



**PRE-PROJECT SELLING IN A PROPERTY BUSINESS:
THE PERSPECTIVE OF ISLAMIC LAW**

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Abstract: Actors in the real estate market have developed a marketing strategy in the form of pre-project selling. This strategy is conducted to perform a market test for any property a developer intends to market. However, in practice, the system often poses problems, such as misrepresenting the property and inflicting customers' financial losses. From the perspective of Islamic law, this type of transaction is characterized as *gharar* (uncertainty, deception, and risk), having no exact object, and having forbidden. This article uses a *Sharia*-based perspective to analyze the characteristics of pre-project selling. This research aims to determine the legality of pre-project selling under *Sharia* law and prescribe solutions for society. The method used in this article is legal research, using legislation-based, conceptual, and case-based approaches, along with a comparison of national legislation with the written text of the al-Qur'an and hadith. The paper concludes that while pre-project selling should not be legally banned, there need steps taken to reduce its risks. This could be applied, for example, by creating minimum prerequisites for allowing pre-project selling, such as the existence of a plot for construction or the requirement of permits to be obtained before the pre-project sale. This research contributes to the development of legal science in general and Islamic jurisprudence, especially regarding Islamic law agreements' validity.

Pelaku usaha dalam bidang properti telah mengembangkan strategi pemasaran berbentuk *pre-project selling*. Strategi ini dilakukan untuk melakukan tes pasar properti yang hendak dipasarkan oleh pengembang. Namun, dalam praktek, system ini sering menimbulkan masalah, seperti misrepresentasi terhadap properti, yang menimbulkan kerugian finansial pada pembeli. Dari perspektif hukum Islam, transaksi semacam ini merupakan transaksi *gharar*, yang tidak memiliki obyek yang jelas, dan dengan demikian dilarang. Artikel ini menggunakan perspektif berbasis syariah untuk menganalisa karakteristik dari *pre-project selling*. Tujuan riset ini adalah untuk menentukan legalitas *pre-project selling* dalam hukum

Syariah dan memberikan solusi bagi masyarakat secara umum. Tulisan ini menyimpulkan bahwa sementara *pre-project selling* tidak perlu dilarang secara hukum, perlu ada langkah-langkah yang diambil untuk mengurangi risikonya. Hal ini dapat dilakukan, misalnya, dengan membuat prasyarat minimum untuk mengizinkan *pre-project selling*, seperti keberadaan sebidang tanah untuk konstruksi, atau persyaratan bahwa izin diperoleh sebelum penjualan. Penelitian ini berkontribusi pada pengembangan ilmu hukum pada umumnya dan ilmu hukum Islam pada khususnya, terutama terkait keabsahan perjanjian di dalam hukum Islam.

Keywords: *Agrarian Law; Gharar; Pre-Project Selling; Property; Islamic Legal Theory.*

INTRODUCTION

As a religion, Islam does not only start and end at prescribing rules for between man and God, such as those on prayers, but also, Islam as a whole, prescribes rules broader and more comprehensive, governing the relationships between man and his neighbors in social, economic, and political aspects.¹ One of the prescribed practices that cover social and economic fields is *muamalah* (dealings), which is applied to create prosperity in entire societies through commerce.

Property is a burgeoning market in Indonesia. The abundance of property market competitors has brought about intense competition in drawing buyers in the past few years. One of the resulting impacts is implementing various marketing strategies aimed at practical and fast sales, including a strategy known as pre-project selling. This particular strategy is prevalent among developers. It involves performing sales or marketing before the property involved has been built. Some developers take it one step further by selling or marketing properties without building, construction, and other permits.²

In practice, the strategy is prone to issues. Recent cases, such as the Meikarta complex built by Lippo Group in South Cikarang, the Bintaro Icon apartment, and the Kalibata City apartment, demonstrate the possible extent of damage caused by the strategy's failure. Moreover, these are certainly not the only cases. Pre-project selling is simply too problematic. In many instances, the information given to potential buyers is too unclear or sometimes plain wrong - at times by mistake, but in others, by dishonesty. There are also issues with the actual building of the projects. Developers fail to fulfill their public and social obligations, and often, the expectation of their buyers. Thus, pre-project selling is just as problematic on the contractual side of the issue. Buyers have to pay upfront - from the down payment,

¹ Muhammad Nadraturzaman Hosen, "Analisis Bentuk Gharar Dalam Transaksi Ekonomi," *Al-Iqtishad: Jurnal Ilmu Ekonomi Syariah* 1, no. 1 (2009): 54, <https://doi.org/10.15408/aiq.v1i1.2453>.

² Purbandari, "Kepastian Dan Perlindungan Hukum Pada Pemasaran Properti Dengan Sistem Pre Project Selling," *Majalah Hukum Widya* 29, no. 320 (2012): 12; Oemar Moechthar and Agus Sekarmadji, "Recast of Land Owners for Home Stay Through Synchronization of Electronic Data Inter-Institutions," *Jurnal Pertanahan* 10, no. 1 (2020): 1-14.

booking fees, administrative fees, to other costs. Nevertheless, if they ever decided to cancel the transaction, standard contracts usually contain the clause that down payment cannot be refunded.

In fact, from a legal perspective, pre-project selling is possible to be applied. In Indonesian law, individual ownership of property can be transferred by sale, barter, or a gift. Pre-project selling involves this transfer with the property that has yet to exist as an object. However, while it has all the makings of a valid transaction, it is incredibly prone to consider failure.³ Unfortunately, even with the creation of sales and purchase agreements containing the parties' rights and obligations,⁴ buyers are placed in a disadvantageous position. This reality has caused the government to issue cautions against pre-project selling. This was stated in the Decree of the Minister of Housing No. 11/KPTS/1994 (Surat Keputusan Menteri Perumahan Rakyat No.11/KPTS/1994) the Guidelines on the Formation of Apartment Unit Sales Contracts. The Guidelines emphasize that an ideal property sales contract should involve property owned or legally possessed by a developer. It means that property has not been the subject of a legal charge by creditors. The developer has obtained the necessary permits from the project. The transaction should comply with the Guidelines. However, the popularity of pre-project selling continues to grow.

