

The Equality of Parties in Sale-and-Purchase Binding Agreement on Land and Building with the Pre-Project Selling System

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Abstract

The study aims to analyze the legal implications of the Regulation of the Minister of Public Works and Housing of the Republic of Indonesia Number 11/PRT/M/2019 on the Sale-and-Purchase Binding Agreement on Land and Building. The emphasis lies on the equality of parties that involve in buying and selling property using pre-project selling system. This study used legal materials and concepts to approach the issue. The primary legal materials consisted of statutory regulations; and the secondary legal materials consisted of books, scientific journals, and electronic articles. The Regulation of the Minister of Public Works and Housing of the Republic of Indonesia Number 11/PRT/M/2019 does not regulate sanctions for buyer's unilateral cancellation. According to the Regulation, if buyer unilaterally cancels transaction, seller (housing developer) receives only ten percent of the sum of money that the buyer has paid. This provision does not fulfil the principle of equality for the parties. The objectives of law (legal justice, benefits, and certainty) cannot be achieved because of the inequality of parties. The condition leads to seller's loss. It is especially happened if house that has been partially built-in accordance to special conditions at the request of the buyer. The house can be difficult to be sold.

Keywords: equality of parties, pre-project selling, sale-and-purchase binding agreement on land and building.

A. Introduction

House or shelter is a basic human need. The United Nations' Conference on Human Settlements Development in Istanbul, Turkey, states that the urbanized world requires adequate shelter for all people; and the development of human settlements must be carried out in a sustainable manner.¹ In Indonesia, the state regulates the right to housing for all citizens. In the second Amendment to the 1945 Constitution, Article 28 H paragraph (1) states that Every person shall have the right to live in physical and spiritual prosperity, to have a home and to enjoy a good and

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¹ United Nations, *United Nations Conference on Human Settlements (Habitat II)*, Istanbul Turkey: Reports, 2018, p. 7.

healthy environment and shall have the right to obtain medical care.² Based on the constitution, the government has issued the Law Number 1 of 2011 on Housing and Settlement Area. The Law states that the State is also responsible for protecting its citizens through the provision of housing and settlements. Therefore, the State must facilitate everyone from all levels of society with decent, healthy, safe, and harmonious housing.

Construction of houses must be based on the standard to fulfil healthy and decent housing. A healthy and decent house is a human right.³ Everyone needs a place to live. It can be a merely place to live or a living place that also serves as a place of business like a shophouse. For that purpose, Indonesia regulates that home ownership can be achieved through several processes before the transfer of rights of the property from the seller to the buyer. the process is not always through the selling and purchasing. The transfer of rights of property can be through grants, inheritance, etc. The transfer of rights is carried out before an authorized official, the Land Deed Officer (PPAT – *Pejabat Pembuat Akta Tanah*). This study focuses on the transfer of property ownership rights through sale and purchase process.

Sale and purchase transactions of a property is conducted in an agreement between seller and buyer. In the agreement, both parties will bind themselves to each other in accordance with Article 1457 of the Civil Code. By binding themselves to one another, each of seller and buyer will bear rights and obligations.⁴ In some transactions, there is a term *down payment*. Article 1646 of the Civil Code regulates that if the purchase provides a down payment, one of the parties cannot cancel the purchase by ordering to have or to return the down payment. The rule does not accommodate the possibility of a cancellation that may cause a dispute between both parties.⁵ Such agreement has conflict potential if the parties only use the Civil Code as the reference. Therefore, there is the concept of a Sale-and-Purchase Binding Agreement on Land and Building. It is expected to be a solution to the sale and purchase problem. The Sale-and-Purchase Binding Agreement on Land and Building is made in a deed by a public notary as a binding agreement between seller and buyer.⁶ The current trend of commercial practice of property business is

² Article 28 H paragraph (1) of The 1945 Constitution of the Republic of Indonesia.

³ Dwi Meilani, "Strategi Pengentasan Kemiskinan Pemerintah Daerah Kabupaten Purbalingga sebagai Upaya Pemenuhan Hak Atas Perumahan yang Layak bagi Keluarga Miskin Melalui Program Rehabilitasi Rumah Tidak Layak Huni Tahun 2017", <https://digilib.uns.ac.id/dokumen/detail/61451/Strategi-Pengentasan-Kemiskinan-Pemerintah-Daerah-Kabupaten-Purbalingga-sebagai-Upaya-Pemenuhan-Hak-Atas-Perumahan-yang-Layak-Bagi-Keluarga-Miskin-Melalui-Program-Rehabilitasi-Rumah-Tidak-Layak-Huni-Tahun-2017>, accessed on December 2021, p. 183.

