

THE IMPLEMENTATION OF THE LEGAL PRINCIPLE OF GUARANTEE OF MORTGAGE RIGHTS IN THE ACQUISITION OF BUSINESS CAPITAL

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ABSTRACT

This study aims to investigate and analyze the urgency of reorienting the implementation of the legal principle of guaranteed mortgage rights to create a balanced legal relationship and provide legal protection to the parties equally. This study uses a legal pluralism approach by examining the principles of law, legal norms, legal regulations, doctrines relating to the imposition of mortgage rights in the procurement of capital and its implementation in people's lives. Theories and concepts used in this study are the concept of material rights, the concept of collateral, the concept of contract law, responsive law, progressive law, the principles of law. From the results of the study, there are various deviations from the principles of material security and the related principles of agreement law. In addition, deviations from the principle of material laws and guarantees result in different interpretations within the community in the implementation and enforcement of the law, and a lack of legal certainty that has the potential to cause conflicts that result in a lack of legal protection for the parties. The results are useful for the potential to resolve the difficulties for stakeholders, both the government, business actors, and the community in general in terms of guarantees in mortgage rights. This study aims to reformulate the legal consideration of legal principle of the existence of guarantee in mortgage rights.

Keywords: Legal Principles, Guarantees, Mortgage Rights, Agreements, Material Rights.

INTRODUCTION

In an effort to anticipate the development of society in the industrial revolution era 4.0, almost all activities including business activities cannot be separated from electronics. The law also experienced significant development. The rule of law covers the principles of law, the rule of law in the strict sense, norms and concrete legal rules (Mertokusumo & Pitlo, 2013). The making and implementation of law must contain three basic values namely, justice, expediency and legal certainty (Badriyah, 2015). One legal norm that is very needed in business activities is the regulation of collateral. One guarantee that is widely used by business actors is the Mortgage right. In Indonesia after the entry into force of the Mortgage Law, guarantees for land use of mortgage rights. There is a legal unification of guarantees for land rights (Silviana et al., 2020).

According to Satrio (2002) the aim is to eliminate dualism, so as to provide as much legal certainty as possible in interpreting the Mortgage Law and its implementing regulations. Both mortgages and mortgage rights are material guarantees. Guarantees are very important in business activities both nationally and internationally to provide security against default risk in business practices, one of which is in the acquisition of capital for business development (Mugarura, 2016).

The existence of guaranteed mortgage rights is needed by the community, especially in the business world. To improve mortgage rights services that meet the principles of openness, timeliness, speed, convenience and affordability in the framework of public services, as well as to adjust legal developments, technology and community needs, in the implementation of mortgage rights information technology is used so that procedures for mortgage rights services can be integrated in an integrated manner. electronics so that they become more effective and efficient as specified in the Regulation of Indonesian Minister of Agrarian and Spatial Planning/Head of the National Land Agency No. 9 of 2019 concerning Electronic Integrated Mortgage Rights Services. On the other hand, there are often a variety of deviations from the principles of material security as well as the principles of agreement law, among others in the implementation of electronic based security guarantee rights. This is partly due to various discrepancies in the provisions of articles in the Mortgage Law or between the Mortgage Law and other legal regulations. This results in a variety of different interpretations in society, resulting in legal uncertainty in its implementation and has the potential to cause conflict (Saraswati et al., 2020).

During the industrial revolution 4.0, there were very significant changes, including in the acquisition of venture capital for business people. In business activities, every business actor requires capital. In the case of capital originating from external parties, the creditor has a great risk of meeting the receivables. Collateral is an important factor in securing creditors' receivables. Material security is a strong guarantee and easy to implement. Material guarantees also provide preferential and separatist positions to creditors holding mortgage rights. On the other hand there are a variety of deviations from the principles of material security as well as the principles of agreement law in people's lives, one of which is related to the registration of electronic mortgage rights. This often results in a lack of balance and protection of the legal relations of the parties that lead to injustice. This study aims to investigate and analyze the urgency of reorienting the implementation of the legal principle of guaranteed mortgage rights to create a balanced legal relationship and provide legal protection to the parties equally.

