

# THE SAMSAH EXISTENCE IN ACEH FROM A MORALITY PERSPECTIVE: THE ISLAMIC ECONOMICS AND THE FREEDOM OF CONTRACT PRINCIPLE

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**Abstract:** *This study aims to determine the concept of samsarah or agency in Islamic Economics and the Principle of Freedom of Contract. The research method is descriptive qualitative research using literature or library research (library research) data sources. The research approach uses a normative approach using primary and secondary data to examine the ideals of the Islamic Economic and the Principle of Freedom of Contract conception and then analyze how it is applied to the agency existence determination. The results showed that the issue arises from the fee method that the agent perceived. Islamic Economic and the Principle of Contract Freedom chance agents to harm sellers and buyers for a financial loss through fraud. However, the Principle of Freedom of Contract in the Criminal Code provides more substantial legal assurance for all parties in the contract. The author's observation shows that setting up the percentage of the commission-based the Freedom of Contract Principal model will cope with the agency disruption.*

**Keywords :** *Agent<sup>1</sup>, Islamic Economics<sup>2</sup>, the Freedom of Contract Principle<sup>3</sup>, Morality<sup>4</sup>*

**Abstrak:** *Penelitian ini bertujuan untuk mengetahui konsep samsarah atau keagenan dalam perspektif Ekonomi Islam dan Kebebasan Berkontrak. Metode penelitian yang digunakan adalah penelitian kualitatif deskriptif dengan menggunakan sumber data penelitian kepustakaan (library research). Pendekatan penelitian ini menggunakan pendekatan normatif dengan menggunakan data primer dan sekunder untuk mengkaji keberadaan agen yang disruptif dari sudut pandang Ekonomi Islam dan Prinsip Kebebasan Berkontrak pada ketentuan perundang-undangan kemudian menganalisis bagaimana penerapannya. Hasil penelitian menunjukkan bahwa permasalahan keagenan yang terjadi berasal komisi dan keuntungan yang diperoleh agen. Prinsip Ekonomi Islam dan peraturan perundang-undangan masih memberikan kesempatan untuk agen dalam melakukan tindakan yang merugikan penjual dan pembeli dalam bentuk kerugian finansial melalui penipuan. Namun, Asas Kebebasan Berkontrak dalam KUHP memberikan kepastian hukum yang lebih substansial bagi semua pihak dalam kontrak keagenan (agen, penjual dan pembeli). Menurut pengamatan penulis, penetapan persentase pada konsep pemberian komisi pada Prinsip Kebebasan Kontrak dapat meminimalisir permasalahan disruptive tersebut.*

**Keywords :** *Agen<sup>1</sup>, Ekonomi Islam<sup>2</sup>, Prinsip Kebebasan Berkontrak<sup>3</sup>, Moralitas<sup>4</sup>*

## INTRODUCTION

Entrusting an agent service system has been used by people for trading their goods for a long time. The agent's existence is to ease the buying and selling process on a seller behalf as a middleman who does not take legal ownership of the sold goods. The good owner gives a sales agent contractual authority to trade and set the object price according to terms and conditions (Lahilote, 2010).

From an Islamic economic viewpoint, agents well-known as *samsarah* or an agent known as *simsar* are similar to commercial law perspectives. An agent is a *simsar* or a company with short or long-term relationships with buyers who commonly receive, store, and ship goods to their buyers. A *simsar* existence is widely accepted in the Islamic economic concept. However, the implementation of *samsarah* is in accordance with Sharia compliance, where fraud or other violation is not allowed between the parties involved in the transaction. The transaction is authorized if all parties comply with *maqāshd al-syar'iyah* provisions consisting *ta'āwwun* in the contract (Suhendi, 2005).

The meaning of agents, brokers, and commissioners is similar from the Islamic economic point of view as *samsarah*. According to his function, to run his business, an agent or *simsar* will make such an agreement with the good's owner about how to trade the goods and the amount of commission compensated (Saliman, 2006). First, the *simsar* compensation typically comes from a percentage of the object selling price within the Islamic economics concept. For example, *simsar* takes a listing on a \$150,000 property at a commission rate of 10% that equals a \$10,000 total commission. Second, *simsar* can directly be paid from the good's owner or an agent company sponsor depending on the listing agreement specified in the first contract, which can be a flat fee or directly come from their clients. Sometimes, *simsar* can get both types of commission mentioned.

