

the Legal Protection for the Implementation of Auctions and Execution of Collateral Rights is Related to Law Number 4 Of 1996 About Collateral Rights on Land and Related Assets

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Abstract

This study employs the Juridical Normative research method. Therefore, the legal research in this study encompasses academic legal research that includes normative and doctrinal aspects to address various legal issues that are raised. The approaches used in this research are the statutory approach, conceptual approach, case approach, and historical approach. The implementation of legal protection for debtors and creditors regarding the Guarantee Rights of Collateral from the execution of Auctions and Executions that disregard legal regulations, namely Law No. 4 of 1996 and Minister of Finance Regulation No. 27/PMK.06/2016 on Auction Implementation Guidelines, still raises several legal issues. The lack of legal certainty and fairness is a major reason for dissatisfaction among a certain group of people, particularly debtors. While the bias towards rules and legal protection for the rights and interests of debtors tends to leave them in a weak position. The strict regulations and legal institutions outside of the UUHT and PMK regarding the Implementation Guidelines for Auctions are more dominant as alternatives for debtors, creditors, or auction winners (third parties) to obtain legal protection facilities.

Keywords: *Legal protection for debtors, creditors, collateral rights, auction execution and enforcement*

Abstrak

Penelitian ini menggunakan metodologi Yuridis Normatif. Dengan demikian, penelitian hukum yang ditulis dalam penelitian ini mencakup penelitian hukum yang bersifat akademis dengan elemen normative dan doctrinal untuk menjawab berbagai masalah hukum. Studi ini menggunakan tiga pendekatan: perundang-undangan (statute approach), konseptual (conceptual approach), kasus (case approach), dan sejarah (historis). Banyak masalah hukum terkait dengan penerapan undang-undang, seperti UUHT Nomor 4 Tahun 1996 dan PMK Nomor 27/PMK.06/2016 tentang Petunjuk Pelaksanaan Lelang, yang melindungi debitur dan kreditur dari Jaminan Hak Tanggungan dari Pelaksanaan Lelang dan Eksekusi. Ketidakpuasan sebagian orang, terutama debitur, berasal dari jaminan kepastian hukum dan elemen keadilan. Namun, aturan dan perlindungan hukum terhadap hak-hak dan kepentingan debitur seringkali dibiarkan pada posisi lemah. Jika debitur, kreditur, atau pemenang lelang (pihak ketiga) ingin mendapatkan perlindungan hukum, tujuh undang-undang dan lembaga hukum di luar UUHT dan PMK tentang Petunjuk Pelaksanaan Lelang lebih sering digunakan sebagai alternatif.

Kata kunci: *Perlindungan hukum debitur, kreditur, jaminan hak tanggungan, pelaksanaan lelang dan eksekusi*

A. INTRODUCTION

The legal protection of the Republic of Aline is outlined in Article IV, which states the objective of establishing a government that safeguards the entire Indonesian nation and promotes the welfare of all Indonesian citizens. Article 28D paragraph (1) of the 1945 Constitution states that every individual has the right to recognition, guarantee, protection, and fair legal certainty, as well as equal treatment before the law.

Legal protection in development, particularly in the economic sector, is a crucial determinant in the implementation of development activities.¹ For instance, borrowing and lending activities, commonly known as credit, are regulated in Chapter III of Book III of the Civil Code. Given the importance of borrowing and lending in the development process, it is essential for lenders and borrowers (creditors and debtors) to receive protection through a collateral rights institution to ensure legal certainty.

The presence and existence of guarantee institutions are highly necessary as they can provide certainty and legal protection for fund providers (creditors) and loan recipients or debtors.² With the enactment of Law No. 4 of 1996 concerning Mortgage Law on 9 April 1996, as mandated by Article 51 of Law No. 5 of 1960,³ it is expected to address the challenges of the rapidly moving, competitive, and complex national economy by requiring economic policy adjustments, including in the field of regulation. The formation of UUHT is motivated by the inadequacy of provisions for mortgages (Book II of the Civil Code concerning land) and credit agreements (Staatsblad 1908-542 amended by Staatsblad 1937-190), which are no longer in line with the principles of national land law. As a result, the existing legislation is considered insufficient in providing legal certainty in Indonesia, as it has been stated in the Preamble of the 1945 Constitution regarding credit activities.⁴ According to Sutan Renny Sjahdeini, as quoted by Adrian Sutedi in his book "Hukum Hak Tanggungan,"⁵ it is stated that the provisions regarding mortgage and credit verband are no longer in line with the principles of national land law and are unable to accommodate the developments in the field of credit and collateral rights as a result of economic progress. The UUHT is specifically designed to regulate the institution of security rights over land, and does not encompass security rights over other assets apart from

