

# Legal Uncertainty in the Policy of the Notary's Property Sale Binding on the Making of the Deed

*By Sisca Utami Damayanti*



## Legal Uncertainty in the Policy of the Notary's Property Sale Binding on the Making of the Deed

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### Abstract

From this point of view, the implementation of a binding sale and purchase agreement for property (land and buildings) is interesting for further study, considering that the binding sale and purchase agreement is a legal action that precedes the process of transferring rights to property. As a form of engagement, this sale and purchase binding agreement contains the rights and obligations of the parties who make it, so if the things that have been agreed upon in the sale and purchase agreement are violated or not fulfilled by the parties who made it, it can be said that this has happened. default. However, in practice, a binding sale and purchase agreement can be canceled unilaterally by one of the parties or by agreement of both parties. Even binding agreements for the sale and purchase of land, for example, can be canceled by a court decision. The cancellation of an authentic deed of agreement will certainly have certain legal consequences.

**Keywords:** *Legal Uncertainty; Notary Public; Property Sale and Purchase Agreement*

### Introduction

An agreement is a legal action that appears to accommodate certain interests of community members. In general, an agreement can be made freely, free to agree with anyone, free to determine its form and terms, and free to determine its form, namely written or unwritten. Article 1338 paragraph 1) of the Civil Code states that all agreements made legally apply as laws to those who make them. Article 1338 of the Civil Code contains the principle of freedom of contract, meaning that everyone is free to agree in any form, both in form, content, and to whom the agreement is intended. From this principle it can be concluded that the community is allowed to make agreements in the form and content of anything (about anything) and the agreement is binding on those who make it like a law.

In Article 37 paragraph (1) of Government Regulation Number 24 of 1997 concerning Land Registration it can be seen that for the transfer of land rights, an authentic deed made by a public official called the Land Deed Making Officer (PPAT) is appointed by the government, so that the transfer of land



rights cannot be carried out without fulfill<sup>23</sup> the requirements stipulated by the applicable laws and regulations, but in various practices before the sale and purchase of property are carried out before the authorized PPAT / notary, the parties must first carry out a legal action by make a deed of binding sale and purchase before a notary. The binding is inter<sup>19</sup> as a preliminary agreement from the main intention of the parties to transfer rights to property. This sale and purchase agreement contains promises to carry out the sale and purchase if the conditions required for this have been met. The binding of land sale and purchase is an anonymous agreement that appears as a form of agreement development in society.

Agre<sup>24</sup>ents binding sale and purchase of property (land and buildings) in practice are often made in the form of an authentic deed made before a notary, so the deed of binding sale and purchase is an authentic deed that has perfect evidentiary power. This is intended by the parties to provide more protection and legal certainty for the parties who make it. Because the notary in making a deed is impartial and looks after the interests of the parties objectively. With the help of a notary, the parties who make a binding sale and purchase agreement will get assistance in formulating the things to be agreed upon, but an agreement cannot always work according to the agreement desired by the parties. Under certain conditions, various things can occur, which result in an agreement being canceled, either canceled by the parties or by court order.

From this point of view, the implementation of a binding sale and purchase of property (land and buildings) is interesting for further study considering that the binding sale and purchase agreement is a legal action that precedes the process of transferring rights to property. As a form of engagement, this sale and purchase binding agreement contains the rights and obligations of the parties who make it, so that if the things that have been agreed in the sale and purchase agreement are violated or not fulfilled by the parties who made it, it can be said that this has happened. default, but in practice the binding sale and purchase agreement is possible to be canceled unilaterally by one of the parties or by agreement of both parties.

<sup>4</sup> The guarantee of legal certainty to be realized in this land registration includes certainty of the status of the registered rights, certainty of the subject of the rights, and certainty of the object of the rights. Registration of this right produces a certificate as proof of the right. The essence of the contents of the provision stipulates that "legal proof of ownership of land rights is a certificate". Thus is<sup>16</sup> related to land such as land tenure, ownership and use of land by persons or legal entities that violate the provisions of the applicable land laws and regulations, buying and selling of land outside the applicable procedures, use of land that is not by designation, fake certificates, overlapping certificates, land manipulation and so on can be minimized.

