

PROBLEMS OF IMPLEMENTATION OF ELECTRONIC LAND CERTIFICATE ARRANGEMENTS AS DEBT GUARANTEE

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Abstract

The implementation of land registration and electronic mortgage installation is intended to provide efficiency to rights holders and related agencies in carrying out activities in the land sector. This study aims to determine the positive law regarding the legal certainty of the parties to the electronic land certificate which is used as debt guarantee and the role of the Notary/Official Certifier of Title Deeds in the implementation of the installation of mortgage rights. Using library research, normative juridical methods, analyzing data with a qualitative approach. The Minister of Agrarian and Spatial Planning/Head of the National Land Agency realizes digital-based land registration activities as stipulated in the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Number 1 of 2021 whose implementation has been postponed. Land-electronic certificates can be used as collateral for debtors' debts by making a deed of granting mortgage which is made and signed before the Land Deed Maker Officer which is then registered at the local National Land Agency Office. The Electronic Mortgage System is implemented as stated in the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia Number 9 of 2019, the results of the mortgage certificate are in the form of printed electronic documents.

Keywords: *electronic land registration, notary/land deed maker officer.*

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A. Introduction

The implementation of land registration is *recht cadastral* (land registration in order to provide legal certainty and certainty of land rights). Based on Article 19 paragraph (1) Law on Agraria No. 5 of 1960, this aims to ensure legal certainty and legal protection for holders of land rights with the issuance of land certificates as legal evidence, which is one of the government's policies.⁴

With the development of the world of technology and information gave birth to a legal product that we know as cyber law. By utilizing this information and communication technology, the Ministry of Agrarian Affairs and Spatial Planning/Head of the National Land Agency in public services realizes the modernization of land services by implementing electronic-based land services.

Land parcels that can be issued electronic land certificates are divided into two, such as: land parcels that have never been registered and registered for the first time, and land parcels registered to replace analogue certificates to digital ones for those already registered. The implementation of the electronic land registration service will produce electronic information data or referred to as electronic documents. The electronic document is in the form of an electronic certificate which is the right holder data as well as access to the electronic certificate in the electronic system. Electronic documents are proof of ownership of land that has been registered, which can be used as legal evidence and can be used when litigation in court.

Land registration carried out with an electronic system is carried out with the aim of making it easier for the community and the National Land Agency to maintain and manage data in the digital era. With the change from the land certificate from an analog system to an electronic certificate, of course this can help avoid the risk of loss, fire and or damage to physical documents on the analog certificate.

Proof of Ownership of Land Rights can be used as collateral for debtors' debts to creditors. To provide legal protection and certainty for the parties in the provision of credit facilities, of course the parties will make an agreement before the Notary / Land Deed Making Officer. The agreement consists of the main agreement, namely the Credit Agreement and then an agreement will be made for the granting of the object of collateral, which is an additional agreement, namely the Deed of Granting Mortgage. The Deed of

⁴ Yuyun Mintaraningrum, "Aspek Kepastian Hukum Dalam Penerbitan Sertifikat Hak Tanah (Analisis Putusan Pengadilan Tata Usaha Negara Semarang Nomor Putusan PTUN Nomor 24/G/TUN/2000/PTUN.Smg)" (2015) 2 Repertorium 1.

Granting Mortgage is then registered at the local National Land Agency Office where the land certificate will be charged with a guarantee in the form of a mortgage which is mutually binding between the debtor and creditor. The process of installing mortgage is done online. The result is in the form of a printed Electronic Document as regulated in the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency No. 9 of 2019 on Electronic Mortgage Rights.

Provisions regarding electronic evidence have been regulated in Law No. 11 of 2008 on Electronic Information and Transactions. The purpose of the implementation of land registration and installation of mortgages electronically is to facilitate and provide efficiency to rights holders and related agencies in the implementation of activities in the land sector. However, it also creates conflicts in the community, especially those who are unfamiliar with technology. For example, people who are in rural areas, they do not know how to access the electronic system on the land objects they own. They also do not know on what if the right holder owns more than one plot of land because having multiple accesses for one right holder is also considered inefficient.

In the implementation of the mortgage installation, the debtor will usually submit the object of his debt guarantee in the form of a certificate of land which is used as collateral for the debt. If for objects whose proof of ownership is in the form of electronic certificates and access through electronic systems, the debtor will submit the printed electronic certificates. The issue that should be discussed is related to data security and legal certainty for the parties because each party can access and print the electronic certificates.

B. Problem Formulation

There are two problem formulations in this research: first, how is the implementation of electronic land certificates used as collateral for mortgage rights? Second, what is the role of a Notary/Land Deed Maker Officer in the implementation of the installation of mortgage rights on the electronic land certificate?