¹ Herowati Poesoko, 2013, *Dinamika Parate Executie Obyek Hak Tanggungan*, Edisi Revisi, Yokyakarta, Aswaja Pressindo. Hal. 1

² Herowati Poesoko, *ibid.* Hal 2

³ Salim HS., 2016, *Perkembangan Hukum Jaminan Di Indonesia*, cet ke-9, Jakarta, PT. RajaGrafindoPersada, Hal 99

⁴ Adriana Sutedi., 2012, *Hukum Hak Tanggungan*, cetakan ke-2, Jakarta, Sinar Grafika, Hal. 2

⁵ Adriana Sutedi, *loc cit*

land, as stipulated in the UUHT. The institutions guaranteeing rights outside of encumbrances will be allowed to develop independently in accordance with the evolving legal needs of society.⁶

As stated by Sudikno Mertokusumo and A. Pitlo⁷ asserts that the law cannot be considered complete. Legislation is but one stage in the process of legal formation and must seek its completeness in legal practice and the judiciary. Similarly, that is also the opinion of M. Isnaenion the birth of the Law of Mortgage Rights should not be seen as implying that the created devices automatically become perfect; yet, the law itself is not a final product.⁸

Although the Law on Mortgage Rights has been recognised for its existence as a reform of land security institutions, it is undeniable that there are still legal issues. Among them are the weak position and status of the debtor in relation to the creditor, the low determination of the value limit of the collateral object in the auction, which does not reflect the principles of justice and legal certainty. The Law of Collateral Rights does not provide any legal recourse for debtors who feel aggrieved by the implementation of auctions and executions, prompting debtors to seek alternative legal remedies commonly used in procedural law. On the other hand, the presence of PMK Number 27 of 2016 regarding the Implementation Guidelines for Auctions, particularly Article 14, creates a legal loophole that results in legal uncertainty for creditors in the execution of Auctions and the Execution of Collateral Rights.

Based on the legal facts, it is necessary to update the UUHT in order to achieve a balance between the rights of debtors and creditors that reflects a fair and just legal certainty. This aligns with the views expressed by Peter Mahmud Marzuki in his book "Filosofi Pembaharuan Hukum Indonesia," as quoted by Herowati Poesoko, that the UUHT represents a renewal of the guarantee institution. The essence of legal renewal should focus on renewing legal values rather than simply updating legal rules or its substance. Based on these new values, a new legal framework is established. Procedural rules must not deviate from or contravene substantive provisions. Meanwhile, substantive provisions must reflect legal values, meaning that these provisions cannot simply be formulated without the existence of a ratio legis in the form of legal values that are prevalent in society.⁹

⁶ Racmad Usman., 2009, Hukum Jaminan Keperdataan, cetakan ke- II, Jakarta, Sinar Grafika, Hal 332

⁷ Herowati Poesoko, op cit, Hal. 8

⁸ Herowati Poesoko, loc cit

⁹ Herowati Poesoko, op. Cit., Hal.8-9

B. RESEARCH METHOD

1. Research Type

The research conducted for the writing of this study is a legal research. The methodological approach employed is the normative juridical approach, which focuses on the legal protection of debtors and creditors regarding the collateral rights in the implementation of auctions and executions. The type of research conducted is normative legal research or library-based legal research, which involves examining library materials or secondary data, with a specific focus on the rules regarding Legal Protection for Debtors and Creditors on the Collateral Guarantee from Auction and Execution.

2. Data Types

The types of data (legal materials) used in this study are: primary legal materials, secondary legal materials, and tertiary legal materials.

- a. Primary legal materials include the opening of the 1945 Constitution, the body of the 1945 Constitution, other legislation related to land rights guarantees, Law No. 5 of 1960 concerning the Basic Agrarian Law, Law No. 4 of 1996 concerning the Basic Housing Law, Law No. 10 of 1998 concerning Amendments to the Auction Implementation Law, and Court Decisions that have legally binding effects and are related to Mortgage Rights Guarantees.
- b. Secondary legal materials are obtained from textbooks/literature, doctrines from legal experts, and research findings, as well as court decisions legal decisions in the form of articles and journals, particularly those discussing the topic of Mortgage Rights Guarantee.
- c. Tertiary legal materials are legal materials that provide guidance and explanations about primary and secondary legal materials, such as legal dictionaries and encyclopaedias.

