

Conference Paper

Validity of Mortgage Rights Based on Credit Agreement Aspects

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Abstract.

Mortgage is an important part of civil law in economic legal activities. There are four stages of the interweaving of law in this relationship, namely pre-agreement, agreement, authorization of implementation, and the elimination of mortgage. In all these phases, creditors and debtors have equal rights, because the relationship between them is consensual (*balanced law*) because the parties assume ownership of each other. But in the practice of mortgage rights so far, the creditor takes a dominative position so that the application of the procedure does not provide justice to the debtor. This study provides answers about how to formulate legal renewal so that the relationship of mortgage rights can be intertwined on the basis and principles of procedural justice. This type of research is explanatory, with its empirical normative nature, using sources of normative legal materials and expert opinions. It is hoped that the output of this research is to guarantee academic honesty and provide empirical benefits, which is to be a source of strengthening and law-making for the mortgage and financial rights in Indonesia.

Keywords: mortgage, credit, agreement

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1. INTRODUCTION

Economic development in a nation is a result of the spirit of togetherness and constructive dependency between citizens in interacting and doing transactions at the same time. The more active members of the community carry out interactions in which there are transactional links, the economic growth naturally occurs. International policies adopted by most countries in the world about free trade have changed domestic economic policies, including in Indonesia.[1] Then these interactions and transactions cross national borders. Data published by the Central Statistics Agency (CSA) states that Indonesia's economy in 2018 grew 5.17 percent, has experienced higher growth compared to achievements in 2017 of 5.07 percent.[2]

This growth is closely related to good capital management by banks as creditors and users of banking services as debtors. Communities need capital support in business

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activities and consumer financing such as the procurement of residential property. The need for housing has increased the trend of mortgages and consumer credit now occurring in almost all countries. Despite the slowdown in the property market until the middle of the second quarter of this year due to the 2019 elections. But the property market is predicted to move significantly in the third and fourth quarters.[3]

The trend is also offset by the strengthening of government regulations, one of the policies being for example is the loosening of Loan to Value (LTV) which can make developers offer down payments as low as 0%, when most of the obstacles faced by the public as debtors in buying property is a down payment. The policy has given public enthusiasm to be able to own a house with bank credit financing. The last 10 year government policy regarding the certificate of ownership rights over citizens' land, aside from being intended to ensure legal certainty, is also intended so that people have the same rights in lending and borrowing with banking institutions. With the community making bank loan loans with a certificate of guarantee, the government's step in increasing public financial inclusion can be realized.[4]

However, not all lending and borrowing relationships end well. The most important risk is carried out by the bank as a creditor, because of the potential non-repatriation of loans if bad credit occurs. So the bank as the holder of mortgage rights requires the support of legal certainty. The bank as one of the financial institutions that helps smooth the business of its debtors through loans in the form of credit has the main function in economic growth. According to article 1 number 11 of Law No. 10 of 1998 concerning Amendment to Law No. 7 of 1992 concerning Banking.[5]

There is a capital needed that requires it in a very large amount, so the supply does not have to always be provided by who needs it for the development, but can be assisted by other parties. One of the institutions that have businesses in the economy, such as providing credit, is a bank. One of the ways banks help provide capital is by credit. Credit as explained in Article 1 of Law Number 10 of 1998 concerning Amendment to Law Number 7 of 1992 concerning banking namely the provision of money or claims that can be equaled, based on a loan agreement between the bank and another party that requires the borrower to repay the debt after a certain period of time with interest.[6]

Mortgage law is a legal instrument that provides protection and guidance in providing legal services between debtors and creditors. The balance of the parties in the agreement is the sanctity of the legal relationship. The Bank's decision to provide loans to debtors is certainly based on the debtor's positive qualifications. Therefore, a guaranteed return can be achieved. Law Number 4 of 1996 concerning Mortgage Rights was born as a guarantee of security and certainty. In line with that, Andi said

that another goal is to abolish dualism in national land law. This means the creation of a national land law unit and the creation of legal certainty regarding land rights, in addition to optimally achieving land functions in accordance with their designation. the development needs of the Indonesian people.[7]

Before the birth of the Mortgage Law, the legal relationship was based on statutory regulations based on article 1131 of the Civil Code, which stipulates that all debtors, both movable and immovable property, existing and future will be liable for all commitments. Furthermore, the Basic Agrarian Law (BAL) No. 5 of 1960 in Article 28 states that what can be used as an object of debt collateral is the Underwriting Right, namely Ownership Rights, Business Use Rights and Building Use Rights. However, the Mortgage Law still addresses the problem because not everything that is contained in the rules of the Mortgage Rights Act applies ideally as expected, or in other words has caused inconsistencies.