C. Methodology

This research applies the normative juridical methodology.⁵ The sources of law used in this research include: Law No. 5 of 1960 on Agraria, Law No. 30 of 2004 jo. Law No. 2 of 2014 on Notary Positions, Government Regulation No. 24 of 1997 on Land Registration, Regulation of the Minister of Agrarian and Spatial Planning/Head of the

⁵ Soerjono Soekanto, *Pengantar Penelitian Hukum* (2005) 35.

National Land Agency of the Republic of Indonesia No. 9 of 2019 on Electronic Integrated Mortgage Services, Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency No. 1 of 2021 on Electronic Certificates. Secondary legal materials are obtained from library materials, including sources related to research, journals, legal books, legislation, literature. This research technique is qualitative analysis. The approach used is the statute approach and the conceptual approach.

D. Discussion and Results

1. Electronic Land Certificate as Debt Guarantee

a. The Implementation of the Electronic Land Certificate is Used as Collateral for Mortgage Rights

With the development of people's lives and conditions that until now still depend on activities and businesses that are mostly agrarian, this makes the activities of community life related to land, of course, increasing and even more complex. Thus, there is a need for government efforts so that in the future the community is not burdened with increasingly complicated problems in the land sector. One of the government's efforts in dealing with the problems experienced by the community is by implementing land registration for the first time as stated in Article 1 point 9 of Government Regulation No. 24 of 1997.

Land registration is the process of issuing a certificate of legal proof of ownership of land rights. According to Law No. 5 of 1960 Article 19 paragraph (2), things that need to be done in the implementation process include: measurement, mapping and bookkeeping of land; registration of land rights and transfer of rights; the provision of valid proof of rights documents as strong legal evidence.

The final result of land registration activities is the issuance of a certificate. By having a certificate, legal certainty⁶ regarding the types of land rights, subject rights, and objects of rights becomes real. In addition, certificates also provide various benefits, including minimizing disputes with other parties and strengthening the bargaining position if certified land rights are needed by other parties for development purposes when compared to uncertified land as well as shortening the transition process and the imposition of land rights.

⁶ Novita Riska Ratih, "Analisis Yuridis Sertifikat Tanah Hak Milik Elektronik (E-Certificate) demi Mewujudkan Kepastian Hukum" (2021) 2 Jurnal Signifikan Humaniora 1, 5-6.

The right to a plot of land authorizes the holder of the right to use or take advantage of the land. Land rights are different from land use rights. Land rights in agrarian law recognize the division between primary land rights and secondary land rights. Primary land rights are land rights that can be controlled directly, are long-lasting and can be inherited by individuals or legal entities. While secondary land rights are rights to land that arise or are charged over existing land rights.

The implementation of Land Registration is regulated in Government Regulation No. 10 of 1961 on Land Registration which was replaced by Government Regulation No. 24 of 1997 but was not completely replaced as stated in Article 64 of the Regulation. For a more complete arrangement, it is regulated in the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency No. 3 of 1997 and finally regulated in the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency No. 1 of 2021.

The objectives of the agrarian reform to be achieved by the Agrarian Law can be seen in the preamble which formulates its objectives, among others, to: lay the foundations for the preparation of a national agrarian law which is a tool to bring prosperity, happiness and justice to the country. and the people, especially the peasants in order to provide justice and prosperity for the community; laying the foundations for establishing the unity and simplicity of the land law; laying the foundations to provide legal certainty regarding land rights for the whole people.

The government implements the Agrarian Law by providing legal certainty as a guarantee for people and legal entities who are the holders of rights, objects of land rights and the rights they have on their land.⁷ Services in electronic-land registration will produce electronic data information or called electronic-documents in the form of electronic-certificates. This digitalization effort is very important to respond to technological developments that are developing to facilitate data collection and services in the agrarian sector.⁸

Land registration in Indonesia consists of two stages, namely land registration for the first time and registration as maintenance of land registration data. Land registration for the first time was carried out through two types of registration, namely systematic land registration and sporadic land registration. Systematic land

⁷ A.P.Parlindungan, *Komentar Undang-Undang Pokok Agraria* (Mandar Maju 1993) 15.

⁸ Elza Syarief, 'Electronic Land Certificates: Its Goals and Challenges' [2021] 1 (4) Research Horizon 120. 120-122.

registration is carried out simultaneously by the National Land Agency. Systematic land registration aims to register land parcels based on long-term and annual work plans and is carried out in areas determined by the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency, while sporadic land registration is carried out by owners of land parcels that have not been registered themselves.⁹

The Agrarian Law guarantees legal certainty over the rights obtained after land registration is carried out as an effort carried out by the Government.¹⁰ The lack of public understanding of the importance of registering land rights has resulted in many parcels of land that have not been registered at the National Land Agency Office. The high cost of land registration and the lack of public knowledge about the purpose of land registration as well as the complicated process of managing it at the National Land Agency are the reasons why people do not want to register their land rights.

