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Buying and selling of cultural heritage objects in terms of positive law and Muamalah jurisprudence

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Abstract

Indonesia is a country rich in cultural heritage which is a cultural heritage. One of the areas rich in cultural heritage is the Tulungagung area, BPCB East Java mentions 1,912 cultural heritage objects in Tulungagung, but there are still many people who are less aware of the sense of nationalism towards cultural heritage, characterized by the frequent buying and selling of cultural heritage. Previous research states that the level of management and preservation of culture is the obligation of local governments (Khalid Rosyadi, 2014). This research aims to see the implementation of Law No. 11 of 2010 and Fikih Muamalah on the sale and purchase of cultural heritage that occurs in Tulungagung. The method used in this research is qualitative method. Based on the results obtained that the sale and purchase of cultural heritage analyzed by Law No. 11 of 2010 is not justified on the grounds that it is prohibited to transfer ownership without the authorization of the government as well as Fikih Muamalah this sale and purchase is not valid in its terms and conditions on the grounds that cultural heritage is not someone's property but goods controlled by the State.

Key words: Cultural Heritage, Sale And Purchase, Tulungagung

A. Introduction

Every human being who is born will always need help from one another to help each other meet the needs of life, one of which is buying and selling transactions. Selling and buying according to language is Mutlaq Al-Mubadalah which means absolute exchange.¹ Meanwhile, according to etymology, buying and selling is the exchange of something for something else (Muqobalatus syai' bissyai').² From the explanation above, it can be concluded that buying and selling is the exchange of something for something we want to have at the right price and using money as a medium of exchange.

Along with the times and time. Human needs begin to vary, although it can be said that these needs are not the main needs. One of them is the human need to collect antique objects and trade antique objects. In this context, the objects being traded are rare objects that have a selling price.

¹ Sayyid Sabiq, Fiqh As-Sunnah, Juz 3, (Lebanon Darul Fikr), hal. 124.

² Abdurrahman Al-Jaziri, Kitab fiqh ala madzahibil arba'ah (juz 2, Beirut, Darul Fikr), hal. 141

high or what is commonly called cultural heritage objects. Cultural Heritage Objects are natural objects and or man-made objects, both movable and immovable, in the form of units or groups, or parts, or remnants that have a close relationship with the culture and history of human development.³ The nature of cultural heritage objects that can be carried and moved easily results in the ease of people selling the object.

Therefore, buying and selling is regulated in several legal aspects such as Islamic law and positive law. Basically, the law of buying and selling is according to the Qur'an, Sunnah, and Ijma' has its own definition. The foundation of the Qur'an includes Surah Al-Baqarah verse: 275 which means: "Whereas Allah has justified buying and selling and forbidden usury", according to As-Sunnah is what means: "buying and selling must be ensured to be mutually agreeable" (H.R. Baihaqi and Ibn Majah), according to Ijma is that scholars have agreed that buying and selling is permitted on the grounds that humans will not be able to meet their needs, without the help of others⁴. Based on this legal basis, the law of buying and selling is permitted according to the Qur'an, Sunnah, and ijma' of the scholars'. Buying and selling that is permitted,

According to Sheikh Jalaludin Mahally, basically buying and selling fudhuly is not valid unless the contract consists of:

- a. Become the guardian of the owner of the goods
- b. A person who is strongly suspected of inheriting an item
- c. People who obtain permission to sell from the owner of the goods
- d. The person who controls the owner. In this case, the sultan (ruler/government)⁵ is also included

In this context, cultural heritage objects are under the control of the government as an effort to preserve and protect them from irresponsible hands.

