

Fair Consumer Protection, Balanced and Proportional in a Fixed E-Commerce Agreement Based on Justice Value

Hazilina^{1*}, Gunarto², Habib Adjie²

¹Student of Doctoral Program in Law, Universitas Islam Sultan Agung Semarang, Indonesia

²Lecturer at Doctoral Program in Law, Universitas Islam Sultan Agung Semarang, Indonesia

*Corresponding author

Hazilina

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Abstract: The era of today is full of unexpected events. As well as in the field of on-line purchase agreement. In E-Commerce the form of agreement used is the standard / fixed that the contents of the agreement has been first prepared by the business actors without involving their customers, there is no bargain about the contents of the agreement. Here we see the position of the consumer is in a weak position, no bargaining position is the same between business actors with consumers. In connection with the matter in Article 9 of Law Number 11 Year 2011 concerning Transaction and Electronic Information stipulates that the business actor is obliged to provide complete information related to the terms of the contract to the consumer in offering its products, Article 18 of the Consumer Protection Law concerning the prohibition of the prohibition on the use of the standard clause is apparently in fact the business actor still commits a violation even though Article 18 Paragraph (3) of the Consumer Protection Act has stated that the documents or agreements that comply with the provisions in paragraphs (1) and (2) of the Consumer Protection Act this is declared null and void. In this study using normative legal research to provide prescriptive "justification", research is conducted in order to find a new knowledge for fair consumer protection. The result of this study is that consumer protection does not reflect fairness, balance and proportionality in the standard E-Commerce Agreement. This is because in the standard E-Commerce agreement there is no equal bargaining position for both parties so that it has placed a stronger position on the business actor and the weak position on the consumer, because the contents of the agreement is determined unilaterally by the business actors so there is no "space" to do negotiations on matters that have not been agreed upon in the offering of a product. Where this means that the use of a standard agreement on a Commerce transaction is contrary to the principle of consensus and the principle of contracting which is an essential principle that must exist in an agreement.

Keywords: Consumer Protection, E-Commerce Standard Agreement, Justice Principle, Balance and Proportionality.

INTRODUCTION

Societies have a lot of various characters. Each depends on the background of the environment, education and family life. In social life there are rules of law that must be respected, obeyed by human beings both as individuals and individuals in groups or communities and for those who violate will receive sanctions as a result of non-compliance with the rule of law. Although every person or group of persons are free to act or perform an activity in accordance with their human rights, but must not violate the law either written in the form of laws made by the government or the unwritten law in the form of living habits, remains maintained and respected so that customary law in a society in a certain area should not be contrary to public order and morality.

With both the other individual and the spiritual life there are kaedah-kaedah that must be fulfilled. The existence of rules that grow and live in a particular society. Thus the law can be interpreted as a collection of rules both written and unwritten which regulate, protect the human life must oblige, implemented and enforced to balance existing in society can be maintained and sanction for violation. So within the law there are rules that must be done but there are also restrictions on the balance that exist in the community can be maintained and the sanctions for those who commit violations. So within the law there are rules that must be done but there are also restrictions on not doing something and the existence of sanctions for those who violate the subject of the Law is anything that basically has rights and obligations and therefore can play a role in legal traffic with the governance the applicable legal terms and conditions. Because to be able to perform a

legal act must be according to the rules legislation set by the government, considering our country is a state law. In the traffic law that has / the support of rights and obligations is called the legal subject namely; People (natuurlijkpersoon) and Legal entity (rechtspersoon). Every person is the bearer of rights and duties, not distinguished between the rich and the poor, no differences according to religion or belief adopted, all the same as the bearer of rights and duties. So people or human beings are the supporters of rights and obligations since they are still in the womb, born to death.

Although when we look at Article 2 B.W., there are exceptions:

- "The child, who is in the womb of a woman, is considered to have been born, whenever there is an interest on it".
- "When Death when born occurred, it is assumed that he never existed to begin with".

The legal entity (rechtspersoon) is a business entity established by a number of people who have the same interests and objectives to conduct a business in an association, own property can do the same legal acts with the person (natuurlijkpersoon) the ordinance its establishment according to the prevailing laws and regulations.

