

**RESEARCH ARTICLE****DEBT GUARANTEE CHARGING BASED ON THE JUSTICE PRINCIPAL**Noor Saptanti^{1*} | Adi Sulistiyono¹ | Burhanudin Harahap¹ |¹Faculty of Law, Universitas Sebelas Maret**Abstract**

The purpose of this paper is to determine whether the imposition of forest guarantees is part of the risk mitigation of banks in channeling loans whether they are fair. This is important considering that the bank has issued a number of funds to borrow and must ensure that the funds are returned by the customer according to the agreed time period, so as a guarantee to bind the good faith of the customer is to impose a debt guarantee. This paper is based on a doctrinal research that uses a conceptual and statutory approach with secondary data sources. Conceptual uses justice principal, and statutory uses secondary data. The results of the research show that the law provides rights and obligations for fund providers and borrowers in a fair and measurable manner. Conceptually, justice that provides equal opportunities for the parties is also realized by a contract that is not coercive, even though the debt obligation contract is part of a complement to the lending and borrowing agreement.

Keywords: agreement, debt collateral imposition, lending and borrowing, justice

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1 | INTRODUCTION

Article 33 paragraph (4) of the 1945 Constitution states that "the national economy shall be organized based on economic democracy with the principles of togetherness, equitable efficiency, sustainability, environmental insight, independence, and by maintaining a balance between progress and national economic unity." The mean-

ing of being together in togetherness is that every member of society plays a role in carrying out and advancing economic development¹. The principle of equitable efficiency has a meaning in achieving or striving for common goals carried out economically

¹ Butt, S., & Lindsey, T. (2008). Economic reform when the constitution matters: Indonesia's Constitutional Court and Article 33. *Bulletin of Indonesian Economic Studies*, 44(2), 239-262.

and without sacrificing the interests of realizing social welfare and prioritizing social justice above individual interests. The principle of sustainability is that in creating economic governance, it is imperative that they be carried out continuously, integratedly, gradually, and in a planned manner for a long period of time. Environmentally sound in the running of the economy, it is necessary to pay attention to the condition of the community and the environment so that it can be preserved and takes into account the needs of the community. Broadly speaking, the contents of this verse mean that people's participation is also needed and helps in building the country's economy.

In fulfilling the need or expanding the business, funds are needed to assist in fulfilling the support for economic development. This business is then facilitated by the banking sector by providing loans, debt, credit or financing to the public. The implementation of the credit agreement requires the provision of a guarantee followed by a power of attorney to impose a mortgage². Institutional guarantees are important in making and implementing credit agreements in the event that the collateral is in the form of land, this letter is called a Power of Attorney to Provide Mortgage Rights (abbreviated as SKMHT). According to Habib Adjie, the mortgage guarantee institution as intended consists of 2 (two) parts, namely the material guarantee and individual guarantees. Material security is the right of the creditor to get priority to obtain repayment of the debt that takes precedence over other creditors. Personal guarantee is a guarantee that is made personally on certain debts from a debtor.³

² Altamuro, J., & Zhang, H. (2013). The financial reporting of fair value based on managerial inputs versus market inputs: evidence from mortgage servicing rights. *Review of Accounting Studies*, 18(3), 833-858.

³ Habib Adjie, (2000), *Hak Tanggungan sebagai Lembaga Jaminan Atas Tanah*, Mandar Maju, Bandung, hlm. 1.

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Collateral⁴ has the objective of being a form of security for funds lent by banks to customers, and as a requirement for complying with laws and regulations. According to Abdulkadir, that actually banks are required to ensure that the guarantee received has met the requirements of the applicable laws and regulations, so that it can be ensured that all juridical aspects related to collateral binding have been completed and will be able to provide adequate protection for the bank.⁵

Even though the agreement has been guaranteed by law in order to get the desired performance repayment, there are still risks that remain. None other than this is the essence of business which is always smeared with various types of risk threats in the form of losses. There has never been a story that a business always benefits. The ups and downs of managing a business, of course, will always occur according to internal and external influences. Therefore, when market players are about to enter into an agreement, they are obliged to rely on careful calculation of profits and losses. Fortunately, it can be achieved, the risk can be prevented as early as possible, it can only be helped by the formation of an agreement made by the parties, by setting it in the agreement clauses.⁶

Collateral charging is part of bank credit risk mitigation, however, how to mitigate this risk provides a sense of fairness to the bank and customers, will be discussed in this paper.