The type of commission paid for agents and brokers is different in the contract of freedom principle. Receiving payment directly from clients is prohibited since the agent works under the designated broker umbrella. On the other hand, brokers are to be paid directly from their clients because brokers are able to work independently (Abdulkarim, 2022)

Currently, sales agents existence and contribution to their function have a positive and negative perspective among society. The reason comes from some agents who run their business

unethically, such as fraud which inflicts a financial loss for sellers and buyers. Some agents manipulate an object price where the price is higher than a price stipulated by the object owners, and according to the agreement, agents are compensated only by sellers without changing the good price (Mariyati, 2022). The case was triggered by agents increasing prices without sellers realization. Furthermore, buyers will recognize that the sellers who set high pricing and in the end, buyers are unwilling to buy the object. However, some buyers might accept the transaction for unknowing a market price of the thing, which means they will be disappointed after buying the object.

At the point of used car trading, some agents manipulate the information about the condition of the sold car by showing only the positive side of the object. After buying the car, a buyer found that the car condition was not matched the information provided (Yoesrizal, 2022).

Another story comes from Fatma, 2022. One day she wanted to travel and needed public transport, and she could find herself since she waited in front of the highway. Suddenly, an agent came and halted public transportation for her without her agreement. Then, the agent asked for some amount of money from the driver by helping to find a passenger. As a result, Fatma had to pay more than the usual charge for public driving service. This condition disappointed her and might happen to other people.

The abovementioned matters show that agent misconduct commonly happens and can harm other parties, such as buyers, sellers, or the people using their service. In addition, the issues prove a shift in the agent function as an intermediary who often sets the price from the seller without agreement and sometimes shares fake information, which can disrupt sellers and buyers at the same time. Looking at the finding, the problem is based on the commission, payment, or profit that agents want to have. Whereas, transaction through service agency has been arranged in the rule of the Islamic economics and Indonesian contract freedom principle where all the elements should be done principal and ethically. However, sellers and buyers seem to need protection to deal with agent mischiefs.

## THEORY FRAMEWORK

### **Samsarah In the Islamic Economics and the Freedom of Contract Principle Concept**

*Samsarah* is a Persian vocabulary that has been adopted into Arabic, which means a profession in mediating two different parties in

exchange for compensation, either in the form of wages (ujah), bonuses, or commissions (ji'alah) in completing a transaction (Victoria, B., Victoria, B., & profile, 2022)

In Arabic, *simsar* is the plural of *samsarah* which means "intermediary between the seller and the buyer" (Yunus, 1989) According to the term, *samsarah* is an intermediary between the seller and the buyer, also known as *al-dallah*. *Simsār* also means three good propositions or a skilled person. Traders were also called *al-simsarah* in the pre-Islamic period, but the Prophet Muhammad S.A.W called them *al-tujjār* (Hasan, 2004).

*Simsar* is a term for people who work for others by settlement in the trading contract. This term is also appropriate for people looking for (showing) other people as partners so that the *simsar* gets a commission from the person who becomes their partner (Sabiq, 1996). In this case, Yusuf Qardhawi remarked that brokers (*samsarah*) are allowed for people living from different neighbors because they ease the delivery system. Thus they will benefit both parties (Ihsan, 1993).

In this case, the *simsar* and the seller must agree first, and then both are said to have a contract. If there is no contract between parties and *simsar* charges the object owner for a commission because he sold the object, it is unacceptable, and the object owner can reject the request (Anwar, 2007). So, *samsarah* term is an intermediary between a person or service bureau with parties who need their services (producers, owners of goods) to facilitate buying and selling transactions in exchange for wages (ujrah) if they can fulfill their achievements or with commissions (ji'alah). The existence of *samsarah* eases the trading system, whether transactions are in the form of services or goods.

*Samsarah* contract validity is based on the pillars and conditions (Ya'qub, 1992):

1. *Al-Muta'āqidāni* (*simsār* and object owner) In this *samsarah* contract relationship, there must be an agent (middleman) and the object owner (seller).
2. *Mahal al-ta'āqud* (type of transaction and compensation) The transaction carried out must be known and consist of moral and halal. Then, the *simsar* commission must be defined in advance to avoid misunderstanding between the agent and the owner of the goods.

3. *Al-shghat* (lafadz or something that shows pleasure for the *samsarah* contract). The requirement of *samsarah* contract refers to the general conditions of 'aqad or transactions according to Islamic Economics rules, because practically, the *samsarah* contract is realized in the form of compensation for wages 'aqdu al-ijārah (*ijarah* contract) or with an 'aqdu al-ji'ālah (*ji'alah* contract) commission (Abdulkarim, 2022).