⁴ Fadhila Restyana Larasati and Mochammad Bakri, "Implementasi Surat Edaran Mahkamah Agung Nomor 4 Tahun 2016 pada Putusan Hakim dalam Pemberian Perlindungan Hukum bagi Pembeli Beritikad Baik", *Jurnal Konstitusi*, Vol. 15, No. 4, 2018, p. 2.

⁵ Supriyadi, "Kedudukan Perjanjian Pengikatan Jual Beli Hak Atas Tanah dalam Perspektif Hukum Pertanahan", *Jurnal Arena Hukum*, Vol. 9, No. 2, 2016, p. 210.

⁶ Rizky Eka Nanda, Elita Rahmi, and Fauzi Syam, "Pembatalan Akta Pengikatan Jual Beli dan Perlindungan Hukum", *PJS Journal of Politics and Law*, Vol. 1, No. 1, 2021, p. 7.

pre-project selling method. Pre-project selling is the practice of selling a project or building/property that has not been built yet. The property is still a concept or an image. The construction is usually carried out after.⁷

Pre-project selling is a method of sale that is considered profitable for property seller. Seller offers a house concept in the form of a block plan. If the buyer agrees, the construction of the house will be carried out. Property seller can take advantage of payments from buyers as working capital with the concept of mutual trust that the seller will work on the construction of the house according to the agreement; and the buyer will pay according to the agreed price.⁸ As a form of trust between seller and buyer in the transaction, both parties make an initial binding in an agreement. The Sale-and-Purchase Binding Agreement on Land and Building is accomplished before the construction of the property and after the buyer paid a certain amount of money in advance as a sign of completion and a down payment for the purchase. The Sale-and-Purchase Binding Agreement on Land and Building is an agreement because it set the rights and obligations of parties. It is in accordance with Article 1233 of the Civil Code, which has binding power (Article 1338 paragraph (1) of the Civil Code). According to the provisions, the agreement has the same binding power as the law for the party who made it.

Unfortunately, the Sale-and-Purchase Binding Agreement on Land and Building has the potentials of conflicts since the agreement only cover incomplete property. There is no direct transfer of rights. In response to this potential conflict, the Minister of Public Works and Housing has issued the Regulation of the Minister of Public Works and Housing Number 11/PRT/M/2019. The Regulation covers two main items in selling and purchasing property: marketing and Sale-and-Purchase Binding Agreement on Land and Building. The clause of Sale-and-Purchase Binding Agreement on Land and Building in the Regulation is the result of the revocation of the Decree of the Minister of Public Works and Housing Number 11/KPTS/1994 on Guidelines for Selling and Purchasing Flats and Number 09/KPTS/M/1995 on Guidelines for Selling and Buying Houses.

Article 11 paragraph (1) of the Regulation of the Minister of Public Works and Housing Number 11/PRT/M/2019 regulates Sale-and-Purchase Binding Agreement on Land and Building as an initial agreement between seller and buyer of property. A Sale-and-Purchase Binding Agreement on Land and Building must contain:

1. identity of parties;
2. the agreement object description;
3. prices and payment methods;
4. guarantee for developers;
5. the rights and obligations of parties;
6. building handover time;

⁷ Yohanes Sogar Simamora, *Penerapan Prinsip Caveat Vendor sebagai Sarana Perlindungan bagi Konsumen Perumahan di Indonesia*, Surabaya: Universitas Airlangga, 2016, p. 161.

⁸ Purbandari, *Kepastian dan Perlindungan Hukum Pada Pemasaran Properti dengan Sistem Pre-Project Selling*, Jakarta: Widya, 2019, p. 13.

7. maintenance;
8. building use;
9. transfer of rights;
10. cancellation and expiration of sale-and-purchase binding agreement on land and building; and
11. dispute resolution.

The government expects that the Regulation will prevent conflicts and become the means of dispute resolution between consumer and property developers in a clearer and more specific legal rule. However, there is an incompatibility between the Regulation and other laws and regulations. The regulation even contains new norms that previously were not regulated in the previously existed legislation that have the same aims and objectives with the Regulation. In addition, the Regulation does not contain norms for sanction clauses. Without sanction clause, there will be a void since there is no legal certainty for the parties. For example, when a buyer cancels the purchase of a property, seller must return buyer's money. The seller is in a disadvantaged condition because a part or all the money has been used to build the house that has been agreed upon in the Sale-and-Purchase Binding Agreement on Land and Building. Article 150 paragraph (2) of the Housing and Settlement Law regulates administrative sanctions for anyone who organizes housing and settlement areas that do not meet requirements. However, it does not regulate sanctions for buyers who make unilateral cancellations.