According to Law No. 11 of 2010 on Cultural Heritage is an amendment to Law No. 5 of 1992 on Cultural Heritage. This law was formed as an effort of the Indonesian government to take responsibility for the preservation of Cultural Heritage by making arrangements for the protection, utilization, and development of Cultural Heritage. Being named a Cultural Heritage must meet the criteria. The criteria include that the Cultural Heritage is 50 years old, has cultural value that strengthens the value of the nation's personality or special significance for history, science, education, religion, and culture. This is also stated in Chapter III article 5 points a,b,c,d of Law Number 11/2010 on Cultural Heritage.⁶

Article 12 paragraph 1 of Law No. 11/2010 on Cultural Heritage states that anyone can own and/or control Cultural Heritage Objects, Cultural Heritage Buildings, Cultural Heritage

³ <http://cagarbudaya.kemdikbud.go.id/informasi/cagarbudaya> diakses pada 14 januari 2023

⁴ Jamaludin, Kontrak Jual Beli dalam Islam, Jurnal Muamalatuna, Vol.11, No.2, Desember 2019, Hal.77

⁵ <https://islam.nu.or.id/syariah/hukum-jual-beli-barang-milik-orang-lain-xeful> diakses pada 10 Mei 2023

⁶ Undang-undang Nomor 11 Tahun 2010 tentang Cagar Budaya

Structures, and/or Cultural Heritage Sites while taking into account their social functions as long as they do not conflict with the provisions of this law. Cultural Heritage is the root of the nation's culture and certainly becomes very potential for the development of our nation in the future so that it can be called the nation's cultural heritage that is priceless and requires good preservation management.⁷

Cultural Heritage can be owned by inheritance, grants, exchanges, gifts, purchases, and or court decisions or stipulations, except those controlled by the State.⁸ Article 17 paragraph 1 also states that every person is prohibited from transferring ownership of Cultural Heritage of national rank, provincial rank, or district / city rank either all or parts, except with the permission of the minister or regent in accordance with the level. According to the criminal provisions, Article 101 of the Cultural Heritage Law states that any person who without permission transfers the ownership of Cultural Heritage as mentioned in Article 17 paragraph 1 shall be punished with imprisonment for a minimum of 3 months and a maximum of 5 years and/or a fine of at least Rp. 400,000,000 (four hundred million rupiah) and a maximum of Rp. 1,500,000,000 (1 billion five hundred million rupiah).⁹ However, unfortunately, the buying and selling of Cultural Heritage objects is still very common.

B. Research Method

This research uses a type of field research that goes directly to the field to observe, analyze and study and make conclusions from the problems found in the field related to the sale and purchase of cultural heritage objects in Tulungagung Regency using ethnographic methods related to sociocultural patterns and activities.

The research location is in Tulungagung Regency, precisely at the Reco Pentung Statue, Gayatri Temple, a cultural heritage place that has been authorized or is still in the status of an object suspected of cultural heritage (ODCB). The researcher acts as an observer to observe respondents who are in accordance with the research theme such as, collectors of cultural heritage objects, buyers of cultural heritage objects, the person in charge of cultural heritage objects, the government. Secondary data is obtained from various sources such as journals, books, archives, and information related to the sale and purchase of cultural heritage objects.

Observation data collection techniques make direct observations of the elements seen in the symptoms at the time of research on cultural heritage objects. Interviews asked questions to respondents related to the buying and selling of cultural heritage objects systematically. Documentation is done by recording the results of interviews, photos, and written forms of interview results.

C. Research Result

1. The Practice of Buying and Selling Cultural Heritage Objects in Tulungagung

⁷ 7 Prasetyo Bagus, Efektivitas pelestarian Cagar Budaya dalam Undang-undang nomor 11 tahun 2010 tentang Cagar Budaya, jurnal legislasi Indonesia, no.1, vol.15

⁸ UU Nomor 11 Tahun 2010 tentang Cagar Budaya.

⁹ UU Nomor 11 Tahun 2010 tentang Cagar Budaya.

Cultural Heritage is a cultural heritage that must always be preserved. This is the responsibility of all levels of Indonesian society. Cultural Heritage is also the character of a nation. Maintaining and preserving Cultural Heritage is the same as maintaining and preserving the character of our nation. So, it is fitting that we always preserve it from ignorant hands who want to damage, and eliminate it for personal interests.