2 | RESEARCH METHOD

This research is a type of normative research with a statutory approach and a conceptual approach.⁷ The use of these two approaches is intended to obtain a comprehensive study of matters related to guarantee

⁴ Berger, A. N., & Udell, G. F. (1990). Collateral, loan quality and bank risk. *Journal of Monetary Economics*, 25(1), 21-42.

⁵ Abdulkadir Muhammad, (1993), *Jaminan dan Fungsinya*, Gema Insani Pers, Bandung, hlm. 27

⁶ Moh Isnaeni, (2016), *Hukum Jaminan Kebendaan Eksistensi Fungsi Dan Pengaturan*, Laks Bank PRESS Indo, cetakan I, Yogyakarta, hlm. 44

⁷ Peter Mahmud Marzuki, (2005), *Penelitian Hukum*, Prenada Media, Jakarta, hlm.93.

binding, namely in granting Mortgage Rights in the form of Power of Attorney to impose Mortgage Rights (SKMHT) and Deed of Granting Mortgage Rights (APHT), which so far have only accommodated in the form of conventional. The characteristics of this study are normative that uses secondary data sources, including Law Number 4 of 1996 concerning Land Mortgage Rights and Land-related Objects, Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 About Banking, various related regulations, journals, legal dictionaries and some of the latest relevant research.

3 | DISCUSSION

A special guarantee agreement can only be made if there is an initial agreement which has actually been guaranteed by Article 1131 of the Civil Code. The agreement which is only fortified by Article 1131 of the Civil Code is known as the principal agreement, namely the credit agreement, while the new fort as a coating built by the parties in the form of a special guarantee agreement is only in the position of an additional agreement (*accessoir*). Thus the special guarantee agreement as an additional agreement, its existence depends on the main agreement in the form of a credit agreement. Basically, this additional agreement cannot stand alone, but its existence depends on the main agreement.

Providing loan funds for the benefit of the community in the form of credit facilities provided by the bank accompanied by the provision of guarantees as a form of security for loans. Credit provided by the Bank is not given immediately⁸, it requires trust from the Bank to the customer or debtor who will receive the loan. After fulfilling the conditions determined by the Bank and approved, the loan can be disbursed and then handed over to the customer. The requirements that need to be fulfilled are administrative requirements, credit utilization requirements, cash flow, collateral or collateral requirements and others.

In order to provide a sense of security for the bank as a creditor who has distributed funds to customers,

⁸ Psillaki, M., & Eleftheriou, K. (2015). Trade Credit, Bank Credit, and Flight to Quality: Evidence from French SME s. *Journal of Small Business Management*, 53(4), 1219-1240.

collateral charges are made in the form of a Power of Attorney to Charge Mortgage Rights (SKMHT) and Deed of Granting Mortgage Rights (APHT). It's just that the imposition of mortgage rights is considered burdensome for the debtor / borrower. This is because banks by holding on to SKMHT and APHT can transfer collateral that was previously owned by the customer to become the property of the bank, due to bad credit.

A credit agreement is an obligatory agreement when it is not equipped with a material guarantee agreement to get collateral, the right to collect is only positioned as a personal right which has an individual nature of action which ultimately is only guaranteed by Article 1131 BW (*Burgelijk Wetboek*), and does not have a material claim due to not holding an object. certain as collateral. So the bank loan position is not covered by collateral.

From the material guarantee agreement made between debtors and creditors, material rights are born. If the object of the contracted object is in the form of a movable object, a lien will be born, while the contract with the object is immovable, then a Mortgage will be born. Both are classified as material security rights. In accordance with its character which is contained in Book II BW, automatically the lien and Mortgage Rights are classified as material rights.

