



An Analysis of Land Rights Mortgage from a Civil Law Perspective

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ABSTRACT

Land is one of the natural resources controlled by the state and used for the benefit and prosperity of the people, as stipulated in Article 33 Paragraph (3) of the 1945 Constitution. The various land rights referred to in Article 4 of Law No. 5/1960 on the Basic Regulation of Agrarian Principles (UUPA) are further regulated in Article 16 Paragraph (1) of the UUPA, which are temporary land rights. One of the temporary land rights is a land mortgage. Based on this temporary characteristic, the researchers conducted research on agricultural land mortgage disputes. Based on the brief analysis mentioned previously, the researchers analyzed Decision Number: 20/Pdt.G/2021/PN.Blk which relates to the mortgage of land rights. This research uses a normative juridical approach by examining theories, concepts, legal principles, and regulations that are closely related to this research based on primary legal materials. The research method used is the literature method, because it requires the study of documents such as books and laws and regulations relating to the provisions and legal rules in the implementation of a land title pawn as a mortgage. The process of encumbering mortgage rights under Law No. 4/1996 involves three stages: a promise to grant Mortgage Rights, the granting of Mortgage Rights before a Land Deed Official (PPAT), and registration at the local land office. In Decision Number 20/Pdt.G/2021/PN, the plaintiffs were granted ownership of the disputed land, but the court did not rule on their claim regarding losses due to the defendant's unlawful possession after the pledge period expired.

Keywords: *Legal Provisions, Mortgage of Land Rights, Mortgage Rights*

INTRODUCTION

Land is one of the natural resources that can be controlled by the state and used to the greatest extent for the prosperity of the people, as stipulated in Article 33 Paragraph (3) of the 1945 Constitution. As the organization of all the people, the state has the authority to regulate and organize the allocation, use, supply, and maintenance of the earth, water, and space. In addition, the state has the right to determine and regulate legal relationships between people and the earth, water, and space, including legal relationships related to legal acts on these three elements, as stipulated in Article 2 of Law No.5/1960 on Basic Agrarian Principles (UUPA).

Based on the state's right to control, various kinds of land rights are determined that can be granted to individuals, either privately or jointly with other people, as well as to legal entities. This provision is stated in Article 4 of the UUPA. Furthermore, the various kinds of land rights are further regulated in Article 16 Paragraph (1) of the UUPA, which distinguishes them into permanent and temporary land rights. One of the temporary land rights is the Land Mortgage.

In research conducted by Lapadengan (2015) regarding the mortgaging of land rights according to customary law in Indonesia, it is stated that the imposition of movable objects is made by mortgage, which in Banking Law and Security Law is regulated by Law No. 42/1999 concerning Fiduciary Guarantees. The practice of mortgaging land according to the Customary Law System is still valid among the people in Indonesia, because the process and procedures are fast, simple, and convenient.

Meanwhile, research conducted by Gunawan (2022) regarding the mortgaging of land rights in the Sasak tribe community based on Islamic law and civil law in Indonesia showed that the general cause of the implementation of mortgages there was due to the economic difficulties they experienced. In its implementation, religious leaders and the community responded positively to the process of implementing the land mortgage because the mortgage agents recorded every incoming mortgage transaction as in accordance with the provisions of Islamic law. Meanwhile, from the civil law perspective, namely the provisions of Article 7 of Law No. 56 PRP of 1960 concerning the return of mortgaged goods without compensation when it has reached 7 years, is not in accordance with the applicable mortgaging tradition in the community, because it only favors the land mortgagor himself.

The research gap between these two studies lies in the comparative legal perspectives and regulatory inconsistencies in land mortgaging practices in Indonesia. Lapadengan (2015) focuses on land mortgaging under customary law, emphasizing its practical advantages, such as being fast, simple, and convenient. Meanwhile, Gunawan (2022) examines land mortgaging within the Sasak tribe community from both Islamic and civil law perspectives, highlighting economic

motivations and legal discrepancies. While Lapadengan discusses how customary practices persist despite formal regulations, Gunawan identifies conflicts between civil law, particularly Article 7 of Law No. 56 PRP of 1960, and local mortgaging traditions, which tend to favor different parties in the transaction.