2. METHODOLOGY/ MATERIALS

This study focuses on the process of observing, asking questions, and searching for answers through tests and experiments in the field of science. In fact, the scientific method is widely applied in science, in various fields. Many empirical sciences, especially social sciences, use mathematical tools derived from probability and statistical theories, together with the results of these, such as decision theory, game theory, utility theory, and operations research (*erations research*). Philosophers of science have addressed general methodological problems, such as the nature of scientific explanations and the justification of induction, game theory, utility theory, and operations research.[8]

The scientific method is very important for the development of scientific theories, which explain empirical law (*experientia*) scientifically rationally. In a typical application of the scientific method, a researcher develops a hypothesis, tests it in various ways, and then modifies the hypothesis based on the results of tests and experiments. The modified hypothesis is then retested, further modified, and tested again, until it becomes consistent with the observed phenomenon and test results. In this way, the hypothesis functions as a tool used by scientists to collect data. From that data and various scientific investigations carried out to explore hypotheses, scientists can develop broad general explanations, or scientific theories. [8]

3. RESULTS AND DISCUSSIONS

The relationship of debt and receivables is regulated in the civil code namely Article 1754 of the Civil Code. In that article it is explained that "Use-out loan is an agreement, which determines the first party to surrender a number of items that can be used up to the second party on condition that the second party will return similar items to the first party in the same amount and condition". So based on this article debt is interpreted legally as an agreement, in fact thus the legal relationship is contained in a statement only, that whether the gift of money is worth "debt" or "not debt". If the gift is worth the debt, it must be returned. Therefore, the debate over written and unwritten agreements, carried out under the hand or before a notary official, is a technical debate that has developed lately along with the plurality of legal relationships in debt and debt.[9]

All of the agreements that were made legally according to the rules in Article 1320 of the Indonesian Criminal Code and / or other rules stand on the same principles and principles as in Article 1338 of the Indonesian Criminal Code. In the development of the model of legal actions that give birth to agreement capital, the potential is actually already regulated in Article 1319, stating that "All agreements, whether they have special names nor those with a specific name, are subject to the general rules contained in this chapter and the previous chapter. The second paragraph does not apply based on S. 1938-276 ". That is, one of the new forms which then emerged was the credit agreement and the mortgage agreement.[10]

Credit agreement is one form of agreement, a number of experts present credit in various definitions. Before going into the subject of a credit agreement, first know the conceptual definition of the credit. The definition of credit listed in Article 1 Number 11 of Act Number 10 of 1998 concerning Banking: "That credit is the provision of money or claims that can be equated with that, based on the loan agreement and agreement between the bank and other parties that require the borrower to pay off the debt after a certain period of time with interest.[11]

In credit there are several elements, namely: (a) Accounts receivable relationship. (b) There is a creditor, there is also a debt recipient. (c) There are agreements and agreements in which rights and obligations, values and time are listed. (d) One party is a bank. (e) Interest is given. Based on the definition above shows that the "Agreement" is one of the legal requirements of the credit, if the parties do not agree with each other and agree on the debt and debt relationship then the relationship is invalid. In the case of the agreement the treaty law applies, as has been reviewed in the previous article. But it needs to be a legal note that the Banking Law does not stipulate in its definition

the placement of guarantees in the agreement. Therefore, actually "collateral" is not one of the legal requirements in credit legal relations[12]

In credit agreements many things are ignored by Creditors, because in many cases, Creditors always become dominant over debtors. For example, the creditor must first explain some of the main items of financial information that have the potential to become a dispute in the future, namely: the amount of credit, the credit period, the total amount that must be paid (the total amount payable), for example the amount to be paid if the debt is repaid early (examples of the amount payable if the debt is repaid early), the interest rate (the interest rate), the annual percentage rate (APR) , fees or other costs - e.g. to skip payments (any other fees or charges - e.g. for missing a payment).[13]

The internal regulations carried out by most banks (creditors) have changed the rules for calculating the total charge for credit (TCC) on which the APR is based. This can be seen in many cases of confiscation of executions, the object of credit dependents is parathied by the creditor even though the principal's credit schedule has not ended, while on the other hand, the debtor is subject to a fine if late. So in fact the meaning of the late fee is that the late debtor pays installments for the period of the agreement. The sentence for late parate if the debtor is late in installments within the timeframe of the agreement is a violation of the norms of the credit agreement.[14]