3. Data Collection Techniques

The data collection technique used in this study involved doing a literature review. At the beginning of the research, the author collected secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials related to this study.

4. Data Analysis

The collected secondary data is inventoried, processed, and analysed qualitatively. Subsequently, the data is described in a way that it explains, outlines, and depicts the issues and their resolutions related to this writing.

C. ANALYSIS, FINDING AND DISCUSSION

1. The role of the government in providing legal protection to debtors and creditors regarding the collateral guarantee rights in the implementation of auctions and executions.

a. Duties and Responsibilities of the Government

The role of legal protection provided by the government is within the context of the Rule of Law, rather than the legal protection under Immanuel Kant's concept of the Night Watchman State, which refers to a state that is solely responsible for maintaining public order and security.¹⁰ The sole responsibility of the State is to ensure the maintenance of public order and security, without any involvement in social and economic matters. Alternatively, as proposed by Montesquieu, a State will not actively intervene in the lives of its citizens because the role of the State, in this case the government, is solely to create and uphold laws. In other words, the State is solely responsible for security in a narrow sense. However, the government should play a role similar to that of a welfare state, where it ensures the provision of basic welfare services for its citizens. In this case, the government functions as a legislator, regulator, and mediator. The legislative function involves regulating and providing legal protection for debtors and creditors in economic activities.

The duty and responsibility of the State, in this case the Government, is to provide legal protection and ensure the availability of fundamental welfare services for its citizens. According to Utrecht in the book titled "Introduction to the Law of Indonesian State Administration, 4th edition, Publisher Ikhtiar, Jakarta, 1960," the government of a modern legal state is responsible for maintaining security in the broadest sense, which includes social security in all areas of society. In a welfare state, the period of liberal economics has passed and has been replaced with a more centrally guided economy.¹¹ The primary function of legal

¹⁰ Yopi Gunawan dk, *Perkembangan Konsep Negara Hukum dan Negara Hukum Pancasila*, Cetakan ke-II, PT. Refika Aditama, Bandung, 2015, hal.49

¹¹ Jongker Sihombing, *Peran dan Aspek Hukum dalam Pembangunan Ekonomi*, Cet ke- I, PT. Alumni, Bandung, 2010, Hal. 89

protection is to establish regulations that aim to achieve social and economic welfare for the community and ensure balanced individual performance in the economy. The second aspect is the decentralisation of authority in administrative agencies and regulatory institutions.

The task and responsibility of the government is to provide legal protection to both debtors and creditors, ensuring that they are treated equally and, if treated differently, based on rational differences without regard to any distinctions. According to Munir Fuady in his book "Teori Negara Hukum Modern (Rechtsstaat)", as quoted by Yopi Gunawan, Dk, the rule of law is a system of governance that is based on just laws, organised within a constitution. In this system, all individuals within the state, whether governed or governing, are subject to the same laws. This ensures that everyone is treated equally, while recognising rational differences such as skin colour, race, gender, religion, region, and beliefs. Furthermore, the power of the government is limited by the principle of power distribution, preventing arbitrary actions and the violation of people's rights. Consequently, the people are given roles and responsibilities in a democratic manner, according to their abilities.¹²

Munir Fuady's opinion is in line with the Theory of Distributive Justice (Aristotle), which states that justice provides each individual with a share according to their merit. I do not advocate for everyone to receive an equal share, but rather a balance, not equality.

The principle of the government's duties and responsibilities in providing legal protection for debtors and creditors is in line with the direction of the people's economy policy, which relies on a fair market mechanism, promotes healthy competition, considers economic growth, and upholds principles of justice.

b. Implementing the Role of the Government in Providing Legal Protection

The government's implementation of its role in providing legal protection to debtors and creditors is manifested through regulations, the establishment of Mortgage Rights Guarantee, Law No. 4 of 1996, Minister of Finance Regulation No. 27/PMK.06/2016 regarding the Implementation Guidelines for Auctions, and other regulations related to Mortgage Rights Guarantee: Law No. 5 of 1960, Civil Code, Commercial Code, Supreme Court Regulations, Supreme Court Circulars, Financial Services Authority, Banking Law.

2. The legal protection and enforcement to ensure legal certainty and fairness for debtors and creditors about the collateral guarantee during auction and execution.