Although this legal entity has the same status as an individual, but in exercising its rights and obligations the legal entity is represented by persons acting as committee listed in its deed of establishment. The provisions concerning legal entities can be seen in Article 1653 BW until Article 1665 BW, other than legal entities / associations shall also be regulated and entered into Book III regulating the Engagement.

The State of Indonesia is a constitutional state then all acts of the citizens or the conduct of the society shall be in accordance with applicable law. In order for the people to live regularly, orderly, peaceful, safe, fair, prosperous and prosperous then required the rules of law, both written law in the form of legislation and unwritten rules in the form of habits or traditions obeyed by a certain communities and the existence of sanctions for violators.

The purpose of law is to regulate the order in society which is done fairly and peacefully.¹The law

¹ L.J.Van Aveloorn "states that the purpose of law is to regulate the order in society peacefully and fairly. To achieve legal peace must balance the conflicting interests of one another, and each person should obtain (wherever possible) what is his right. L.J.Van Aveloorn *"Inleiding tot de studie van het Nederlandse Recht"* dalam Soeroro, *Pengantar Ilmu Hukum*, Sinar Grafika, Jakarta, 2013, p. 57

should make what is called "Algemeene regels" (general rules / conditions) [1]. This regulation is required by an orderly society for the sake of legal certainty, although at times it can lead to injustice.²

A covenant is an act by which one or more persons commit themselves to one or more persons. Subekti says that the Engagement is; "A legal relationship (regarding property wealth) between two people, who gives the right to the one to demand the goods of something else, while the other is obliged to fulfill the demand [2] ".³

According to Article 18 Paragraph (1) Sub-Paragraph g of the Consumer Protection Act states that: "*Business actors in offering goods and / or services intended for trading are prohibited to make or include a standard clause on each document and / or agreement if: regulations in the form of new rules, additions, continued and / or advanced alterations made unilaterally by business actors in the period when consumers utilize the services they buy*".⁴

If you see from the above provisions, the business actor should have a good intention to comply with the provisions set by the government. However, in trade traffic through internet media / on sale and on line this provision has not been fully complied with, for example in the standard agreement contained in Bukalapak online shop websites for example, contains the following provisions: "The rules of use of the Bukalapak may change from time to time and / or be updated from time to time without prior notice. By accessing Bukalapak, Users are deemed to agree to the changes in the Bukalapak usage rules. At Lazada's online shop service there is a provision on the price of the product as follows, the price of the Product "We reserve the right to change the Price List at any time without giving any reason or prior notice". Similarly, the online shop of Elevenia in its terms contains the provision that: "Elevenia has the right, in its sole

² Jeremy Bentham says that laws aim solely at what is useful to people. This opinion is emphasized on the things that are useful for many people and is general about the matter of justice. The theory relating to this usefulness is called the utilitarian theory, which argues that law is essentially aimed at realizing what is beneficial to one person and can also harm others, then the purpose of the law is to provide as much benefit as possible. Here the certainty by law for individuals is the ultimate goal of the law. L.J.Van Aveloorn *"Inleiding tot de studie van het Nederlands Recht"* dalam Soeroro, *Pengantar Ilmu Hukum*, Sinar Grafika, Jakarta, 2013, p.58.

³ Subekti, *Pokok-Pokok Hukum Perdata*, Intermasa, 2003, p. 122.

⁴ Pasal 18 ayat (1) huruf g Undang-Undang Perlindungan Konsumen.

discretion, to change, modify, add or delete part of this Agreement at any time without further notice. If Elevenia does this, Elevenia will announce the amendment of the Agreement on this Web Site. Continuing use of this Web site after such changes is a sign of your acceptance of any revisions to the Agreement and other Terms enforced by Elevenia ". In the above sale and purchase agreement it is clear that the consumer is in a weak position due to the lack of freedom of contract, the absence of bargaining position between the business actor and the consumer, and the weakness of consumer protection so that there is no justice, balance and proportionality in the Standard Agreement E-Commerce.

MAIN PROBLEM

Based on the above Introduction of the problem, the following issues can be formulated:

- How is consumer protection fair, balanced and proportional in the standard E-Commerce agreement?
- What are the disadvantages of consumer protection in relation to the default E-Commerce agreement?

