



Legal Enforceability of Preliminary Sale Agreements on Mortgaged Strata Title Units

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ABSTRACT

This study examines the legal status and enforceability of Preliminary Sale and Purchase Agreements, in the context of mortgaged strata title units under Indonesian property and contract law. While the agreement serve as binding commitments between developers and buyers, they do not effectuate ownership transfer and are not publicly registered, rendering them legally subordinate to mortgage encumbrances that are recorded and enforceable as real rights. The research applies a normative-juridical method, supported by doctrinal and comparative legal analysis, to assess the hierarchy between personal contractual rights and secured creditor claims. Findings reveal that consumers who enter into of Preliminary Sale and Purchase Agreements, for units still burdened by mortgages face significant legal uncertainty, particularly in cases of developer default. The study further evaluates the adequacy of Indonesia's consumer protection framework, highlighting the persistence of exploitative clauses in of Preliminary Sale and Purchase Agreements, and the absence of institutional safeguards. To reconcile the imbalance between buyers and financial institutions, the paper proposes regulatory reforms, including the mandatory registration of PPJBs, standardized contract terms, and strengthened disclosure obligations. These recommendations aim to enhance legal certainty, uphold the principles of pacta sunt servanda, and ensure more equitable outcomes in Indonesia's increasingly complex vertical housing market.



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INTRODUCTION

This section explains the three main components. First, to describe the phenomenon being studied, the introduction must contain the research background and research context. Second, the author explains the relationship between the phenomenon and existing theories (at least the journal cited must be less than ten years old), along with gap analysis and the novelty of the research, and finally explains the research objectives. All introductions should be presented in paragraph form, not pointers, with a proportion of 15-20% of the overall length of the article.

The introduction should not be divided into background sub-chapters, problem formulation, and objectives. Beginning of paragraph once tab. Citations are written in bodynote format and are relevant to the bibliography (recommended using the Mendeley application or other reference management application programs such as EndNote, Reference Manager, or Zotero) (10pt, spacing 1.0, spacing after paragraph 6pt).

The manuscript should be written as concisely, consistently, and as directly as possible. The number of pages consists of 10–20 (twenty) pages (including figures and tables). Manuscripts are written single-spaced on one side of A4-sized paper (210 x 297 mm). Manuscripts must have normal margins, or top, bottom, right, and left margins, namely 2.54 cm. The font used is Times New Roman. 10pt. Manuscripts must be written in English.

RESEARCH METHODS

This study employs a normative juridical method to examine the legal enforceability of Preliminary Sale and Purchase Agreements under Indonesian property and contract law. It involves

a doctrinal analysis of statutory instruments, judicial decisions, and relevant legal literature. Additionally, the study uses comparative legal methods to explore how other civil law jurisdictions address similar legal conflicts between preliminary contractual rights and mortgage encumbrances. A policy evaluation framework is further employed to assess the adequacy of consumer protection mechanisms and to formulate recommendations for regulatory reform.

Preliminary Sale and Purchase Agreements (PSRA) have been extensively discussed in Indonesian legal scholarship as binding contracts with conditional character. According to Subekti (2002), PSRA reflect the principle of *pacta sunt servanda* and thus carry a contractual obligation, albeit without effecting a real transfer of ownership. Harsono (2007) emphasizes that the PSRA functions as a transitional legal instrument, requiring follow-up with a deed of sale and purchase (before a Land Deed Official While doctrinally valid, the enforceability of PSRA against third parties, especially secured creditors, remains contested. Yahya Harahap (2014) warns that without registration or a clear statutory basis PSRA may not override the rights of creditors holding formal security interests such as mortgages (*hak tanggungan*), as governed by Law No. 4 of 1996 on Mortgage Rights The concept of strata title ownership in Indonesia, regulated under Law No. 20 of 2011 on Apartment Units, introduces a layered ownership structure where individual units are owned privately, while common property is jointly owned. Scholars such as Priyanto (2018) and Laily (2019) highlight the legal complications that arise when developers encumber strata units with mortgages prior to transferring title to consumers, raising issues of conflict of interests between contractual buyers and financial institutions. Moreover, Article 42 of the Apartment Law stipulates that any promises made during the marketing or construction phase—including those made in PSRAs—are binding on developers. However, there is limited judicial consistency in interpreting whether such promises are enforceable against creditors, especially in cases of developer default.