Much research in the area of pre-project selling has been devoted to contracts law⁵ and consumer protection law.⁶ This article provides a novel analytical framework from a *Sharia* (Islamic canonical law based on the teachings of the Al-Qur'an and the Prophet's traditions (Hadith and Sunnah), prescribing both religious and secular duties and sometimes retributive penalties for lawbreaking) law perspective. From a *Sharia* law point of view, in particular, the initial analysis that should be conducted is how individuals, social groups, or governments should act in a *kaffah* (entirely) Islamic society, as dictated in the

³ Seto Darminto, "Perlindungan Hukum Bagi Pembeli Dalam Penjualan Satuan Rumah Susun Secara Pre-Project Selling (Studi Kasus: Apartemen Dukung Golf (PT. Megacity Development))" (Fakultas Hukum Universitas Indonesia, 2012), 2-3; Agus Sekarmadji et al., "Data Synchronization Model to Improve The Supervision of Land Ownership for Citizens Towards The Indonesian Agrarian Reform Agenda," *Hamdard Islamicus* 43, no. S1 (2020): 801-10.

⁴ Maria S.W. Sumardjono, "Kebijakan Pertanahan Antara Regulasi Dan Implementasi," *Kompas*, 2001.

⁵ See e.g. Fani Martiawan Kumara Putra, "Kebebasan Berkontrak Pada Peristiwa Pre-Project Selling," *Perspektif* 24, no. 1 (2019); Purbandari, "Kepastian Dan Perlindungan Hukum Pada Pemasaran Properti Dengan Sistem Pre Project Selling"; Farid Husin, "Perjanjian Kerjasama Antara Pelaku Pembangunan Rumah Susun Dengan Bank Terhadap Penjualan Rumah Susun Melalui Sistem Pre Project Selling," *Jurnal Spirit Pro Patria* IV, no. 1 (2017); Lintang Yudhantaka, "Keabsahan Kontrak Jual Beli Rumah Susun Dengan Sistem Pre Project Selling," *Yuridika* 32, no. 1 (2017); Irwan Gomulja and Habib Adjie, "Control of Freedom Principle Contract in the Pre Project Selling System," *Research, Society and Development* 9, no. 6 (2020).

⁶ Edi Krisharyanto, "Prinsip Perlindungan Konsumen Berdasarkan UU Nomor 8 Tahun 1999 Tentang Perlindungan Konsumen," *Jurnal Perspektif* 24, no. 2 (2019).

Holy Qur'an.⁷ In Indonesia, Islamic Sharia goes beyond faith. For example, in the Aceh province, Sharia has become a law, thanks to the province with Islamic socio-cultural and historical background and Indonesia's regional autonomy.⁸ Sharia law goes beyond prayers and religious rituals, like the Ramadan Fasting. It also governs a complex network of human behaviors and interactions.⁹ While its implementation as the law has been rife with controversy - Sudan, for example, where the law was used as a political tool by the nation's elite, in truth, Sharia was created for the welfare of all humankind, regardless of race, creed, or religion.¹⁰ It provides a lens by which we can examine many modern phenomena - whether they abide by what is written in the Holy Qur'an and Hadith and whether they adhere to the teachings of Rasulullah.

In light of the above, this article discusses the conformity between the practice of pre-project selling and provisions of Sharia law as written in the Holy Qur'an and Hadith. This paper uses legal research supported by empirical data. In this research, an in-depth analysis was performed on legal materials on land law, legal norms, legal concepts, and legal theories on the judiciary. Virtually, legal research is conducted to find a solution to an existing legal problem, not just by accepting or analyzing hypotheses but by making prescriptions of what should be applied to resolve the issue. A statutory approach, applied by inventorying and categorizing relevant legal materials into a comprehensive list, is viewed as most suitable for this end. Aside from the approach described above, this research also requires empirical data support in the Indonesian people's understanding of land possession supervision for Indonesian citizens. The information is used as supporting data for the research. In a legal context, this research uses a non-doctrinal approach, which treats the law not as a normative, static object but as a process formed by social, political, and economic experiences. The analysis is performed qualitatively by setting forth legal principles (such as the legal principles of legislation) and their procedural prerequisites or mechanisms, alongside an analysis of social, political, and economic factors influencing the procedural and substantive laws on land dispute resolutions. In this case, the other disciplines'

⁷ Masyhuri, *Kajian Teori Ekonomi Dalam Islam* (Bandung: Pusat Penelitian Ekonomi Lembaga Ilmu Pengetahuan Indonesia, 2003), 42.

⁸ Syamsul Bahri, "Pelaksanaan Syari'at Islam Di Aceh Sebagai Bagian Wilayah Negara Kesatuan Republik Indonesia (Nkri)," *Jurnal Dinamika Hukum* 12, no. 2 (2012): 358-67, <https://doi.org/10.20884/1.jdh.2012.12.2.62>.

⁹ Iffatin Nur, "Revitalisasi Nilai-Nilai Syari'ah," *Jurnal Ahkam* 9, no. 2 (2008): 132; Fuady Abdullah and Moh. Mukhlas, "Dissenting Approaches of Islamic Economics: The Contemporary Juristic Discussion of Riba," *Justicia Islamica* 17, no. 1 (2020); Burhanuddin Susanto, "The Reconstruction of The Modern Advertising Concept: An Islamic Law Perspective," *Justicia Islamica* 17, no. 1 (2020).