METHOD OF RESEARCH

The approach in this research is to use normative legal research. Normative legal research is a study that always takes legal issues as the norm system used to provide prescriptive "justification" of a legal event. So that normative legal research makes the norm system as the center of study, as a system building associated with a legal event.

This research is conducted with the intention to provide legal argument as the basis for determining whether an event is right or wrong and how best the event should be according to law. Reference in this normative legal research is a norm system, such as legislation, legal principles and legal doctrines taught to seek legal construction and legal relations. Normative law research only stops within the scope of the conception of law, legal principles and rules only, not to the human behavior that implements the rule.

Specification in this research is analytical descriptive. The research is conducted in order to find a new knowledge for fair, balanced and proportional consumer protection in connection with the use of standard clauses in the E-Commerce transaction agreement.

DISCUSSION

How consumer protection in the standard E-Commerce agreement can be fair, balanced and proportiona

Plato argues about the essence of justice associated with expediency, he argues that: "Justice has a good and just relationship is determined by a statement that later became useful and useful only if

previously used; which states that the idea of justice produces the sole value of the idea of goodness [3]."⁵

The essence of justice can be seen as follows: "A possible quality, but not necessarily, of a social order that guides the creation of mutual relationships among fellow human beings. Only then he is a form of human kindness, because it is human just when his behavior is in accordance with the norms of social order that should be just. The point of a just social order is that it guides human behavior in creating a condition that satisfies all humans in other words that so everyone can be happy in the rule.

The essence of justice according to Hans Kelsen is in accordance with the norms that live and thrive in society. Norms that live and thrive in society, not only legal norms, but also other norms, such as religious norms, decency, and others. The purpose of the norm made is to achieve happiness. Happiness in this concept, not just individual happiness, but happiness for all people or human [4].⁶

The principles of justice in the application of the concept of justice that individuals before others are entitled to a relative position of equality or inequality. This is something to be considered in the uncertainty of social life when the burden or benefit of being recovered type is disturbed. From there the tradition of justice is seen as the maintenance or restoration of balance or proportion and its basic rules are often formulated as the treatment of the same and unlike, yet we add to it and treat things differently in different ways .

John Rawls asserts that a democratic justice enforcement program should take into account two principles of justice, namely: First, give equal rights and opportunities to the broad basic freedoms of equal freedom for everyone. Second, able to reorganize the socio-economic disparities that occur so as to provide reciprocal benefits for everyone, whether those from lucky or disadvantaged groups. The main subject of social justice is the structure of society, or rather, the way in which major social institutions distribute fundamental rights and obligations and determine the sharing of benefits from social cooperation [4].⁷The meaning of the word fair according to the Indonesian General Dictionary has two meanings, the first is not

⁵Hans Kelsen, *Dasar-Dasar Hukum Normatif*, Bandung: Nusa Media, 2008, p.117.

⁶H.L.A.Hart, *The Concept of Law (Konsep Hukum)*, diterjemahkan oleh M.Kosim, (Bandung:Nusa Media, 2010),hlm 246, dalam Salim,HS, Septiana Erlies, *Penerapan Teori Hukum PadaPenelitian Disertasi Dan Tesis*, Grafindo Persada, 2004, p. 30

⁷Ibid., p. 30

biased (impartial), the second means fitting; not arbitrary [5].⁸

Jhon Stuart Mill points out that:

"There is no theory of justice that can be separated from the demands of expediency. Justice is a term given to rules that protect claims that are essential to the welfare of society, claims to hold pledges equally treated, etc [6]".⁹

According to Thomas Aquinas distributive justice is basically a tribute to human person (acceptio personarum) and nobility (dignitas). In the context of distributive justice, justice and equity is not achieved solely by the actual value assessment but also on the basis of similarity between one thing and another (aequalitas rei ad brakes). There are two forms of similarity:

- Proportionality (proportionist acquisition);
- Equality of quantity or quantity (quantity acquisition) [7].¹⁰

The articles contained in the body of the 1945 Constitution are to contain the basic and general rules which then to regulate matters of a special nature the government establishes the rules of law or other special provisions / positive law according to the ordinance set by the government [8].¹¹

Positive laws that will be formed then must be in accordance with the noble values contained in the Indonesian society even though the community continues to grow, it is intended to realize a safe, just, prosperous and prosperous life of all the people of Indonesia. Therefore, it is necessary to have rules that uphold human rights.