This reveals a gap in understanding how customary, Islamic, and civil law frameworks interact in land mortgaging practices across different communities in Indonesia. Additionally, there is a lack of analysis on the impact of legal inconsistencies on community practices and financial security. Another potential research gap is the socio-economic factors that contribute to the continued use of customary and Islamic mortgage practices despite the presence of formal civil law regulations. Therefore, this research is conducted to analyze the legal aspects of agricultural land mortgage disputes within the framework of temporary land rights as regulated in Indonesian agrarian law. This study aims to examine Decision Number: 20/Pdt.G/2021/PN.Blk and evaluate how the court addressed the dispute over land mortgage rights. Additionally, it seeks to assess the application of legal principles and regulations in resolving land mortgage disputes, particularly in cases where the mortgage period has ended. Another objective is to identify legal gaps or inconsistencies in judicial decisions, specifically regarding the absence of compensation for the plaintiffs despite the defendant's extended possession of the land.

LITERATURE REVIEW

Norms in civil law are regulatory norms (*regelend recht* or *aanvullend recht*), as explained by Surtoutomo & Masriani (2023). Hernoko (2019) adds that there are several principles in civil law according to UNIDROIT (The International Institute for the Unification of Private Law). The Principle of Freedom of Contract, as stated in Article 1338 Paragraph (1) of the Indonesian Civil Code, grants parties the freedom to determine or choose contract clauses, define the object and form of the contract, and accept or deviate from optional legal provisions (*aanvullend optional*). However, this freedom has exceptions in formal and real contracts and permissible causality conditions, as emphasized by Niewenhuis (Brampu et al., 2024). The Principle of Consensualism states that contracting parties must agree on essential matters within the contract, as regulated in Article 1320 of the Civil Code (Sutiyoso & Parmitasari, 2023). The Principle of *Pacta Sunt Servanda* asserts that an agreement made serves as law for the parties involved, as outlined in Article 1338 Paragraph (1) of the Civil Code (Situmorang, 2021). The Principle of Good Faith refers to Article 1338 Paragraph (3) of the Civil Code, which states that contracts must be executed with honesty and good intentions (Masturi et al., 2020). The Principle of Valid Contract Requirements includes four key elements: mutual agreement, legal capacity of the parties, a specific subject matter, and a lawful cause. Additionally, other

principles in civil law include the principle that a contract can be annulled if it contains significant disparities (gross disparity), the principle of *contra proferentem* in interpreting standard contracts, the recognition of local business transaction customs, the principle of agreement through offer and acceptance or through actions, the prohibition of bad faith negotiations, the duty of confidentiality, the principle of protecting weaker parties from standard clauses, the principle of respecting contracts during hardship, and the principle of exemption from liability in force majeure situations (Solanki, 2024).

In national land law, several fundamental principles apply. The Principle of Nationalism states that only Indonesian citizens (WNI) may own land rights without discrimination between men and women, or between native and naturalized citizens. The Principle of State Control explains that land, water, airspace, and natural resources at the highest level are controlled by the state as the people's governing body. The Principle of Purified Customary Law (sanitized adat law) asserts that customary law serves as the foundation of agrarian law after being cleansed of its negative aspects. The Principle of Social Function states that land use must not conflict with public interest, the rights of others, morality, or religion, as stipulated in Article 6 of the Basic Agrarian Law (UUPA). The Principle of Nationality affirms that all Indonesian citizens, whether native or of foreign descent, have the right to land ownership. The Principle of Non-Discrimination ensures no distinction between native Indonesians and naturalized citizens regarding land ownership rights. The Principle of Mutual Cooperation dictates that all agrarian efforts should be based on national interest through collective work or other cooperative methods. The Principle of Unification establishes that agrarian law must be consolidated under a single law applicable to all Indonesian citizens, namely the UUPA. The Principle of Horizontal Separation (*horizontale scheidings beginsel*) stipulates that land ownership is separate from buildings and other objects on it (Hidayanti et al., 2021).