In Tulungagung, there are 150 Cultural Heritage that have been designated by the Regent and 1 that has been designated by the Governor. And in total there are 460 Cultural Heritage and Suspected Cultural Heritage Objects in Tulungagung Regency.¹⁰

Regulations on Cultural Heritage are regulated in law number 11 of 2010 concerning Cultural Heritage as stated in article 96 paragraph 1: the government and local governments have the authority to determine the ethics of preserving cultural heritage.

collect cultural heritage data, manage cultural heritage areas, give awards to people who preserve cultural heritage, move and store cultural heritage for security purposes. Investigate cases of cultural heritage violations.

In this case, the practice of buying and selling Cultural Heritage Objects in the Regency has occurred. This was conveyed by Winarto as the Head of the Cultural Heritage Division of the Tulungagung Regency Culture and Tourism Office. Although it was not found directly by the Office, Winarto admitted that he received a report from the social media Facebook.¹¹ And reports of the discovery of buying and selling practices have also been found by Mustkim, a member of Astagayatri. The motives carried out by the community in carrying out this transaction are diverse. According to information from Mustakim as a member of Astagayatri, people buy and sell for amulets and collections for worship. The personal opinion of Mustakim is that the Cultural Heritage Objects used in the transaction are used for Amulets. Because next year is a political year. So they are embarrassed to come to the site and often encountered are photos of people and party logos. Items are lost or traded for Talisman purposes. And they believe that.¹²

According to Andy Kristian's statement, the sale and purchase of cultural heritage objects was once carried out for collection purposes. And that is only ethnographic cultural heritage objects. Ethnography is not fixed, meaning that anyone can own it for artistic purposes. For example, a 25-year-old jaranan musical instrument was sold to the agency. The agency buys it for collection purposes.

Another motive for the community is that they do not know the procedures and procedures for reporting if they find Cultural Heritage Objects. So they choose to sell

¹⁰ Wawancara dengan Bapak Winarto di Dinas Kebudayaan dan Pariwisata 6 April 2023

¹¹ Wawancara dengan Bapak Winarto di Dinas Kebudayaan dan Pariwisata 6 April 2023

¹² Wawancara dengan Bapak Winarto di Dinas Kebudayaan dan Pariwisata 6 April 2023

them to collectors. Another motive is that people are afraid to report it to the relevant Office, in this case the Culture and Tourism Office. The fear in this case is that there will be excavation on their land. They are usually afraid because of that. Another motive is that people sell to collectors because it is more profitable. Because the agency does not have a budget stock that can be given directly to the person who found the Cultural Heritage. In addition to that factor, collectors who understand Cultural Heritage objects will buy at a higher price than the compensation given by the government to the discoverer. The following are some of the motives that conducted by the Tulungagung community related to the sale and purchase of Cultural Heritage Objects that they found.¹³

The efforts made by the Tulungagung Regency Culture and Tourism Office are to conduct socialization to the community. The socialization efforts carried out by the Office are by inviting all village heads to be socialized regarding the rules and laws number 11 of 2010 concerning cultural heritage¹⁴.

In addition to the Department, Tulungagung Regency also has a community that focuses on history and cultural heritage. The activity of Astagayatri is learning ancient Javanese script. In addition, Astagayatri also explores sites. Site exploration serves to assist the agency in monitoring the condition of Cultural Heritage in Tulungagung. If it is in a damaged condition, then Astagayatri also helps repair and renovate the Cultural Heritage. In addition, Astagayatri also conducts socialization to the community about Cultural Heritage and also the Law on Cultural Heritage.¹⁵

In addition to the above efforts, the Agency also has the Tulungagung Regional Museum which functions as a place to secure, preserve and exhibit Cultural Heritage Objects. Museums are very functional in protecting, securing, and preserving cultural heritage. Museums can also be said to be a vehicle for education and recreation for the general public. The collections in the Tulungagung Regional Museum are Archaeology and Ethnography. Archaeology discusses 5 things: artifacts, ecofacts, features, sites, and areas. The collections in the Tulungagung Regional Museum are artifacts. Artifact means man-made, such as statues, inscriptions, etc. While there are 6 types of Ethnographic collections. Ethnography is the ethnos of tribes in the archipelago.¹⁶