¹² Yopy Gunawan Op. Cit Hal. 68-69

a. A. Legal Protection Arrangements for Debtors and Creditors Regarding Collateral Security

The birth of the Mortgage Law as mandated by Law No. 5 of 1960, other regulations related to the regulation of Mortgage Rights Guarantee include the Banking Law, Fiduciary Law, OJKBW.RV, and HIR.¹³ However, in practice, due to the Mortgage Law not explicitly providing legal protection for debtors and creditors, the last alternative is formal procedural law and the Civil Code (Book III of the Civil Code, Articles 1759, 1760, 1761, and Article 1762 on the obligations of the lender, Article 1753 of : In practice, Article 1365 of the Civil Code is utilised as the foundation for debtors or creditors to assert their rights. Similarly, the provisions of Auction Regulation PMK No. 27/06.PMK/2016 do not specifically address legal protection for debtors, except for Article 14 and Article 30 paragraph (c) on the cancellation of auction implementation.

b. Forms of Legal Protection

According to Phillipus M. Hadjon in his book "Legal Protection for the People of Indonesia," the theoretical forms of legal protection are divided into two categories:

- Preventive and legal protection.
- Repressive protection¹⁴

The legal protection in the form of preventive measures for auctions and execution of Mortgage Rights can be classified under the Minister of Finance Regulation Number 27/MK.06/2016 concerning the Implementation Guidelines for Auctions Article 14 (1), Article 28. The execution can be carried out through legal resistance or ordinary lawsuits initiated by the debtor to prevent auctions and execution. On the other hand, Recourse Legal Protection serves to resolve disputes when they occur. The legal practice in Indonesia partially categorises the handling of legal protection for the people into two bodies.

- Through the institution of General Judiciary and
- Government agency is an institution that serves as an appellate court in administrative matters.¹⁵

¹³ Gatot Supramono, *Perjanjian Utang Piutang*, Cetakan ke- I, Kencana Prenada Media Group, Jakarta, 2013. Hal. 109

¹⁴ H. Salim dan Erlies Septiana Nurbani, *Penerapan Teori Hukum pada Penelitian Disertasi dan Tesis*, Cetakan ke- I, PT. Raja Grafindo Persada, Jakarta, 2016. Hal 264

¹⁵ H. Salim dan Erlies Septiana Nurbani, *Loc. Cit*

Another institution that provides legal protection to debtors, in addition to the Consumer Protection Agency, is the Financial Services Authority (Law Number 21 of 2011), which is responsible for implementing regulations and supervision regarding

- a. The activity of financial services in the banking industry,
- b. The financial services activities in the capital market sector,
- c. The service activities in the insurance, pension fund, financing institution, and other financial services sectors. However, in practice, the law is honestly ineffective. Auction and execution are legal mechanisms that provide protection for creditors. Meanwhile, for the debtor, they are required to keep up with the legal developments.

3. Legal remedies for debtors, creditors, and third parties affected by the implementation of auctions and foreclosure of mortgage rights.

Article 1365 of the Civil Code serves as an alternate basis for the aggrieved party, with debtors often resorting to legal remedies or ordinary lawsuits when they feel disadvantaged. For creditors, auction and execution are actions taken to fulfil their rights in cases of debtor's negligence or breach of promise, while the UUHT does not provide a clear formulation, especially for debtors regarding their rights during auction and execution. Consumer protection institutions such as OJK and other institutions like credit insurance are ineffective in providing legal protection for debtors.

4. Legal Protection and Justice Aspects for Debtors and Creditors in the Implementation of Auctions and Foreclosure of Collateral Rights

The legal protection provided to debtors and creditors in the implementation of Auctions and Executions aims to ensure fairness and legal certainty. However, in practice, there are numerous complaints, legal issues, and injustices, which align with what N.E. previously stated. Algra, as quoted by Achmad Ali in his book "Unveiling Legal Theory and Judicial Prudence," states that the question of whether something is just (*rechtvaardig*) largely depends on its conformity (*rechtmitigheid*) with the personal legal views of an evaluator.¹⁶

Thus, true justice, as intended by Aristotle, is achieved by Distributive Justice in the implementation of Auctions and Execution of Collateral Rights, where the rights of the debtor become the obligations of the creditor and vice versa. Justice allocates shares to debtors and

¹⁶ Achmad Ali, *Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (Judicial Prudence) termasuk Interpretasi Undang-Undang (Legisprudence)*, Cetakan ke- V, Kencana Prenadamedia Group, Jakarta, 2013. Hal. 222

creditors according to their respective proportions. The user does not desire for debtors and creditors to have identical rights and obligations, but rather seeks a balance between the two.