The guarantee referred to in Article 1131 BW which is known as general guarantee, even though the guarantee that provides is a law, is still vulnerable and places creditors in an unsafe position, because they still have to scramble to get their debt paid off when the debtor's property is successfully sold. auction. It is likely that the actions of fellow creditors that are obtained do not match the amount of funds previously channeled as loans. Such uncomfortable conditions can be avoided by taking advantage of suggestions in the guarantee law by deviating from Article 1131 BW in order to get a better position.

Giving credit of course also contains risks, that is, if the borrowing party or debtor is unable to pay off the credit according to the agreement. To guarantee this credit and minimize the risk, usually the creditor will ask for a debt repayment guarantee from the debtor. Credit according to Article 1 number 11 of Law no. 10 of 1998 concerning Banking is the provision of

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money or an equivalent claim, based on a loan and loan agreement between the bank and another party which requires the borrower to pay off its debt after a certain period of time by giving bank interest. ” To guarantee creditors to repay debtors’ credit, a collateral object is required. Debt collateral can be in the form of goods as material collateral and or in the form of a debt guarantee so that it is an individual guarantee.

Security rights over land are rights that reside to the creditor concerned, which authorizes the creditor to sell land specifically designated as collateral and collect the receivables from the sales proceeds if the debtor is in default or in default. This authority is also accompanied by the right to repayment precedence over other creditors. In addition to providing a position to precede (*droit de preference*)⁹, the security right over land will also continue to burden the land which is used as collateral even though it is in the hands of whoever the land is (*droit de suite*). This land guarantee right is known as the dependency law.¹⁰

Material security in the form of giving property rights to the collateral holder (creditor) can be in the form of movable objects and immovable objects in the form of land rights. Collateral in the form of land rights to pay off a credit (debt) is called a Mortgage Rights. Mortgage rights in Article 1 number 1 of Law No.4 of 1996 concerning Mortgage Rights are collateral rights imposed on land rights as referred to in Law Number 5 of 1960 concerning Basic Agrarian Principles, following or not following other objects is an agreement with the land, for the settlement of certain debts, which gives priority to certain creditors over other creditors. It can be said that Mortgage Rights are collateral rights over land which are imposed on certain land rights to guarantee the repayment of certain debts to certain creditors whose position is prioritized in obtaining repayment of their receivables from other creditors. The process of imposition of Mortgage Rights in order to provide legal certainty according to law must be attended by

⁹ De Vareilles-Sommieres, M. Du Conflit de Creances et du Droit de Preference Entre Creanciers. Rev. Critique Legis. & Juris., 34.

¹⁰ Munir fuady,(2013), Hukum Jaminan Utang, Erlangga, Surabaya, hlm. 69

mortgage rights (HT) givers / debtors, HT recipients (creditors) to sign the Deed of Granting Mortgage Rights (APHT) before PPAT. However, there are times when it turns out that when the time for the signing of the deed is set, the party giving HT is unable to attend, then the law determines that a power of attorney to impose mortgage rights (SKMHT) to the HT recipient (Bank) can be granted.

After the issuance of Law No. 4/1996 concerning Mortgage Rights to Land and Objects related to Land /UUHT (LN 1996-42; TLN 3632). Thus the mandate of Article 51 of the UUPA has been fulfilled, that the Law on Mortgage Rights has been formed, so that the provisions on Mortgages and Credietverban are no longer valid. Article 25 of the UUHT also regulates that as long as it does not contradict the provisions in the UUHT, all laws and regulations regarding HT loading, except for the provisions regarding Credietverband and Mortgages as long as HT loading, will remain in effect until the stipulation of the implementing regulations for the UUHT and in their application with the provisions of the UUHT.⁴⁹ With the enactment of the UUHT which came into effect on April 9, 1996, the HT institution is the only institution for land security rights in the written National Land Law. The existence of HT in a debt guarantee institution is in order to provide balanced legal protection between creditors, debtors and third parties. The guarantee institution regulated in Article 1131 of the Civil Code does not provide protection to creditors, because according to this article, all assets of the debtor are guarantees for repayment of debts to all creditors. If the proceeds from the sale of the debtor’s assets are not sufficient to pay off the receivables of all creditors, then each creditor will only receive a balanced payment in accordance with the amount of the debtor. If it turns out that the entire debtor’s assets have transferred to another party, it is no longer a guarantee for the repayment of the creditor’s receivables.¹¹