This pre-agreement procedure must be carried out by the creditor in order to guarantee the right of justice for the debtor. Because when the credit is guaranteed in the object of dependents, the rights of creditors and debtors become equal in law. Therefore borrowers must be given the opportunity to ask questions and make agreements further explained. In many cases, the creditor provides a one-sided draft to be signed by the debtor, the debtor has no authority to refute or refuse, it could be due to ignorance or helplessness. Therefore, it is necessary to be done before a notary of the credit agreement that places the mortgage right in it, because the notary will read, ask, explain the relationship and legal risk and save all legal communication in a notarial document called minuta notariat.[15]

Furthermore, why is it required to be done before a notary, because the credit agreement with the placement of the mortgage can be an active legal engagement for the parties when the Mortgage Certificate (MC) has been issued on 14 days after the signing. If the credit agreement is not carried out before a notary, it is not valid, because it is not directly tied to the AIR and MC. In a bank credit agreement the creditor to reduce the occurrence of a risk in the credit agreement, the debtor must provide a guarantee to provide a sense of confidence and security for the creditor in a credit agreement. The definition of collateral according to the provisions of Article 2 Paragraph

(1) Decree of the Board of Managing Directors of Bank Indonesia Number 23/69 / KEP / DIR dated February 28, 1991 concerning Guarantees of Granting Credit. That what is meant by collateral is a bank's confidence in the ability of the debtor to pay off a loan in accordance with the agreement. According to the provisions of Article 1 Item 23, what is meant by collateral is additional collateral given by the debtor customer to the bank in the context of providing credit or payment facilities based on sharia principles.[16]

The purpose of collateral is to get a credit facility from a bank. This collateral is submitted by the debtor to the bank. The other definition of collateral according to Hartono Hadisoeparto is that Collateral is something given to creditors to provide confidence that the debtor will fulfill obligations that can be valued with money arising from an engagement. Another understanding, according to M. Bahsan, is that collateral is anything that is received by a creditor and given by the debtor to guarantee a debt receivable in the community. As well as the Seminar on the National Legal Development Board in Yogyakarta, argues that the Guarantee is guaranteeing the fulfillment of obligations that can be valued with money arising from a legal engagement. Therefore, the guarantee law is very close to the law of matter.[17]

The implementation of mortgage rights is marked by the issuance of a Mortgage Certificate by the National Land Agency. Furthermore, the question that then becomes a question is what if the implementation of the mortgage has existed before the issuance of the mortgage certificate. Often the implementers of mortgage institutions are fooled by this problem. This is as illustrated in the creditor who gives money to the debtor before the issuance of the Mortgage Certificate. The legal action taken by the creditor is a mistake. This is because the money given is within a period that is not bound by the legal ratification of the mortgage relationship contained in the mortgage certificate. The money given has not been tied to the object owned by the debtor, even if the money is received with a payment receipt. According to the Civil Code, the receipt of the money can be declared as pure debt without dependents. Regarding pure debt without dependents, the legal basis for the parties is a Credit Agreement or statement of receipt.[18]

The legal basis for the legal vacancy period is clearly described in Article 13 paragraph (5) that "Underwriting Rights are born on the date of the Land Book of the Underwriting Right as referred to in paragraph (4)" and earlier Article (4) explains that "Date of the Land Book of the Underwriting Right as referred to in paragraph (3) is the date of the seventh day after complete receipt of the documents required for registration and if the seventh day falls on a holiday, the relevant land book is given the date of the next working day ". This means that this article confirms that all legal actions that are giving

and receiving rights prior to the birth of a mortgage right are declared invalid because they cannot bind the mortgage right. As for the majority of the implementers said that the IPA (Power of Attorney for Giving Rights of Tangungan) was sufficient to be the basis for the transfer of money. Regarding these assumptions is not justified, because IPA is intended as a basis for direct registration by the creditor representing the debtor, not as a basis for the creditor to hand over the pre-MC money.

4. CONCLUSION AND RECOMMENDATION

The legal relationship in the bond of rights is equal to the parties due to the transfer of rights between the parties. In the debt-receivable agreement, the creditor has an obligation to submit money and the debtor has an obligation to submit collateral in the form of land and or buildings. However, in debt-receivable agreements, legal degrees always provide legal protection to debtors, and ignore the rights of creditors. In fact, the risk of creditors in debt agreements is quite high compared to debtors. The fulfillment of the rights of the parties is actually contained in four stages of the implementation of the mortgage legal relationship, namely: legal protection in the pre-agreement is the parties protected by maladministration and or violations of laws and regulations carried out by creditors in that stage, Conducting surveys to provide decisions and determinations. credit, is an effort of the parties protected by an agreement that is not implemented before a Notary.

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