Mortgage rights (*hak tanggungan*) are considered real rights with priority over personal claims, as affirmed by the *lex specialis* nature of Mortgage Law No. 4 of 1996. This places buyers under PSRA at a disadvantage, as their rights are personal and do not qualify as *in rem* interests. Comparative scholars such as Van Erp (2006) argue that civil law systems prioritize mortgage creditors due to the public nature of registration, which lends them stronger legal standing than holders of unregistered or conditional agreements. In the Indonesian context, Wiryono (2020) asserts that there is no clear statutory conflict-resolution mechanism when mortgage execution collides with PSRA claims, making the legal position of buyers vulnerable in insolvency or foreclosure scenarios.

The Consumer Protection Law (Law No. 8 of 1999) and the Apartment Law aim to protect consumers in property transactions. However, as noted by Fitriani (2021), the regulatory framework does not fully address the situation where a consumer's contractual rights are impaired by third-party creditor enforcement. There is an ongoing gap between consumer protection norms and the realities of property financing, where developers often secure funding by mortgaging properties already promised under PSRA This legal vacuum reflects what Hadjon (1987) describes as a failure of preventive legal protection, where rights exist in theory but lack enforceability due to insufficient institutional and procedural guarantees.

The literature illustrates that while PSRA are recognized instruments under Indonesian civil law, their binding power is weakened when confronted with registered security interests. There is a clear doctrinal and regulatory disconnect between contractual consumer rights and secured creditor claims. Although consumer protection laws offer normative support, they are often not operationalized in cases involving developer insolvency and mortgage enforcement. This study seeks to fill that gap by providing a comprehensive legal analysis of the conflict between PSRA holders and mortgage creditors, grounded in both doctrinal interpretation and policy implications, and by proposing reforms that enhance legal certainty and equity in the sale of mortgaged strata title units.

RESULTS AND DISCUSSION

1. The Legal Enforceability of Preliminary Sale and Purchase Agreements on Mortgaged Strata Title Units.

The intersection of property rights, contractual obligations, and mortgage law in Indonesia presents a complex legal landscape, particularly concerning the enforceability of preliminary sale and purchase agreements on mortgaged strata title units. Theoretically, the principle of **pacta sunt servanda** should ensure that PPJBs hold legal force between developers and buyers, yet the encumbrance of a mortgage introduces significant uncertainty (Malau et al., 2022). The core issue arises from the fundamental difference between the rights conferred by a PPJB and a mortgage: the former grants a personal right (**recht in personam**) to the buyer, whereas the latter establishes a real right (**recht in rem**) for the creditor (Christudason, 2000). This discrepancy becomes critical when developers, seeking financing, mortgage apartment units already subject to PPJBs. Mortgages, by virtue of their registration in the land registry, possess a real right nature that takes precedence over unregistered contractual agreements, potentially undermining the buyer's expectations and contractual entitlements.

The legal framework governing mortgage rights in Indonesia, as stipulated in Law Number 4 of 1996, grants the first mortgage holder the right to sell the mortgaged object through a public auction if the debtor defaults (Sampurno et al., 2021). This right, known as **Parate Executie**, allows the creditor to bypass the need for approval from the debtor or an order from the Chairman of the District Court, streamlining the execution process (Sampurno et al., 2021). However, this right can conflict with the rights of PPJB holders, who have a legitimate expectation of acquiring ownership of the property. The question then arises on the extent to which PPJB holders are adequately protected when the apartment unit they have contracted to purchase is subject to a mortgage, especially considering that the mortgage holder's real right has a superior position in law. The practical implications of this legal imbalance are substantial, as developers may exploit the system by mortgaging units already promised to consumers, thereby jeopardizing the interests of buyers who have entered into PPJBs in good faith. To resolve this conflict, it is essential to consider whether the principle of good faith can provide a basis for protecting the rights of PPJB holders against the mortgage holder. The legal protection available to creditors includes both preventive and repressive measures, addressing situations where land rights burdened with liability are removed (Kusumaningrat, 2019).