¹⁰ Iffatin Nur and Muhammad Ngizzul Mutaqin, "Reformulating The Concept of Maslahah: From a Textual Confinement Towards a Logic Determination," *Justicia Islamica* 17, no. 1 (2020); Abdurrohman Kasdi, "Actualizations of Maqasid Al-Shariah in Modern Life; Maqasid Al-Shariah Theory As a Method of The Development of Islamic Laws and Shariah Economics," *Justicia Islamica* 16, no. 2 (2019).

involvement (in this case, socio-political sciences) is needed for a critical approach to legal studies. Combined with a critical approach to social theory, it is the tool best suited for a study beyond a mainstream positivism approach.

THE CONCEPT OF *PRE-PROJECT SELLING*

Indonesia's private law system recognizes that all contracts, so long as they are validly made and not violate the law, morals, and public order, are enforceable under the law and bind the parties as an act issued by the government. These are the principles contained in Article 1338 paragraph (1) *juncto* Article 1340 of the Indonesian Civil Code (*Burgerlijk Wetboek*), also known as *pacta sunservanda* (agreements must be kept), and freedom of contract. The law's recognition of contracts extends both to 'named contracts' (*benoemdovereenkomst*), those stipulated under the *Burgerlijk Wetboek*, and 'unnamed contracts' (*onbenoemdovereenkomst*), those that are not. The validity of these contracts depends on the fulfillment of Article 1320 of the *Burgerlijk Wetboek*, which stipulates subjective and objective requirements. Subjective requirements are consent (*toestemming*) and capacity (*bekwaamheid*), whereas objective requirements are the existence of a specific object (*eenbepaaldonderwerp*) and a legitimate cause (*oorzaak*). The non-fulfillment of these categories has different consequences. If personal requirements are not met, the contract in question becomes voidable (*vernietigbaar*), which allows for a renewal of the agreement. However, if objective requirements are not met, the agreement in question would be void *ab initio* (*nietig*).

Pre-project selling is included among unnamed contracts. A sales strategy is applied before a project has been built, using images or concepts as the object. In Indonesia, the strategy is adjusted to meet local demands. While often applied in the conventional sense - i.e., before the projects are built, pre-project selling can also occur after the projects are built, but before they are completed. As a strategy, pre-project selling is genuinely used as a market test for the property being marketed. While traditional market tests use smaller groups, developers see pre-project selling as a way to kill two birds with one stone.¹¹

The strategy was first popularized in European countries, including France. Since 1967, French law has recognized a unit's sale from a building plan using a specific type of contact, known as a sale of a building to be constructed' (*vented'immeublea'construire*). The agreement involves a buyer paying a down payment to the developer, followed by consecutive payments as the construction is finished built, and ownership is transferred gradually until construction is

¹¹ D'Alvia Daniele, "Risk, Uncertainty and the Market: A Rethinking of Islamic and Western Finance," *International Journal of Law in Context* 16, no. 3 (2020): 1-14; Purbandari, "Kepastian Dan Perlindungan Hukum Pada Pemasaran Properti Dengan Sistem Pre Project Selling," 11-12.

completed. The buyer is protected by law if the developer does not finish the building. The developer is allowed to obtain payment before the property's completion is to ensure that they can finance the building's construction. With their existing funds, developers can obtain loans from financial institutions with more ease and pay contractors responsibly for construction.¹²

Erwin Kallo¹³ defined pre-project selling as a sale done before the property has been built entirely. Developers usually offer apartment units using images or brochures. The brochures usually contain the layout plan, building plan, unit design, facilities, unit price lists, and payment methods. When potential buyers are interested in the offer and agree with the offer made by developers, they usually agree to conduct initial transactions through the payment of booking fees or down payment, even though the property offered is, in reality, still just a patch of land.

Luthvi Febryka Nola¹⁴ defined pre-project selling as a sale of the property before it is being constructed and when the sold object is still in the form of images or concepts. The reason why developers conduct pre-project selling is to understand the market's response towards the property being built - in other words, testing the water. The strategy is legally possible, so long as it fulfills requirements laid down in Law No. 20 of 2011 on Apartments. According to the provision of Article 42 paragraph (2) of Law No. 20 of 2011, marketing for apartments can be conducted before the construction of the apartment so long as the seller has obtained at least the following prerequisites: permits necessary for the intended purpose, proof of right to over the land, proof of legitimate possession of the apartment, apartment building permits, and a guarantee of the construction of the apartment by a third-party guarantee institution. Regulations on the marketing of apartments can also be found in Law No. 1 of 2011 on Housing and Residential Areas. According to Article 42 paragraphs (1) and (2) of Law No. 1 of 2011, apartments that are still being constructed can be marketed using a preliminary sales agreement after the fulfillment of several prerequisites: proof of land ownership, the existence of an object, acquisition of a building permit, the availability of infrastructures and public utilities, and completion of the residential area by at least 20%.

According to Erwin Kallo, some key aspects to pay attention to in pre-project selling purchases include¹⁵ (a) Checking the legal requirements of the project, such as certificates or land deed of sale, land use permit, building permit, etc.; (b) If the purchase is for personal use, the property should be located at a place

¹² Cornelius Van Der Merwe, *European Condominium Law* (Cambridge: Cambridge University Press, 2005); look at Yudhantaka.

¹³ Erwin Kallo, *Panduan Hukum Untuk Pemilik/Penghuni Rumah Susun (Kondominium, Apartemen Dan Rusunami)* (Jakarta: Minerva Athena Pressindo, 2009), 24.