The established legal rules should be used as a means to realize the goals or lofty ideals of the founders of the Indonesian nation as set out and included in the fourth paragraph of the 1945 Constitution, namely to protect the entire Indonesian mother land, promoting the general welfare, the intellectual life of the nation and participating in the implementation of world order based on freedom, eternal peace and social justice.

⁸ W.J.S. Poerwadarminta, *Kamus Umum Bahasa Indonesia*, Balai Pustaka, Jakarta, 2007, p.8

⁹Salim, HS, Septiana Erlies Nurbani, *Penerapan Teori Hukum Pada Penelitian Disertasi dan Tesis*, Raja Grafindo Persada, 2004, p. 29

¹⁰E.Sumaryono, *Etika Hukum Relevansi Teori Hukum Kodrat*, Thomas Aquinas, Kanisius, Yogyakarta, 2002, p. 90-91 (selanjutnya disingkat E.Sumaryono-II) dalam Agus Yudha Hernoko, *Hukum perjanjian Asas Proporsionalitas Dalam Kontrak Komersial*, Kencana, Jakarta, 2011, p. 49.

¹¹Jogi Nainggolan, *Energi Hukum Sebagai Faktor Pendorong Efektivitas Hukum*, Refika Aditama, Bandung, 2015, hlm, 153-154.

Along with the development that occurs in the community, where progress in various fields such as telecommunications, electronics, trade inevitably must be followed to meet the needs of life in society. Changes that occur in the life of the community due to progress in various fields is of course also affect the rules of law / existing law. The government must, of course, make regulations that suit the needs, although in reality the law is always left behind compared to the social changes that exist in the midst of people's lives. In accordance with the above, it can be said that the ultimate goal of law is to achieve justice. One of the efforts to achieve justice is through law enforcement from law enforcement officials who hold the oath / pledge, responsible in carrying out the duty of the State in accordance with what has been established by the government to achieve justice and legal certainty and able to provide legal protection for all Indonesian people.¹²

A rule of law should be based on various norms such as religious norms, morals and legal norms and other rules that exist in society. Moral and religion should be a guide for the human conscience in upholding truth and justice according to the divine teachings contained in the scriptures. Legal norms are needed so that people can live orderly, orderly because every human behavior must be framed by the rules that are forcing and for violators will get sanctions in accordance with the established either in the form of warning, compensation, or sanction confinement. Thus human beings must obey every rule of law whether it is within the religion and also what mentioned in the law of the State so that the life of society and the state can be orderly, safe and peaceful. One of the things that need to be considered in E-Commerce trading transactions is balanced position among the parties both consumers and business actors, and also agreement between the parties must be fulfilled [9].¹³

In connection with the increasingly widespread E-Commerce trading transactions even with capital Rp.100.000, - just someone can make an investment offered on this line. For example, by investing on-line mutual funds that also offer and have advantages such as the following :

- Mutual funds are regulated by an investment manager who is already professional and indeed experts in the field of investment so that investors do not have to worry where the run of funds.
- Mutual fund investment is also safe and not merely focused on corporate investment. This also will make the losses can be minimized.

¹²Sacipto Raharjo, Op. Cit. p. 188-189.

¹³Titik Triwulan Tutik, *Hukum Perdata dalam Sistem Hukum Nasional*, Kencana Prenad Media Group, Jakarta, 2008 p. 373-374.

- Information obtained by investors will also be very transparent related to the management of funds so that fund progress can be seen.
- Potential for high profit.
- Supervise OJK so that the security of your funds is also maintained.¹⁴

Consumer Protection Deficiencies In Relation To the Use of the Standard Clause in the E-Commerce Transaction Agreement

Some experts gave their definition on what is called the principle of law.¹⁵ Similarly, the principles of contract law have a very important meaning, because as a basis that will be the determinant for its validity, an agreement made by the parties.