The Guarantee of Mortgage Rights

Dependents are one of the security guarantees that the object is the right to land, the following or not, along with other objects related to land, which are an integral part of the land. Land is an immovable object. Before the entry into force of Law No. 4 of 1996 concerning Mortgage Rights, there was a dualism of the legal guarantee for land rights. Customary land uses credietverband institutions, while Western land uses mortgages as stipulated in the Civil Code. In other countries guarantees of immovable property using mortgages, such as in China, Sweden, the Netherlands, Egypt, United Kingdom, Australia, Japan, United Kingdom (Gan et al., 2012;

Hullgren, 2017; Francke & Schilder 2014; Hassanein & El-Barkouky, 2008; Naoi et al., 2019). In a dynamic business development, mortgages are needed in the legal relationship between finance companies and consumers. Therefore, regulation of mortgage is very necessary (Naoi et al., 2019).

The main principle of giving guarantees is to guarantee the security of creditors' receivables, giving confidence to creditors of the fulfillment of the debtor's achievements (Badriyah et al., 2019). This pretension is in the form of giving something, doing something, not doing something (Busro, 2011). According to Gai et al., (2016), for the security of creditors from the risk of default on creditors' credit, it is important to control moral hazards in financial institutions and ensure financial sustainability from public intervention. The principle of guarantee for immovable property in various countries using mortgages. Mortgages are contracts to convince creditors to pay off debtors' debts (Bidabad, 2017). Mortgages become one of the considerations of various heterogeneity of factor analysis for financial institutions to provide loans to debtors (Ozhegov, 2017).

The mortgage guarantee is basically an agreement. Therefore, it should be based on the principles of contract law. Legal principles of the treaty outline include the principle of consensualism, the principle of freedom of contract and the principle of *pacta sunt servanda* (Mertokusumo, 2010). In addition to being based on the principles of contract law, the Mortgage Rights as a Material Guarantee must also be in accordance with the principles of guarantee Law in general and the principles of guarantee of Mortgage Rights in particular. The principles of mortgage should fulfill the principle of specialty, of publicity and undivided (Suyatno, 2018).

The principle of publicity is reflected in Article 13 of the Mortgage Right Act which states that the granting of mortgage rights must be registered at the land office. By registering the mortgage, it shows that the mortgage can be known by the public. The principle of non-division is reflected in Article 2 of the Mortgage Right Act which states that the Mortgage Right has the nature of not being divided, unless agreed in the Deed of Granting Mortgage. This means that mortgage rights burden the overall object of mortgage rights, so that the repayment of some debts does not free up some of the object rights. This principle of non-division can be distorted (there are exceptions), if the parties have made an explicit agreement in the Deed of Granting the Mortgage Rights concerned. Furthermore, Article 2 states that if the Mortgage Right is imposed on several land rights, it can be promised in the Deed of Granting the Mortgage Right in question, that the repayment of the guaranteed debt can be made in installments with the amount equal to the value of each right on land which is part of the Mortgage Right object, which will be freed from the Mortgage Right, so that the Mortgage Right will only burden the remaining Mortgage Right object to guarantee the remaining debt that has not been repaid.

Legal Principles of Guarantee of Mortgage Rights

In the life of the community there are various deviations in the implementation of the principles of the Mortgage Guarantee Law. In practice there are often non-conformities with the principles of contractual law and guarantees. The substance of the legal arrangements regarding Mortgage Rights also shows a variety of things that indicate incompatibility with the ideal. Formulation of the contents of the legal rules intended for the legal relationship of the

encumbrance of the Mortgage Guarantee. However, there are things that are out of sync between one article and another article in one statutory regulation and between one statutory regulation and another statutory regulation, such as conflict of norms regarding the subject of mortgage rights. There is a contradiction between the Mortgage Rights Act and the Regulation of the Minister of Agrarian and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia Number 9 of 2019. Regarding the position of creditors of mortgage rights holders in the event of a bankrupt debtor, there is an unsynchronization between the Mortgage Rights Law and the Bankruptcy Law (Wahyudi, 2019).

In addition, there is also a contradiction between the articles in the Bankruptcy Law. The Mortgage Rights Act stipulates that in the event of a bankrupt debtor, the creditors of the mortgage right holder can exercise the rights - just as bankruptcy does not occur. Relating to arrangements concerning the abolition of mortgage rights and deletion, there is contradiction between the formulation in the Mortgage Rights Act and the Regulation of the Minister of Agrarian and Spatial Planning/Head of the National Land Agency No. 9 of 2019. There are also differences in the formulation regarding the registration of Mortgage Rights. In the Mortgage Law the registration of Mortgage Rights is done manually by submitting an application for registration to the Land Office, while in the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 3 of 1997 it is done electronically. On the one hand, this is very beneficial for the community, especially the business world because it is easier and faster. On the other hand, there are various formulations that are out of sync between the Mortgage Rights Act and the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 3 of 1997, among others, regarding the granting of Mortgage Rights, the Abolition of Mortgage Rights and the Deprivation of Rights.

