

Conference Paper

A Comparative Study on the Principles of Online Buying and Selling from the Perspectives of Islamic Law and Indonesian Positive Law

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ORCID:Dwiyana Achmad Hartanto: <http://orcid.org/0000-0001-5616-8978>**Abstract**

The study aims to analyze the comparative perspectives between Islamic Law and Indonesian Positive Law in the practices of online buying and selling (trading). This study uses a juridical and normative approach with a specification of descriptive-analytical research. The data comes from primary law, secondary law, and tertiary law, and the researcher used a qualitative method to analyse the data. The shift and development of offline-based buying and selling (trading) practices to online practices today has required special regulation in the Indonesian Positive Law.

The absence of specific rules regarding the practice of online buying and selling indicates that these activities should be subjected to the existing positive Indonesian laws. The principle of freedom of making contracts in the Civil Code (*KUH Perdata*) provides freedom to make any trade agreements. For the sake of legal certainty in the execution of online buying and selling, the parties must refer to the provisions of the Civil Code, the Information and Electronic Transaction Law (*ITE Law*), and the Consumer Protection Law (*UUPK Law*) that are relevant to the trading practice. In addition to these provisions, Islamic Law within the scope of *mu'amalah* also provides guidelines for the practice of direct buying and selling, but not online buying and selling; however, Islamic law also provides freedom in *mu'amalah*. The existence of these provisions makes it interesting to conduct a comparative study on the principles of online trading practices from the perspectives of Islamic law and Indonesian positive law.

Islamic Law considers it legal to conduct online buying and selling if the terms and conditions of buying and selling are fulfilled, if it provides benefits and negates harm, and if it does not conflict with *Al-Qur'an* and *Al-Hadith*, and if it can be designated as *al-'adatu muhakkamah* (a custom which is defined as law). According to the Indonesian positive law, in principle, online trading is legal as long as it fulfills the provisions of trading, that is the fulfillment of the terms, elements, principles, rights, and obligations of the parties regulated in the provisions of the Civil Code, Information and Electronic Transaction's Law, and Consumer Protection Law, along with providing legal assurance and protection for the parties.

Keywords: comparative study, online buying and selling, Islamic law, Indonesian positive law

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1. Introduction

Nowadays there has been a change in the pattern of people's behavior as a result of technological development in terms of politics, economy, social, culture and other aspects of life. In the economic perspective, for example, there has been a shift in people's behavior in the field of trading, where the conventional buying and selling has now changed into buying and selling which uses online system, which is also called electronic commerce (e-commerce). It certainly enables all parties, both prospective sellers and potential buyers, to make trading transactions. They do not need to meet in one place and one time to perform buying and selling activities but through online media they can make transactions. Prospective sellers only need to advertise the products they are going to sell, by explaining virtually the commodities they sell, while prospective buyers also only need to see the product virtually, in which they finally make an agreement of buying and selling. The buyer transfers money according to price of the goods that have been agreed upon and the seller sends the goods that the buyer has purchased after the payment is made or through other mechanisms/patterns according to the agreement of both parties.

The practice of online buying and selling or *electronic commerce (e-commerce)* has been a trend or life style among millennial generation today which in principle bases on the aspect of trust of both parties. It can be seen from the Analytic Data Advertising (ADA), which shows that the activity of online purchase increases by 400% since March 2020 due to the pandemic of Covid_19. Bank Indonesia (BI) noted that purchase transactions via e-commerce in March 2020 reached 98.3 million transactions. The number shows 18.1% higher compared to February. Not only that, the total value of e-commerce transactions also increased by 9.9% to 20.7 trillion rupiah from February 2020.

The practices of online buying and selling or electronic commerce (e-commerce) of the Indonesian positive law are not specifically regulated in statutory regulations, so that they are based on various statutory provisions related to buying and selling, such as the Civil Code (*KUH Perdata*), Law of the Republic of Indonesia Number 11 of 2008 concerning Electronic Information and Transactions (*UU ITE*), Law of the Republic of Indonesia Number 19 of 2016 concerning amendments to Law Number 11 of 2008 concerning Electronic Information and Transactions (*UU ITE*), and Law Number 8 of 1999 concerning Consumer Protection (*UUPK*), which in principle consider it legal on the practice of online buying and selling as long as they comply with the provisions of these laws.