Generally, transaction requirements must be applied to *al-āqidāni* (seller and buyer) and by *al-shghat* (voice statement). Meanwhile, a *simsār* is only charged with the conditions of *al-tamyīz* without *al-'aql wa al-bulūgh* (puberty) as required by *al-āqidāni* (al parties in the contract), because the *simsār* is only a mediator and is not responsible for transactions. As for the conditions regarding the *mahall al-ta'āqud* (object of commerce and compensation), the scholars require the thing of a legal transaction (*masyru*) and a predetermined payment (*ma'lūm*) (Abdulkarim, 2022).

The buyer right is to demand delivery of the goods, defect-free guarantee, and guarantee against re-identification. Each party requires Islamic contract law compliance and additional legal contracts that confirm and strengthen the main legal consequences (Syarifuddin, 2003). Furthermore, the seller is responsible for delivering the goods and receiving the payment from the buyer. In terms of *samsarah* contract, the seller is also responsible for the actions taken by *simsar*. In other words, the owner of the goods is obliged to bear the risk. The seller also gets rights from *simsar* in services paid to the buyer by selling the goods. The buyer rights are *simsar* obligations. If *simsar* can fulfill his obligations, then *simsar* can get his rights.

One of the legal principles adopted in contract law for agency is the "principle of freedom of contract," which means that everyone is free to make any agreement, as long as the deal is completed legally and in good faith and does not violate public order decency. Article 1329 of the Civil Code stipulates that "everyone" qualified to make a contract unless he is determined to be incompetent by law" (Wibowo, 2003).

The principle of freedom of contract does not mean that parties who make transactions with agent services can make agreements and get absolute freedom. Several restrictions imposed by the articles in the Civil Code make this law a limited law. Article 1320 of the Civil Code stipulates four

conditions for a valid agreement. First, there is an agreement from both parties. Second is the ability to carry out legal actions. Third, determine the contents of the deal, its implementation, and its requirements, and the last is there is a halal causality (Ihsan, 1993).

## RESEARCH METHOD

This study is a comparative descriptive using the normative juridical approach, which is the method of legal research by researching library materials of samsarah regulation from Islamic Economics and the Freedom of Contract Principle of civil law provisions. The analysis uses primary and secondary sources based on books, journal articles, and several law dictionaries under Islamic Economics and the Freedom of Contract Principle in statutory provisions.

### A REVIEW OF SAMSARAH CONCEPT TOWARD THE EXISTENCE OF AGENTS WITHIN TRANSACTION

#### 1. Samsarah Concept Analysis of Commercial Agents Rights and Obligations According to Principle of Freedom of Contract and Islamic Economics

Based on the comparison between the principle of freedom of contract and samsarah in Islamic Economics from fiqh muamalah concept, there are differences regarding the rights obtained by agents. In the statutory provisions contained in the regulation of freedom of contract, it is stated that the right of the agent is in the form of a provision that is an excess of the object selling price of the transaction being traded (Ihsan, 1993). While, in the Islamic Economics from fiqh muamalah concept, Bukhari stated commission for a samsar: That Ibn Sirin, 'Atha', Ibrahim and al-Hasan thought there was nothing wrong if the merchant said to the broker: "Sell my clothes at that price. As for the excess (if there is profit), then it is for you." Ibn Sirin also said, when a merchant said to a broker: "Sell my goods at this price, while the profit is for you." Or he said: "The profit is divided in two," then it is not sinful (Al-Bani, 2007). In the concept of Islamic Economics, the payment received by samsar can be in the form of provisions. According to Hamzah Yaqub, samsarah is an intermediary trader whose function is to sell the object of other people by taking charge (Ya'qub, 1992). Also, in the sale and purchase contract, the agent may receive a commission from the seller or a charge from buyers based on the exceeded fixed price. This occurrence has because there is no special

stipulation to the agency problem that may occur and damage other parties. While the hadith of the Prophet, in general, specifies about qarinah that agreements and engagements made by two or more people can be used as provisions that all parties must obey.

شروطهم عند الم سلمون

Meaning:

"Muslims are based on their agreements". (History of Ahmad, Daud, and others) (Daud, 2003).

Since the concept of agent rights have been regulated by Islamic Economics and the principle of freedom of contract is too general, some parties involved in the samsarah contract may suffer from financial loss. The provision provided as an opportunity for agents to make as much profit as possible. Sometimes, the gains obtained by agents are much higher than the profits acquired by the authorized sellers from the object of the transaction being traded. This is supported by the absence of statutory provisions and Sharia arguments that explicitly stipulate the percentage of fees that agents may take from the sale of the transaction object. As a result, agent provision is achieved without the seller concern. The amount of profit taken by the agent makes it appear as if the agent owns the objects.