On the other hand, the Law Number 8 of 1999 on Consumer Protection protects buyer strongly and firmly if the property seller is in default. In fact, the State has the right to intervene in regulating the basic rights of consumers. The State will always present in processing and sanctioning property sellers who are suspected of committing fraud against buyers.

The Regulation of the Minister of Public Works and Housing Number 11/PRT/M/2019 regulates two main points. First, buyer who has made an advance payment as a completion and a down payment to purchase a house must have a Sale-and-Purchase Binding Agreement on Land and Building made with a Public Notary deed to maintain the legal status of the agreement. Second, there should be a determination of the schedule for the construction of the house that has been agreed and the sanctions imposed on each party in the event of a cancellation of the purchase.

Prior to this study, there have been some studies focusing on the Regulation of the Minister of Public Works and Housing Number 11/PRT/M/2019. The first, from Malik, examined the impact of the regulation on developers and consumers.⁹ The second, Khairunnisah and Hutasoit examined the legal protection of home buyers

⁹ Rahima Malik, "Dampak Hukum Peraturan Menteri PUPR No. LI/Prt/M/2019 tentang Sistem Perjanjian Pendahuluan Jual Beli Rumah Susun Terhadap Hak dan Kewajiban Pelaku Pembangunan dan Konsumen", *Dharmasiswa*, Vol. 1, No. 1, 2021, p. 8.

based on the Regulation.¹⁰ Riza and Octarina analyzed the characteristics of the deed of the sale and purchase agreement of the house and apartment unit and the legal consequences of not implementing the clause in the deed of the sale and purchase agreement of the house or apartment unit.¹¹

The clause of agreement in the Regulation of the Minister of Public Works and Housing Number 11/PRT/M/2019 is a special concern for public notaries and other officials authorized to make Sale-and-Purchase Binding Agreement on Land and Building deed. The terms in Sale-and-Purchase Binding Agreement on Land and Building have their own specificity that cannot be equated with other system. There is an inequality in between consumer and developer that may cause losses for the developer if the consumer cancels the transaction.

B. Sale-and-Purchase Binding Agreement on Land and Building in the Regulation of the Minister of Public Works and Housing of the Republic of Indonesia Number 11/PRT/M/2019

The sale of property with pre-project selling creates a legal relationship between the seller and the buyer. The legal relationship in the agreement is not a relationship that can arise by itself as contained in the family property. The legal relationship between one party and another cannot occur by itself. The connection is created because of the "legal action." The legal actions taken by the parties give rise to the legal relationship of the agreement so that one party is given the right by the other party to obtain achievements. The other party provides itself with the obligation to fulfill its achievements.¹² The existence of an agreement in the legal act of buying and selling houses is legitimized by Government Regulation Number 12 of 2021 concerning Amendments to Government Regulation Number 14 of 2016 concerning the Implementation of Housing and Settlement Areas which states as follows: Number 10 states that the Preliminary Sale and Purchase Agreement System, hereinafter referred to as the PPJB System, is a series of agreement processes between each person and development actors in marketing activities as outlined in a preliminary sale and purchase agreement or sale and purchase binding agreement before the sale and purchase deed is signed. Number 11 Preliminary Sale and Purchase Agreement or Sale and Purchase Binding Agreement, hereinafter referred to as PPJB, is an agreement between development actors and everyone to carry out the sale and purchase of houses or flats, which development actors can carry out prior to construction for apartments or in the process of construction for single houses. and Row house made before a notary.

¹⁰ Khairunnisah and Wesley L. Hutasoit, "Penerapan Peraturan Menteri Pekerjaan Umum dan Perumahan Rakyat Nomor 11/PRT/M/2019 Tentang Sistem Perjanjian Pendahuluan Jual Beli Rumah", *Legalitas*, Vol. 5, No. 2, 2020, p. 8.

¹¹ Safira Riza Rahmani and Nynda Fatmawati Octarina, "Akta Perjanjian Pengikatan Jual Beli Rumah/Rumah Susun sebagai Perlindungan Hukum bagi Penjual dan Pembeli", *Jurnal Supremasi*, Vol. 10, No. 1, 2020, pp. 36-46.

¹² Sekhar Chandra Pawana, "Konsepsi Perjanjian Pengikatan Jual Beli Rumah Susun Milik Sebagai Sebuah Panjer", *Acta Comitatus: Jurnal Hukum Kenotariatan*, Vol. 10, No. 2, 2019, pp. 7-14.

