

The Legal Politics of the Government to Provide Legal Certainty Related to the Practice of Pawning on A Paid Rent Based on Justice Value

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Abstract. *Pawning has become a trend in society because the procedures and requirements are easy, simple, and uncomplicated so that people immediately get money. So it is not uncommon for people to guarantee their goods in pawning activities. Based on the formulation of Article 1150 of the Civil Code, it can be seen that pawning is a material security right on certain movable objects belonging to the debtor or another person on behalf of the debtor to serve as collateral for the settlement of certain debts, which gives priority rights (preference) to the holder of the lien over other creditors. , after prioritizing the costs for the auction and the cost of rescuing the pawned goods taken from the sale proceeds through a public auction of the pawned goods. As material rights, liens continue to follow the object or goods pledged in the hands of whoever holds it (droit de suite). Likewise, it contains a right to sue because the recipient of the pledge has the right to claim the lost goods back. This provision is as contained in Article 1152 Paragraph (3) of the Civil Code. Article 1152 paragraph (4) of the Civil Code stipulates that if later it turns out that the pawnbroker does not actually have the right to alienate the goods, for example, he is only the tenant or the borrower of the goods, then the lien rights of the pledge holder cannot be cancelled.*

Keywords: Certainty; Guarantee; Payment; Material.

1. INTRODUCTION

The implementation of pawning is a tradition that people are used to. Due to an urgent need, pawning is a solution to fulfill human needs. This is reasonable because in a pawn agreement the goods used as collateral can be taken back and the collateral becomes his property when someone has capital for redemption.¹

In Article 1150 of the Civil Code, a pawn is a right obtained by a person who has receivables on a movable property². The movable property is handed over to the person who is in debt by a person who has a debt or by another person on behalf of a person who has a debt.³ The debtor gives the power to the debtor to use the movable property

¹M. Sulaeman Jajuli, Kepastian Hukum Gadai Tanah Dalam Hukum Islam Di Kabupaten Bogor, *Ahkam*: Vol. XV, No. 2, July 2015, p. 221-331

² Ong Argo Victoria, Ade Riusma Ariyana, Devina Arifani. (2020). *Code of Ethics and Position of Notary in Indonesia*. Sultan Agung Notary Law Review 2 (4), 397-407, <http://lppm-unissula.com/jurnal.unissula.ac.id/index.php/SANLaR/article/view/13536>

³Boer Mauna. 2005, *Hukum Internasional: Pengertian, Peranan, dan Fungsi Dalam Era Dinamika Global*. Second Edition, Alumni. Bandung, p. 285.

that has been handed over to pay off the debt if the debtor is unable to fulfill his obligations at maturity.⁴

Based on the formulation of Article 1150 of the Civil Code above, it can be seen that a pawn is a material security right on certain movable objects belonging to the debtor or another person on behalf of the debtor to be used as collateral for the settlement of certain debts, which gives priority rights (preference) to the holder of the lien over other creditors, after prioritizing the costs for the auction and the cost of rescuing the pawned goods taken from the sale proceeds through a public auction of the pawned goods.⁵

Material rights that provide enjoyment are the rights to own property as regulated in the second book of the Civil Code, namely the right to control and property rights. While material rights that provide guarantees, meaning that material rights basically occur on objects belonging to other people. The guarantee rights are lien (pand) and mortgage (*hypothek*).⁶

Pawning has become a trend in society because the procedures and requirements are easy, simple, and uncomplicated so that people immediately get money. So that it is not uncommon for people to guarantee their goods in pawning activities on black pawns. The procedure is considered not to require a long time which may be considered as the interpretation of every society. However, in an illicit pawn transaction, it has many shortcomings and fraudulent practices, so the government forms an institution in charge of pawning activities which is expected to minimize parties in the pawn activity.⁷