Mortgage rights provide balanced protection to creditors, debtors and HT givers. Even to third parties whose interests can be affected by the method of

¹¹ Boedi Harsono, (2003), Hukum Agraria Indonesia, Sejarah Pembentukan Undang-Undang Pokok Agraria Isi Dan Pelaksanaannya,Djambatan, Jakarta, hlm 418

settlement of creditors and debtors, in the event the debtor is in default. The third party in this case is particularly the other creditors who buy the HT object. However, HT does provide protection to creditors and special positions to certain creditors. The privileged position of creditors holding Mortgage Rights (HT) are:

1. The creditor is given the main right to preempt the settlement of the receivables from the other creditors if the debtor is in default (Droit De Preference). In the debt and receivable (credit) agreement, the creditors holding HT are given priority to receive payment of their receivables from other creditors from the sale of HT Objects, if the debtor is in default or defaults on payment. However, the position of the pre-emptive right does not reduce the preference for the State's receivables according to the applicable legal provisions.

2. The Mortgage Rights burden the HT object in the hands of whoever the object is in (Droit De Suite), that is, the creditor holding the HT is still entitled to sell the HT object auction, even if the right has been transferred to someone else, if the debtor fails to promise.

3. If the HT grantor is declared bankrupt, the creditor HT holder is still authorized to do everything he gets according to the UUHT. The HT object is not included in the bankruptcy bill, before the creditor takes the payment of the debt from the HT object sale. Those who are declared bankrupt are the HT grantor, namely the party who appoints his assets as collateral. In this case the HT Giver is not always a debtor as the party in debt, but it can also be another party.

4. The nature of the Mortgage can not be divided (asa ondelbaarheid). This characteristic gives the creditor a special position, so the nature of HT cannot be divided, if it is imposed on more than one HT object. HT will burden each HT object in full, if the credit is paid off in installments then HT will still burden each object for the remaining outstanding debt. However, in practice this principle can be deviated and must be mentioned in the Deed of Authorization.

5. Easy and sure in the execution. For creditors holding HT, a special method is provided which is regulated in Article 20 UUHT, namely to use their

right to sell HT objects through a public auction based on Article 6 of the UUHT or by using a "parate executie" based on Articles 224 RIB and 158 RRBg. You can even do sales under your hands. In the case of a debtor in default, there is no need to take the usual civil action method, which is time-consuming and costly.

6. Legal protection for the interests of creditors holding HT is the certainty of HT's date of birth. The birth of HT is the date of the seventh day after receipt of complete documents required for registration and if the seventh day falls on a holiday, the land book concerned shall be given the date of the next working day.

The legal protection given to debtors, HT givers and third parties is also considered in the UUHT, namely:

1. Give HT with an authentic deed. The authentic deed requirements are to provide a balance of privileges given to creditors holding HT who dorit de preference and droit de suite. For this reason, requirements are given for the validity of HT imposition, namely: First, the granting of HT must be done with an authentic deed, in this case the Deed of Granting Mortgage Rights (APHT) which is made by an appointed official, namely the Land Deed Making Official (PPAT). Second, the obligation to fulfill the special conditions. These requirements must be stated clearly and in detail in the APHT, apart from the name, identity and domicile of the creditor and HT provider, it must be clearly and clearly stated which receivables are guaranteed and the amount or value of the dependents. This means that there must be a clear and definite description of the objects that are designated as HT objects.