Hadith of the Prophet Muhammad S.A.W emphasizes the term of the provision

"شروطهم عند" which means "based on their contracts". If we look at the contents of the sentence, it is clear that there is an agreement between the parties driving the business. However, the typical agent activity shows that agents take a cost in the form of a provision from the buyer without the sellers comprehension. Furthermore, in case of an agreement, even though there is an agreement between the agent and the seller as the owner of the goods regarding the benefits obtained by the agent, the agent often takes advantage in accordance with his wish. So the sale and purchase transactions carried out are not in accordance with the agreement.

In addition to agent rights within Islamic Economics concept, the payment received by agents can be commissions or profits divided between the samsar and the seller as the owner of the object sold based on the agreement made at the first contract. In the practice of agency contract or

samsarah that occurs in society, the agent will only get his rights if he has completed his achievements and fulfilled the interests of the owner of the goods. Furthermore, the samsarah practice is almost the same as a representative in a wakālah bil ujah contract but different in compensation paid method. As an authorized middleman in the wakālah bil ujah contract, a Wakil will work on a person behalf according to his commend, and the Wakil will be paid directly by a commender. Even though the Wakil cannot fulfill his duty thoroughly, the commander must pay the Wakil for his service. Then, the author analyzes that a commission-only given by the object owner might limit the agent misconduct activity because the provision model in the Islamic Economics concept can espouse agents to obtain huge profits that are likely to be detrimental to both the seller and the buyer (Zahra, 1998). On the one hand, when the owner of the goods entrusts the agent to sell the objects, the agent charges a very high price for the object transaction so that no one is interested in purchasing the object. Also, the agent can, at the same time, harm the seller and the buyer. The agent may lie about the price of the object to be traded where they state to the buyer that the price set by the buyer has exceeded the market price determination, then the agent sells it above the market price charged by the buyer, who also does not know the standard market price of the object (Mariyati., 2022).

Regarding the obligations of agents, there are many similarities between the regulations of the principle of freedom of contract and Islamic Economics. In business activities, the agency can be interpreted as a legal relationship in which the agent is authorized to act for and on behalf of the seller to conduct transactions with other parties. The primary standard of samsarah process is an authority possessed by the agent working on behalf of the owner of the goods. A similar case in Islamic Economics is where simsar is obliged to complete the tasks assigned by the owner of the goods to him. The rest of the seller is responsible for simsar's actions and the smooth sale and purchase (P., 2022).

In the Islamic Economics and the principle of freedom of contract standard of business activities, the agency is usually defined as a legal relationship in which the agent is authorized to act for and on behalf of the principal to carry out business transactions with other parties. The main criterion to say an agency is the authority possessed by the agent acting for and on behalf of the principal (Simatupang, 2003). Thus, the simsār is obliged to

complete the achievements charged by the goods' owner. The rest of the sellers are responsible for samsar actions and are responsible for the proper sale and purchase mechanism (Simatupang, 2003).

In the perspective of Islamic Economics, it is stated that if the agent agrees by exceeding the limits of the authority given by the seller, then the agent himself is responsible for their actions (Hamzah, 1992). This concept explains the direct relationship between agents and buyers that they lose. But problems arise when the agent harms the seller as the owner of the goods. Legal certainty does not provide strict legal protection for the obligations that must be fulfilled by the agent when the agent takes destructive actions against the seller as the owner of the goods so that the owner of the goods is often harmed. However, even though the sellers are aware of the many irregularities committed by agents, many sellers still use the services of agents to sell their merchandise.

## **2. Strengths and Weaknesses of Samsarah of the Owner Protection of the Object Transaction in the Islamic Economics and the Freedom of Contract Principle Concept**

The principle of freedom of contract and the simsar theory in Islamic economics has explained the samsarah contract agreement. Article 1338 paragraph 1 of the Civil Code states that a party can enter into any agreement, including an agency agreement, as long as it is within the limits that do not conflict with the law, compliance, decency, and public order (Simajuntak, 2005). The simsar theory of Islamic economics has been stipulated for its contract agreement where the existence of simsar is allowed. The compliant implementation is no fraud between the parties involved in the sale and purchases transaction, namely between the seller as the owner of the goods the buyer as the agent (Suhendi, 2005). Likewise, the transaction is permitted as long as do not conflict with maqashid al-syar'iyah provisions, which is the element of ta'awwun in the contract.

However, those limitations of Islamic economics and the Freedom of Contract Principle determination do not seem to be implemented in agency contracts where agents threatening actions are frequently happening nowadays. One example is the existence of the agents at the terminal. The driver does not need the agent services to look for passengers because it is certain that the passenger will presently board the car. But the agents exist and set the public transport service charge higher

than usual without the driver knowledge. No passenger is interested in paying a high price and switching to use another relatively cheap public transportation (Syarifuddin, 2003).