People who pledge their goods in illegal pawning experience a lot of losses, namely at least the rights of the pawnbroker are often not fulfilled and the obligations of the pawnee are not fulfilled or vice versa. It is from the practice of illicit pawning that it can lead to interest in inappropriate pawning activities, so that in this case a practice of usury is experienced. In that case, the government formed a Persero Pegadaian Company to avoid these fraudulent practices. There are still many people who continue to use black pawns in pledging their goods, so the author will discuss a little about dark pawns or pawns carried out outside the Persero Pegadaian Company. It is undeniable that legal problems in the practice of pawning in Indonesia do not only cover the field of civil law, but also in the realm of criminal law. Pawn transactions, which were initially limited to civil matters, turned into criminal matters. The various problems of pawning in this legal practice basically stem from the type of object of the pawn, namely movable objects. Basically, movable objects are objects that are relatively easy to move and have a high level of mobility. Such characteristics make it difficult to determine who is the legal owner of movable objects. This is also in line with the principle of control of movable objects in Article 1977 of the Civil Code which is called bezit.⁸

⁴Asri Wijayanti. Kedudukan Ijazah Sebagai Jaminan Dalam Hubungan Kerja. Surabaya: *Jurnal Media Hukum dan Peradilan*. 2015p. 24.

⁵Rachmadi Usman, 2009, *Hukum Jaminan Keperdataan*, Sinar Garafika, Jakarta, p. 105.

⁶Lina Puspawati, Hukum Kebendaan Perdata, *Jurnal Hukum dan Keadilan* Volume 4 No.1 March 2017, p 75-94

⁷Isdiyana Kusuma Ayu, Peningkatan Kesadaran Hukum tentang Konsep dan Problematika Pelaksanaan Hukum Gadai, *Dedikasi Hukum Jurnal Pengabdian Masyarakat* Volume 1, No. 1, April 2021, p. 58-72

⁸Isnaeni, M. 2014, *Pengantar Hukum Jaminan Kebendaan*. PT. Revka Petra Media. Jakarta, p.15

One of the non-banking institutions that provide credit is a pawnshop. Pawnshops offer loans with a pawn system. So people don't need to be afraid of losing their belongings. Pawnshops have conveniences, including easy and simple procedures and administrative requirements, where customers only need to provide brief information about their identity and the purpose of using the credit, in a relatively short period of time the loan funds have been disbursed and interest is relatively low.⁹

From the description above, the problem that will be discussed is how the legal politics of pawn rental is based on the value of justice and legal protection for the owner of the object of the pawn.

2. RESEARCH METHODS

The method used in this research was normative legal research that moves on the nature of legal scholarship.¹⁰In this research, a statutory approach and a conceptual approach were used.

3. RESULT AND DISCUSSION

3.1. The Political Law of Pawning Based on the Value of Justice

Provisions regarding pawning are regulated in Article 1150 of the Civil Code to Article 1160 of the Civil Code. The pawn regulates movable objects so that the article is declared still valid. According to Article 1150 of the Civil Code, pawning has the meaning, namely, "Pawn is a right obtained by borrowing on a movable property, which is handed over to him by a debtor or another person on his behalf, and which gives the authority to the debtor to take repayment of the goods in full take precedence over other debtors, except that the cost of auctioning the goods and the costs that have been incurred to save the pawned goods must be prioritized¹¹.

The implementation of pawning should also prioritize a sense of justice in it, to protect the parties in the pawn transaction so as to avoid the practice of extortion in the implementation of the pawn transaction, which is in accordance with the spirit of the Indonesian nation which prioritizes justice in every social behavior which is of course in accordance with Pancasila as the philosophy of the Indonesian nation.¹²

In the case of usufructuary rights over goods, if the holder of the pledge in a mortgage obtains the usufructuary rights to the goods (pawn-use), then the pledge is usually not accompanied by interest on the pledge. On the other hand, if it is not accompanied by a usufructuary right (save pawn), the mortgage is usually accompanied by interest on

⁹O Dermina Dalimunthe, *Objek Gadai Dalam Kitab Undang-Undang Hukum Perdata (Bw)*, *Yurisprudencia* Volume 4 No. 1 June 2018, p 50-67

¹⁰Philipus M. Hadjon & Tatiek Sri Djatmiati, 2010, *Argumentasi Hukum (Legal Argumentation/Legal Reasoning, Langkah-Langkah Legal Problem Solving dan Penyusunan Legal Opinion*, Gadjah Mada University Press, Yogyakarta, p 3.