Sale-and-Purchase Binding Agreement on Land and Building is an agreement between the seller and the buyer that is carried out before the sale and purchase because some elements have not been fulfilled in the actual buying and selling process. These elements include a certificate of ownership of land that does not exist because it is still in the process; or the unpaid price and taxes imposed on the sellers or buyers.¹³ Sale-and-Purchase Binding Agreement on Land and Building is covered by Article 1313 of the Civil Code. It originates from the freedom of the parties to make an agreement according to their will based on the principles of consensual, *pacta sun servanda*, and freedom of contract. They are accommodated by Article 1320 and 1338 of the Civil Code. The general principles of Sale-and-Purchase Binding Agreement on Land and Building are the principles of trust, legal equality, balance, legal certainty, morality, propriety, habit, and protection.¹⁴

The principle of trust is the belief that those who bind themselves in an agreement will carry out the performance of each that has been agreed upon in the agreement from the beginning to the end of the agreement.¹⁵ The principle of legal equality is that everyone who binds in an agreement is a legal subject. As the legal subjects, parties have the same position, rights, and obligations before the law. Equality before the law will not discriminate people because of race, ethnicity, religion, and skin color.¹⁶ The principle of balance expects parties of an agreement to fulfill every performance according to the agreement.¹⁷ The principle of legal certainty emphasizes parties of the agreement to obey the law and obtain legal justice. The moral principle is contained in Article 1354 of the Civil Code that a person, who commits an act that is carried out voluntarily, is obliged to continue and complete the act until the end.¹⁸ Article 1339 of the Civil Code states the principle of propriety that an agreement must be based on what is appropriate to be agreed upon as the nature of the agreement.¹⁹ The legal custom states that what is regulated in the agreement will not only bind what is clearly and explicitly regulated in the agreement but also based on custom that will bind to habits that have been commonly practiced and are generally recognized.²⁰ The principle of protection requires sale between seller and buyer of house or flat to be carried out by developer before construction for flat or in the construction process for house in a notarial deed.

Before the establishment of the Regulation of the Minister of Public Works and Housing Number 11/PRT/M/2019, the arrangements for sale and purchase were

¹³ R. Subekti, *Aspek-Aspek Hukum Perikatan Nasional*, Bandung: Citra Aditya Bakti, 2018, p. 29.

¹⁴ Salim, H. S, *Hukum Kontrak (Teori dan Teknik Penyusunan Kontrak)*, Jakarta: Sinar Grafika, 2021, p. 13.

¹⁵ M. Mutarom, "Asas-asas Hukum Perjanjian: Suatu Landasan dalam Pembuatan Kontrak", *Jurnal SUHUF*, Vol. 26, No. 1, 2014, p. 54.

¹⁶ Rahima Malik, *op.cit.*, p. 481.

¹⁷ M. Mutarom, *op.cit.*, p. 54.

¹⁸ Niru Anita Sinaga, "Peranan Asas-Asas Hukum Perjanjian dalam Mewujudkan Tujuan Perjanjian", *Jurnal Bina Mulia Hukum*, Vol. 7, No. 2, 2018, p. 92.

¹⁹ *Ibid.*

²⁰ M. Mutarom, *op.cit.*, p. 54.

regulated in the Decree of the State Minister for People's Housing Number 11/KPTS/1994 on Guidelines for Sale and Purchase of Flat and Number 9/KPTS/1995 on Guidelines for Sale and Purchase Agreement. The decree stipulates that efforts to provide legal protection for seller and buyer were limited to the sale and purchase of an unfinished flat.²¹ The agreement was still limited for the purchase of unfinished flat or apartment.

The model of property development and the existing rules are considered no longer effective to protect seller and buyer of other house types, like residential houses, shop houses, hotels, etc. Therefore, the government carried out legal reforms to adapt the developments and the needs of the community, especially in the property world, through the Regulation with a wider and comprehensive scope. The main point of the Regulation covers the preliminary process of buying and selling land and buildings before or after the property built. The clause provides legal certainty and protect interests of parties. It also regulates about the establishment of a binding sale and purchase agreement as a preliminary agreement.