Holders of land rights who already have proof of ownership of land rights will be guaranteed their rights, even though the land is functioned as trade traffic. The implementation of land registration must continue to be carried out so that later the meaning of land can really provide the greatest prosperity as expected for the community. Land rights that are controlled directly and are also old and can be inherited by individuals or legal entities are called primary land rights: right of ownership, building utilization rights, cultivation rights, and rights of usage over land.¹¹

In order to realize the modernization of land services, the National Land Agency has begun to implement electronic-based land services.¹² The services provided include services related to the creation of electronic documents or Electronic Land Certificates. The policy for launching an electronic land certificate begins in 2021, with the issuance of Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency No. 1 of 2021.

⁹ Harris Yonatan Parmahan Sibuea, *Arti Penting Pendaftaran Tanah Untuk Pertama Kali*, Vol.2. No. 20 (2011) *Jurnal Negara Hukum*.

¹⁰ Urip Santoso, *Pendaftaran Dan Peralihan Hak Atas Tanah* (2nd edn, Prenada Media Group 2010) 248.

¹¹ Dyara Radhite Oryza Fea, *Panduan Mengurus Tanah Rumah dan Perizinannya* (Legality, 2018) 13.

¹² Pandam Nurwulan, 'Implementasi Pelayanan Hak Tanggungan Elektronik bagi Kreditor dan Pejabat Pembuat Akta tanah' [2020] 28 (1) *Ius Quia Iustum* 183. 185-189.

In the current digital era, Indonesia itself can be said to have fallen behind in the implementation of electronic land registration certificates. In South Korea since 1998, the Korean Land Information System Agency has implemented an electronic land certificate.¹³ Since 2018, Malaysia has also started the process of digitizing land data with the emergence of several land applications such as e-Tanah, e-Kadaster, and MyGeoName.¹⁴

The National Land Agency during the Covid-19 pandemic has actually provided land services in four areas of electronic-based land services. These areas of service are: certificate checking, Electronic Mortgage services, ZNT (Land Value Zone) information and the preparation of land registration certificates, which are already valid in all areas of the Land Office in Indonesia. However, the electronic land certificate service is still being postponed due to problems due to the pros and cons in the community.

Commission II of the House of Representatives (DPR) and the Ministry of Agrarian and Spatial Planning/Head of the National Land Agency agreed to postpone the enactment of Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency No. 1 of 2021 on Electronic Certificates. This was conveyed in a Hearing Meeting (RDP) between Commission II of the House of Representatives (DPR) and the Ministry of Agrarian and Spatial Planning/Head of the National Land Agency.¹⁵ Commission II of the House of Representatives (DPR) requested that the Ministry of Agrarian Affairs and Spatial Planning/Head of the National Land Agency provide performance results from the four digital services for the land sector that have been implemented. If the digital service system has not yet provided good results and achievements, the land-electronic certificate should not be applied in a hasten.

The Ministry of Agrarian and Spatial Planning/Head of the National Land Agency implements the land-electronic certificate at an early stage through a pilot

¹³ Bola Ju and Katherine Kelm, 'The Power of Effective Geospatial Information Management in South Korea: Development and Application' [2020] 4 *World Bank Group Korea office Innovation and technology Note Series* 1. 4-5.

¹⁴ Ana Silviana, 'Urgensi Sertipikat Tanah Elektronik Dalam Sistem Hukum Pendaftaran Tanah di Indonesia' [2021] 4 (1) *Administrative Law and Governance Journal* 51. 53-54.

¹⁵ Yudho Winarto, 'Komisi II DPR dan BPN Sepakat Penerapan Sertifikat Tanah Ditunda' (*Nasional*, 2021), <<https://nasional.kontan.co.id/news/komisi-ii-dpr-dan-bpn-sepakat-penerapan-sertifikat-tanah-elektronik-ditunda>> accessed 1 April 2022.

project.¹⁶ The pilot project stage is determined by considering the highest level of ease of doing business in Indonesia. For the application of temporary electronic land certificates, priority is given to land assets of government agencies and State-Owned Enterprises, before implementing electronic certificates in the general public.

The electronic land registration service has actually been designed since the enactment of Government Regulation No. 24 of 1997 on Land Registration. Article 35 paragraph (5), (6) and (7) Government Regulation No. 24 of 1997 on Land Registration states that:

“Gradually, land registration data is stored and presented using electronic equipment and micro-film which, after being signed and affixed with an official seal by the Head of the Land Office in the area where the land object is located, has the power of proof. The form and method of storing, presenting and deleting the documents referred to in paragraphs (1) and (2) of this Article 35, as well as the method of storing and presenting land registration data using electronic devices and microfilm shall be determined by the Minister.”

When the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency No. 1 of 2021 applies, all application activities received by the Ministry of Agrarian and Spatial Planning/Head of the National Land Agency regarding electronic-land registration will be processed in accordance with the provisions in force prior to National Land Affairs No. 1 of 2021. Although the application of the electronic certificate has been postponed, all land offices in the territory of Indonesia will continue to prepare infrastructure and human resources for the implementation of electronic land registration.