Another case comes from Yusra, 2022, whose user agent service for trading a used motorcycle for Rp. 13.000.000 in the beginning. Because she did not know the standard price of a used motorcycle in the market, the agent told her that the price was too high and that probably no one would be interested in buying the motorcycle. Thus, the owner of the motorbike lowers the selling price to Rp. 10.000.000. After the motorcycle was sold, Yusra realized that the market price for the type of her used car was Rp. 16.000.000, and from the information, the agent sold the motorcycle at Rp. 15.000.000 (Yusra, 2022).

On the one hand, the agent has fraud against the object owner, and in terms of there being a prosecution, the agent does not want to be responsible. In addition to the examples above, agents still take many deviant actions in buying and selling contracts. The actions occur because of a theory that states that the agent rights can be in the form of provisions (Zahra, 1998).

In Islamic Economics, there is no strict law that protects the owner of the goods from the destructive actions of the *simsar*. The context is determined that the agent's violent act is sinful and will be punished in the afterworld. According to the context, the only protection is for the element of negligence where the negligent party has to take the risk of compensation. If the failure is related to delays in delivery of goods and is not under the agreement and there is an element of intent, the seller must bear the risk (Hasan, 2004). In this case, the form of compensation that the negligent party must pay is not explained.

Generally, in the Islamic Economics and the Freedom of Contract Principle views, when the seller whose agent service feels aggrieved by the agent, he cuts the agreement. Unfortunately, stopping the contract is not the matter of accomplishing all agency issues. For the example, the case of the driver harmed by the agent by increasing the payment fee for passengers so that passengers are reluctant to ride in and look for costs less public transportation, furthermore, with the incident of used motorcycle owners harmed by the agent lies due to unknowing the standard market price of used motorcycles. So, it is clear that unethical agents will shift their role without doubt

from an Islamic economic perspective, and the protection for sellers is unclear (Al-Qardhawi, 1993).

### 3. Islamic Economics and The Freedom of Contract Principle on Samsarah in Buying and Selling Practices

In Islamic Economics, compensated intermediaries in the buying and selling transaction are named *samsarah*. In the case of compensation, Islamic Economics outlines all payment for every mediator in the Principle of Freedom of Contract, whether agents, brokers, or commissioners (Anwar, 2007). In contrast, in the Freedom of Contract Principle, the payment provisions acquired by brokers and commissioners are in the form of certain wages and fees set by the company, so the brokers and commissioners cannot set prices according to their wishes which can lead the detriment for sellers or buyers (Suharnoko, 2004).

So, there are advantages and disadvantages to the law of agency charge provisions in the Freedom of Contract Principle and *samsarah* in Islamic Economics terms. If viewed from the legal protection provided by Islamic Economics, the Principle of Freedom of Contract in the Criminal Code provides more definite legal certainty, which has been regulated in the provisions of the law for agents who carry out destructive acts for the owner of the goods and the buyer. However, there are no details on the number of fees to be paid for the agents.

If considered from the fulfillment of the agent rights, it is more effective if the charge determined by the agent is with the provisions which are the same as the provisions for brokers and commissioners in the freedom of Contract Principle by giving wages or profits divided by two with the owner of the goods. The agent cannot set the maximum price, detrimental to the sale and purchase transaction parties. Even though the agent commission is in the form of a provision, there should be a determined percentage that leads the agent to set the selling price with a standard market price.

The rules and theory of *samsarah* in Islamic economics do not disregard the regulations. It's just that the law stipulated in the agency contract and *samsarah* gives too much freedom to the *simsar* so that the *simsar* can easily commit fraud triggering a financial failure for sellers and buyers.

## CLOSING

### Conclusion

From the Islamic Economics perspective, the samsarah compensates in two ways. First, compensation typically comes from a percentage of the object selling price. Second, samsar can directly be paid from the good's owner or an agent company sponsor depending on the listing agreement specified in the first contract, which can be a flat fee or directly come from their clients. Sometimes, samsar can get both types of commission mentioned.

Based on the Islamic Economics commission determination concept, the protection for the seller as the object transaction owner and a buyer from destructive agent action is questionable. A fraud and running the buying and selling transaction without the owner of the good agreement put the sellers and buyers into a financial loss.

Author observation shows that the Principle of Freedom of Contract in the Criminal Code provides more definite legal certainty to protect sellers and buyers, which has been regulated in the law provisions for agents who carry out destructive acts. Even though there are no details on the number of fees to be paid for the agents, it will be considered a new decree.

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