The effort made by Mustakim as a member of Astagayatri is by buying it from the person who found the Cultural Heritage Object so that it is not sold to the black market or black market. If it has entered the black market, it will most likely be difficult to find

2. The Practice of Buying and Selling Cultural Heritage Objects in Review of Law Number 11 of 2010 concerning Cultural Heritage and Fikih Muamalah

¹³ Wawancara dengan Bapak Andy Kristian di Museum Daerah Tulungagung pada 6 April 2023

¹⁴ Wawancara dengan Bapak Winarto di Disbudpar pada 6 April 2023

¹⁵ Wawancara dengan Bapak Mustakim di rumah Bapak Mustakim pada 7 April 2023

¹⁶ Wawancara dengan Bapak Andy Kristian di Museum Daerah Tulungagung pada 6 April 2023

In order to protect Cultural Heritage from the threat of physical development both on land in rural and urban areas, as well as those in the water in the area of rivers and swamps, a firm policy is needed from the government to ensure the existence of the implementation of supervision of the Law on the preservation of Cultural Heritage.

The preservation of Cultural Heritage is an important part of the development of the nation's cultural resilience because Cultural Heritage contains socio-cultural values that can reflect the identity of the nation such as local distinctiveness or local wisdom that differs from one region to another. As a distinctive, non-renewable, and contextual, Cultural Heritage is the nation's cultural roots and certainly becomes very potential for the development of our nation in the future so that it can be called the nation's cultural heritage that is priceless and requires good preservation management.¹⁷

Article 12 paragraph 1 of Law No. 11/2010 on Cultural Heritage states that everyone can own and/or control Cultural Heritage Objects, Cultural Heritage Buildings, Cultural Heritage Structures, and/or Cultural Heritage Sites while taking into account their social functions as long as they do not conflict with the provisions of this law.

Article 17 paragraph 1 also states that every person is prohibited from transferring ownership of Cultural Heritage of national rank, provincial rank, or district / city rank either all or parts thereof, except with the permission of the minister or regent in accordance with the level.

However, according to Andy Kristian as the Public Relations Officer of the Tulungagung Regional Museum explained that the sale and purchase of Cultural Heritage objects can be done and may be done as long as the objects being traded are ethnographic objects. Ethnographic objects are objects inherited from tribes in the archipelago such as traditional musical instruments such as drums in reog kendang, traditional games such as egrang, and traditional weapons such as keris. As for the objects of Cultural Heritage that are archaeological in nature such as statues, inscriptions and others should not be used personally or traded because it is a criminal offense.¹⁸

According to the criminal provisions, Article 101 of the Cultural Heritage Law states that any person who without permission transfers ownership of Cultural Heritage as mentioned in Article 17 paragraph 1 shall be punished with imprisonment for a minimum of 3 months and a maximum of 5 years and / or a fine of at least Rp.

¹⁷ Prasetyo Bagus, Efektivitas pelestarian Cagar Budaya dalam Undang-undang nomor 11 tahun 2010 tentang Cagar Budaya, jurnal legislasi Indonesia, no.1, vol.15

¹⁸ Wawancara Bapak Andy Kristian di Museum Daerah Tulungagung pada 6 April 2023

400,000,000 (four hundred million rupiah) and a maximum of Rp. 1,500,000,000 (1 billion five hundred million rupiah).¹⁹

One way to fulfill needs is to carry out buying and selling, for this business to occur, a reciprocal relationship between the seller and the buyer is needed. The definition of buying and selling is the process of exchanging between two people for goods of value with something that has become a mutual agreement and which has been justified by shara'.

There are 4 pillars of buying and selling according to scholars, namely: seller and buyer, *sighat* (*ijab kabul*), there are goods purchased, there is an exchange rate.