¹⁴ Luthvi Febryka Nola, "Permasalahan Hukum Dalam Praktik Pre-Project Selling Apartemen," *Majalah Info Singkat Hukum*, 2017.

¹⁵ Erwin Kallo, "Agar Tidak Terjebak Presale," *Majalan Estate*, 2006.

accommodating most personal activities; (c) The price of a property sold by pre-project selling should be lower compared to a finished property; (d) Ensuring that mortgage will be obtained before down payment; (e) calculating the installment rate with the rate of construction; and (f) Paying close attention to sales contract clauses not unknowingly to agree to terms which overly favor developers.

After the buyer has agreed with the apartment's price and model and offered sales and purchase agreement is made as a preliminary step before the actual deed of sale.¹⁶ These agreements are unilaterally prepared in standard forms - i.e., forms widely used, especially among people in the business - by developers or their legal officers. If the buyer disagrees, then no transaction is done at all. Sometimes, buyers have to pay a booking fee first before receiving the sale and purchase agreement.¹⁷ The underlying reason why the sales and purchase agreements are drafted in standard terms is primarily socio-economic matter. By drafting standard contracts, transactions become more efficient, confident, and practical, saving the parties' money, effort, and time.¹⁸

However, standard forms come with their disadvantages, chief of which is the one-side party of these contracts. Munir Fuady¹⁹ mentioned several factors for this: (a) The minimal or even the absence of opportunity for the other party to bargain, which causes said party to have minimal chance to understand the content of the contract, primarily when many terms are written in fine print; (b) Due to the unilateral formation of the contract, the party providing the standard form usually has plenty of time to think about the clauses inside the document, and even to consult with or have the documents drafted by experts. This contrasts with the other party's lack of knowledge; (c) the other party is placed at a lower bargaining position, with the contract being 'take it or leave it.'

Sales and purchase agreements are, themselves, not agreements creating a transfer of rights. They are made when specific prerequisites for said transfer have not been met. Sales and purchase agreements could be made privately between the parties or using the services of a notary. Legally, they are categorized as preliminary agreements. In the context of property law, the creation of sales and purchase agreements have several reasons, examples being the land in question still being mortgaged at a bank, not having been any land and building tax notices, not yet being a building permit, either party not having paid a vendor's or purchaser's tax, and what is especially pertinent to this discussion, the property in question, not having been completed. Only if these requirements are met can a

¹⁶ Supriyadi, "Kedudukan Perjanjian Pengikatan Jual Beli Hak Atas Tanah Dalam Perspektif Hukum Pertanahan," *Arena Hukum* 10, no. 2 (2017): 205.

¹⁷ Yusuf Shofie, *Perlindungan Konsumen Dan Instrumen-Instrumen Hukumnya* (Bandung: PT. Citra Aditya Bakti, 2000).

¹⁸ H.S. Salim, *Perkembangan Hukum Kontrak Diluar KUHPdata* (Jakarta: Raja Grafindo Persada, 2006), 149.

¹⁹ Munir Fuady, *Hukum Kontrak Dari Sudut Pandang Hukum Bisnis* (Bandung: PT. Citra Aditya Bakti, 2003), 78.

deed of sale be made in front of a land deed officer (Pejabat Pembuat Akta Tanah). The land deed officer then uses that deed of sale as the basis for a transfer of rights and title from the developer to the buyer. There is a prevalent and mistaken belief in society that sales and purchase agreements, however, they are called, have created a transfer of rights or ownership. However, even though it creates rights and obligations for either party, it remains a preliminary agreement that requires further steps to create a transfer of rights.

Business transactions always inevitably involve some form of risk. From an Islamic perspective, a business is always faced with one of two realities - profit or the reality of loss. Sometimes, a third reality is involved, one without any profit or loss. It would be very convenient if the man could know what the future posed - and indeed an exciting thought experiment. Nevertheless, the reality is much less predictable, and perhaps only Allah knows the future for a certain.²⁰

THE POSITION OF LAND IN ISLAMIC LAW

Islam is perhaps best described as a religion bringing *rahmatan lil' alamin*- all aspects of life are governed clearly under its laws. This includes the ownership of land and its management. To quote the word of Allah in Surah Al-A'raf (7) verse 128 in the Holy Qur'an:

قال موسى لقومه استعينوا بالله واصبروا إن الأرض لله يورثها من يشاء من عباده
والعاقبة للمتقين

Said Moses to his people, "Seek help through Allah and be patient. Indeed, the earth belongs to Allah. He causes to inherit it whom He wills of His servants. Moreover, the [best] outcome is for the righteous."

The above verse describes the Islamic worldview with clarity - that Allah created the world for the benefit of all His creatures. In line with that, all-natural resources on Earth should be enjoyed by all people, by their physical and mental abilities to earn a living for themselves.²¹ From this consideration, the Indonesian Constitution, particularly in Article 33 paragraph (3), affirms that land, water, and natural resources within are controlled by the state and used to their fullest extent for the people's welfare. The provision of Article 33 paragraph (3) of the Constitution is then further elaborated in the provision of Article 1 paragraph (2) of Law No. 5 of 1960 concerning Basic Regulations on Agrarian Principles (Undang-

²⁰ Sirajul Arifin, "Gharar Dan Risiko Dalam Transaksi Keuangan," *Jurnal Tsaqafah* 6, no. 2 (2010): 317-18; Md Akther Uddin and Abu Umar Faruq Ahmad, "Conventional Futures: Derivatives in Islamic Law of Contract," *International Journal of Law and Management* 62, no. 4 (2020): 315-37; Umi Widyastuti et al., "Sharia Compliance in Sharia Mutual Funds: A Qualitative Approach," *International Journal of Economics and Business Administration* 8, no. 3 (2020): 19-27.