Despite the positive impact, the Regulation Number 11/PRT/M/2019 does not provide certainty to achieve the goals and objectives. It has many loopholes that have been criticized by property business actors. The Chairperson of Real Estate Indonesia states that the Regulation does not reflect an equality of rights and obligations between seller and buyer. A point that is highlighted is Article 9 on the obligation of the property developer/seller to return all funds paid by buyer if the buyer cancels the purchase.²² It seems that the Regulation only anticipate error to be made by property seller or developer. It does not cover fines or administrative sanctions that can be imposed on buyer who do not fulfill obligation.²³ On the other hand, the Regulation is contradictory and counterproductive from the government's expectation that the property sector can help housing development and national economic growth.²⁴

C. The validity of the Sale-and-Purchase Binding Agreement on Land and Building Based on the Regulation of the Minister of Public Works and Housing Number 11/PRT/M/2019

The development of the housing industry in Indonesia is extensive and diverse. This can be seen from the various types of products produced by the company. The various types of housing and marketing offered are directly proportional to the increasing level of competition. Therefore, one crucial factor is marketing or the sales department. In addition to implementing a direct selling system, few

²¹ Rahima Malik, *op.cit.*, p. 479.

²² Berita Satu, "REI Kritisi Peraturan Menteri PUPR tentang PPJB Rumah", <https://www.beritasatu.com/ekonomi>, accessed on June 2021.

²³ Antara News, "REI Berharap Pemerintah Meninjau Beberapa Butir Peraturan PPJB", <https://www.antaranews.com/berita/1031884/rei-berharappemerintah-meninjaw-beberapa-butirperaturan-ppjb>, accessed on June 2021.

²⁴ *Ibid.*

companies implement a sales system through exhibition events to increase product sales from each company.²⁵ Often, apartment sales promotions carried out by developers/developers are carried out through Pre Project Selling sales tactics, namely, marketing that is carried out before the construction of flats is carried out, so that what the developer offers is in the form of illustrations and designs.²⁶ Pre-Project Selling marketing is often carried out by developers/developers to understand market interest in the construction to be marketed. This marketing system is seen as more rational because the seller can take advantage of the down payment paid by the buyer as initial capital. This marketing system is also recognized in the laws and regulations in Indonesia. Article 3 of the Regulation of the Minister of Public Works and Housing Number 11/PRT/M/2019 states that housing or property companies can promote their commodities in several ways as follows.

1. Property developer can conduct sales promotion for residential houses when the property is still under construction.
2. Property developer can conduct sales promotion for flats before the flats are built.
3. Based on paragraphs (1) and (2) of PUPR Ministerial Regulation 11/PRT/M/2019, the promotion must contain clear and correct marketing information. It must also guarantee information certainty regarding development planning and physical condition of the property.

Article 3 of the Regulation states that the main elements must consist of the method of purchases for properties that are still under construction or not built at all. To guarantee the legal certainty and provide legal protection to both sellers and buyers, the Regulation requires a sale-and-purchase binding agreement as an initial agreement that binds seller and buyer. Article 1 point 2 states that a preliminary sale and purchase agreement or sale-and-purchase binding agreement on building and land is an agreement between developer and everyone carrying out sale and purchase of houses or flats that can be carried out before the construction process stated in a notarial deed. Every sale and purchase binding agreement must meet requirements for certainty of land ownership status; building permits, availability of infrastructure, public facilities, and utilities; construction of at least 20%; and the promise.

The article emphasizes that the agreement must be stated in a notarial deed. It is reaffirmed in Article 12 paragraph (1) of the Regulation. The agreement must be signed by the prospective buyer and the property seller before a public notary, which means that the agreement can only be made and signed before a public

²⁵ Putu Bagus Adidyana Anugrah Putra, "Implementasi Augmented Reality pada Media Promosi Penjualan Rumah", *Jurnal Teknologi Informasi: Jurnal Keilmuan dan Aplikasi Bidang Teknik Informatika*, Vol. 14, No. 2, 2020, pp. 142-149.

²⁶ Mika Anabelle and Hanafi Tanawijaya, "Sistem Pre-Project Selling dalam Penjualan Satuan Unit Apartemen Menurut Undang-Undang Nomor 20 Tahun 2011 Tentang Rumah Susun (Contoh Kasus Putusan Pengadilan Negri Jakarta Pusat Nomor: 616/PDT. G/2017/PN. JKT. PST jo. Putusan Pengadilan Tinggi Jakarta Nomor: 20/PDT. G/2019/PT. DKI)", *Jurnal Hukum Adigama*, Vol. 2, No. 2, 2019, pp. 508-532.

notary. Before the sale and purchase agreement is made, as an initial agreement, the prospective buyer is required to make an order. The order letter must contain at least the name of the property, street, or property number, the area and type of building, terms of payment (signature and advances), building specifications, date or period of completion, and other administrative terms and conditions.