¹¹Deen, Thaufiq., Ong Argo Victoria & Sumain. (2018). *Public Notary Services In Malaysia*. *JURNAL AKTA*: Vol. 5, No. 4, 1017-1026. Retrieved from <http://jurnal.unissula.ac.id/index.php/akta/article/view/4135>

¹²Achmad Rifai & Sapto Wahyono, *Kekuatan Hukum Pemegang Hak Tanggungan Atas Pengikatan Kembali Objek Jaminan Dengan Hak Gadai Tanah*, *Jurnal YUSTITIA* Vol. 22 No. 1 May 2021, p. 21-31

the mortgage, as is the case with credit institutions and pawnshops.¹³ A person's inability to pay mortgage interest or redeem dependents, has made many people have to lose valuables. This is where the complicated ethical issue arises between business, justice and humanity in relation to the pawn business¹⁴.

Good and correct transactions in the process of buying and selling or pawning must fulfill a sense of justice for both parties. The view of justice that inherits a strong influence is Aristotle, he divides justice into three parts, namely: Legal Justice, which concerns the relationship between individuals or groups of people with the State. The point is that all people or groups of people are treated equally by the state before and based on applicable law. Commutative Justice which regulates fair or fair relations between one person and another or a citizen of one country and another citizen. That is, legal justice is more about the vertical relationship between citizens, commutative justice is about the horizontal relationship between one citizen and another. Then, Distributive justice or economic justice, is an equitable distribution of the economy or what is considered fair for all citizens. So, distributive justice has to do with the distribution of economic wealth, including the results of development.¹⁵

With regard to justice, Adam Smith accepted only one concept or theory of justice, namely, commutative justice. He rejects distributive justice as a type of justice because justice is always related to rights, while distributive justice is not related to rights.¹⁶

According to John Rawls, social and economic inequalities should be regulated so that they benefit the most disadvantaged and in accordance with duties and positions which are open to all under conditions of equal opportunity.¹⁷

As material rights, liens continue to follow the object or goods being pledged in the hands of whoever holds them (*droit de suite*). Likewise, it contains a right to sue because the recipient of the pledge has the right to claim the lost goods back. This provision is as contained in Article 1152 Paragraph (3) of the Civil Code, which reads:

"If the goods are lost from the hands of the recipient of this pledge or stolen from him, then he has the right to demand it back as stated in Article 1977 Paragraph (2), whereas if the pledged goods are recovered, the matter of the pledge is considered to have never been lost."¹⁸

Based on the provisions in Article 1150 and other articles of the Civil Code, it can be concluded that the nature and characteristics attached to liens are as follows:

- Objects or goods that can be pawned are movable objects, both tangible and intangible movable objects (Article 1150, Article 1153 of the Civil Code).

¹³Roelof Van Dijk, 2011, *Pengantar Hukum Adat Indonesia*, University California, p.61

¹⁴ Yaya Kareng, Ong Argo Victoria, R. Juli Moertiyono. (2019). How Notary's Service in Thailand. *Sultan Agung Notary Law Review*, 1 (1), 46-56, <http://jurnal.unissula.ac.id/index.php/SANLaR/article/view/4435>

¹⁵A. Sonny Keraf, 1998, *Etika Bisnis: Tuntutan dan Relevansinya*, Penerbit Kanisius, Yogyakarta, p. 138-142.

¹⁶Ibid

¹⁷K. Bertens, 2000, *Pengantar Etika Bisnis*, Kanisius, Yogyakarta, p. 101.

¹⁸The Civil Code Article 1152 paragraph (3).