From the pillars above, the sale and purchase of cultural heritage objects has fulfilled its pillars. There are people selling cultural heritage objects, there are people buying, there is a contract, and there is an exchange rate used to buy the Cultural Heritage Objects.

According to the scholars, the condition for buying and selling is that the person be of sound mind. If the person doing it is someone who has not reached puberty, then it is not valid. The next requirement is that the people who carry out the transaction are different, meaning that people cannot be sellers and buyers at the same time. The conditions of the goods being traded are as follows: (1) the goods exist. If it does not exist, then the seller is able to procure the goods, (2) the goods can be utilized and are beneficial to humans, (3) belong to someone, (4) can be delivered at the time of the contract or delivered at a time agreed upon by the two parties. If one of the conditions is not met, then the sale is not valid.²⁰

When viewed from the case of the sale and purchase of Cultural Heritage Objects, Cultural Heritage has not fulfilled the third condition. The first condition is that the goods exist, so the Cultural Heritage object does exist at the time of the transaction. The second condition is useful. Cultural Heritage is indeed useful for educational purposes, historical insights, and also religion. However, Cultural Heritage objects may not be used for personal gain. Third, it belongs to someone. Cultural Heritage in this context may be owned by someone, but it must be registered in advance by the Culture and Tourism Office so that it is properly recorded. The last one is handed over by immediately or at an agreed time. If it already exists, the Cultural Heritage object can be handed over directly.

From the above case, if we look carefully, the third condition is self-owned. Meanwhile, Cultural Heritage Objects are natural objects and/or man-made objects, both movable and immovable, in the form of units or groups or parts, or the rest, which

¹⁹ UU Cagar Budaya no 11 tahun 2010

²⁰ Kurnia Ningsih Prilia, *Fiqh Muamalah*, (Jakarta, Rajawali Pers), hal.91

have a close relationship with culture and the history of human development. From this definition, we can understand that Cultural Heritage Objects do not belong to someone directly because someone who owns them is certain that the objects are found and then sold to buyers.

Regarding ownership, in the Cultural Heritage Law in article 12 paragraph 1 it is stated that everyone can own Cultural Heritage Objects, Cultural Heritage structures, Cultural Heritage Buildings, Cultural Heritage Sites, and Cultural Heritage Areas by taking into account their social functions as long as they do not conflict with the provisions of this law. And in article 17 paragraph 1 it is also explained that everyone is prohibited from transferring ownership of Cultural Heritage of national rank, provincial rank, and district / city rank except with the permission of the minister, governor, regent in accordance with the level.

In Islam, the concept of ownership is of several kinds. In the provisions of Shara', causes of property ownership there are several causes, namely:

a. Ihrazul Mubahat (Causing permissibility)

In terms of ihrazul mubahat is the permissibility of someone owning property that has no man such as fish in the sea, rainwater etc.

b. Al-uqud (contract)

An agreement stipulated by ijab kabul based on the provisions of Shara' which has an impact on its object. Judging from its purpose, the contract aims to reach an agreement to give birth to new legal consequences. So that it can be said to be valid if it fulfills the conditions and pillars. As a result, the transaction and the object of the transaction become lawful. Examples: buying and selling, renting and grants.

c. Al-khalafiyah

Is the place of someone or something new to the old place that has been lost in various kinds of rights. Khalafiyah is divided into two: khalafiyah syakhsun an syakhsin and syaiun an syaiin.

d. At tawalladu minal mamluk (multiply).

Is the result of property that has been owned (multiply). Examples: calves born, profits from trade, fruitful trees etc.²¹

When viewed from the cause of ownership, Objects Heritage classified from the first cause that is ihrazul mubahat or cause the ability to own. In this sense, objects or assets that do not have a master can be owned. However, in the state procedure of a person who

²¹ Kurnia Ningsih Aprilia, Fiqh Muamalah (Jakarta, Rajawali pers) hal. 71

finds or knows the person who finds, the regulation states in article 10 that every person who finds or knows the discovery of Cultural Heritage objects or objects suspected of Cultural Heritage or valuable objects whose owners are unknown must report it to the government no later than 14 (fourteen) days from the discovery or knowledge of the discovery. This means that even though anyone can have it, they still have to report it to the relevant Office or the government to collect data on Cultural Heritage. Therefore, even though the person is allowed to keep it, they are not allowed to sell it because the item is actually owned by the state for the benefit of history, education, and religion.