The principle of contract law is a foundation in making a treaty, generally the principles of the agreement are:

- The principle of consensualism;
- The principle of freedom of contract;
- The principle of Pacta Sunt Servanda;
- The principle of good faith

In the National Law Workshop Workshop organized by the National Legal Development Agency, the Department of Justice on December 17-19, 1985 has formulated 8 principles of National Alliance Law, namely [9]:¹⁶

- The principle of trust;
- The principle of Equal Law;
- Balance principle;
- Principle of Legal Certainty;
- Moral Principle;
- Principle of Precision;
- The Principle of Habit;
- Principle of Protection.

The general principles of treaty law as mentioned above are:

- The principle of consensuality,
- The principle of freedom of contract,

- The principle of binding force (pacta sunt servanda);
- Good faith principles.

Besides the general principles of some legal experts also add other principles relating to the principle of equilibrium agreement. The principle of equilibrium is a principle intended to harmonize the legal institutions and the basic principles of covenant law known in the Civil Code based on the thinking and the background of individualism on the one hand and the Indonesian way of thinking on the other [10].¹⁷

The principle of proportionality in an agreement is aimed at putting the position of the parties in balance. To achieve these objectives, the government intervention is needed, not only by making the law but also the supervision of its implementation is also a factor that is not less too. It is intended to provide legal protection to the parties, especially in the world of trade that is to protect consumers.

In connection with the protection of such consumers can be seen as regulated in Article 18 of Law Number 8 Year 1999 on Consumer Protection. When considered the article contains rules that limit and balance the bargaining position of the parties, wherein the inclusion of standard clauses / standard clauses by business actors or by producers not to harm the other party / consumer [11].¹⁸

Thus in an agreement the position of the parties in the exchange between rights and obligations should be sought in a balanced position, and if there are an imbalance the parties may reject the agreement.¹⁹

Speaking of proportionality in a treaty can not be separated from the premise that there must be a balance of bargaining position equally / equally in carrying the burden of obligations between the parties fairly and justly in accordance with the legal values of Indonesia which is reflected in customary law (harmony, mutual assistance, kinship).²⁰

Similarly, transactions conducted among consumers with business actors in E-Commerce, of course, have a risk that is not small where the rights of consumers can be violated. One of the causal factors is because in conducting sale and purchase transactions do not occur face to face among consumers with business

¹⁴<http://wacana.siap.web.id/2017/10/investasi-mudah-sejak-kuliah-dengan-reksadana-online.html#.WignwDcxXIV>, diakses pada 7 Desember 2017. Pukul 23.40.WIB.

¹⁵ Bellefoird argues that the principle of law is the basic norm outlined by the positive law and which by law is not regarded as deriving from the more general rules. This general legal principle is the precipitation of positive law in a society. Notohamijayo, *Soal-Soal Pokok Filsafat Hukum*, BPK Gunung Mulia, Jakarta Pusat, 1975, h 49, Sudikno Mertokusumo, *Penemuan Hukum Sebuah Pengantar*, Universitas Atma Jaya, Yogyakarta, 2010 h 6, dalam Leli Joko Suryono, *Pokok-Pokok Hukum Perjanjian Indonesia*, LP3M UMY, 2014, p.58.

¹⁶ Titik Triwulan Tutik, Op. Cit. p. 230.

¹⁷ Herlin Budiono, *Ajaran Umum Hukum Perjanjian dan Penerapannya di Bidang Notariat*, Citra Aditya Bakti, Bandung, 2010, p.33.

¹⁸ Agus Yudha Hernoko, *Hukum perjanjian Asas Proporsionalitas Dalam Kontra Komersial*, Kencana, Jakarta, 2011, p. 104

¹⁹ Ibid., p. 88-89

²⁰ Ibid. p. 101

actors but only through electronic media, one of the media used is with the internet. In relation to no face to face between consumers and business actors, the goods offered are also not present in the eyes but through the images available on the electronic screen (computer, mobile phone etc), this does not close the possibility of fraud or dishonesty in transactions.

Consumers interested in purchasing an item offered on a website will present an agreement containing terms / clauses commonly used in an agreement previously prepared / established unilaterally by the business actor. There is no prohibition to use standard / standard callus in transactions either in real terms or by using electronic (E-Commerce) as long as the standard agreement does not include what is prohibited by Article 18 of the Consumer Protection Act.

