PRINSIP HAK KEBENDAAN DALAM LEMBAGA JAMINAN HAK TANGGUNGAN

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**MORTGAGE; MATERIAL RIGHT**
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## RINGKASAN
## PRINSIP-PRINSIP HAK KEBENDAAN
## DALAM LEMBAGA JAMINAN HAK TANGGUNGAN

Beban kredit macet atau *non performing loan* (disingkat NPL) menjadi salah satu faktor penentu kesehatan bank, sedangkan kesehatan bank akan turut mempengaruhi perekonomian pada umumnya. Sesuai undang-undang perbankan, maka bank dalam memberikan fasilitas kredit harus mempunyai keyakinan bahwa debitor mempunyai kemampuan untuk membayar kembali hutangnya. Selain itu, bank juga memerlukan jaminan kebendaan (*collaterral*) tertentu, misalnya bangunan gedung yang dewasa ini bisa lebih bernilai daripada harga bidang tanahnya.

Pasal 51 Undang-Undang RI Nomor 5 Tahun 1960 tentang Peraturan Dasar Pokok-Pokok Agraria (disingkat UUPA) yang merupakan hukum tanah nasional telah menyediakan lembaga jaminan kuat yang dapat dibebankan atas tanah, yaitu Hak Tanggungan sebagaimana kemudian diatur dalam Undang-Undang RI Nomor 4 Tahun 1996 tentang Hak Tanggungan Atas Tanah Beserta Benda-benda Terkait Dengan Tanah (disingkat UUHT) yang diundangkan pada tanggal 9 April 1996, untuk mengganti lembaga *hypotheek* dan *credietverband*. Sebagai derivasi hukum tanah nasional, UUHT meresepsi asas hukum Adat terutama asas pemisahan horisontal (*horizontale scheiding beginsel*), dan oleh karenanya juga hanya membedakan benda menjadi benda tanah dan benda bukan tanah. Hak Tanggungan adalah lembaga jaminan yang obyeknya benda tanah, dan --sesuai ketentuan Pasal 4 ayat (1) UUHT-- tanah-tanah Hak Milik (disingkat HM), Hak Guna Usaha (disingkat HGU), Hak Guna Bangunan (disingkat HGB), maupun Hak Pakai, dapat dibebani Hak Tanggungan. Selain itu, Pasal 47 ayat (5) Undang-Undang RI Nomor 20 Tahun 2011 Tentang Rumah Susun (disingkat UURS) menyatakan bahwa Sertipikat Hak Milik Satuan rumah Susun (disingkat SHM Sarusun) dapat dijadikan jaminan utang dengan dibebani Hak Tanggungan.

Pembebanan Hak Tanggungan dapat dilakukan atas benda tanah saja, atau berikut benda bukan tanah (antara lain bangunan gedung) yang merupakan satu kesatuan dengan benda tanah yang bersangkutan. Namun pembebanan Hak Tanggungan atas benda bukan tanah itu harus dinyatakan secara tegas dalam Akta Pemberian Hak Tanggungan (disingkat APHT), sebab perbuatan hukum menyangkut tanah tidak dengan sendirinya membawa akibat hukum terhadap benda bukan tanah. Selain itu, apabila benda tanah dan benda bukan tanah tersebut dimiliki oleh pihak-pihak yang berbeda, maka kedua-duanya (pemegang hak atas tanah maupun pemilik benda bukan tanah) harus bersama-sama menandatangani APHT, sebagaimana diatur dalam Pasal 4 ayat (4) dan ayat (5) UUHT.

Hak Tanggungan mempunyai ciri-ciri hak kebendaan yaitu selalu mengikuti bendanya (*het zaakgevolg*) sehingga akan senantiasa dapat dipertahankan di tangan siapapun bendanya