<sup>25</sup> Nationally, the Ministry of Agrarian Affairs and Spatial Planning (ART)/BPN proposes 5 million plots of land which <sup>15</sup> then be provided with free certificates by each local National Land Agency (BPN) in the region. The issuance of land <sup>15</sup>ificates through the Complete Land Registration Program (PTSL) program is not much different from the issuance of land certificates through the National Agrarian Program (PRONA), which are both carried out free of charge, also with prerequisites from registration of rights to issuance or service from BPN, pre-service is borne by the land owner, such as Land and Building Rights Acquisition Fees (BPHTB), the basis for rights, stamp duty, boundary markers are borne by the land owner. evenly distributed in all villages and sub-districts in one district. Meanwhile, for the PTSL program, data collection is carried out centrally in one village, whereas it is different from the program that issues certificates, it is not comprehensive for all uncertified land parcels in one area, while for PTSL all land within the area that does not yet have a certificate will be made (Masnah, 2021).

Accounts payable can provide many benefits to both parties. Accounts payable is an act of mutual help between human beings which is highly recommended in Religion. Debt and credit can reduce the

difficulties of other people who are suffering from problems and can strengthen the kinship of both parties. Debt and credit begin with a debt and credit agreement with two legal subjects, namely the debtor and creditor, then usually followed by the delivery of guarantees, but in practice, it turns out that many people make pseudo or pretend agreements by making a deed of agreement on debt and credit with collateral for land certificates or the house certificate is then packaged as a binding sale and purchase agreement (hereinafter referred to as the PPJB) for land or house which is also accompanied by a power of attorney to sell to be used to transfer collateral from the debtor to the creditor if the debtor defaults, then such thing is a pseudo or pretend agreement pura and must be assessed as a Debt and Receivable Agreement with a guarantee (Ro'fiah & Nurul Fadila, 2021).

The relationship between debts and receivables with collateral for land or house certificates and then packaged as a Sale and Purchase Agreement (PPJB) for land or houses should not occur at this time, because as stated above, buying and selling in the rules of Indonesian national land law is based on customary law, namely selling buying and selling without collateral and the event is not a mortgage on land, but a loan.

When examined in more depth, the granting of power of attorney to sell by drawing up a deed of power of attorney to guarantee the repayment of the creditor's debt if the debtor defaults should not be carried out considering that this carries legal risks for the parties, because there is no legal certainty and legal protection, especially for the debtor because with the power of attorney to sell, the creditor can at any time sell the object of attorney regardless of whether there is a default or not (Lianda Islami et al., 2021). According to the principles of Indonesian national land law based on the customary law system, in the customary law system, buying and selling land is a free sale, where it is meant that the sale of land is a transfer of land forever with the seller receiving an amount of payment paid openly, clear and cash.

In the construction of a debt and credit legal relationship, if land and house buildings are to be used as collateral for a debt, then what is made should not be a binding sale and purchase agreement but a debt and credit agreement made by using a Mortgage by the provisions of Law of the Republic of Indonesia Number 4 the Year 1996 concerning Mortgage Rights on Land and Objects Related to Land (hereinafter referred to as UU RI No. 4/1996) which is accompanied by the Deed of Granting Mortgage Rights (APHT) by the Land Deed Making Officer (PPAT), so that if the debtor defaults directly the guarantee can be executed and the actual position of the Mortgage Right is as an additional agreement (accessory) to the main agreement, namely the debt agreement (Nur Maulidan, 2021).

National agrarian politics oblige the state to lead the control and use of land, water, and the natural resources contained therein to achieve people's welfare. This is a manifestation of developing the land sector as referred to in Article 2 paragraph (2) of the Republic of Indonesia Law No. 5 of 1960 which is known as the right to control from the state (HMN). The purpose of the HMN is that the management and utilization of land as one of the agrarian resources are borne by the state as a ruling body that is given a mandate from its people, whose estuary must be aimed at the prosperity and welfare of the people in the framework of social justice. Social welfare is a condition where the material, spiritual and social needs of citizens must be fulfilled to live properly and be able to develop themselves so that they can carry out their social functions. (Amin, 2018).

The initial development of the land law system must be based on the meaning of the law as a tool of social engineering (law as a social engineering tool), that is, law grows and develops with society driven by habit. The theory used in social principles is law as a tool of social engineering stating that law in Indonesia does not only act as a tool, but also as a means of social renewal. It is the law that should be an instrument to direct society toward the goals to be achieved. If necessary, the law can be used to eliminate various negative social habits. Utilization of law as a means to engineer society towards



government (executive) policy scenarios is urgently needed by developing countries, far exceeding the needs of established advanced industrial countries, because developed countries already have legal mechanisms that have been implemented to accommodate changes change in society.

One of the roles of law in law theory as a tool of social engineering must be reflected in future land law politics. This is intended to create a national land policy that makes the people prosperous. The politics of land law needs to be accompanied by an improvement in the orderliness of land law so that it reflects better prevention of the land mafia. The politics of Indonesian land law in setting up the publication system in the process of land registration are quite good. Legal politics is by the concept of law as a tool of social engineering, with the development of a land registration system according to the characteristics of developing countries. The philosophical consideration in choosing a negative publication system with positive characteristics in land registration is that this system is very much in line with the goal of land registration in Indonesia for legal certainty in the character of land to realize justice and people's welfare.