The state holds the highest authority over land, water, and airspace, including the natural resources within them, as a governing body representing the people. This authority grants the state the power to regulate and manage land use, allocation, availability, and conservation; determine and regulate legal relationships between individuals and land, water, and airspace; and regulate legal relationships between individuals and legal actions concerning land, water, and airspace. Based on state control, various land rights can be granted to individuals or legal entities. H.M. Arba categorizes individual land rights into two types: primary and secondary rights. Primary land rights include Ownership Rights, which is the strongest, most complete, and hereditary right that only Indonesian citizens and certain legal entities designated by the government may hold. The Right to Cultivate (HGU) allows individuals or entities to cultivate state-owned land for a specified period, with a maximum of 25 years or up to 35 years for businesses requiring a longer duration. The Right to Build (HGB) grants

individuals or entities the right to construct and own buildings on land they do not own, with a maximum term of 30 years, extendable up to 20 years. The Right to Use permits the use and/or exploitation of land controlled by the state or owned by another person under specific agreements. The Right to Lease for Buildings entitles individuals or legal entities to rent land owned by another party for building purposes, with rent payments made either once or periodically. This right must not include conditions that exploit or oppress the tenant. Secondary land rights, according to H.M. Arba, are rights considered contrary to the law because they involve elements of exploitation and oppression, which is why efforts are made to abolish them in a short time. Examples of such rights include land pawn rights, sharecropping rights, agricultural land lease rights, and squatter rights.

RESEARCH METHODOLOGY

This research uses a normative juridical approach, which is a method that focuses on the study of theories, concepts, legal principles, and laws and regulations relevant to the object of research (Efendi, Jonaedi & Ibrahim, 2016). This approach aims to analyze the legal aspects that regulate the practice of land title pawn and its implementation in the Indonesian legal system.

The research method used is the literature study method, which involves reviewing legal documents such as books, journals, laws and regulations, and court decisions relating to land pledges as debt collateral. This research relies on primary legal sources, namely applicable laws and regulations, as and secondary legal sources such as legal doctrine and academic literature to provide a comprehensive analysis.

In addition, this research will analyze Decision Number: 20/Pdt.G/2021/PN.Blk, in order to understand how legal provisions are applied in resolving land pawn disputes. The juridical analysis of this decision will identify the consistency of the application of the law and potential legal gaps that appear in judicial practice. Thus, this research not only explores the applicable legal norms, but also how they are applied in concrete cases in court.

RESULT AND DISCUSSION

The Implementation of Land Rights Mortgage in Society

Land is one of the natural resources controlled by the state and used for the greatest prosperity of the people, as stipulated in Article 33 Paragraph (3) of the 1945 Constitution. As the organization of all the people, the state has full authority to regulate and administer the allocation, use, supply, and maintenance of the earth, water, and space, as stated in Article 2 of Law No. 5/1960 on the Basic Regulation of Agrarian Principles (UUPA).

The various land rights referred to in Article 4 of the UUPA are further regulated in Article 16 Paragraph (1) of the UUPA, which distinguishes land

rights into permanent rights and temporary rights. One of the temporary land rights is the Hak Gadai Tanah. In Law No. 56 PRP of 1960 on the Determination of Agricultural Land Area and the UUPA, a mortgage is defined as a relationship between a person and land owned by another person who owes him a debt. As long as the debt has not been paid off, the land remains in the possession of the lender (mortgagee), and all the produce of the land becomes the right of the mortgagee as interest on the debt.

The redemption of the land depends on the ability and willingness of the mortgagor. Basically, agricultural land mortgage is a transaction in which land is used as an object of collateral in debt and credit between the landowner and the mortgagee. The purpose of agricultural land pawning is to obtain capital without having to sell the land. Therefore, agricultural land pledges give the landowner the right of redemption in order to take back the land that has been pledged to the pledgee. In the general explanation of Law No. 56/1960 on the Determination of Agricultural Land Area at point 9 letter (a), it is explained that:

“A pledge of agricultural land is a relationship between a person and land owned by another person who owes him money. As long as the debt has not been paid in full, the land remains under the control of the lender (the mortgagee). During that time, the produce of the land is entirely the right of the pawn holder, which is thus the interest on the debt.”

A developing problem in society today is the persistence of the customary agricultural land mortgage system. Its implementation often favors those with strong capital, which potentially harms those who land mortgages. Therefore, the practice of agricultural land mortgaging should prioritize the principle of justice to protect all parties involved in the transaction, and avoid the practice of exploitation. This is in line with the values of Pancasila as the philosophy of the Indonesian nation that upholds justice in social life.