berada, karena Pasal 7 UUHT telah melekatkan asas *droit de suite*. Karakter *droit di suite* tersebut membawa implikasi sebagai berikut. *Pertama* Hak Tanggungan --sebagai hak kebendaan-- lahir dari suatu perjanjian kebendaan, dalam hal ini APHT. Oleh karena itu wajar kalau bank sebagai kreditor telah
x xi menerima pemberian Hak Tanggungan, mengharap bisa sedini mungkin mendapat perlindungan kuat dari daya kerja kebendaan (*zakelijk werking*) dari karakter *droit de suite*. *Kedua*, Hak Tanggungan senantiasa mengikuti dan harus tetap bisa dipertahankan di tangan siapapun bendanya berada. Dengan demikian, dalam hal agunannya berupa tanah HGB berikut bangunan gedung, maka wajar pula apabila pemegang Hak Tanggungan sangat berkepentingan atas tetap bekerjanya karakter *droit de suite* tersebut agar hak jaminan yang telah diperolehnya akan bisa dipertahankan (terutama terhadap bangunan gedung), ketika jangka waktu hak atas tanahnya berakhir. Semua ini agar benda agunan tidak jatuh sebagai jaminan umum bagi kreditor konkuren sebagaimana dimaksud dalam Pasal 1331 KUHPerdata. Perlindungan UUHT yang diharapkan oleh bank sebagai kreditor tersebut bisa terhambat oleh sita eksekusi (*executoriale beslag*) atau sita jaminan (*conservatoir beslag*) yang --atas permohonan kreditor konkuren-- diletakkan oleh pengadilan. Upaya hukum perlawanan pihak ketiga (*derden verzet*) yang ditempuh bank sebagai kreditor, ternyata juga pernah tidak berhasil. Putusan Mahkamah Agung RI Nomor 476 K/Pdt/2008 tanggal 9 Juni 2008 memutuskan "menolak" gugat perlawanan pihak ketiga yang diajukan sebuah bank swasta nasional besar serta menyatakan sah penyitaan eksekusi yang diletakkan oleh Pengadilan Negeri Makasar terhadap obyek APHT berupa benda tanah (HM) berikut benda berikut bangunan gedung. Akibatnya, bank tersebut gagal menjadi pemegang Hak Tanggungan, meskipun APHT sudah ditandatangani dan uang fasilitas kredit sudah ditarik oleh debitor. Selain itu, putusan Mahkamah Agung RI Nomor 7 K/Pdt/2000 tanggal 24 Agustus 2004 menjatuhkan putusan yang menyatakan bahwa *derden vezet* yang diajukan oleh bank BUMN ternama "tidak dapat diterima" (*niet onvankelijk verklaard*) serta menyatakan sah sita jaminan yang diletakkan Pengadilan Jakarta Pusat terhadap benda agunan ex obyek Hak Tanggungan berupa benda tanah (HGB) berikut bangunan gedung. Akibatnya, bank tidak dapat mempertahankan hak jaminan (terutama terhadap bangunan gedung), serta tidak dapat membebankan Hak Tanggungan baru, padahal hutang debitor belum dilunasi. Fakta bahwa karakter *droit de suite* Hak Tanggungan tidak mempunyai daya kerja dalam menghadapi sita eksekusi ataupun sita jaminan itulah yang menjadi obyek penelitian ini. Inkonsistensi dalam penerapan prinsip hak kebendaan --tak terkecuali prinsip pemisahan horizontal dan prinsip *droit de suite*-- merupakan penyebab terjadinya kekeliruan penormaan asas-asas yang bersangkutan, sehingga beberapa ketentuan dalam UUHT pun menunjukkan kelemahan. Pasal 13 ayat (5) UUHT menyatakan bahwa Hak Tanggungan lahir pada tanggal buku tanah Hak Tanggungan, sedangkan tanggal buku tanah itu sendiri --menurut Pasal 13 ayat (4) UUHT-- adalah hari ketujuh terhitung sejak syarat-syarat pendaftarannya dinyatakan lengkap oleh kantor pertanahan. Ketentuan-ketentuan ini menimbulkan fase kosong (vakum) Hak Tanggungan minimal selama tujuh hari, yaitu antara tanggal APHT dengan tanggal buku tanah Hak Tanggungan. Padahal, suatu hak kebendaan (termasuk Hak Tanggungan) lahir dari perjanjian kebendaan (dalam hal ini APHT), sehingga mestinya tanggal buku tanah Hak Tanggungan tersebut harus sama dengan tanggal APHT. xii Selain itu, Pasal 18 ayat (1) huruf d UUHT, yang menyatakan bahwa Hak Tanggungan hapus karena hapusnya hak atas tanah, antara lain dalam hal masa berlaku atau jangka waktu hak atas tanahnya berahir. Ketentuan ini juga menimbulkan fase kosong Hak Tanggungan antara tanggal berakhirnya masa berlaku atau jangka waktu hak atas tanah yang bersangkutan hingga tanggal pembebanan Hak Tanggungan baru. Kreditor kehilangan kedudukannya