In addition, the condition of the goods traded (*ma'qud alaih*) is that the goods belong to the seller. In this context, Cultural Heritage Objects are not the full property of a person because they are registered with the relevant agencies according to their level. Therefore, the sale and purchase is not valid according to *fiqh muamalah* because the goods owned by the seller do not belong to him.

However, according to Andy Kristian as the Public Relations Officer of the Tulungagung Regional Museum. There are cultural heritage objects that can be traded. These objects are ethnographic or objects belonging to ethnicities and tribes in Indonesia. For example, Reog Gendang, which is 25 years old, is sold to the Museum for collection purposes, then the sale and purchase is legal and not a criminal offense. But it would be nice to be donated as a form of our nationalism in maintaining and preserving our culture.

The *fiqh* term for buying and selling goods that do not belong to the owner is *bai'ul fuduli*. One of the conditions for a valid sale is that the goods belong to the seller as explained above. It is not valid to sell goods that do not belong to the seller. The *fiqh* text states:

باطل الفضول بيع

This means that the sale of *fudhuly* (goods that belong to someone else) is not valid. Then there is another *fiqh* text that states the following.

كالمالك الحقوق هذه في الوكيل

Meaning: The right of the representative is like the owner.

The text here explains that the sale and purchase will remain valid if represented to the person. However, in the context of Cultural Heritage Objects where the object is a found object and if it has historical value, it must be reported and registered with the government or the Office of Culture and Tourism so that it is well recorded and secured and preserved as an effort to maintain cultural wisdom in Indonesia.

According to Sheikh Jalaludiin Mahally, basically *fudhuly* sale and purchase is not valid unless the contract consists of :

- a. Being the guardian of the owner of the goods
- b. The person who is strongly suspected of inheriting the goods
- c. The person who has permission to sell from the owner of the goods
- d. The person who controls the owner. In this case, it also includes the sulthan (ruler/government)²²

In this context, Cultural Heritage objects are under the control of the government as an effort to preserve and protect them from irresponsible hands. As mentioned in article 12 that everyone may have but may not be used for personal gain and violate the provisions of the Cultural Heritage law which the prohibition is written in article 17 paragraph 1.

From the description above, the status of the sale and purchase of Cultural Heritage Objects according to Fiqh Muamalah is not valid because the ownership of these goods is in the control of the state or government where the government has an obligation to preserve Cultural Heritage Objects for the benefit of education, history and culture. Because the sale and purchase includes the sale and purchase of Fudhul or selling goods that do not belong to him. And one of the conditions of buying and selling is that the goods belong to someone who is known. If one of the conditions is not met, then the sale is not valid.

D. Closing

Based on the discussion on the research results, it can be concluded that:

1. The sale and purchase of cultural heritage objects in Tulungagung has occurred due to several motives. One of them is that the community does not know the procedure to report if a cultural heritage object is sold find the object. Second, the cultural heritage object is considered an amulet by the community
2. Cultural Heritage objects are prohibited from being traded because the prohibition has been written in law number 11 of 2010 concerning Cultural Heritage in article 17 paragraph 1 which reads "every person is prohibited from transferring ownership without the permission of the government. Also from the perspective of fikih Muamalah, basically buying and selling is permissible, in the context of cultural heritage, cultural heritage objects do not belong to individuals but are controlled by the state. So that the sale and purchase is not valid because it includes bai'ul fudhuly or transactions of goods that do not belong to it.

²² <https://islam.nu.or.id/syariah/hukum-jual-beli-barang-milik-orang-lain-xeful> diakses pada 10 Mei 2023

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