There is no specific treatment or special privileges given to creditors, let alone the privileged rights granted by the UUHT, whereas debtors are in a weak position. Based on the description, the author argues that the Theory of Legal Concept of Development proposed by Mochtar Kusumaatmadja in the conception of Development Law, referred to as the Theory of Development Law by Lili Rasjidi, states that the function of law in national development is "as a means of renewing society" or "as a means of development".....¹⁷ If this Theory of Development Law is applied to the implementation of Auctions and Execution of Collateral Rights, then there is a need to update the regulations on Auctions and Execution of Collateral Rights, namely Law No. 4 of 1996 and Minister of Finance Regulation No. 27/PMK.06/2016, so that in the future, the regulation of Auctions and Execution of Collateral Rights will function as a means (regulator) for the direction of the development of Auctions and Execution of Collateral Rights. The update ultimately serves as a means to establish order and stability in the economic sector, particularly in the implementation of Auctions and Execution of Collateral Rights.

Exactly as stated by Mochtar Kusumaatmadja, "Law not only serves as a set of rules and principles that govern human life in society, but it must also encompass institutions and processes." Similarly, in the case of future auction updates and the UUHT (Law on Mortgage Rights), it is necessary to update the rules, principles, processes, and institutions, including auctions and mortgage guarantees.¹⁸

5. Principle of Justice in the Implementation of Auctions

The analysis of fairness in the implementation of auctions in Indonesia has been a major concern in recent years. Auctions in Indonesia are conducted by the State Property and Auction Service Office (KPKNL) as part of the mortgage execution process. Justice must be the primary principle in the implementation of auctions to ensure that the process is conducted fairly and transparently.

a. Justice in the Implementation of Auctions

¹⁷ Purnama Tioria Sianturi, *Perlindungan Hukum terhadap Pembeli Barang Jaminan Tidak Bergerak Melalui Lelang*, cetakan ke-II, Bandung, CV. Mandar Maju, 2013, Hal 360

¹⁸ Loc Cit.

The fairness in the implementation of auctions in Indonesia can be observed from several aspects. Firstly, the principle of justice must be applied in the decision-making process. Keputusan lelang harus didasarkan pada prinsip-prinsip yang jelas dan tidak membeda-bedakan. Secondly, the principle of justice must be used in the process of conducting auctions. In this case, the auction must be conducted openly and transparently, so that all relevant parties can be aware of the auction results.

b. . Challenges in the Implementation of Justice

However, there are still certain obstacles in the implementation of justice in the auction process in Indonesia. One obstacle is the ambiguity of the applicable legal framework. Terjadisituasi di mana dasar hukum yang berlaku tidak jelas, yang dapat mengakibatkan keputusan lelang yang tidak adil. Another obstacle is the lack of transparency in the bidding process. In certain cases, the auction process is not conducted openly and transparently, which might lead to fraud and discrimination. Twelve

c. Solution

Several solutions can be implemented to ensure the implementation of justice in the auction process in Indonesia. Firstly, the applicable legal basis must be clarified and simplified. Secondly, the auction process must be conducted openly and transparently. Thirdly, the relevant parties must be given the opportunity to participate in the bidding process. Therefore, justice in the implementation of auctions may be ensured and the auction process can proceed fairly and transparently.

D. CONCLUSION AND RECOMMENDATION

1. Conclusion

The legal protection provided to debtors is not commensurate with the legal protection provided to creditors (in fact, the UUHT grants a privileged position and treatment to creditors with certain rights).

The implementation of legal protection for debtors and creditors for the Guarantee Rights of Collateral from the execution of Auctions and Executions that disregard legal regulations, namely Law Number 4 of 1996 and Minister of Finance Regulation Number 27/PMK.06/2016 on Auction Implementation Guidelines, still raises several legal issues.

The lack of legal certainty and fairness is a key reason for dissatisfaction among a certain group of people (particularly debtors). While the bias towards rules and legal protection for the rights and interests of debtors tends to leave them in a weak position. The strict rules and legal institutions outside of the UUHT and PMK regarding the Implementation Guidelines for Auctions are more dominant as alternatives for debtors, creditors, or auction winners (third parties) to obtain legal protection facilities.

2. Recommendation

In order for the government's role in providing legal protection to debtors and creditors regarding the collateral guarantee from auction and execution to be effective and optimal, it is necessary to update or revise the regulations on the collateral guarantee, particularly the Law on Collateral Rights and the Ministerial Regulation on Auction Implementation Guidelines.

The renewal or revision of the regulations on the UUHT and the Implementation Guidelines for Auctions must provide a guarantee of legal certainty and a balanced aspect of justice regarding the legal protection of debtors and creditors over the Collateral Guarantee from the implementation of auctions and executions.

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