sebagai pemegang Hak Tanggungan, baik terhadap benda tanah maupun terhadap bangunan gedungnya. Padahal asasnya, suatu hak kebendaan (termasuk Hak Tanggungan) akan senantiasa mengikuti bendanya (tak terkecuali yang berupa bangunan gedung) di tangan siapapun benda tersebut berada. Fase kosong Hak Tanggungan itulah yang memberi peluang diletakkannya sita eksekusi oleh Pengadilan Negeri Makasar, maupun sita jaminan oleh Pengadilan Negeri Jakarta Pusat sebagaimana dimaksud dalam kedua contoh kasus terurai di atas. Sita eksekusi yang diletakkan oleh Pengadilan Negeri Makasar terhadap obyek APHT, menjadi penghambat bank dalam memperoleh kedudukan sebagai pemegang Hak Tanggungan. Sedangkan sita jaminan yang diletakkan oleh Pengadilan Negeri Jakarta Pusat terhadap agunan ex obyek Hak Tanggungan, menjadi penghambat bank dalam memperoleh Hak Tanggungan baru guna mempertahankan kedudukan sebagai pemegang Hak Tanggungan. Kesimpulan : a. Hak Tanggungan adalah hak jaminan kebendaan yang telah lahir pada tanggal APHT. Antara tanggal pendaftaran dengan tanggal APHT tidak boleh ada rentang waktu. Rumusan Pasal 13 ayat (5) UUHT bertentangan dengan prinsip bahwa hak kebendaan lahir dari suatu perjanjian kebendaan. Selain itu, penormaan prinsip publisitas dalam Pasal 13 ayat (4) UUHT, tidak tepat. b. Ketentuan Pasal 18 ayat (1) huruf d UUHT bertentangan dengan prinsip pemisahan horizontal, dan tidak mencerminkan adanya prinsip hak kebendaan (khususnya prinsip *droit de suite*) dalam lembaga jaminan Hak Tanggungan. c. Sita eksekusi *(executoriale beslag*) ataupun sita jaminan *(conservatoire beslag*) oleh kreditor lain, tidak membawa akibat hukum terhadap obyek Hak Tanggungan. Saran : a. Pasal 13 ayat (4) UUHT harus diubah menjadi : "Tanggal buku tanah Hak Tanggungan adalah tanggal APHT". Kemudian Pasal 13 ayat (5) UUHTdapat disesuaikan dengan perubahan Pasal 13 ayat (4) UUHT tersebut menjadi : "Hak Tanggungan lahir pada tanggal APHT". b. Ketentuan Pasal 18 ayat (1) huruf d UUHT harus diubah menjadi : "Hapusnya Hak Tanggungan karena hapusnya hak atas tanah tidak menghapus hak jaminan yang dibebankan atas benda bukan tanah, kecuali hutang debitor sudah


## SUMMARY

## MATERIAL RIGHT PRINCIPLES ON A MORTGAGE

Non performing loan charge is one of the determinants in bank health which will influence the economy in general. According to banking law, bank giving credit facilities must have faith that debtor is capable in returning his debt. Nevertheless, the bank also needs certain collateral, such as the building, which recently becomes more valuable than its land's price. Article 51 of Law Number 5 of 1960 on Agrarian Principle Regulation, a national law on land, has provided a strong guarantee establishment that can be encumbered on land, that is a Mortgage, as stipulated in Law Number 4/1996 regulated on April 9,1996 to replace hypotheek and credietverband establishment.

As national law on land derivation, the Law Number 4/1996 perceives Custom law principal especially horizontale scheiding beginsel. Therefore, it differentiates object into land and non-land object. Mortgage is a security right over right of land and according to Article 4 No 1 Law Number 4 of 1996- the land of which has the right of ownership, right to cultivate, right to build, and right of use of land can be placed by Mortgage. Charge mortgaging can be encumbered on land, along with or without other properties that constitutes a unity with such land. however, charge mortgaging on non land object must strictly state in the Deed of Granting Mortgage for legal action upon land doesn’t result in

law consequences on non land object vice versa, both must sign the deed in accordance with the Article 4 No 4 and 5 of Law Number 4 of 1996.

Mortgage has material right's characteristic, het zaakgevolg, defendable from any body referring to Law Number 4 of 1996 in Article 7 of *droit de suite* principal, such characteristic implied the followings. Firstly, Mortgage as material right is derived from material agreement of the Deed of Granting Mortgage. As a result, it is proper for banks. As creditor, to receive Mortgage granted. It was expected as early as possible to obtain strong protection from zakelijk working of *droit de suite*. Secondly, Mortgage has *droit de suite* characteristic. So, related with collateral of land with the right to build, along with the building, it is proper

