurred when there is an agreement between the two parties. In the Civil Code, the conditions for a valid agreement are agreement, competence, a certain object and a lawful cause.

ii. In the Civil Code, consensuality is the main reason for buying and selling. At the moment of agreement, the sale and purchase has occurred. Likewise in Islamic law, the agreement is an element of buying and selling, but it is not enough just to agree, but the terms and pillars of buying and selling must be fulfilled. Therefore, Islamic law adheres to the principle of consensuality accompanied by other requirements. The implications of applying Article 1458 of the Civil Code are positive and negative. The positive is that people will easily make a sale and purchase agreement. But along with that there is a negative, namely it is very easy for fraud or fraud to occur from one party

b. Suggestion

In the formation of future national law, the legislature and executive should take the important parts of Islamic law regarding the terms and pillars of buying and selling in buying and selling the object of which is property rights.

REFERENCES

- [1] Afandi, Yazid, 2012, *Fiqh Muamalah and Its Implementation in Sharia Financial Institutions*, Logung Pustaka Yogyakarta
- [2] Al-Hussaini, Imam Taqi al-din Abubakar ibn Muhammad, tth, *Kifayat Al Akhyar Fii Halli Ghayat al-Ikhtishar*, Dar al-Kutub al-Silmiah, Beirut, juz 1.
- [3] As-Sijistani, Al-Imam Abu Daud Sulaiman ibn al-Asy'as al-Azdi, 1354 H/1935 AD Sunan Abi Daud, Tijarriyah Kubra, Cairo.
- [4] Irianto, Sigit, 2019. "Understanding the Definition of Article 1321 of the Civil Code in Covenant Law", <http://jurnal.untagsmg.ac.id/index.php/SH/article/view/1431/1269>.
- [5] Muhammad, Abdul Kadir, 1980, *Covenant Law*, IKAPI Member, Teluk Betung.
- [6] Polak, 2014, *Written Civil Law in Indonesia*, trans. Sulwan, JB. Volter. Groningen, Jakarta.
- [7] Rusyd, Abul Walid Muhammad ibn Ahmad ibn Muhammad Ibn, 1409 H/1989, *Bidayat al Muqtahid Wa Nihayat al Muqtasid*, Dar Al-Jiil, juz 2, Beirut
- [8] Sabiq, Sayid, tth. *Fiqh al-Sunnah*, Maktabah Dar al-Turas, Cairo, juz 3
- [9] Soejono and Abdurrahman, 2018, *Legal Research Methods*, Rineka Cipta, Jakarta.
- [10] Soekanto, Soerjono, 2006, *Introduction to Legal Research*, UI Press, Jakarta
- [11] 2014. *An Introduction to Sociology*, CV Rajawali, Jakarta, revised edition.
- [12] Soemitro, Ronny Hanitijo, 2004, *Legal and Jurimetric Research Methodology*, Ghalia Indonesia, Jakarta
- [13] Soerjopratiknjo, Hartono, 2012, *Various Sale and Purchase Agreements*, Notary Section of the Faculty of Law, Gadjah Mada, Yogyakarta.
- [14] Sofwan, Sri Soedewi Masjchoen, 2016, *Civil Law: Law of Property, Liberty*, Yogyakarta.
- [15] Subekti R, 2014, *Law of Agreement*, Intermasa, Jakarta
- [16] 2014, *Various Agreements*, Lumni, Bandung.
- [17] Syahrani, Riduan, 2017, *Ins and outs and Principles of Civil Law*, Alumni, Bandung.
- [18] Syarifuddin, Amir, 2016, *Outlines of Fiqh*, Kencana, Jakarta
- [19] Utomo, Darmawan Tri Budi, 2016. "Dispute Resolution of Sale and Purchase Transactions Through the Internet (E-Commerce)", <http://jurnal.untagsmg.ac.id/index.php/SH/article/view/1431/1269>
- [20] Vollmar, HFA., 2012, *Introduction to Civil Law Studies*, trans. IS Adiwimarta, CV. Rajawali, Jakarta.
- [21] Wignyodipuro, Surojo, 2015. *Introduction to Law*, Mount Agung, Jakarta.