In the letter of order, the house design should also be attached; and both parties sign it.²⁷ Generally, within a period of 30 days, as a form of seriousness from the buyer, the seller will ask for the down payment for the purchase at least 30% of the total property price. After the down payment, a sale and purchase binding agreement is signed. The sale and purchase binding agreement are a preliminary agreement of sale and purchase. Sale-and-Purchase Binding Agreement on Land and Building is only the initial bond between the seller and the buyer that is private or non-authentic. Non-authentic deed means a deed made only by the parties or prospective sellers and buyers and does not involve public notary. Sale deed is an authentic deed made by a public notary or land deed official. It is a legal act of transferring land rights due to buying and selling. In other words, Sale deed is a condition in land or houses legal transfer.

There is the principle of freedom of contract in contract law, which is an essential principle in the agreement. In essence, a person can make an agreement in any format and with the desired content of the parties involved in the agreement. However, this does not mean that this principle provides absolute freedom for the parties to the agreement. In the Criminal Code, there are limitations given to the principle of freedom of contract with the provisions of the agreement's validity in Article 1320.²⁸ Following the sale and purchase binding agreement, there is a transfer of rights of property, which previously does not occur at the time of the sale and purchase agreement. The agreement is a subject to Article 1253 of the Civil Code. An engagement is conditional when it is dependent on an event that is still to come and which is still not certain to occur, either by suspending the engagement until such an event occurs, or by canceling the contract engagement according to the occurrence or non-occurrence of the event. Sale-and-Purchase Binding Agreement on Land and Building is subject to the conditions for the validity of the agreement as regulated in Article 1320 of the Civil Code, in which the legal terms of the agreement consist of:²⁹

1. the statement of parties who bind themselves in the agreement;
2. the ability to make an engagement;
3. certain things that are agreed upon; and
4. things that have been agreed upon must be lawful causes.

²⁷ Abel Agustian, "Pembatalan Perjanjian Pengikatan Jual Beli (PPJB) Kondominium Akibat Wanprestasi", *Jurnal Recital Review*, Vol. 2, No. 2, 2020, p. 84.

²⁸ Edward Sardono Tedjosaputro, "Notaris dan Asas Kebebasan Berkontrak dalam PPJB Rumah Susun", *Jurnal Ilmiah Hukum dan Dinamika Masyarakat*, Vol. 19, No. 1, 2021, pp. 16-29.

²⁹ Shinta Vanayanti Bumi and Anak Agung Sri Indrawati, "Syarat Subjektif Sahnya Perjanjian Menurut Kitab Undang-Undang Hukum Perdata (KUH Perdata) Dikaitkan dengan Perjanjian E-Commerce", *Kerta Semaya*, Vol. 1, No. 3, 2013, p. 4.

As the legal basis for the validity of an agreement, the Sale-and-Purchase Binding Agreement on Land and Building, which has been made based on what is regulated in the Civil Code and added to the conditions that must be met as stipulated in the Regulation of the Minister of Public Works and Housing Number 11/PRT/M/2019, the agreement becomes valid and acts as law for the parties. The parties must obey the agreement, carry out their obligations and receive the rights as agreed.

The sale and purchase binding agreement on land and building with pre-project selling contains two different scopes of rules. The agreement is included in the legal scope of the agreement and the sale and purchase based on the object is within the scope of land law based on the Law Number 5 of 1990 on Basic Agrarian Regulations. The issuance of the Regulation Number 11/PRT/M/2019 is as a form of balance between the two legal provisions, which aims to provide protection for both parties. However, it still causes problems since in the attachment to the Regulation of the Minister of Public Works and Housing Number 11/PRT/M/2019, the terms and conditions must be complied with. In the principle of freedom of contract, the parties can determine the will of what will be stated in the agreement. This shows that there is a conflict between the substances that are mandatory in the sale and purchase binding agreement with pre-project selling based on the Regulation and the principle of freedom of contract in Article 1338 of the Civil Code. Another problem may arise is that it does not regulate the sanction clauses for violation on the guideline.

D. Equality of Parties of Sale-and-Purchase Binding Agreement on Land and Building Based on the Regulation of the Minister of Public Works and Housing Number 11/PRT/M/2019

The stipulation of standard clauses in a property sale agreement in principle is not something that is prohibited if the contents are first negotiated with the prospective buyer. However, in practice, most sellers do not negotiate with buyers to determine the points of the agreement.³⁰ The inequality of parties in the pre-project selling sale agreement can be compared to the exploitation by property developers to buyer. Buyer receives detail obligations, especially related to money. On the other hand, developer has fewer points in the agreement.³¹ The standard contract in the pre-project selling agreement does not reflect equality since one party has an unequal bargaining position that may lead to conflict.³² However, from developer's point of view, the Regulation Number 11/PRT/M/2019 contains some points to be criticized since the Regulation requires agreement as an initial transaction with buyer and the conditions must be in accordance with the Regulation. They are as follows.