Property is a form of asset. The embodiment of this property is not only in the form of luxury residential ownership. In essence, the property is the right to own a plot of land and use whatever is in it. As a form of asset, property has experienced development along with the emergence of various technologies and information that occur in all corners of the world. The development of the property sector in Indonesia has recently shown positive signs. The nadir for the Indonesian property crash has ended.

Whereas *Judex Facti* was wrong and wrong in applying the law or applying the law improperly by rejecting the lawsuit of the Plaintiff/Applicant for Cassation. In this case, *Judex Facti* does not apply or ignore the provisions in Article 1338 paragraph (3) of the Civil Code which emphasizes that agreements must be implemented in good faith. *Judex Facti* was negligent in considering the bad faith of the Defendant/Respondent of Cassation in controlling and enjoying the object of the agreement without paying installments for the price of the object of the agreement which was detrimental to the Plaintiff/Cassation Petitioner. Besides that, *Judex Facti* also neglected to apply the provisions of Article 1338 paragraph (1) which emphasizes that an agreement is binding on the parties as binding on the law. Even though it was obvious that the Defendant/Respondent for Execution had neglected to comply with the binding sale and purchase agreement and the stages of payment of the selling price of the land and warehouse building as the object of the agreement (Bambang Santoso, 2021).

That the Panel of Supreme Court Justices who tried the quo case was asked to cancel the *Judex Facti* decision because it was wrong and wrong in applying the law or applying the law improperly. In this case, *Judex Facti* only heard the Defendant/Respondent of Cassation so it violated the legal principle of *Deauditur alteram partem*. *Judex Facti*, by law, must act fairly and objectively by taking into account everything that happens during the trial, whether stated in the lawsuit, replica, duplex, or evidence submitted by both parties to the case.

The binding sale and purchase of property, especially land, and buildings, is an anonymous agreement because it is not found in the forms of agreements regulated in the Civil Code. This agreement is an agreement that precedes the property sale and purchase agreement, which must be carried out before the PPAT (Land Deed Making Officer) or Notary. The Sale and Purchase Binding Deed is an authentic deed that has perfect evidentiary power. This is intended by the parties to provide more protection and legal certainty for the parties who make it. If the things that have been agreed upon in the deed of sale and purchase agreement are violated or not fulfilled by the parties who made it, then this can be said to have occurred in default. Article 1266 paragraph (2) of the Civil Code states that to cancel an agreement, a judge's decision must be made. An agreement made legally can be canceled within the validity period of

the agreement and the consequences of canceling the agreement, first of all, it must be seen whether in the past the agreement contained a clause that regulated the possibility of cancellation of the agreement along with its causes and consequences for the parties.

### Research Method

The research used in this research process uses a type of normative legal research (Soekanto & Mamudji, 2015). By using library materials or secondary materials that have been collected. Legal research is also a process to determine legal rules, legal principles, and legal doctrines to answer the legal issues faced. Critical law school is a critique of legal theory that demands that the doctrinal approach was flawed, with abstract principles such as independence, freedom of contract, and property rights can contradict each other in many ways. They use sociological, anthropological, and ideological techniques in order law. They try to delineate the tension between normative ideas and social structures.

### Result and Discussion

#### 1. Legal Construction of Notary's Property Sale and Purchase Binding Policy in Making Deeds

The PPJB row house is made by the developer as a party with a stronger position in the form of a standard agreement. A standard agreement is an agreement in which the terms of the agreement have been determined unilaterally by one of the parties. The standard agreement is a form of individual freedom, in this case, the entrepreneur, to express his will in running his company. Making standard clauses in the PPJB for houses in housing by way of build orders made by development actors leads to an unequal position between business actors and consumers. The contents of the standard agreement, especially in PPJB row houses in housing on a build-order basis, often do not protect consumers.

It is hoped that the law governing PPJB row houses will provide justice for the parties. In this connection, the contents or clauses in the PPJB for row houses between development actors and prospective buyers are not only based on the principle of freedom of contract. Surrendering the PPJB series of houses to the operation of the mechanism of the principle of freedom of contract alone will create an imbalance and disharmony in the relationship between development actors as sellers and consumers as potential buyers so that restrictions are needed on the operation of the principle of freedom of contract carried out by the state (Subekti & Suyanto, 2020).