Different formulations, even contradictory between one regulation and other legislation, or between articles in the same regulation can lead to legal uncertainty and lack of usefulness and cause injustice for the parties. Contradictory implementation of the narrative contradicts different interpretations in society both in terms of the implementation of the law in the event that a conflict does not occur or in law enforcement, namely the implementation in a conflict. This can lead to different implementation, including in the decisions of judges. According to Sergio Nasarre-Aznar (2015), the implementation of laws and court decisions is very influential on legal certainty. Different decisions carry great risks. This causes uncertainty and leads to externalities including lack of international trust in banks in the country concerned. This can lead to a wider liquidity crisis (Sánchez-Martínez et al., 2016), and consequently greater public spending on the sustainability of their business. It is also possible that banks provide more stringent conditions and provide loans with more expensive guarantees, because the bank's risk is very high.

Reformulating the Guarantee Arrangement

The implementation of regulations has an important impact on financial stability at the national and international level. Different legal frameworks in national law and legal uncertainty about the rules applied can weigh on the collateral value and financial market stability. Moreover, this impact can have a continued impact on the provision of credit institutions and the flow of credit to the economy and the functioning of financial institutions (Roisah et al., 2018;

Waridin et al., 2020). Therefore, it should be returned to the main objective of material security is to give creditors the confidence that their receivables will return to creditors. Thus the creditor's rights should receive legal protection in the event that there is interference with his rights. Thus if a case is brought before a court, the judge has a central role in solving the problem. Judges as law enforcers in the courts have a central role, especially in the case that there are no legal regulations or legal regulations but it is not clear, so the role of judges is very important to give decisions that provide justice, usefulness and legal certainty.

Firstly, the legislators should immediately reformulate the guarantee arrangement for Mortgage by synchronizing the legislation. This is done to change the conflicting laws and regulations into harmonious regulations. In addition, it is very necessary to have laws and regulations regarding guarantees in an integrated manner, so that conflicts of legal norms between laws and regulations regarding guarantees do not occur. a state institution whose main function is as a legislative power.

Legislation is closely related to humanity and justice, both in the formation, implementation and enforcement of the law. Law is one form of the implementation of state functions. The state was formed on the basis of motivation related to humanity and justice. Therefore, its aims and basics are also related to humanity and justice. The state and law are instruments of humanity and justice. Thus state and law must link it with humanity and justice (Sumadi, 2016).

Secondly, as long as there are no new laws and regulations, judges in the courts in the resolution of disputes make legal discoveries based on the principle of a special guarantee institution in the form of material guarantees to better provide justice for the community in general and the parties in particular. Judges must have high creativity and progressive thoughts so that they can enforce the law in accordance with the values that develop in society. In adjudicating and making decisions judges must make legal discoveries so that their decisions give birth to actual and beneficial justice for the community (Badriyah, 2011; Tyesta et al. 2020). In law enforcement, the focus must be on the integrity and professionalism of law enforcement officers, especially in the Judiciary Body to conduct judicial proceedings to uphold law and justice based on the Pancasila and the 1945 Constitution of the Republic of Indonesia (Mitendra, 2018).

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Fourth, business actors both financial and non-financial institutions should optimize their attention on sustainable financial management. This is very necessary to prevent financial instability, including the management of corporate debt and debts. Especially now that it is easier in Indonesia to file for bankruptcy. In this case it is not always that the bankruptcy is filed because the company is truly bankrupt. The requirements for filing for bankruptcy are that debtor has two or more creditors and does not pay off at least one debt that is past due and can be billed. Bankruptcy is declared by a court decision, both at the request of the debtor itself and at the request of one or more of his creditors.

CONCLUSION

The main function of the mortgage is to guarantee the security of creditors' receivables, especially to guarantee the performance of the debtor's performance. Mortgage rights always experience developments in line with the rapid development of society, especially in the industrial revolution 4.0 which almost all fields of life cannot be separated from the electronic basis. On the other side, the formulation of the Mortgage Right guarantee arrangement that has been existing there are various conflicts of legal norms that have the potential to cause different interpretations in practice, causing legal uncertainty and lack of legal protection for the parties. Therefore, the reformulation of security guarantee arrangements is very urgent to do in addition to other steps. This is so that the principles of holding guarantees in the business world will be the right means to support the stability of the company and to create confidence in business people as well as in the Indonesian and international community.

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