- Pawning is a material right over movable objects or goods belonging to a person (Article 1152 Paragraph (3) in conjunction with Article 528 of the Civil Code), therefore even if the pawned goods are transferred or transferred to another person, the pawned goods remain and always follow to whomever the object of the pawned goods is (*droit de suite*). If the pawned goods or goods are lost or stolen by someone else, the creditor holding the pledge has the right to claim it back.
- The lien right gives priority to the position (preference right) to the creditor who holds the lien (the recipient of the lien) Article 1133, Article 1150 of the Civil Code.
- Pawns are an accessoir to basic agreements, such as money-lending agreements, accounts payable, or credit agreements (Article 1150 of the Civil Code).
- Pawns have the character of being indivisible (*ondeelbaar*), which is to completely encumber the object or goods being pawned and every part thereof, provided that if part of the guaranteed debt has been paid off, it does not mean that part of the object or property has been liberated the goods are pledged from the burden of the lien, but the lien continues to burden the entire object of the object or goods being pawned for the remaining outstanding debts (Article 1160 of the Civil Code).
- The pawned goods or goods must be under the control of the mortgagee holder creditor (pawnee) who holds the lien or a third party for and on behalf of the lien holder (Article 1150, Article 1152 of the Civil Code).¹⁹

In this regard, Frieda Husni Hasbullah stated, "Lines have special characteristics in the form of accessories, namely:²⁰ The validity of a lien depends on whether or not it is agreed upon in the main agreement or debts, meaning that, if the debt-receivable agreement states that the debtor's debt is secured by a pledge, then the pledge agreement as an additional agreement is also valid, and vice versa if the agreement, the debts invalid, then the pledge agreement is also invalid. Thus, if the debt-receivable agreement is transferred, the lien will automatically also be transferred; but on the other hand, liens cannot be transferred without the transfer of debt agreements. And if for some reason the pawn agreement is cancelled, then the debt-receivable agreement is still valid as long as it is made legally".

The legal basis for pawning can be seen in the following laws and regulations:

- a. Article 1150 of the Civil Code up to Article 1160 of Book II of the Civil Code;
- b. Article 1196 vv, title 19 Book III NBW;

¹⁹Op Cit Rachmadi, p. 108

²⁰Frieda Husni Hasbullah, 2005, *Hukum Kebendaan Perdata, Hak-Hak Yang Memberi Jaminan*, Vol. II, INDO-HILL-CO, Jakarta, p. 27.

- c. Government Regulation Number: 7 of 1969 concerning the Pawnshop Service Company;
- d. Government Regulation Number: 10 of 1970 concerning Amendments to Government Regulation Number: 7 of 1969 concerning Service Companies; and
- e. Government Regulation Number: 103 of 2000 concerning Public Company (Perum) Pegadaian.

If the provisions in Article 1150 of the Civil Code are connected with the provisions of Article 1152 paragraph (1), Article 1152, Article 1153 and Article 1158 paragraph (1) of the Civil Code, it is clear that basically all movable property can become the legal object of a lien as stipulated in the Circular Letter. Bank Indonesia Number: 4/248/Uppk/PK dated March 16, 1972. However, according to the Circular Letter, not all types of movable property can be encumbered with a pledge, there are other types of movable property that are encumbered with fiduciary guarantees. Movable objects here can be tangible or bodily movable objects (*lichamelijk*) and intangible or bodily movable objects (*onlichamelijk*) in the form of receivables or bills in the form of securities.²¹

Basically all tangible movable objects can be used as collateral for loans or mortgage loans at pawnshops. Pawn loans are loans (credit) for a certain period of time to customers on the basis of the pawn law and certain conditions that have been determined by the Pegadaian company.

Objects are divided into 2 (two) namely movable objects and immovable objects.¹⁵ Regarding immovable objects, it is regulated in Article 506 - Article 508 of the Civil Code. As for movable objects, it is regulated in Article 509 – Article 518 of the Civil Code. Subekti, in his book Principals of Civil Law states "an object can be classified as an immovable object ("onroerend") firstly because of its nature, secondly because of its intended use, and thirdly because it is so determined by law".²²

Pledge of movable objects that are not tangible are stated in the provisions of Article 1150 of the Civil Code linked to the provisions of Article 1152 paragraph (2), Article 1152 and Article 1153 of the Civil Code. From the provisions of the article, it can be seen that movable objects that are not tangible in the form of claims or receivables, securities, can also be pledged as collateral for debts.