²¹ Abdul Mannan, *Teori Dan Praktek Ekonomi Islam* (Yogyakarta: Dana Bhakti Wakaf, 1997), 77-78.

Undang Pokok Agraria), which declares that land, water, space, including the natural resources therein within the territory of the Republic of Indonesia, are gifts from the Almighty God and are the wealth of the nation.

From an Islamic perspective, the Earth's land belongs to Allah and is a gift from Him to humankind. As stated by Boedi Harsono,²² this religious lens is the perspective used in Law No. 5 of 1960, in conformity with the first of the Five Principles of Indonesia's national ideology (Pancasila), "Belief in the One and Supreme God." This is also the belief adopted by traditional Indonesian societies, in which the relationship between society and individuals with land and the Earth demonstrates religious-magic properties alongside communalistic ones. This demonstrates the firmly entrenched value that Indonesia's land, water, and space are all divine blessings to be used for the benefit of all. With the prevalence of Islam, this value has taken an even deeper root in society.

Islam does not recognize zamindari or the landlords' feudalistic land ownership with its orientation towards social welfare. Two reasons are particularly relevant. First, the *zamindari* system of ownership and possession contradicts the principle of even distribution of wealth. Second, the *zamindari* system prevents effective land use, with unused land being viewed as *mubadzir* (wasteful).²³ This refusal of an unfair system was also laid down in Law No. 5 of 1960, especially in Articles 7, 10, and 17, essentially prohibiting ownership and possession of land beyond set limits. The Indonesian government has set maximum and minimum limits for a legal subject's land ownership, with an obligation for said subject to work on the land themselves.

Suppose an individual owns vast stretches of land and is unable to utilize its resources well. In that case, an Islamic government has the right to take steps against a said individual to use the land better. *Sharia* provisions on the ownership of land require the owner of the land to use it continually. If the owner leaves it barren and does not use it for three consecutive years, the owner loses his or her right over the land, and the Islamic government has the right to give the land to another party who can properly utilize it.²⁴

HOUSING AND RESIDENTIAL AREAS AS PRIMARY NEEDS IN INDONESIA

Housing is a primary human need, just beneath food in necessity. To guarantee Indonesians' right to housing, there needs to be a legal certainty about the land

²² Boedi Harsono, *Hukum Agraria Indonesia, Sejarah Pembentukan Undang-Undang Pokok Agraria, Isi Dan Pelaksanaannya* (Jakarta: Penerbit Universitas Trisakti, 2013), 228; Sri Hajati et al., "Exchange of Land; A Model Sustaining The Existence of Land Under Adat Law," *Hamdard Islamicus* 43, no. S1 (2020): 811-25.

²³ Mannan, *Teori Dan Praktek Ekonomi Islam*, 79.

²⁴ Taqi al-Din An-Nabhani, *Membangun Sistem Ekonomi Alternatif* (Surabaya: Rislak Gusti, 1996), 140.

ownership where those houses stand. This certainty is also essential considering the critical value of land as a hereditary property, passed down for the sake of the coming generations, and whose existence surpasses human years. For those reasons, humanity has given land special attention and handling and put special effort into ensuring its ownership and possession. Moreover, those are not unusual steps, considering that humankind's lives are inextricably tied to the land.

The limited size of available land, especially in bigger cities, has driven the government to fulfill the people's need for land ownership, especially housing. Horizontal limitations have driven vertical property growth, known in Indonesia as '*rumah-susun*' - apartments or condominiums. The construction of apartments is necessary, especially inland relocation attempts. Real examples in Indonesia include the indigenous people of Asmat in the Papua province, who lived in illness-ridden swamps for years. At least 71 people died in 2018 due to nutritional deficiencies and smallpox in the area. The regional government engaged in a cooperative project with the Ministry of Social Affairs of the Republic of Indonesia in providing public living spaces, welfare, seedlings, working tools, and household appliances. The public living spaces were built in Seramit, Auban, and Sorai in the province. The funds given at the time had reached Rp 3,100,000,000.00. The Ministry of Social Affairs also conducted a welfare program for families, called *Program Keluarga Harapan*, in the district of Agats.

These conditions present a stark contrast with Jakarta's conditions, the most significant metropolitan city in Indonesia and as its capital. Data obtained from the Central Bureau for Statistics of the Republic of Indonesia and Databoks-Katadata Indonesia show that Jakarta residents in 2017 were 10,370,000 lives. The growth can be seen in the graphic below.