When considered in conducting E-Commerce transactions the consumer can not / no opportunity to negotiate with the business actors about the contents of the agreement²¹, this is because the agreement is so, the consumer lives accept / agree then the process of buying and selling can proceed or if disagree / reject the contents of the agreement offered then resulted in the cancellation of sale and purchase.

In an effort to provide protection to consumers, the government has established a National Consumer Protection Agency which serves to provide advice and consideration to the government in an effort to develop protection to consumers in Indonesia. Legal protection for consumers is very important to consider in maintaining legal relationships that occur between the consumer as a user / user of goods and or services with the business actors / producers. This is because the position of consumers is still in a weak position when compared with business actors / producers. The position between the consumer and the business / producer should be equal and balanced considering the existence of the two is mutual need, because the business progress of the producer is dependent on the consumer as the party who uses / uses the product of goods or services marketed / sold by the producer. In order to provide protection to these consumers in addition to the National Consumer Protection Agency,²²the existence of non-governmental organizations that have concern for the problems faced by consumers is also needed by the government.²³

CONCLUSION

Consumer protection does not reflect fairness, balance and proportionality in the standard E-Commerce Agreement. This is because in the standard E-Commerce agreement there is no equal bargaining position for both parties so that it has placed a stronger position on the business actor and the weak position on the consumer, because the contents of the agreement is determined unilaterally by the business actors so there is no "space" to do negotiations on matters that have not been agreed upon in the offering of a product. Where this means that the use of a standard agreement on a Commerce transaction is contrary to the principle of consensus and the principle of contracting which is an essential principle that must exist in an agreement. With regard to justice, the element of balance must also be placed parallel and is a unity that should not be separated. The balance intended not only includes the position of both parties in performing an achievement or enjoying the results of the achievements that have been made by others, but also balanced by others, but also balanced in assuming risks that will arise in the future. In relation to justice and equilibrium, likewise the element of proportionality should be the basis of a standard E-Commerce agreement. The proportion herein is intended to be the division between the achievements made accordingly, comparable, balanced with the results obtained, in other words the proportion between rights and obligations must be balanced among the parties in a standard agreement E-Commerce should be realized. The weakness of consumer protection in the use of standard clauses in electronic commerce transactions (E-Commerce), is a violation of Article 9 of Law Number 11 Year 2008 About Transaction and Electronic Information, which reads: Business actors who offer electronic system products must provide information complete and true to the terms of contracts, producers and offered products, as well as business actors still apply the provisions of Article 18 paragraph (1) of the Consumer Protection Act specifically in point g, where the prohibitions intended by those articles are still included in the requirements the sale and purchase agreement on line although it is clear that the agreement containing such standard clauses will result null and void in relation to the weakness of consumer protection in the E-Commerce trading transaction can be seen also in Article 47 of the Transaction and Electronic Information Act paragraph (2) agreement is a legal requirement s an electronic contract contract, whereas in the E-Commerce trading transaction there is no negotiation between the parties and the "agreement" is deemed to have occurred at the time the consumer clicks as a token of his consent.

RECOMMENDATION

- In E-Commerce trading transactions use standard agreements, namely agreements that have been prepared in advance by business actors, which does not involve the consumer. Thus there is no opportunity to negotiate, this can not be justified

²¹ Pasal 6 dan 7 Undang-Undang Perlindungan Konsumen

²² Pasal 34 angka 1 Undang-Undang Perlindungan Konsumen

²³ Pasal 44 Undang-Undang Perlindungan Konsumen

because the position of the parties becomes unbalanced and biased, and causes injustice on the one hand, there is no balance and disproportionate.

- Freedom of contract is an important element that must be realized in every treaty, it is a respect for human rights, where everyone is free to make an agreement.
- The Government should revise Article 9 of Law Number 11 Year 2008 on ITE, which reads: Business actors offering products through electronic systems must provide complete and correct information relating to the terms of contracts, producers, and products offered. Because at its disposal in E-Commerce trading transaction the use of standard clause is circulated by the Consumer Protection Act as it is still used in the terms of online sale and purchase.

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