The emergence of the Government's desire to implement Electronic Land Certificates, has caused various public anxiety, including: the existence of fear and still not trusting the accuracy of data in electronic certificates, data leakage, hacking, data leakage; there are concerns that the electronic land certificate cannot be used as collateral for debts at the bank; there are doubts regarding the strength of evidence in court; there is a culture of comfort by holding a certificate in paper form (analog); and there is news about the electronic land certificate which tends to be negative on social media so that it makes the public panic.¹⁷

¹⁶ Silviana (n14) 54.

¹⁷ Ahmad Thovan Sugandi, ‘Sertifikat Elektronik Indonesia Terkendala Keamanan Data’ (*Teknologi*, 2022) <<https://teknologi.bisnis.com/read/20220203/84/1496168/sertifikasi-elektronik-indonesia-terkendala-keamanan-data>> accessed 3 April 2022.

Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency No. 1 of 2021 on Electronic Certificates under article 16 regulates four things, including:¹⁸

1. Arrangements for replacement of land certificates into electronic land certificates;
2. Land certificates which are changed to electronic land certificates are recorded in the land book, measurement letter and/or the drawings of the flats;
3. Withdrawal of the analog land certificate by the Head of the Land Office to be combined with the land book;
4. All *Warkahs* (a collection of files used as the basis for the issuance of a land certificate for a plot of land) at the Land Office are scanned and transferred to the media and stored in the Database.

Although the implementation is gradual, building public awareness (public awareness) of land owners for media transfer and its benefits are still being improved. Electronic land certificates are expected to provide more legal certainty of land ownership and minimize land mafia and land disputes. Electronic land certificates which are stored with electronic documents at the National Land Agency will be safer from flooding, safe from fire or safe from loss.

Electronic land certificates equipped with hash code, QR code and single identity security as a substitute for paper-based conventional land certificates are an effort and innovation of policies issued by the Ministry of Agrarian Affairs and Spatial Planning/Head of the National Land Agency. This is a manifestation of the Government's response to rapid technological advances. Actually, the digitization of public services in Indonesia has been running, as can be found in the OSS (Online Single Submission) feature, the online court (e-court), taxation with e-filing tax applications, electronic fiduciary registration, and the land sector has begun in 2020 namely Electronic Mortgage Rights.

b. Mortgage Guarantee

In order to ensure that the prospective debtor would carry out their obligation of debt repayment to the creditor, the prospective debtor shall provide a certain kind

¹⁸ Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 1 of 2021 on Electronic Certificates art. 16.

of guarantee bound by the mortgage right. If the debtor were to commit default, the guarantee would be taken over and put on auction by the bank with court approval.¹⁹

Properties that are often used for collateral in bank credit comprise both movable and immovable objects. In the Credit Agreement, the immovable property which is often used as collateral is in the form of land for its increasing economic value thus highly profitable. This is also due to the increasing demand and availability of land. Collaterals that can be encumbered with mortgage rights include Ownership Rights (Hak Milik), Building Utilisation Rights (Hak Guna Bangunan) and Cultivation Rights (Hak Guna Usaha). To guarantee land rights means to guarantee the security that is attached to the land certificate to the bank, which is then called Mortgage Right (Hak Tanggungan).

In its formation process, the Mortgage Right is bound by a Deed of Granting Mortgage which is made and signed before the Land Deed Maker Officer and registered to the regional Land Office. The certificate would also contain the guarantee provision in the form of a mortgage that is mutually binding between the debtor and creditor. The inherent nature of Mortgage is that Mortgage cannot be divided. This means that the object of the mortgage is fully burdened with the mortgage until the debtor's debt is paid. As long as the debtor has not repaid the debt, the Mortgage will still be attached to the object of the mortgage.²⁰

Individuals or Legal Entities as Creditors are considered Users of the Electronic Mortgage System Service (SHT-el) as regulated in the laws and regulations on Mortgages. Meanwhile, the State Civil Apparatus of the Ministry of Agrarian Affairs and Spatial Planning/Head of the National Land Agency is the User of the Electronic Mortgage System Service in charge of serving Mortgage Rights. In order to become a registered user in the said system, one must meet several requirements such as having an electronic domicile, a certifying document registered to the Financial Services Authority, a statement of fulfillment of the requirements and criteria as well as approval of the provisions as a registered user and other conditions determined by the Ministry.

Since the issuance of the Regulation of Minister of Agrarian and Spatial Planning/Head of the National Land Agency No. 9 of 2019, the mortgage

¹⁹ Riky Rustam, *Hukum Jaminan* (UII Press 2017) 57.

²⁰ I Ketut Oka Setiawan, *Hukum Pendaftaran & Hak Tanggungan* (Sinar Grafika 2019) 102.

registration process has undergone many changes. In online or electronic registration, the Land Deed Maker Officer only registers the Deed of Granting Mortgage online, while the result which is in the form of electronic documents (Electronic Mortgage Certificate) will be printed directly by the creditor on condition that the said creditor has been registered as a user.