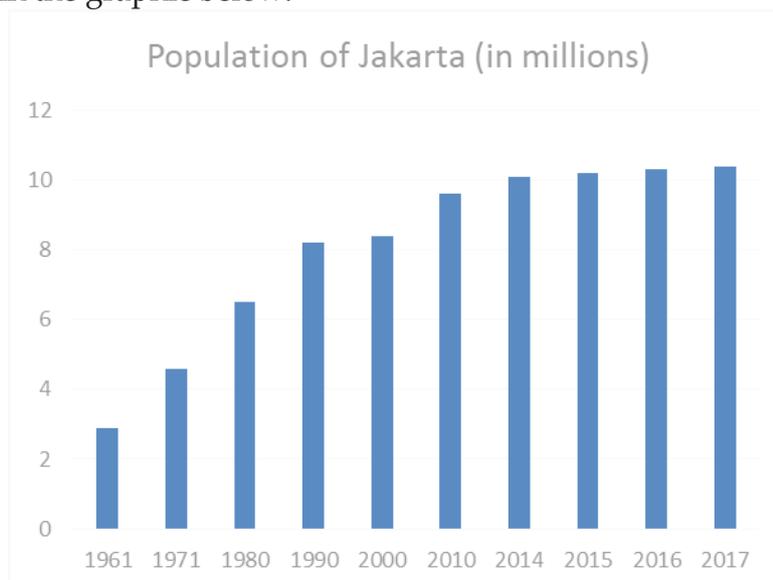


Figure 1: The residents of Jakarta. Source databooks.katadata.co.id

Over the past two years, the number of residents in the capital has increased by 269 people every day, or 11 people by the hour. This is predicted to increase in the coming years. The government program attempting to reduce the birthrate has been inadequate to resolve the Indonesian population's exponential growth. Both regional and central governments' full efforts have been concentrated on this pressing issue. There have even been discourses on moving the capital from Jakarta to less populated cities. This is understandable, considering that many living spaces have become unsanitary and unhealthy, with those coming from other regions having built temporary residential areas inconsistent with the Jakarta city plan. These areas are mostly packed and unsafe, with the most severe crisis being that of fires. Among those in 2018 were the fire in South Petojo, Gambir, Central Jakarta; the fire in the residential area in Tanah Tinggi, Johar Baru, Central Jakarta; the fire in Srengseng Sawah Road, South Jakarta; the fire in Dempet Bridge, Sumur Batu Raya Road, Sumur Batu, Kemayoran, Central Jakarta; and the fire in a densely populated residential area near the Taman Kota Station in West Jakarta. These incidents have created a necessity for the government to rearrange the city, most densely populated areas and slums, into apartment areas to create a more beautiful, greener city.

This need has drawn the interest of property developers to provide residential areas for potential buyers. Through this sale method, developers can maximize their chances of earning profits with demand and a market in place. Nevertheless, the industry's resulting intense competition has created a necessity for developers to find innovative ways to gain market share and profits, one of which is pre-project-selling.

THE VALIDITY OF PRE-PROJECT SELLING IN LEGAL AND SHARIA PERSPECTIVES

As stated earlier, Islam is a religion *rahmatan lil' alamin*, with all aspects of life being governed by its provisions. This includes sales transactions, which are outlined in Al-Baqarah (2) verse 275 of the Holy Qur'an. In the verse, Allah said:

الذين يأكلون الربا لا يقومون إلا كما يقوم الذي يتخبطه الشيطان من المس ذلك بأنهم قالوا إنما البيع مثل الربا وأحل الله البيع وحرم الربا فمن جاءه موعظة من ربه فانتهى فله ما سلف وأمره إلى الله ومن عاد فأولئك أصحاب النار هم فيها خالدون

Those who consume interest cannot stand [on the Day of Resurrection] except as one stand Satan is beating into insanity. That is because they say, "Trade is [just] like interest." Nevertheless, Allah has permitted trade and has forbidden interest. So whoever has received an admonition

from his Lord and desists may have what is past, and his affair rests with Allah. However, whoever returns to [dealing in interest or usury]-those are the companions of the Fire; they will abide eternally therein.

In *Sharia's* definition, sales transactions are those involving the exchange of wealth based on mutual consent. In other words, transferring ownership is in return for a legitimate consideration, in the form of a valid currency.²⁵ The legal basis for sales transactions can be found in Surah An-Nisa (4) verse 29, which states:

يا أيها الذين آمنوا لا تأكلوا أموالكم بينكم بالباطل إلا أن تكون تجارة عن تراض
منكم ولا تقتلوا أنفسكم إن الله كان بكم رحيما

O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent. Moreover, do not kill yourselves [or one another]. Indeed, Allah is to you ever Merciful.

The prescription of sales transactions in the Holy Qur'an is intended to allow individuals to fulfill their needs using something in the hands of their brethren without hardships or danger. In Islamic law, there are five rules to sale transactions. They are: (a) The seller is the absolute owner of the property being sold, or has permission to sell it, is of sound mind, is not dumb; (b) The buyer is legally allowed to perform financial transactions, is not dumb, and is not a child who had not reached adulthood; (c) The property being sold is something that may be sold and purchased, is pure, can be transferred, is known by the buyer even only by its properties' (d) There must be a *lafad zakat*, or a pronouncement of the agreement, both *ijab* (offer) and *qabul* (acceptance). It may be conducted orally, for example, with the buyer saying "sell this item to me," to which the seller says "I sell this to you," or it may be done by conduct, with a transfer of possession from the seller to the buyer after an oral request of sale; (e) Mutual *ridha* or consent. Sales agreements that lack the consent of both parties are, therefore, invalid.²⁶

Sales transactions are nearly done for profit. However, in reality, not all sales transactions somewhat give benefit to both parties. A form of transaction, termed *gharar*, characterized by uncertainty, both in form and substance, are especially prone to deception and, consequently, loss. In Islam, it is strictly prohibited by the Prophet Muhammad or Rasulullah. Primary considerations include the fact that it may cause trading anxiety among members of society and, indirectly, the potential stunting in a country's economic growth.²⁷

²⁵ Chairuman Pasaribu, *Hukum Perjanjian Dalam Islam* (Jakarta: Sinar Grafika, 1994), 33.

²⁶ Abu Bakar Jabir Al-Jaza'iri, *Minhajul Muslim, Pedoman Hidup Ideal Seorang Muslim*, ed. Andi Subarkah (Solo: Penerbit Insan Kamil, 2016), 584.

²⁷ Purbayu Budi Santosa and Aris Anwaril Muttaqin, "Larangan Jual Beli Gharar: Tela'ah Terhadap Hadis Dari Musnad Ahmad Bin Hanbal," *Jurnal Ekonomi Syariah Equilibrium* 3, no. 1 (2015): 158.