This legal challenge necessitates a comprehensive examination of the Constitutional Court Decision No. 18/PUU-XVII/2018, particularly its implications for the **parate eksekusi** rights associated with fiduciary guarantees (Rae, 2021). The decision has raised concerns about the potential reduction in the attractiveness of fiduciary guarantees, which could consequently diminish the willingness of creditors to extend credit to prospective debtors. Fiduciary, as governed by Law No. 42 of 1999, involves the transfer of ownership rights based on trust, allowing the owner to retain control over the object (Kristiyanti, 2021). This is an evolution from pawning institutions, suitable for movable property and immovable property without Mortgage Rights (Kristiyanti, 2021). Despite legal protections for both parties in a fiduciary guarantee agreement, weaknesses persist, notably in the non-registration of fiduciary objects. Additionally, inconsistencies arise when financial institutions include fiduciary guarantees in financing agreements but fail to formalize them through notarial deeds or register them with the Fiduciary Registration Office. This complexity is compounded by the frequent practice of creditors engaging third-party debt collectors for self-execution, despite regulations in place since 2011 aimed at preventing such actions (Azhar et al., 2019). Consequently, the enforceability of PPJBs on mortgaged strata title units hinges on a delicate balance between upholding the real rights of mortgage holders and safeguarding the legitimate expectations of buyers under preliminary agreements.

The normative foundation for the executorial power of fiduciary certificates stems from agreements registered to gain executorial force, which can then serve as conclusive evidence of a debtor's default (Butarbutar, 2022). The legal landscape has evolved due to amendments and interpretations, leading to the recognition of the need for judicial process in executing fiduciary

guarantees under specific circumstances (Pitanuki, 2020). This evolution has spurred considerations for strengthening legal protections for creditors, particularly concerning fiduciary guarantee agreements, in order to address practical challenges such as unregistered fiduciary objects. The enforceability of a PPJB is further complicated by the nature of the strata title itself. Strata title, as a form of ownership, involves individual ownership of a unit within a building and shared ownership of common areas, governed by Law No. 20 of 2011, provides a framework for managing and regulating strata title properties, including the rights and obligations of owners. However, the legal complexities surrounding the mortgage of strata title units, especially in relation to PPJBs, highlight the need for greater clarity and protection for buyers entering into preliminary agreements.

The management of common areas and facilities in strata living is crucial for ensuring optimal performance and requires active involvement from various stakeholders, including the Commissioner of Building and the Joint Management Body (Fakhrudin et al., 2011). The Strata Management Act 2013 in Malaysia promotes self-governance for strata schemes, where the Management Corporation, established under the Strata Title Act 1985 and Strata Management Act 2013, administers and manages the scheme (Vern et al., 2019). However, issues such as unfair maintenance fee distribution for common properties can arise, emphasizing the importance of clear regulations and equitable practices. In the context of Indonesian law, these management and regulatory frameworks are critical in determining how the rights of PPJB holders can be reconciled with the rights of mortgage holders in strata title units. Therefore, the legal enforceability of PPJBs on mortgaged strata title units must consider the broader context of property rights, contractual obligations, and the need for equitable protection for all parties involved (Hidayah & Komariah, 2022).

2. The Intersection of Consumer Protection and Legal Certainty in Preliminary Sales of Encumbered Apartment Units

The intersection of consumer protection and legal certainty in preliminary sales agreements for strata title units, particularly when those units are encumbered, presents a complex challenge in Indonesian law. The contractual relationship between developers and buyers in these transactions falls squarely within the ambit of consumer protection law, necessitating a careful examination of the power dynamics and potential for exploitation (Widiarty et al., 2024). Indonesian Law No. 8 of 1999 concerning Consumer Protection serves as a bulwark against unfair contractual terms, prohibiting businesses from incorporating clauses that disproportionately disadvantage consumers (Rohendi, 2015). This legislation underscores the importance of safeguarding consumer rights and ensuring a level playing field in commercial transactions (Purwoko et al., 2018; Sigalingging, 2018). Article 18 of the law specifically targets clauses that unilaterally shift liability onto the consumer, restrict their right to refunds, or subject them to unilateral changes imposed by the seller, all of which are common pitfalls in preliminary sale and purchase agreements (Wibowo, 2020). The core tenet of consumer protection law is to acknowledge and rectify the inherent power imbalance between businesses and consumers, ensuring that consumers are not exploited or subjected to unfair contractual terms due to their comparatively weaker bargaining position.