2. Legal Protection for the Owners of Electronic Land Certificates

a. Rights and Obligations of the Parties in Mortgage Rights

The potential of capital lies in its utilization to become an actual economic resource in accordance with the policy of the government in running the economy as one of the development goals. Funds disbursed by providing credit to the public are sought not to come only from the State Revenue and Expenditure Budget and the Central Banks. Funds disbursed are also obtained from the community in a more productive direction.²¹

A company will cease operating without funds. In all business activities, especially in the real sector, capital serves as the 'blood' of the company. If in carrying out its business activities, the company is lacking capital (funds) then this will greatly affect the smooth running of the business activities of the company. Hence to expedite these business activities, usually companies will need credits from financial institutions.²²

The operational activities of the bank as a financial institution are conducted by collecting funds from the public, which will then be managed by the bank, one of the measures is by re-investing the funds in the community by providing credits which in the end, the funds will be returned to the bank.²³

Credit loans can be given by individuals or financial institutions that have the ability to provide funds through credit agreements.²⁴ A guarantee agreement in this case cannot stand alone without the credit agreement as the primary agreement. The guarantee agreement in this case is hence the additional agreement (*accessoire*) of the primary agreement. After the credit agreement is agreed upon, the rights and obligations are born by the two parties.

²¹ Purwahid Patrik and Kashadi, *Hukum Jaminan (Edisi Revisi Dengan UUHT)* (Fakultas Hukum Universitas Diponegoro 2008) 1.

²² Sutan Remy Sjahdeini, "Hak Jaminan Dan Kepailitan", [2000] 11 *Jurnal Hukum Bisnis*.

²³ Hasanudin Rahman, *Aspek-Aspek Hukum Pemberian Kredit Perbankan Di Indonesia* (Citra Aditya Bakti 1995) 9.

²⁴ Indonesian Civil Code art. 1754.

The laws and regulations have provided security for creditors by providing general guarantees according to Articles 1131 and 1132 of the Burgerlijk Wetboek (Indonesian Civil Code) which stipulate that all material assets of the debtor, both movable and immovable, existing or to be in existence, shall become the collateral for all of their engagements with the creditor. In the event of a default, all of the debtor's assets are sold at auction and divided according to the size of the receivables of each creditor.

The right of the creditor is to receive payment for the principal debt of the debtor as well as the interests, if agreed. Meanwhile, the obligation of the creditor is to provide funds in accordance with the agreement. The right of the debtor is to receive funds from creditors, and their obligation is to pay the principal debt and any existing interests as agreed. The debtor is said to be in default if, within the specified period of time stated in the agreement, the debtor is unable to fulfill their obligation.

Debtors will provide collateral to creditors as a form of implementation of the credit loan. Collateral is crucial in every credit agreement since it serves as the guarantee for the repayment of the debt. What is used as collateral here is land rights, in accordance with Article 28 of the Agrarian Law No. 5 of 1960.²⁵

According to the Mortgage Law, Mortgage Rights are the only guarantee vessel for land. Therefore, the National Land Law Unification has been completed. The importance of security for credit facilities is given by the Bank to the Debtor, therefore the formation process of Mortgage must not deviate from the Mortgage Law.²⁶

According to Article 8 of the Mortgage Law, the debtor is the Provider of the Mortgage. However, in addition to the debtor, other legal subjects can also guarantee the repayment of the debt as long as they have the authority to take legal action on the object of the Mortgage when it is registered, thus the legal subject is also referred to as the Provider of the Mortgage.²⁷

The control over the land used as collateral for the Mortgage remains in the hands of the Mortgage Provider. This is due to the fact that Mortgage as the vessel

²⁵ Boedi Harsono, *Himpunan Peraturan-Peraturan Hukum Tanah* (Djambatan 2002) 45.

²⁶ Arkisman and Nandatama Ayu Lafitri, "Kepastian Hukum Sertipikat Hak Tanggungan Elektronik Dalam Hukum Pembuktian di Peradilan Menurut Hukum Acara Perdata", (2020) 9 Jurnal Pro Hukum 2.

²⁷ Purwahid Patrik, *Asas-Asas Itikad Baik Dan Kepatutan Dalam Perjanjian* (Badan Penerbit UNDIP 1986) 62.

of guaranteeing land rights does not have the authority to physically control the land that is used as collateral, except in the circumstances provided in the Mortgage Law Article 11 paragraph (2). In debts that can be used as debtors are Banks or non-bank financial institutions, individuals or other legal entities. Mortgage rights holders can be made by Indonesian nationals, Indonesian legal entities, foreign nationals and or foreign legal entities can be holders of Mortgage Rights.²⁸

The Mortgage Law Article 11 paragraph (1) regulates aspects that must be included in the Deed of Granting Mortgage in order to fulfill the principle of specialization of the mortgage rights.²⁹ There will be legal consequences if these aspects are not listed. The said aspects are to be included in the Body of the Mortgage Law as one of the articles or paragraphs, not merely in the explanation section.³⁰

The provisions of Article 20 paragraph (1) of the Mortgage Law which state that if the debtor is in breach of contract, hence:

- 1) The right of the first Mortgage holder is to sell the object of the Mortgage as referred to in Article 6, or
- 2) The executorial title contained in the Mortgage Certificate as referred to in Article 14 paragraph (2), (Article 20 paragraph (1) UUHT).