xiiixiv that banks have the immediate interests on the application of *droit de suite*. In order to maintain its security right (especially on the building) on the time agreed, on deadline of rights on land is over. So that the collateral object won't fall as general guarantee for concurrent creditor in accordance with Article 1331 of Civil Law. Law Number 4 of 1996 protection expected by bank as credits can be hindered by executoriade beslag or conservatoir beslag creditor concurrent application by decision of court. Legal action on third party (derden verzet) by the bank as creditor, has ever been unsuccessful. The Indonesian Supreme Court decree No 476 K/Pdt/2008 on June 9 2008 declared to "refuse" legal action on third party conducted by a big private national bank and legalize execution foreclosure by Makassar District court on the Deed of Granting Mortgage object in the form of land with right of ownership along with object and building. As a result the bank failed to be the Mortgage holder, though the deed is agreed and money of credit facility has been drawn by debtor. Moreover, such decree by The Indonesian Supreme Court no 7K/Pdt/ 2000 on August 24, 2004 declared that the decree stating derden vezet proposed by well known governmental bank was not only unacceptable (niet onvankelijk verklaard) but also legalized guarantee foreclosure by District court of Central Jakarta on collateral, formerly as Mortgage object on land, with right to build along with the building. So that bank won't be able to defend security right (especially on the building) and also can encumber new mortgaging, though the debt loan is not yet paid. The fact that *droit de suite* characteristic of Mortgage don't have working power over either execution or guarantee foreclosure that become the object of this study. Inconsistency in applying the principle --including splitting horizontal-- is the reason for the norming mistakes with related principal, so several enactments in Law Number 4 of 1996 on Mortgage of land along with properties related to the land indicated weaknesses. Article 13 No 5 in it stated that Mortgage is born on date of Mortgage's land book, while that of land book itself-subject to Article 13 No 4 Law on Mortgage is within 7 days after completing registration requirement by the land office. These can cause vacuum Mortgage 7 days in minimum, between the date of the Deed of Granting Mortgage and that of land book of Mortgage. Even though, its principal, a material right (including Mortgage) was from material agreement, that is the Deed of Granting Mortgage, which should have the same date. Besides, Article 18 No 1 d of Mortgage law stipulated that Mortgage is over due to the abolishment of right to land, 3sum which is in case of validity period or time line of right to land ends. Such enactment also created vacuum Mortgage between the deadline or time line of its right to land and date of new charge mortgaging. Bank lost its position as Mortgage holder separated creditor either toward land object or its building. Though the basis is that a material right (including Mortgage) has *droit de suite* characteristic no exception in the form of building. Conclusion : Article 13 No 4 and Article no 18 point 1d on Law number 4 on 1996 on Mortgage were the cause of Mortgage vacuum which eventually gave opportunity to put foreclosure on mortgage object. Revision is needed for those articles. Suggestion. Article no 13 point 4 on Law on Mortgage should be changed into "land office shall record Mortgage

registration in land book of Mortgage on the date of the Deed of Granting Mortgage". Whereas, Article no 18 point 1d Law no4/1996 shall be added a sub clause "except for the building encumbered separated security right " .nevertheless, when there is no revision, bank would better not approving credit facility before receiving original Mortgage certificate, and not granting the credit within time line overdue the validity period of the right to land.

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## ABSTRACT

## MATERIAL RIGHT PRINCIPLES ON A MORTGAGE

This study is entitled the implication of material right characteristic on Mortgage. Article number 1 point 1 in Law No 4/1996 on Mortgage of Land along with Properties Related to the Land states that Mortgage is a security right over right of land, along with or without other properties that constitutes a unity with such land, for the settlement of certain debts, which gives the preferred position to certain creditors against other creditors. Referring to this enactment of Law No 4/1996, Mortgage has reserved one of the material right's characteristics, that is *droit de preference*, so that the Mortgage holder obtains the preferred position against other creditors.

Mortgage is projected as a strong security establishment which is capable to grant the permanent legal power for interested parties as stated in a considerant Law No 4/ 1996. Therefore, Article 7 of Law No 4/ 1996 also encumbers other characteristics of that of prime

material right, *droit de suite* characteristic. It is implied that Mortgage becomes an absolute security establishment (two ways), is always defendable and shall follow the object, whoever holds it. It is expected that *droit de suite* characteristic is capable of protecting the Mortgage holder creditor from other creditor's disturbances who has interest on the guaranteed object, either land or non-land, i.e. the building.

However, concurrent creditor is still able to find opportunities to put foreclosure on the object. Cases revealed in this study showed that banks can fail to be the Mortgage holder, or lost their position as separated Mortgage creditor holder hindered by foreclosure. It was caused by the inconsistency in norming *droit de suite* principal. Article 13 No 4 and Article 18 point 1 d in Law No 4/1996 on Mortgage open the opportunity in the vacuum Mortgage occurrence which makes putting foreclosure on the guaranteed object possible. Article 13 point 4 of Law Number 4 of 1996 created a vacuum Mortgage conducted by the land conveyancing officer within a period not later than 7 business days after the signing date with the date of the Mortgage land book. In addition, Article 18 No 1d of Law Number 4 of 1996 created longer vacuum phase of due date of right to land to new Mortgage encumbered date.

This study aimed to find unite concept of the Deed of Granting Mortgage date with the date of book land. It was also intended to find encumbered security right of building. not subject to charge mortgaging on land object. Moreover, it was also to find a concept of avoiding foreclosure by concurrent creditor of guaranteed object. Therefore, some Articles in Law Number 4 of 1996 on Mortgage of Land along with Properties Related to the Land are needed to revise.

*Keywords: vacuum Mortgage, foreclosure in, paralyzed Law Number 4 of 1996.*