In addition to the positive legal provisions, Islamic legal provisions within the scope of *mu'amalah* also provide regulations regarding buying and selling, but they do not provide specific regulations on the online buying and selling. Indonesian positive legal provisions and Islamic law regarding online trading practices are very necessary, considering that in one hand the practice of online buying and selling makes it easy for parties, but on the other hand, there possibly come new problems in the online buying and selling or electronic commerce (e-commerce) is also possible, when the parties have bad commitment and harm one of the parties. Based on the description above, the author is interested in conducting a comparative study of how the online principles of buying and selling according to Islamic law and Indonesian positive law?

2. Research Method

The research method used in the study is juridical normative approach or doctrinal approach, with the specification of analytical descriptive research. The data used were secondary data in form of primary law consisting of Civil Code (*KUH Perdata*), Law of the Republic of Indonesia Number 11 of 2008 concerning Electronic Information and Transactions (*UU ITE*), Law of the Republic of Indonesia Number 19 of 2016 concerning amendments to Law Number 11 of 2008 concerning Electronic Information and Transactions (*UU ITE*), and Law Number 8 of 1999 concerning Consumer Protection (*UUPK*); secondary data consisting of scientific journals and books related to the research topic; and tertiary legal resources taken from internet and dictionaries. The study used qualitative method to analyse the data.

3. Result and Discussion

3.1. Online Buying and Selling

Buying and selling is a means to meet human needs, because it is impossible for humans to fulfill their own needs without the help of others. The definition of buying and selling according to the Civil Code is stated in the provisions of Article 1457, that "Buying and Selling is an agreement whereby one party binds himself to hand an item (goods), and the other party to pay the promised price". In other words, it can be said that buying and selling is a reciprocal agreement, which means that each party of the seller and the buyer has rights and obligations. The term two reciprocal actions is in accordance with the Dutch term *koop en verkoop* which means one party *verkoopt*

(selling) while the other is *koopt/sale* which means sale (only seen from the seller). In French it is called *vente* (sale), while in German it is called *kauf* (purchase). The basis for the application of buying and selling online in general is Article 1338 of the Civil Code, that “all agreements made legally are valid as laws for those who make them”. This provision means that everyone is free to enter into an agreement of anything, with anyone, and in any way, included in this freedom is to buy and sell online.

Buying and selling according to Islam is *al-ba’i* which means to exchange property for property. In terminology it is an exchange transaction excluding facilities and enjoyment (with the exception of facilities and enjoyment, so that it does not include rental and marriage). The basis for buying and selling in the *Al Qur’an* is based on the letter Al-Baqarah verse (275): “... buying and selling and forbidding usury...”.

Online buying and selling or electronic commerce (electronic commerce/e-commerce) is distribution, purchase, sale, marketing of goods and services through electronic systems such as internet, television, and other computer networks. E-commerce can involve electronic fund transfers, electronic data exchange, automated inventory management systems, and automated data collection systems. The practices of online buying and selling or *electronic commerce (e-commerce)* have now become a trend in the millennial community. Many saat ini menjadi salah satu trend pada masyarakat milenial. There are many means that can be used as media of buying and selling online, such as *facebook, instagram, twitter, personal blog, whatsapp, website*, even online shops, like Shopee, Tokopedia, Bukalapak, Olx, dan other media. This online buying and selling’s facility has been widely accepted by the community and in mant of its implementation are carried out by parties, and is considered to provide convenience and benefits for the parties. This shows that there has been a shift in people’s behavior in their lives and this behavior has been accepted and considered good by the community. Hence, this behavior can be said to be *al-’urf* (customs) which the majority of people already believe, either in the form of repeated words or deeds so that they are embedded in their souls and accepted by their minds.

3.1.1. Comparation of the Principles of Online Buying and Selling in the perspective of Islamic Law and Indonesian Positive Law

The practice of online buying and selling or electronic commerce (e-commerce) in particular has not been regulated by statutory regulations, so that in its implementation it must refer to the existing laws that are relevant to the practice of online buying and selling, i.e. by analyzing it whether the sale and purchase has met the terms of a buying

and selling transaction, and it is necessary to see how the patterns or mechanisms of online buying and selling or electronic commerce (e-commerce) are commonly carried out. If the buying and selling certainly does not conflict with the provisions in the positive law, then the online buying and selling can be said to be legal. Likewise, in the context of Islamic law, the buying and selling must not be against the Al-Qur'an and Al-Hadith.