The initial form of Mortgage is *cum creditore*. The position of recipient of the Mortgage is said to be the proper owner because the transfer of their property rights is also carried out properly.

b. Execution of Mortgage Rights

Legal protection for creditors as Mortgage holders is found in the provision of Article 6 of the Mortgage Law. In the said Article, it is regulated that creditors can sell the assets of the debtor at auction and take repayment of their receivables from the proceeds of the sale if the debtor is in breach of contract. The bank as the creditor holding the first Mortgage has the right to sell the object of the Mortgage on its own power through a public auction. The direct execution of the collateral through this auction is one of the attractions of the Mortgage Law since the process

²⁸ Purwahid Patrik (n 14) 62.

²⁹ Patrik and Kashadi (n 12) 66–68.

³⁰ Patrik and Kashadi (n 12) 144.

is much faster than the general civil procedure. The mortgage gives a primary position to certain creditors over other creditors.

In the implementation of bankruptcy, the parties are guided by the legal basis which has the function of providing the most beneficial rights. The creditor holding the Mortgage Rights is a separatist creditor, which means that the implementation of the settlement of the debt is separated from the bankrupt property for a period of time. This is as regulated in the Law on Bankruptcy and Suspension of Debt Payment Obligations Article 56 and Article 59.

When there are debts that are not guaranteed by Mortgage Rights, the creditor is enabled to sue the debtor under the applicable Civil Procedural Law. However, its completion would be long and costly. One of the characteristics of a mortgage guarantee is ease and certainty in its execution. There are three ways of implementing the execution provisions on Mortgage Rights, including:³¹ Executorial Title, Parate Executie, and Underhand Execution.

The submission of an execution application submitted by the Mortgage holder is the basis for the District Court to give a reprimand to the Mortgage provider in the implementation of the auction based on the executorial title. After that, the bailiff of the District Court shall carry out the confiscation in accordance with the terms and procedures as regulated in Article 197 HIR which will then be issued a Stipulation of Auction which will then be submitted to the Auction Office.

The District Court is located as the seller with the issuance of an Auction Decision which is then submitted to the Auction Office.³² The results of the auction will be submitted to the District Court, which is then submitted to the execution applicant/Mortgage holder. If there are still remains of the execution, then they must be submitted to the respondent for execution.

Bank of Indonesia Regulation No. 14/15/PBI/2012 Article 46 paragraph (1) letter b describes the Asset Quality Assessment of Commercial Banks. The valuation in question is a written statement from an independent appraiser or an internal appraiser of the Bank regarding the estimation and assessment of the economic value of the collateral based on an analysis of objective and relevant

³¹ Law No. 4 of 1996 on Mortgage on Land and Objects Related to Land art. 20; *Herzien Inlandsch Reglement* (HIR), Article 224. *Rechtreglement voor de Buitengewesten* (RBG) art. 258.

³² M Yahya Harahap, *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata* (Sinar Grafika 2014) 128.

facts according to generally accepted methods and principles established by the association and or the authorized institution. Thus, it is through this provision that the debtor gets a guarantee of the value of their collateral.

Legal protection for other debtors is by doing roya parsial as a deviation from Article 2 paragraph (1) of the Mortgage Law. The authority given by the owner in encumbering their property rights with limited material rights (*jura in re aliena*), but what is charged is only all material rights that belong to them.³³

The following legal protection for debtors is in the Mortgage Execution auction. The Auction Office is obliged to notify the debtor in advance regarding the existence of an auction application. The debtor must know in advance that the object of the mortgage guarantee on the loan will be auctioned before the auction is carried out.

The determination of the limit value in the execution auction is also part of the legal protection for debtors. The limit value that has been determined must be included in the auction announcement. The holder of the first Mortgage cannot also purchase the collateral through auction even though in the Regulation of the Minister of Finance of the Auction Implementation Instructions Article 70 it is stated that creditors can also buy, this is because the purchase of collateral itself is carried out by the creditor of the government bank at the auction which determines the Limit Value by the approval from the Court or the interference of the State Receivable Affairs Committee.³⁴

The final legal protection for the debtor in the Execution Auction is after the auction is carried out and the auction price is paid by the buyer, the net proceeds from the auction will be deposited by the Auction Hall no later than 3 (three) days from the date of receipt of payment for the auction from the buyer, and if there are still some remains after the auction price is paid to the creditor, then the remains are to be given back to the debtor.³⁵

³³ Kartini Muljadi and Gunawan Widjaja, *Seri Hukum Harta Kekayaan: Hak Tanggungan* (Kencana 2005) 160.