2. Fulfillment of Publicity requirements. The HT giver is obliged to register the HT to the Regency / City Land Office where the HT dam object is recorded in the HT Land Book, so that the assignment of land objects with HT by the HT authority and the HTT recipient is known by the interested parties. Registration of HT to the Land Office is open to interested parties, including data on HT. This also provides certainty regarding the birth of HT for the parties,

3. Promises that were forbidden. In providing protection to the HT giver, it is prohibited to give HT

with a promise, that if the debtor fails the creditor's promise because the law will become the owner of the HT object. If there is such a promise, it is null and void by law.

4. Protection for other HT givers, namely provisions regarding HT removal, HT cleaning, roya or removal of HT and under-hand sales (Articles 18, 19, 20 and 22 UUHT) are in order to provide protection to HT givers and HT object buyers.

The function of the guarantee of mortgage is legal certainty for the bank as the creditor if one day the debtor defaults or fails to pay his debt according to the agreed date¹². When the debtor is unable to pay off his debt to the bank, the collateral can be disbursed or executed to cover the repayment of the debtor's debt. For the guarantee of the mortgage, the creditor only has the right to the debt that has not been paid by the debtor, whether the debt mentioned in the agreement or debt that arises in the future after the loan agreement is made, if after the creditor's debt is paid off and there is still a remainder of the result of the execution of the guarantee of the security right it will be returned to the debtor. The authority to sell collateral for security rights is contained in Article 6 of the Mortgage Rights Law No. 4 of 1996. Article 6 of the Mortgage Rights Law No. 4 of 1996 states "If the debtor is in default, the holder of the first mortgage has the right to sell the object of the mortgage. on his own power through a public auction and collect the receivables from the proceeds from the sale."

The procedural justice theory was put forward by John Rawls¹³. Through a procedural theory of justice, it is hoped that it will be able to guarantee the implementation of rights and at the same time distribute obligations fairly for all people so as to realize peace, order and fairness in a complete and comprehensive manner¹⁴. "justice as fairness". Rawls argues that liberty and equality can be combined in one principle

¹² Ouazad, A., & Kahn, M. (2019). Mortgage finance in the face of rising climate risk. NBER working paper, (w26322).

¹³ Thibaut, J., Walker, L., LaTour, S., & Houlden, P. (1973). Procedural justice as fairness. *Stan. L. Rev.*, 26, 1271. See also the main book Rawls, J. (2020). *A theory of justice*. Harvard university press.

¹⁴ Jonathan Wolff, (1996), *An Introduction to Practical Philosophy*, Oxford, Oxford University Press.

of justice. Namely: "everyone has the same rights to basic freedoms, and if there is injustice then the people who are left behind must be benefited by it". This is a principle which must be embedded in social institutions if social justice is to be truly realized. "Justice is the first virtue of social institutions, as truth is of systems of thought"¹⁵.

Based on this theory, there has actually been an even distribution of rights and obligations between creditors and debtors. Indeed, there is a different original position between the customer and the bank, but the difference in the original position is canceled when the customer signs an agreement in the agreement for accounts payable and the imposition of mortgage rights. The bank's obligation is to provide the amount of funds needed by the customer, and the customer's obligation is to pay it according to the agreed time period.

4 | CLOSING

The imposition of mortgage rights through SKMHT or APHT is part of the bank's efforts as a provider of loan funds to ensure that borrowing customers return the funds according to the agreed time period. The legal certainty provided by the SKMHT function law is a special power of attorney that is only made if the HT grantor is unable to attend the charging of HT, not an SKMHT institution which must always be made in every HT guarantee such as SKMH in a mortgage. In the use of SKMHT, it should be strictly in accordance with the provisions of the law, so that it will provide more guarantee for legal protection to HT holders. There are still many debt-receivable agreements in the practice of providing guarantees of land rights only up to SKMHT, except for certain legal actions specified in statutory regulations. The dissemination of the UUHT should always be carried out for credit-giving institutions. Creditors always get legal certainty and legal protection by holding HT certificates.

¹⁵ John Rawls, (1985), 'Justice as fairness political not metaphysical' *Philosophy and Public Affairs* 14.

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