The subject of the pawn consists of two parties, namely the pawner (*Pandgever*) and the pawnee (*pandnemer*). *Pandgever* is a person or legal entity that provides collateral in the form of movable objects as a pledge to the recipient of the pledge for a loan of money given to him or a third party. The pawnee (*pandnemer*) is a person or legal entity who receives a pawn as collateral for a loan of money that is given to the pawner (*Pandgever*). In Indonesia, the legal entity appointed to manage pawn institutions is a pawnshop company.

In Indonesia, the institution appointed to receive and distribute credit under the pawn law is a pawnshop. The most prominent effort carried out by Perum Pegadaian is

²¹Op Cit., Dermina.

²²Subekti, 1982, *Pokok-Pokok Hukum Perdata*, Intermasa, Jakarta, p. 61-62.

distributing money (credit) based on the law of pawning. This means that the pawned goods must be handed over by the pawnbroker to the pawnee, so that the goods are under the authority of the pawnee. This principle in pawning is called the *inbezitteling* principle. Since the occurrence of the pawn agreement between the pawnbroker and the pawnee, since then the rights and obligations of the parties have arisen. The right of material security such as a lien must be born from an agreement between the parties who agreed to a pledge as a settlement of the debtor's debt.²³ Article 1155 of the Civil Code has regulated the rights and obligations of both parties. The rights of the pledgee are:

- Receive installments of loan principal and interest in accordance with the specified time
- Article 1155 of the Civil Code states that the holder of the pawn has the right to pawn the pledged item again, if that right has become a habit, as is the case with mortgaging sero letters or bonds.
- Article 1156 paragraph 1 of the Civil Code explains that if the pawnbroker (the debtor) is in default, then the holder of the pawn (the debtor) has the right to sell the pawned item; and then take payment of the debt from the sale of the item. The sale of the goods can be done alone or can also ask the judge's intercession
- Article 1157 paragraph 2 of the Civil Code explains that the holder of the pawn has the right to get compensation for the costs he has incurred to save the pawned item.
- Article 1159 paragraph 1 of the Civil Code explains that the holder of the pawn has the right to hold the goods that are pawned until the time the debt is repaid, both regarding the amount of principal and interest.

The obligations of the pawnee are regulated in Article 1154, Article 1156 and Article 1157 of the Civil Code. Liability of the pawnee:

- Take good care of the pawned items
- Article 1154 of the Civil Code states that it is not permissible to transfer the pawned goods into his possession, even though the pawnbroker is in default.
- Article 1156 of the Civil Code states to notify the pawnbroker (debtor) about the transfer of the pawned goods
- Article 1157 of the Civil Code describes being responsible for the loss or shrinkage of the pledged goods, to the extent that it occurs due to negligence

²³Moch. Isnaeni, 1996, *Hipotek Pesawat Udara Di Indonesia*, Dharma Muda, Surabaya, p. 36.

- Article 1158 of the Civil Code explains that the holder of a pawn must provide a calculation of the income from the sale and after he has paid off his debt, he must hand over the excess to the debtor.
- Article 1159 of the Civil Code explains that the holder of the pawn must return the pawned goods, if the principal debt, interest and costs to save the pawned goods have been paid in full.²⁴

Pledger's rights:

- Receiving pawned money from pawnbrokers
- Entitled to pawned goods, if the principal, interest and other costs have been repaid
- Article 1156 of the Civil Code explains the right to sue the court so that the pawned goods are sold to pay off their debts

Liability of the mortgagee:

- Handing over the pawned goods to the pawnee
- Paying the principal and capital rent to the pawnee Article 1157 of the Civil Code describes paying the costs incurred by the pawnee to save the pawned goods.²⁵

The implementation of pawning in this legal system seeks not to cause losses or minimize losses, besides that the implementation of pawning is safer and easier to implement, does not have an element of extortion as stated in the provisions of the law, and provides more justice for each party who made the agreement, namely between the seller of the pawn and the buyer of the pawn.