Online buying and selling according to Islamic law based on the merchandise object is included in the group of buying and selling in general, namely exchanging money for goods. In terms of price standardization, it is included in the transaction group of bargaining, i.e., buying and selling where the seller does not disclose the capital of the goods which he/she is selling. Whereas in terms of the payment method, it is included in the group of: 1) buying and selling with delayed payment; 2) buying and selling with delayed delivery of goods; or 3) buying and selling with both delayed delivery of goods and delayed payment, depending on the agreement between the seller and the buyer. Meanwhile, the legal requirements for buying and selling according to Islam are divided into 2 (two): 1) Subjective conditions, i.e., that the parties must be: pubescent, able to choose, not mentally impaired, and not forced; 2) Objective conditions, i.e., that the object of sale and purchase must be: ritually clean, useful, able to be handed over, fully owned by the seller, certain object, and not impose a time limit (buying and selling for a certain time).[5]

Regarding the pillars and terms of buying and selling, the Islamic clerics have different view. According to the Hanafiyah cleric, there is only one pillar of buying and selling, namely *ijab* (an expression of buying from a buyer) and *qabul* (an expression of selling from a seller). This view argues that the pillar of buying and selling is only the willingness between the seller and the buyer, but willingness is an element of heart that is difficult to sense and cannot be seen, so indicators are needed that show the willingness of both parties which can be in form of words, namely *ijab* and *qabul* or in form of action, i.e., giving each other (handing over goods and receiving money). Meanwhile, the majority of scholars (*Jumhur 'Ulama*) argues that there are four pillars of buying and selling, those are: 1) Persons who are bound in a contract (*al-muta'qidain*), i.e., the seller and the buyer; 2) *Sighat* (pronunciation of *ijab* and *qabul*); 3) *Ma'qud 'alaih* (the purchased goods); and 4) the exchange rate for goods' substitutes. According to the '*Ulama Hanafiyah*, persons bound by contract, the purchased goods, and the exchange rate of goods are terms of buying and selling, not the pillars of it. Furthermore, buying and selling which are prohibited and legally invalid are: 1) goods which are stated to be unclean by religion; 2) buying and selling of animal sperm; 3) buying and selling of young animals in their mother's stomach; 4) buying and selling of *mukhadharah* (selling

fruits that are not suitable for harvesting); 5) buying and selling of *munabadzah* (selling and buying by throwing); 6) buying and selling of *gharar* (cryptic buying and selling, there may be an element of fraud); 7) buying and selling food that is measured twice (less trusting of the parties). There are terms, pillars, and provisions for the prohibition of conventional buying and selling that they must also be fulfilled in online buying and selling, because both are forms of buying and selling, so as to be legal according to the provisions of the Sharia.

Online buying and selling or electronic commerce (e-commerce) is not specifically regulated in the Al-Qur'an and Al-Hadith, because at that time there was no internet, so with changes in people's behavior in making buying and online selling transactions or electronic commerce (e-commerce) and it has been accepted as a good habit or custom, it needs to be established as law, although there is a possibility of fraud (*gharar*) and mutual distrust between the parties. Online buying and selling or electronic commerce (e-commerce) is very likely to be permissible and not prohibited, as well as a custom/habit that can be established as law (*al-'adatu muhakkamah*) with the following conditions: 1) The products sold are *halal* in its substance; 2) Clarity on the status of the owner of the goods being sold; 3) The suitability of price with the quality of the goods, and 4) Honesty of the parties.

The practice of online buying and selling is a form of behavior change in modern society today, which has taken place continuously and accepted by the community in general, so that it can be called custom/habit. In establishing Islamic law, apart from basing on the Al-Qur'an and Al-Hadith, it is also based on the practice/behavior of the community in their daily activities, which by Islam it is also seen as one of the third source of law (*Ra'yu*) on the condition that it does not conflict with the Al-Qur'an, Al-Hadith, and is accepted by the public in general as something good. The practice of online buying and selling or electronic commerce (e-commerce) can be referred to *Majma' Al Fiqh Al Islami* (OKI Fiqh Division), that "If a contract occurs between two people who are far apart, not in one assembly, one another does not see each other, do not listen to each other's transaction partner, and the media between them is writing or letters or messengers; it can be applied to facsimiles, telexes, and computer screens (internet), so that the contract takes place with the delivery of *ijab* (consent) and *qabul* to each of the transacting party. If the transaction takes place at one time while the two parties are far apart, this can be applied to transactions via telephone or cellphone, then the occurring *ijab* (consent) and *qabul* are immediately done as if they were in one place." The rule of *ushul fiqh* states, "*al-hukm yataghayyar bi taghayur al-azminah wa al-amkinah*", that law can change in line with the change of time and place. To certain extent, the Islamic

Law is therefore regarded adaptable and flexible to the change of society including in: economy, politics, culture, custom, and habits living in the community. This rule implies the existence of a theory of mutual relationship between Islamic law and society, which at the same time serves as justification that every legal development must always be seen from its social perspective.