In the context of PPJBs, a number of problematic clauses frequently emerge, raising significant concerns about consumer vulnerability and the potential for abuse (Romdoni, 2024). Developers often include provisions that waive their responsibility to deliver the unit if financing fails, effectively shifting the risk of project failure onto the consumer (Kuncoro et al., 2019). Equally concerning are clauses that deny consumers the right to reclaim payments if the transaction collapses, leaving them financially exposed without recourse. Furthermore, developers may reserve unchecked authority over the unit until the full transfer of ownership, potentially enabling them to make unilateral changes or impose burdensome regulations on the buyer. These internal regulations, often created unilaterally by the developer, can further restrict the consumer's rights and control over their investment. Such provisions directly contradict the principle of fairness that underpins consumer protection laws and may render the PPJB unconscionable, particularly when the unit is already encumbered by a mortgage unknown to the buyer. The presence of such clauses highlights the urgent need for greater regulatory oversight and enforcement to protect consumers from potentially exploitative practices in the real estate market.

Despite the legally binding nature of the PPJB under private law principles, the existence of a conflicting real right held by a creditor significantly weakens the buyer's ability to enforce the contract or safeguard their investment (Harjono & Panjaitan, 2021). This is further exacerbated by the fact that consumers are traditionally perceived as the weaker party when it comes to private law (Cuijpers, 2009). This systemic asymmetry undermines the goals of consumer protection and reveals a critical regulatory gap in harmonizing property, contract, and consumer law. The lack of a mandatory registration mechanism for PPJBs with a public authority further compounds the problem, creating a situation of informational asymmetry and legal uncertainty. Unlike mortgages, which are meticulously recorded and publicly accessible, PPJBs remain invisible to third parties, leaving buyers legally exposed to potential claims or encumbrances on the property.

Addressing these multifaceted challenges requires a comprehensive approach that encompasses both doctrinal clarity and institutional reform. Introducing a mandatory registration mechanism for PPJBs in the national land registry would be a significant step forward in enhancing transparency and protecting consumer interests. Such a registry would provide a centralized and publicly accessible record of PPJBs, allowing potential buyers to conduct due diligence and assess the legal status of the property before entering into a transaction (Juncal, 2014). This would serve to mitigate the risks associated with undisclosed encumbrances or conflicting claims, providing greater legal certainty and confidence to consumers. Moreover, increased regulation and oversight, consumer education, and the utilization of technology for consumer protection are crucial in tackling these issues (Romdoni, 2024). Clarity in legal principles should reduce litigation (Ndekugri, 1999).

The registration system plays a decisive role in determining the efficiency and effectiveness of the real estate market (Wang et al., 2018). Land registration has been shown to improve access to formal credit, increase land values, stimulate investment in land, and raise output and income (Feder & Nishio, 1998). Land registration authorities are frequently held accountable for the alleged mismanagement and manipulation of land records in various countries (Khalid et al., 2022).

To address these challenges, this study recommends several key reforms: the implementation of a mandatory registration regime for PPJBs; the integration of escrow and disclosure requirements to inform buyers of existing encumbrances; and the standardization of contractual clauses to eliminate exploitative terms. These steps are essential to strengthen legal certainty, enhance consumer protection, and ensure a balanced legal relationship between developers, buyers, and financial institutions in the Indonesian property sector.

Ultimately, reconciling the conflict between personal and real rights within the framework of Indonesian housing law will require not only legislative refinement but also institutional commitment to upholding justice, transparency, and the principle of legal security in property transactions.

CONCLUSION

This study has examined the legal enforceability of *Perjanjian Pengikatan Jual Beli* (PPJB) for strata title apartment units burdened by mortgage encumbrances (*hak tanggungan*), highlighting the doctrinal, practical, and regulatory complexities inherent in such transactions. The analysis demonstrates that while PPJBs are recognized as binding agreements under Indonesian private law, their status as personal rights renders them subordinate to registered mortgage rights, which enjoy real, enforceable status against third parties.

The legal vulnerability of PPJB holders becomes particularly evident in cases of developer default or insolvency, where secured creditors possess superior claims over the unit, regardless of existing contractual obligations to buyers. This condition is exacerbated by the absence of a registration mechanism for PPJBs and the widespread practice of executing such agreements underhand, bypassing formal legal requirements.

Furthermore, from a consumer protection perspective, the current regulatory framework falls short in ensuring legal certainty and safeguarding buyer interests. Despite the intent of Law No. 8 of

1999 on Consumer Protection and Law No. 20 of 2011 on Apartment Units to uphold fair practices, the asymmetrical legal position between consumers and creditors highlights a pressing gap in enforcement and institutional coordination.

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