3.2. Legal protection for the owner of the object of the pawn

Based on the form of objects that are pledged as collateral in pawning, the legal principle contained in article 1977 paragraph (1) of the Civil Code which states that for movable objects that are not in the form of interest, as well as receivables that do not have to be paid to the bearer, whoever controls them is considered as the owner. Based on this understanding, it can be concluded that the law protects someone who controls an object (as if it were his own) without questioning who the real owner of the object is. The conditions for the occurrence of pawning of movable objects consist of two conditions, namely: the pawned goods must be released from the Pledger to the Pawnee and there must be an agreement to give this lien which can be done in writing or orally.²⁶

Article 1152 paragraph (4) of the Civil Code stipulates that if later it turns out that the pawnbroker does not actually have the right to alienate the goods, for example, he is only the tenant or the borrower of the goods, then the lien rights of the pledge holder

²⁴P.N.H. Simanjuntak, 2015, *Hukum Perdata Indonesia*, Kencana, Jakarta, p. 198-199.

²⁵Salim HS. 2014, *Perkembangan Hukum Jaminan Di Indonesia*. PT. RajaGrafindo Persada, Jakarta, p. 48

²⁶Sofwan, S. S. M. 1974, *Hukum Perdata: Hukum Benda*. Liberty. Yogyakarta, p. 15

cannot be cancelled. It's just that the holder of the pawn must be honest (*te goeder trouw*), that is, he must really think that the giver of the pawn is entitled to give the pledge. If there are things that should be able to flow the mind of the lien holder towards an event that makes the pawner not entitled to give the lien, then the lien holder is not protected and the lien must be cancelled.²⁷

In connection with Article 1152 paragraph (4) of the Civil Code, it can be stated that because a lien arises from an agreement between the lien holder (creditor) and the lien provider (debtor), then based on the subjective requirements for the validity of a formal agreement Article 1320 paragraph (2) of the Civil Code It can be stated that every pawn agreement must have the parties, both the pawn holder and the pawnbroker, must have the authority to act. The authority to act includes the capacity of individuals to act within the law (subjective capacity) and have the right to carry out legal actions (objective capacity).²⁸

In relation to the claim of the pawnbroker against the pawnbroker, due to the default of the pawner, in this case the creditor of the pawnbroker is authorized to sell his goods on his own power, if the debtor does not fulfill his obligations.²⁹

4. CONCLUSION

The provisions in Article 1150 of the Civil Code are related to the provisions in Article 1152 paragraph (1), Article 1152, Article 1153 and Article 1158 paragraph (1) of the Civil Code, it is clear that basically all movable objects can become legal objects of liens as stipulated in Bank Circulars. Indonesia Number: 4/248/UPPK/PK dated March 16, 1972. The pawned goods must be handed over by the pawnbroker to the pawnee, so that the goods are under the control of the pawnee. This principle in pawning is called the *inbezitteling* principle. Since the occurrence of the pawn agreement between the pawnbroker and the pawnee, since then the rights and obligations of the parties have arisen. Article 1155 of the Civil Code has regulated the rights and obligations of both parties. Legal protection for the actual owner of the object of pawn for the auction of the object of the pawn is provided by law, namely, if it is proven that the recipient of the pawn received the pawn in bad faith, then the recipient of the pawn is obliged to return the goods that were pawned to the real owner.

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²⁷Hasbullah, 2005, Frieda Husni, *Hukum Kebendaan Perdata, Hak-Hak Yang Memberi Jaminan*, Vol.II, INDO-HILL-CO, Jakarta, p. 156

²⁸Habib Adjie, Emmy Haryono Saputro, Perlindungan Hukum Bagi Pemilik Objek Gadai Atas Pelelangan Objek Gadai, *Jurnal Hukum Bisnis* Vol 1 No.1 April 2015, p. 52-66

²⁹H.F.A. Volmar cited by Chidir Ali, 1990, *Hukum Benda Menurut KUH Perdata*, Tarsito, Bandung, p.160.

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