The relationship between the behavior or tradition of society with Islamic law in the perspective of *al-ahkam al-khamsa* (five rules of Islamic law) which includes: *haram* (prohibited), *fardh* (obligatory), *makruh* (disliked), *sunnah* (encouraged), and *jaiz/mubah/halal/libahah* (permitted), can be included provided that it is not contrary to the beliefs of Islamic law. 'Urf or custom (tradition), as a tool or method of exploring Islamic law. This statement is in line with the standard for forming the legal line, i.e., *al-'adatu muhakkamat* (custom can be referred to determine law). Custom (tradition) is a habit in daily life which is covered by the term *mu'amalah*, i.e., not worship. Anything that is customary and considered good, except those that are contrary to Al Qur'an, is permissible, as stated in the Hadith of the Prophet SAW: "What is seen good by people is also good according to Allah". In this case, the pros and cons in question are in addition to being based on objective criteria (benefits), must also be viewed subjectively (in terms of the vision of a Muslim).

The word *adat* (custom/tradition) comes from the Arabic word '*adah*' which is also translated as '*Urf*'. '*Adah*' means habit, while the word '*Urf*' means something which is known. Some scholars argue that '*adah*' means repetition or habitual practice, which can be used for both individual and group interests. Meanwhile, on the other hand, '*Urf*' is interpreted as a repetitive practice that can be accepted by someone who has common sense. The conditions that must be fulfilled by *al-'urf* in order to be made into law are: 1) not against Al-Qur'an and the Sunnah; 2) the customs have become a tradition in every community's *mu'amalat* or in majority of them; 3) there is no prior agreement regarding the conflict against the custom; 4) the custom was still practiced by people when the incident took place.

According to the provisions of Civil Code (*KUH Perdata*), the legal conditions for online buying and selling cannot be separated from the general provisions on the validity of the agreement. When the legal conditions of the agreement are fulfilled, then the buying and selling is also considered valid. These conditions are listed in the provisions of Article 1320 of the Civil Code (*KUH Perdata*):

1. Agreement from those who are bound in a contract (bond)
2. Ability of making a bond

3. A defined (certain) thing

4. Subjected to the *Halal* reason

An agreement of online buying and selling must also meet 3 (three) kinds of elements, those are: 1) *Essentialia*, i.e., a very important element in an agreement that must exist; 2) *Naturalia*, i.e., an element of agreement that should exist if not set aside by both parties; and 3) *Accidentalialia*, i.e., an element of the agreement available if required by both parties. In addition to fulfilling the above three elements, online trading must also meet the principles of agreement, namely: 1) the principle of consensuality (agreement between the two parties); 2) the basis of trust (fulfilled performance by the parties); 3) the basis of freedom of contract (agreements are not bound by certain forms); and 4) what is promised binds both parties (*Pacta sunt servanda*).^[13]

The provisions of Article 1458 of the Civil Code (*KUH Perdata*) state that buying and selling is regarded to have occurred between the two parties, as soon as these persons agree on the material and the price, although the object has not been delivered or paid. This provision is also very relevant when applied in online buying and selling, considering that the practice of online buying and selling is usually carried out in various patterns, such as the buyer making a payment first (via transfer) and then the goods are sent by the seller or vice versa, and sometimes the payment is made at the time the goods is received through a freight forwarder.

Regarding the obligations of the parties in online buying and selling, they must comply with the provisions of Article 1474 of the Civil Code (*KUH Perdata*) that “The seller has two main obligations, namely to deliver the goods and secure them”. In relation to the delivery of goods, according to the provisions of Article 1477 of the Civil Code, it is stated, “the delivery must take place at the place where the goods were sold at the time of sale, if no other agreement has been made regarding that matter. Meanwhile, the obligation to secure goods in general is regulated in Article 1491 of the Civil Code, that states, “The coverage which is the responsibility of the seller to the buyer is to guarantee two things, those are first securing the object being sold in a safe and secured manner; second, for the existence of hidden defects in the goods, or in such a way as to issue a reason for cancellation of the purchase”. Meanwhile, the obligations of the buyer are regulated in the provisions of Article 1513 of the Civil Code, which states “the main obligation of the buyer is to pay the purchase price, at the time and at the place as stipulated in the agreement”. In buying and selling online, you must also be based on these conditions, so that the rights of the seller and the buyer are fulfilled.