³⁰ Sudaryatmo, *Hukum dan Advokasi Konsumen*, Bandung: Citra Aditya Bakti, 2019, p. 93.

³¹ Sudaryatmo, *Masalah Perlindungan Konsumen di Indonesia*, Bandung: Citra Aditya Bakti, 2019, p. 32.

³² Steven R. Salbu, "Evolving Contract as ad Device for Flexible Coordination and Control", *American Business Law Journal*, Vol. 34, No. 3, 1997, p. 375.

1. Marketing

Previously, the Law Number 1 of 2011 on the Housing and Settlement Areas and the Government Regulation of 2016 on Housing do not cover property marketing. In the Regulation of the Minister of Public Works and Housing Number 11/PRT/M/2019, Article 4 paragraph (1) requires certainty of space allocation, land rights, control status, permits, and guarantees from guaranteed institutions. The Regulation stipulates that property developers must complete legal documents. At least there must be spatial planning, land certificates, Developer's Business Registration Number, Building Permit, selling price, specifications, and infrastructure of the property to be sold.

Article 7 paragraph (2) of the Regulation stipulates that if a property developer has received payment from a buyer at the marketing stage, the property developer is obliged to submit information about the schedules of development, agreement and sale deed signing, and house handover. If the developer fails to fulfill the schedule, the buyer can make a unilateral cancellation and the developer must return all payments that have been received. The developer must make the return no later than thirty days from the written cancellation by the buyer. The developer is also the subject to a late fee of 1% per day. If the cancellation of sale is not due to the negligence of the developer, the developer is given the right to deduct 10% of the amount paid by the buyer. This provision can be detrimental to the developer if the building is under the construction and exceeds the sum of money.

2. Sale-and-Purchase Binding Agreement on Land and Building

The Sale-and-Purchase Binding Agreement on Land and Building in the Regulation of the Minister of Public Works and Housing Number 11/PRT/M/2019 is regulated in Chapter III, Articles 10 to 14. The Regulation requires developer to show a certificate of land ownership and submit a copy in accordance with the original Building Permit. For the sale of house property, developer must show the construction of facilities and infrastructure at least roads and sewerage and show a statement letter regarding the availability of public utilities (electricity and water sources) to buyer. For flats, developer must show a letter of availability of ready-to-build land outside the shared land which shall be submitted to the Regional Government (Article 10 paragraph (6)); and show or submit a report from a construction supervisory consultant or construction management consultant that the property has reached 20% (Article 10 paragraph (7)).

The Regulation of the Minister of Public Works and Housing Number 11/PRT/M/2019 also regulates agreement cancellation. If the cancellation is due to the negligence of the property developer, the developer must return all payments that have been received from the buyer. On the other hand, if the sale and purchase agreement is canceled due to the negligence of the buyer, the developer is only entitled to deduct 10% of everything that has been paid by the buyer (article 13 paragraph (2) b). According to the Regulation, an agreement must contain at

least the identity of parties, the description of object, physical data, location, house prices, payment procedures, developer's willingness not to withdraw funds of more than 80% before fulfilling the agreement; guarantee of developers, the validity of ownership, rights and obligations of parties, the time of building handover, the minutes of the building handover, the handover of keys, and the signing of the sale deed. In the explanation of the Regulation number 8, letter a, the developer is responsible for the maintenance of the house for a minimum of three months after the handover. This provision is contrary to Article 94 of the Government Regulation Number 14 of 2016 on the Implementation of Housing and Settlement Areas that stipulated the obligation to maintain buildings is carried out after the completion of construction until before the building handover, not after the handover, use of the building; transfer of rights; cancellation and expiration of the conditional sale agreement, and dispute resolution.

The Regulation of the Minister of Public Works and Housing Number 11/PRT/M/2019 stipulates that the agreement must be made in the form of a public notary deed, while the Law of 2011 on Housing does not provide the requirement. Some of the new norms in the Regulation are as follows.