Looking to *Sharia* laws, sales transactions have always been forbidden by Rasulullah if they are manifestly unjust. Among others, the primary thresholds are that they could be used to unjustly gain somebody's wealth, containing elements of fraud, and having the potential to cause hatred and conflict among Muslims. Therefore, it is understandable that *gharar* (uncertainty, deception, and risk), with its uncertain form or nature, and vulnerability to manipulation are prohibited.²⁸

The root word for *gharar* is *gharar*, meaning 'unaware exposing oneself and property to destruction.' The essence of *gharar* is *al-nuqsan*, meaning 'to decrease.' For instance, to say *gharar al-naqah* in Arabic is to say that the camel's milk has decreased. In Arabic, the word *gharar* has many meanings: *al-khatar*, meaning danger, gamble, taking turns; *al-khida'* which means to defraud or deceive; and *aljah*, which is not to know. The *tarteefs* of *al-Qamus al-Muhit* and *Lisan al-'Arab* describes *gharar* as the intent to deceive and prey on one's wealth in unjust ways. *Al-gharar* means *al-taghrir*, which means that someone enables themselves or their wealth to ruination without knowing or realizing it. In the Islamic legal perspective, *gharar* is linked to sales contracts that are *haram* or forbidden due to their uncertain elements, which may cause conflict between the buyer and the seller.²⁹

The prohibitive rule on *gharar* has been agreed on by the *mazhab 'ulamā'* (scholars of the different Islam schools). This agreement is based on the Hadith of Abu Huraira (HR. Muslim, no: 2783), which stated that Rasulullah forbade all sales transactions containing elements of *gharar*.

As a rule, no one may sell something which has an element of uncertainty. Therefore, it is forbidden to sell fish still inside the water, or wool still attached to a sheep's skin or an animal fetus at a breeding place, or milk still inside an animal's teat, or fruits before they are ripe, or seeds before they ripen. It is also forbidden that an item that the seller prevents the buyer from looking at, or turning over, or examining if it is located at the transaction. The seller refuses to mention the nature, type, and several if it is not. This is in line with Rasulullah's words, which state:³⁰

Do not buy fish still in the water, for it (the sales transaction) is gharar (possesses elements of fraud)" (HR. Al-Baihaqi in the Book of As-Sunan Al-Kubra: 5/340, Ath-Thabrani in the Book of Al-Mu'jamulKabir: 10/258, and Ahmad).

Therefore, the word *gharar* describes an action containing elements of violations of rights, danger and leads to destruction and uncertainty. Imam

²⁸ Al-Jaza'iri, *Minhajul Muslim, Pedoman Hidup Ideal Seorang Muslim*, 589, 591.

²⁹ Abdul Hadi bin Awang, "Gharar Dalam Perspektif Fiqh Al-Hadith: Analisis Terhadap 'Illah Dan Prinsip," *Jurnal Ilmiah Hadis* 4, no. 2 (2012): 64.

³⁰ Al-Jaza'iri, *Minhajul Muslim, Pedoman Hidup Ideal Seorang Muslim*, 591.

An-Nawawi stated that the prohibition of *gharar* sales is one of the noblest of many principles of monetary transactions in the Holy Qur'an. Muslim 'ulamā' place the *gharar* Hadith at the forefront of the Book of Al-Buyu', or the Book of Transactions. The Book contains provisions on a wide range of issues, such as the sales of unknown items, non-transferable items, fish sales inside a vast pond, and many more.³¹

In scholarly circles, *gharar* is a much-discussed topic. Al-Jurnani and Az-Zaila'iy interpreted *al-gharar* as a consequence of which cannot be known. Some Hanafiyah 'ulamā' interpreted it as an uncertain risk that cannot be predicted. Al-Kasany interpreted it as an event whose occurrence is uncertain. IbnuArfah, a Malikiyyah 'ulamā', interpreted it as a transaction in which the success of one of the transactions or the object of that transaction is doubtful. Ar-Rofi'iy, a Syafi'iyah 'ulamā', interpreted it as a risk. Abu Ya'la al-Hanbaly interpreted it as a doubt between two issues, both of which contain uncertainty. Ibnul Atsir stated that *gharar* gives earthly joy but is unpleasant at a human level as pleasurable to the buyer, but essentially it contains something uncertain. Al-Azhari stated that *gharar* sales transactions are sales transactions that lack a sense of trust. The Islamic Shaykh Ibnu Taimiah stated that *al-ghararis* something with unknown consequences. As a general summary, the scholarly Islamic view of *gharar* can be categorized into two: one, something that is hidden, including its consequences, secrets, or aspects; and two, something which has blurred flaws, and therefore questionable predictability of success.³² Sayyid Sabiq also mentioned that *gharar* sales transactions are sales transactions that lead to the path of poverty or *mukhatara* (speculation) or *qumaar* (a blame game).³³

Several aspects may be unknown in a *gharar* transaction, as mentioned by Ibnu Rusyd. These are: (a) an aspect of ambivalence on the object being provided or the agreement itself; (b) an aspect of ambivalence on the price conditions or the period for payment, if any; (c) an aspect of ambivalence on the form of payment or the possibility of possessing it; (d) an aspect of ambivalence on the perpetuity of the price.³⁴

If we look to the above explanation in connection with pre-project selling, the prerequisites for a valid *mualamah* (economic) transaction has not been met. This is since the object being traded, in this case, the property sold, has yet to come into existence. Potential buyers are only given brochures containing the image of the house, office building, or apartment unit, certainly presented with beautiful

³¹ Najamuddin, "Transaksi Gharar Dalam Muamalat Kontemporer," *Jurnal Syariah* 2, no. 1 (2014): 25.

³² Shadiq Muhammad Ami, *Al Ghararwa Atsaruhu Fil Uqud Fi Fiqh Islami* (Bairut: Dar Jiil, 1990), 28-34.