Article 18 paragraph (1) letter a of Law Number 8 of 1999 concerning Consumer Protection (hereinafter referred to as Law No. 8 of 1999) stipulates "Businesses in offering goods and/or services intended for trading are prohibited from making or including standard clauses on every document and/or agreement if it states the transfer of responsibility of the business actor; paragraph (2) "Business actors are prohibited from including standard clauses whose location or shape is difficult to see or cannot be read clearly, or whose disclosure is difficult to understand. Based on Article 18, development actors are prohibited from making or including standard clauses in every document and/or agreement when declaring the transfer of responsibilities of business actors and are prohibited from including standard clauses whose location or shape is difficult to see or cannot be read clearly, or whose disclosure is difficult to understand.

PPJB Row houses in Indonesia are made in the form of standard agreements or made with standard clauses called exoneration clauses, it is necessary to discuss legal issues that arise due to standard agreements in general, which are also faced by PPJB Row houses which are agreements. the standard. These exoneration clauses can appear in various forms, such as clauses of complete release from

responsibility that must be borne by his party in the event of a breach of promise (default), they can also limit the amount of compensation that can be claimed or can also be in the form of a time limit for people who aggrieved may file a lawsuit or compensation. A clause that does not absolve a party from another party's lawsuit, may be felt as burdensome to the other party (Suryanto et al., 2022).

For example, if in the PPJB row house, there is a provision that gives rights to the developer without any reason to terminate the agreement that has been made, a provision that is very burdensome for the debtor, even though the provision is not a provision that absolves or limits liability for the debtor's lawsuit. Such a clause still means that development actors can't be held responsible for their actions. An exoneration clause is a clause that aims to relieve or limit the responsibility of one party to another party's lawsuit if the person concerned does not or does not properly carry out his obligations specified in the agreement. Article 1337 confirms "A cause is prohibited if the cause is prohibited by law or contrary to morals or public order. This article can be interpreted that the contents or clauses of an agreement may not conflict with law, morals, and public order.

There are three benchmarks in Article 1337 to determine whether the terms and conditions clause in a standard agreement can apply and can bind the parties, namely law, morals, and public order. Whereas according to Article 1339, the benchmarks are propriety, custom, and law. When combined, the benchmarks of the two articles are law, morals, public order, decency, and custom. Based on this description, it can be seen that internal legal protection in the contract of buying and selling row houses is protection that originates or originates from within the parties in making a contract which is an autonomous factor, namely the main factor or primary determining factor in determining the contents of the contract, meaning, nature and The extent of the rights and obligations of the contracting parties can be seen in what is agreed upon by the parties (, E. P., & D, 2019).

## 2. Legal Uncertainty Binding Sale and Purchase of Property Notary

There is a loss for the debtor because of a defect in the will or a defect in the agreement, namely the incomplete agreement because it was formed not based on free will, such as a debtor who did not intend to sell his land or house from the start. This volitional defect usually occurs in the pre-contract period or phase (Sari et al., 2022). Debtors who are harmed and feel treated unfairly can only hope for the cancellation of the PPJB (Abel Agustian, 2020) because it is considered to have caused losses to the debtor and this can happen because maybe from the start the creditor has bad intentions hoping that if the debt from the debtor is not repaid then the power of sale will be used so that the object that is used as an object in the power of sale will be taken over and controlled by the creditor. This has deviated from the pure purpose of making the PPJB.

The provisions of Article 1321 and Article 1449 BW confirm that 3 defects of agreement or defects of will can be used as reasons for canceling the agreement, namely, oversight, deception, coercion, and fraud. The current development of defects of will can also occur due to reasons of misuse of circumstances (Misbruik Van Omstandigheden), therefore reasons of abuse of circumstances can be used as the 4th (fourth) reason for canceling the agreement. BW does not yet regulate abuse of circumstances even though in Indonesia it has been implemented up to the judicial level and has been accepted in jurisprudence, in contrast to the new Dutch BW in Nieuw Burgerlijk Wetboek (NBW) which has determined abuse of circumstances to be one of the reasons for canceling the agreement. (Subekti & Suyanto, 2020). The PPJB which is used to disguise the legal relationship between debt and credit is a contract that looks legally obscure. This implied-in-law contract is the only type of contract in which there is no element of agreement between the parties, but by law, it is considered that there is an element of agreement of the will. (Gomulja, 2020).

### Conclusion

The making of the PPJB with the power of sale as a means of defrauding the legal relationship of debt and credit has experienced a defect of will because the debtor did not originally have the will to sell the land or building that was used as collateral through the PPJB. Misuse of PPJB as a means of defrauding debt and credit relations occurs due to misuse of circumstances where one party is depressed and down economically so that they have no other choice but to take legal action to make PPJB and selling power.

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