- a. The Law Number 1 of 2011 on the Housing and Settlement Areas and the Government Regulation Number 14 of 2016 do not cover clauses of marketing. However, The Regulation of the Minister of Public Works and Housing Number 11/PRT/M/2019 regulates it. In fact, the Regulation should not stipulate new norms.
- b. The agreement in the Regulation must be made with a public notary deed. The Law Number 1 of 2011 on the Housing and Settlement Areas does not require the deed. Likewise, the Law Number 20 of 2011 on Flats does not require the agreement to be with a notary deed. It only enables, not a requirement, the agreement to be made before a notary. It means that it can be in the form of an underhand deed before a notary make it legal.
- c. The Regulation stipulates that certain conditions must be met for the availability of infrastructure, facilities, and public utilities in the construction of flat. The conditions are evidenced in a statement from the developer on the availability of land ready to build outside the shared land to be handed over to the local government. This rule is a new norm that was not previously regulated.

Hadjon says that people who really understand law must know that the Minister's decision is at a level lower than law. Likewise, in the Jurisprudence of the Supreme Court Number 1205 K/Pdt/1990 dated December 14, 1991, freedom of contract is limited by the provisions of the legislation in Indonesia. From both views, the Regulation Number 11/PRT/M/2019 is a legal product containing norms conflicting law based on the hierarchy of applicable laws and regulations. The consequences of the clauses in an agreement as regulated in the Regulation, both for developers and buyers can be determined based on the following aspect.

1) Aspect of Justice

The Regulation of the Minister of Public Works and Housing of the Republic of Indonesia Number 11/PRT/M/2019 on the Sale-and-Purchase Binding Agreement on Land and Building cannot fulfill a sense of justice for developers. The Regulation requires developer to provide clear information about the commodities. On the other hand, buyer is not required to perform financial disclosure of the ability to buy property that can avoid cancellation. Cancellation is a considerable loss for property entrepreneurs. As an illustration, a unit that is originally intended to be purchased is canceled, it will be difficult to sell it later as a result of the special requests. The special request in this case is a change in the layout of the space or the concept of the building from the standard offered by the seller.

In the case of cancellation, developer is required to return all money that has been paid by buyer, if the cancellation is caused by developer. Even if the cancellation is caused by developer, the money must be returned with the right to deduct only 10% of the amount. Moreover, the developer is a subject to a late fee of 1% per day. It makes developer unequal with buyer since buyer is not a subject to sanctions. The clause causes the developer's financial even greater. The Regulation has failed to provide a balanced fairness of rights and responsibilities between property entrepreneurs and consumers or buyers.³³

2) Aspect of Legal Certainty

To test whether a legal product has met aspect of legal certainty, it is necessary to look at the legal certainty indicators that legal certainty will provide a guarantee for a person to behave in accordance with the applicable law. Likewise, if the applicable law cannot provide legal certainty, a person will not have standard to behave.³⁴ The Regulation provides strict regulations in the marketing aspect, agreement, and cancellation as well as provisions for refunds to buyers with certainty, by eliminating obligations for the opposite to buyers so that buyers who cancel will not provide a loophole for lawsuits. Thus, the unilateral binding power will not realize the legal certainty expected by the Regulation.

3) Aspect of Legal Benefits

A law that does not provide benefits to the community at large and only benefits some parties will not achieve the purpose of legal benefits. Laws that provide benefits will make a maximum contribution to the life of the people. The Regulation is expected to provide benefits with clauses that serve as benchmarks in marketing and agreements. The expectation may have not been realized because since the beginning, the Regulation has been unable to provide a sense of justice for developer, especially related to the inequality in the distribution of rights and

³³ Rahima Malik, *op.cit*, p. 488.

³⁴ *Ibid*, p. 489.

obligations between developer and buyer. The Regulation is felt to only provide benefits to buyer.

E. Conclusion

The Regulation of the Minister of Public Works and Housing of the Republic of Indonesia Number 11/PRT/M/2019 on the Sale-and-Purchase Binding Agreement on Land and Building regulates marketing and agreement as clauses for property entrepreneurs to bind in sale and purchase agreements. The regulation is not able to provide a sense of justice as the goal of legal theory, especially in the distribution of rights and obligations between property entrepreneurs and buyers.

Developer is required to return all money that has been paid by buyer with the right to only 10%, even if the cancellation of the purchase is due to the buyer's fault, not the seller's. This cancellation will be detrimental to the seller, especially if the buyer has ordered a special design. Buildings with special design are usually difficult to be sold. On the other hand, the seller is a subject to a late fee refund of the consumer of 1% per day of the delay. It is surely a financial burden for the property developer. Weaknesses in this regulation must be described in more detailed provisions in the agreement.

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