One of the regulations established as the implementation of laws related to agricultural land pledging is Law No. 56/1960 on the Determination of Agricultural Land Area. This law regulates the minimum and maximum limits of agricultural land ownership, the prohibition of absentee land ownership (guntai), restrictions on liens, and provisions for profit sharing. Regarding restrictions on lien holders, Article 7 of Law No. 56/1960 states that land that has been mortgaged for 7 years (between 5-10 years) or more must be returned to the mortgagor without the obligation to pay a ransom. However, in practice, many mortgaged lands last for years, even decades, and are often inherited by the heirs of the mortgagor. This happens because the mortgagor is unable to redeem the land, so agricultural land mortgaging has the potential to become a form of land tenure that is unfair to the economic powerless.

Legal Protection for Land Rights Mortgagees

Based on the explanation of Philipus M. Hadjon, legal protection is the protection of dignity and recognition of human rights owned by legal subjects, based on legal provisions in accordance with their authority. Legal protection includes various legal efforts that must be provided by law enforcement officials to provide a sense of security, both psychologically and physically, from disturbances and threats originating from any party. Basically, the principle of legal protection rests on the concept of recognition and protection of human rights. This concept aims to limit and establish obligations for the community and government in guaranteeing these rights. The government has the obligation and responsibility to respect, protect, strengthen, and promote human rights as stipulated in the law, other laws and regulations, and international law accepted by the Republic of Indonesia.

Article 29 Paragraph (1) of Law No. 39/1999 on Human Rights explains that everyone has the right to the protection of his or her person, family, honor, dignity, and property. Furthermore, Article 36 Paragraphs (1) and (2) of the same law state that everyone has the right to own property, either individually or jointly with others, for the development of themselves, their family, nation and society in a manner that is not contrary to the law. In addition, no one shall be deprived of their property rights arbitrarily and unlawfully.

Based on the provisions in Law No. 39/1999, it can be seen that the obligation to provide protection to holders of land rights lies with the state or government as an organization of people's power. To obtain legal protection, means and mechanisms are needed to support it.

A mortgage right, like other land rights, can be removed. The abolition of a mortgage means that the purchaser of the mortgage no longer has the right to the land that he previously held under the mortgage. According to Article 7 of Law No. 56/1960, a lien is nullified for several reasons, namely:

1. Redemption has been made by the pledgor.
2. It has lasted for seven years for agricultural land, ponds, and perennials.
3. There is a court decision in the settlement of the lien through the mechanism of *Milikbeding*.
4. Revoked in the public interest.
5. The land is destroyed due to natural disasters, such as floods or landslides, in which case the mortgage money cannot be claimed back by the mortgagee.

CONCLUSION AND SUGGESTION

Conclusion

The process of encumbering mortgage rights according to Law No. 4/1996 concerning Mortgage Rights on Land and Objects related to Land goes through three stages, namely the first stage is a promise to grant Mortgage Rights. This promise must be stated in and is an integral part of the debt and credit agreement or other agreements related to debt and credit issues. This agreement itself must be in writing. It can be in the form of a deed under hand, or it can be authentic, depending on the legal provisions governing the material of the agreement concerned. The second stage is the granting of Mortgage Rights. This is done at the office of a Land Deed Official (PPAT). The PPAT here can be an ex officio sub-district PPAT or a Notary PPAT. The granting of the Mortgage Right is set out in the Deed of Granting Mortgage Rights (APHT), the form and content of which are stipulated in the Regulation of the Minister of Agrarian Affairs/Head of BPN No. 3/1996. The third stage is the Registration of Mortgage Rights. This stage is carried out at the local regency/city land office. The process that occurs in the registration of the Mortgage Rights begins with the recording of the Mortgage Rights in the HT Land Book by the Head of the Land Office.

In the garden land mortgage case in Decision Number: 20/Pdt.G/2021/PN. The plaintiffs are entitled to the disputed land and the defendant is obliged to vacate and surrender the disputed land to the plaintiffs without compensation and any expenses. However, in this decision the Panel of Judges did not provide a decision regarding the plaintiff's claim that the unlawful possession of the disputed land by the defendant during the excess period of the pledge, the plaintiff has suffered losses which have been calculated above is unlawful possession and is an act against the law.

Suggestion

During the process of mortgage encumbrance, the government should provide understanding and assistance to people who make agreements in unwritten form so that they can switch to written agreements, so that the agreement has stronger legal force. In addition, the Panel of Judges in this case should have considered the excess pawn period held by the defendant and calculated the losses suffered by the plaintiffs.

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