³³ Sayyid Sabiq, *Fiqh Sunah* (Bandung: Al-Ma'arif, 1990), 70.

³⁴ Ibnu Rusyd, *Bidayatul Mujtahid* (Semarang: As Syifah, 1990), 47.

graphic design, to pique their interest in the property. On the other hand, the developer is still constructing the property in question. Some developers even dare sell units that present no apparent signs of construction any time soon or even lack permits for construction, such as a building permit, a location permit, and a noise permit, among others. Another draw for buyers, aside from the beautifully presented images, is because the property being traded is still in the construction phase; the price at which it is sold is much lower than a property that is 100% completed.

In Surabaya, an example of this can be found in the sales of “The Frontage New Superblock,” which offers malls, restaurants, family entertainments, and commercial uses around Ahmad Yani Road. Sales began in 2014, and a total of 140 units had been sold at the end of 2015. Nevertheless, until 2018, the construction has not yet begun. If we analyze from a *Sharia* perspective, the property in question is unclear since the developer cannot hand over the agreement’s object when it was made, whether existing or coming into fruition at a future time. Besides, the agreement’s object’s condition, the property, cannot be guaranteed to conform with the one agreed on in the transaction.

In Mustafa’s words³⁵, humankind is given freedom by Allah in economics, be it individually or collectively, to achieve its objectives. However, freedom cannot violate the rules laid down by Allah, which means that freedom is not absolute. Allah’s only limitation for humankind’s conduct in the field of *muamalah* is laid down in Surah Al-Baqarah (2) verse 188 of the Holy Qur’an:

ولا تأكلوا أموالكم بينكم بالباطل وتدلوا بها إلى الحكام لتأكلوا فريقا من أموال الناس بالإثم وأنتم تعلمون

And do not consume one another’s wealth unjustly or send it [in bribery] to the rulers in order that [they might aid] you [to] consume a portion of the wealth of the people in sin, while you know [it is unlawful].

Aside from *gharar*, a form of sales transaction forbidden in *Sharia* is the system of ‘*urbun*. ‘*Urbun* is the act of purchasing something by paying part of its price (down payment) to the seller, with the money forming part of the final price if the transaction succeeds, or it is considered a gift to the seller if the transaction does not. The prohibition for a Muslim to perform an ‘*urbun* transaction or takedown payments as laid down by the followers of the Rasulullah, who stated.³⁶

³⁵ Mustafa Edwin Nasution, *Pengenalan Eksklusif Ekonomi Islam* (Jakarta: Kencana, 2007), 26.

³⁶ Al-Jaza’iri, *Minhajul Muslim, Pedoman Hidup Ideal Seorang Muslim*, 593.

For the (Rasulullah) has forbidden ‘*urbun* transactions’ (HR. Imam Malik, in the Book of Al-Muwaththa’: 419). Imam Malik stated in explaining the hadith that it occurs when someone purchases an object or leases an animal for transportation, and then says, “I give you a dinar with the condition that if I cancel the purchase or lease, then what I give becomes yours.”

Ath-Thabrani wrote in *al-Ausath* that Amr bin Syu’aib stated, “Rasulullah forbids transactions which involve prior down payment.”³⁷ In the previous sub-chapter, it is mentioned that in pre-project selling, buyers who have agreed with the offer made by developers to purchase specific units are obliged to make certain preliminary payments, including down payment. If the buyer cancels the purchase for some reason, the down payment cannot be refunded. This is in an apparent contradiction with *hadith*, in which the Rasulullah has forbidden transactions with down payments or ‘*urbun*.

The existence of a *kaffah* society, in line with the teachings of Islam, would benefit Muslims and entire societies. While pre-project selling should not be legally banned, there needs to be further analysis of how it should be applied. This could be applied, for example, by creating minimum prerequisites for allowing pre-project selling, such as the existence of a plot for construction, having required permits, such as building permits, location permits, business permits, and other necessary documents for sale. Aside from that, there needs to be a provision on a minimum overall building completion of 20%. These requirements have been governed under the Indonesian Housing and Residences Law.³⁸ With those steps, the elements of *gharar* and ‘*urbun* can be avoided, and the transaction can be viewed as *halal*, being consistent with national legislation, the Holy Qur’an, and Hadiths.

CONCLUSION

Pre-project selling in property sales is an innovation to a market property before it has come into existence or has been completed. This marketing system by legislation in Indonesia can still be conducted with the conditions that the property has been completed by 20%, and permits such as location permits and building permits have been attained. That title over the land is not the subject of a charge by third party creditors. Considering Islamic law, if a transaction’s object is unclear,

³⁷ See also, the chronicles of al-Hakim in ‘*Ulum al-Hadits*, 128 and ath-Thabrani in *al-Ausath*, 4/335, on Ibn Hajar Al-Asqalani, *Bulughul Maram, Himpunan Hadits-Hadits Hukum Dalam Fikih Islam* (Jakarta: Darul Haq, 2017), 121.

³⁸ Government Regulation Number 14 Year 2016 on Housing and Residences (*Peraturan Pemerintah Nomor 14 Tahun 2016 tentang Penyelenggaraan Perumahan dan Permukiman*), Art. 22(4).

it can be categorized as a *gharar* transaction forbidden by *Sharia*. For that reason, the government needs to perform an analysis and further control of this marketing strategy to prevent the occurrence of loss in the future. As buyers, individuals in society must be more active and careful in differentiating profitable transactions from the bad. If buyers have any doubts about the transaction's success, it would be advantageous for them to consult experts in the field to minimize the possible losses that may occur in the future. After all, it is easier to prevent a future loss than deal with one that has happened.

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