Online buying and selling or electronic commerce (e-commerce) must also meet the provisions of the Information and Electronic Transaction Law (*ITE Law*), i.e., Article 3, which states that “Utilization of Information Technology and Electronic Transactions is carried out based on the principles of legal certainty, benefits, prudence, good commitment and freedom, using technology or without technology” and the provisions of Article 9, which states “Business actors offering products through Electronic Systems must provide complete and correct information relating to the terms of the contract, manufacturers, and products offered.” The provisions of this article require good commitment from business actors. The provisions of Article 1 point 2 (Amendment to the *ITE Law*) provide the meaning of Electronic Transactions as legal acts carried out using computers, computer networks, and/ or other electronic media. This definition provides the basis for general regulation regarding online buying and selling or electronic commerce (e-commerce).

The practice of buying and selling online must also refer to the provisions of the Consumer Protection Law (*JUPK*) to provide protection for parties, in the form of fulfilling rights and obligations. As for the rights and obligations of business actors (sellers) are included in:

Article 6

“The rights of business actors are:

1. The right to receive payment in accordance with the agreement regarding the conditions and exchange value of the goods and / or services being traded;
2. The right to obtain legal protection from the actions of consumer with bad commitment;
3. The right to make proper self-defense in legal settlement of consumer disputes;
4. The right to rehabilitate a good name if it is not proven by the goods and/ or services being traded;
5. The rights regulated in the provisions of other laws and regulations.”

Article 7

The obligations of business actors are:

1. Have good commitment in carrying out business activities;
2. Provide true, clear and honest information regarding the condition and guarantee of goods and/ or services, as well as provide an explanation of the use, reparation and maintenance;

3. Treating or serving consumers properly and honestly, and not discriminatory;
4. Ensuring the quality of goods and/ or services produced and/ or traded based on the applicable quality standards for goods and/ or services;
5. Provide the opportunity for consumers to test, and/ or try certain goods and/ or services, as well as provide guarantees and/ or guarantees or goods made and/ or traded;
6. Provide compensation, indemnity and/ or substitute services if the goods and/ or services received or used are not in accordance with the agreement.

Regarding the rights and obligations of buyers (consumers) in the provisions of the Consumer Protection Law (*UUPK*) are:

Article 4

Consumer Rights are:

1. The right to comfort, security and safety in consuming goods and/ or services;
2. The right to choose goods and/ or services and to obtain these goods and/ or services in accordance with the exchange rates and conditions and guarantees promised;
3. Right to get correct, clear and honest information regarding the condition and guarantee of the goods and / services used;
4. The right to have their opinions and complaints heard about the goods and/ or services used;
5. The right to get advocacy, protection and proper consumer protection for dispute resolution efforts;
6. The right to receive consumer guidance and education;
7. The right to be treated or served correctly and honestly in a non-discriminatory manner;
8. The right to get indemnity, compensation and/ or replacement if the goods and/ or services received are not in accordance with the agreement or not as it should be;
9. The rights regulated in the provisions of other Prevailing Laws.

Article 5

Consumers' obligations are:

1. Read and follow the information instructions and procedures for the use or utilization of goods and/ or services, for the sake of security and safety;
2. Have good commitment in making transactions for the purchase of goods and/ or services;
3. Pay according to the agreed exchange rate;
4. Participate in proper legal settlement of consumer protection disputes.

4. Conclusion

Islamic law considers online buying and selling legal when the terms and conditions of sale and purchase are fulfilled, provide benefits and deny harm, and do not contradict Al Qur'an and Al-Hadith, can even be set *al-'adatu muhakkamah* (custom determined as law). According to the Indonesian positive law, in principle, online buying and selling is legal, as long as it meets the conditions of sale and purchase, i.e., the fulfillment of the terms, elements, principles, rights and obligations of the parties set out in the provisions of the Civil Code (*KUH Perdata*), the Information and Electronic Transaction (*ITE*) Law, and Consumer Protection Law (*UUPK*), and provide certainty and protection law for the parties.

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