³⁴ Sianturi (n 25) 81–82.

³⁵ Maria Stephannie Halim, "Perlindungan Hukum Terhadap Pemilik Jaminan Dalam Lelang Eksekusi Hak Tanggungan" (2018) 1 Jurnal Hukum Bisnis Bonum Commune.

3. The Role of the Notary and the Government Regulation in the Formation of Mortgage Rights

a. Procedure for Formation of Mortgage Rights

The registration of mortgage rights is carried out by completing all the data required in the formation of the said mortgage. The Land Office will then produce a land book which serves as the mortgage. The Land Office will record the formation of the mortgage right into the land book of the land title that is the object of the mortgage. Then, the minutes on the formation of the mortgage are copied to the certificate of the said land rights.

In the Mortgage Certificate, there are provisions that are specifically intended to confirm the existence of executorial power in the Mortgage Certificate. This is designed so that in the event of the debtor committing default, the debtor is deemed ready for the mortgage guarantee to be executed. As is the case with a court decision that has obtained permanent legal force, through procedures and by using a parate executie institution in accordance with the provisions of the Civil Procedure Code.

In terms of proving that there is a formation of mortgage right, the certificate of mortgage that has been issued by the Land Office can be used as valid legal evidence, proof that it is true that the formation of mortgage right is based on the date of recording or registration of mortgage right which is included in the land book of Mortgage. On this basis, it can be seen and proven from when the object of the mortgage is used as debt security.³⁶

The mechanism for registering electronic mortgage services is by:

- 1) The parties go to the office of the Land Deed Making Officer (PPAT) to make the Principal Agreement in the form of a Deed of Credit Agreement, followed by the Additional Agreement, namely the Deed of Granting Mortgage Rights (APHT);
- 2) Before the agreement between the two parties is enforced, the Land Deed Making Officer (PPAT) will conduct initial check on the certificate of the mortgaged land in the land information service;
- 3) The signing of the Deed of Granting Mortgage (APHT) at the Office of the Land Deed Maker (PPAT);

³⁶ Boedi Harsono and Sudarianto Wiriodarsono, "Konsepsi Pemikiran tentang UUHT", 27 May 1996, Bandung, 17.

- 4) The Land Deed Maker Official (PPAT) which has become a registered user in the National Land Agency Partner (BPN) electronic system, will input the data on the Deed of Granting Mortgage (APHT) and upload the Deed of Granting Mortgage (APHT);
- 5) The system will issue a cover letter for the deed;
- 6) Creditor which have also become registered users apply for mortgage registration through the electronic mortgage system (HT-el);
- 7) Creditors complete the necessary requirements and provide a statement regarding the accountability for the validity and the authenticity of the submitted electronic documents;
- 8) Creditor obtains proof of registration and then makes the payment for Non-Tax State Revenue (PNBP);
- 9) The Land Office inspects the submitted electronic documents submitted while the National Land Agency issues the Mortgage Certificate;
- 10) Creditors can print certificates that have been issued by the system as well as print and paste a mortgage note sticker on the certificate of mortgage object.

The arrangements regarding the use of a Power of Attorney for Imposing a Mortgage are explainable as follows:³⁷

- 1) The Power of Attorney for Imposing a Mortgage must be made with a Notary Deed or a Land Deed Official Deed with the following provisions:
 - a) The power given is only to form the Mortgage Rights, not to carry out other legal actions;
 - b) Does not provide the power of attorney with substitution rights;
 - c) The object of the mortgage, the amount of debt, the name and identity of the creditor, the name and identity of the debtor or other provider if the debtor is not the provider of the Mortgage are clearly stated;
 - d) The power of attorney granted cannot be withdrawn nor terminated for any reason unless the power of attorney has been exercised or because the time period has expired.
- 2) The power of attorney to impose Mortgage on land rights that have been registered must be followed by making APHT no later than 1 (one) month after being granted.

³⁷ Law No. 4 of 1996 on Mortgage on Land and Objects Related to Land, art. 15.

To fulfil the principle of specialization in Mortgage, Article 11 paragraph (1) of the Mortgage Law explains that the Deed of Granting Mortgage must include the following:

- 1) Complete identity and name of the provider as well as the holder of Mortgage;
- 2) Domicile of the provider and holder of Mortgage;
- 3) Clear designation of the debts that are pledged as collateral, as well as the full name and identity of the debtor concerned;
- 4) Guaranteed Value;
- 5) The object of the mortgage must be described clearly.

Not all land rights can be used as collateral for the debt. The conditions that must be met so that land rights can be used as collateral for debt are as follows:³⁸

- 1) It is valuable to a certain amount of money;
- 2) It is including the rights listed in the general register since they must meet the publicity requirements;
- 3) It can be transferred, considering the possibility of default by the debtor, hence the object used as collateral for the debt can be sold in public; and
- 4) Requirements as per the law.

b. Functions of Notary/Land Deed Maker Officer in the Formation of Mortgage Right

In carrying out the duties and authorities of a Notary, a Notary has a function to facilitate and provide legal certainty to the public in civil law. Notaries must be impartial, reliable, able to maintain confidentiality, able to provide firm evidentiary guarantees, and make agreements that can protect the interests of the parties in a civil manner.³⁹ Notaries have the authority to make authentic deeds as public officials as well as other authorities as referred to in this law or other laws that are not contradictory.⁴⁰

The Notary/Official Making the Land Deed makes a deed that can show the existence of legal action between the creditor and the debtor, in other words, the deed can protect the interests of the parties and is also perfect legal evidence, thus meaning that the Notary/Official Making the Land Deed has a working relationship with the bank related to the making of authentic deeds and registration of credit

³⁸ HS H. Salim, *Perkembangan Hukum Jaminan Di Indonesia* (Raja Grafindo Persada 2004) 104.

³⁹ Sulindari Hartanti, Nisya Rifiani, *Prinsip-Prinsip Dasar Profesi Notaris*, (Dunia Cerdas 2013).

⁴⁰ Law No. 30 of 2004 on Notary Position Article 1 Paragraph 1 *j.o* Law No. 2 of 2014 on Amendment to Law No. 30 of 2004 on Notary Positions.

guarantees. The notary/Land Deed Making Officer functions to check the completeness of the files used as collateral for debtors' debts before the Bank always provides credit facilities to debtors.

The authority of the Notary/Official Making the Land Deed that must be considered and known by the Bank before the Deed of Granting Mortgage is made for the collateral to be attached to the Mortgage, among others:⁴¹

- 1) The Deed of Granting Mortgage must be made in front of the Land Deed Making Official with the provision that the location of the Mortgage object is in the working area of the Land Deed Making Official.
- 2) If there are several objects of Land Rights and they are located outside the work area of the Land Deed Making Official, it can be done merging several Land Deed Making Officials by using a Power of Attorney to impose Mortgage Rights (SKMHT).

The responsibilities of the notary for electronic certificates issued include: civil liability; administrative liability; and criminal liability. The civil responsibilities of the Notary are in the form of compensation; administrative sanctions, namely written warnings, temporarily dismissal, honorable dismissal, and dishonorable dismissal in accordance with the Notary Position Law. Criminal liability arises when a Notary commits a criminal action, hence the responsibility that arises is an individual responsibility.

E. Conclusion

The culture and the habit of the people in feeling comfortable by holding a certificate in paper form (analog) creates anxiety and fear for the community with the emergence of the Government's policy to implement an Electronic Certificate. In the implementation of Electronic Land Registration and Electronic Certificates, the Land Agency must be ready in terms of a digital-based application system so as not to cause disadvantageous for the people. There is a delay in the implementation of the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency No. 1 of 2021, the Electronic Land Certificate Registration has not been fully implemented and cannot be used as collateral for debt, so it is deemed necessary for the

⁴¹ Bayu Yhuwana "Kedudukan Kreditor Pemegang Hak Tanggungan dengan berakhirnya Hak Guna Bangunan yang menjadi Obyek Hak Tanggungan (studi pada PT. Bank Jawa Tengah Cabang Utama Semarang), (Universitas Diponegoro, 2010).

Government to review the Regulation of the Minister of Agrarian and Spatial Planning/ Head of the National Land Agency No. 1 of 2021 in terms of its implementation on debt guarantees so as not to conflict with pre-existing regulations.

The Electronic Mortgage System provides benefits for its users for its ease of registration. However, in the implementation of the registration of electronic mortgage guarantees, there are several technical obstacles experienced by users of the electronic service system, including inaccessible networks for areas where it is difficult to obtain an internet network, systems that sometimes experience glitches or crashes and systems that are not functioning properly. If the Mortgage Certificate has been issued while there is an error in filling out the data in the electronic mortgage service registration, the Electronic Mortgage Certificate can be corrected under the condition that it must be done through the electronic system no later than 30 (thirty) days from the date the Mortgage Certificate is issued. This has the potential to cause new problems, instead of making it easier, it makes it difficult for the registrant who must report the error in the data entry and the correction takes a long time.

With the involvement of a Notary in the issuance of Electronic Certificates, this role should be regulated in the future amendment of the Law on Notary Positions as well as the Law on Information and Electronic Transactions. The position of a Notary should also be recognised as a service provider in electronic transactions realm. More concrete arrangements are needed for all responsibilities of a Notary in the administrative field, civil and criminal procedures, specifically their partake in the issuance of electronic certificates. This is aimed to offer insights to the legislature and executive in forming the implemented regulations for the enforcement of mortgage guarantees in order for other regulations to adjust.

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