

Elimination of Mortgage Rights on Ownership Rights Due to Land Acquisition for Public Interest at the Directorate of Land Acquisition and Reserves

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Abstract. *The purpose of this study is to determine how the Elimination of Mortgage Rights on Ownership Rights Due to Land Acquisition for Public Interest in the Directorate of Land Acquisition and Reserves, which is based on primary data and secondary data. This study uses a sociological legal approach. Data that has been collected from library research is then analyzed qualitatively. The research data after being analyzed using qualitative methods, in the study using the analysis knife of legal protection theory, and the theory of the workings of law. It is concluded that: 1. The elimination of land ownership rights that are used as collateral for mortgage rights because land acquisition for public interest will automatically cause mortgage rights to be eliminated by law. This means that the mortgage rights can no longer be used as collateral for a principal agreement that has been made previously. Law Number 5 of 1960 has provided legal certainty regarding the elimination of land ownership rights that can be caused because the land falls to the state and the land is destroyed. The state has the power to regulate and organize the allocation, use, supply and maintenance of land. 2. The elimination of land ownership rights for public interest according to Law Number 5 of 1960 concerning Basic Agrarian Principles and other applicable laws and regulations can be implemented by paying attention to the provision of appropriate and fair compensation according to applicable laws and regulations. Law Number 2 of 2012 concerning Land Acquisition for Development in the Public Interest, Government Regulation Number 19 of 2021 concerning the Implementation of Land Acquisition for Development in the Public Interest, Government Regulation Number 39 of 2023 concerning Amendments to Government Regulation Number 19 of 2021 concerning the Implementation of Land Acquisition for Development in the Public Interest and its implementing provisions, Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Number 19 of 2021 concerning the Implementation*

Provisions of Government Regulation Number 19 of 2021 concerning the Implementation of Land Acquisition for Development in the Public Interest is the legal basis for implementing the method of providing compensation to entitled parties.

Keywords: Administration; Land; Mortgage; Ownership.

1. Introduction

The purpose of Mortgage Rights is to provide a strong guarantee for creditors who are holders of Mortgage Rights to be prioritized over other creditors. At the time of making SKMHT and APHT, there must be confidence in the notary or PPAT concerned, that the grantor of the mortgage rights has the authority to carry out legal acts against the object of the mortgage rights that are charged, although certainty regarding the possession of such authority is only required at the time the granting of the mortgage rights is registered.

The binding of credit guarantee with mortgage rights is carried out if the customer or debtor who receives credit from the bank, makes immovable goods in the form of land (land rights) with or without objects that are not related to the land (for example buildings, plants, statues, and so on) as collateral without the debtor physically handing over the collateral to the creditor, meaning that the collateral is physically still controlled by the person concerned and its ownership remains with the original owner, but because it is used as collateral for debt with the holding of a mortgage agreement, so that the authority of the mortgage grantor to carry out legal acts with third parties or other acts that result in a decrease in the value of the collateral is limited by the mortgage rights held by the bank as the holder of the mortgage rights. The mortgage rights are declared to be born on the date of the land book mortgage rights complete with the documents required for its registration. Also, the termination of the mortgage rights is based on Article 18 paragraph (1) of the Mortgage Rights Law, that the mortgage rights terminate or are removed due to several things as follows:¹

1. The deletion of the debt causes the mortgage as an accessoir right to be deleted. This occurs because the mortgage is there to guarantee the repayment of the debt from the debtor's debt which is the main agreement. Thus, the deletion of the debt also deletes the mortgage;
2. Release of the mortgage right by the mortgage holder. The elimination of the mortgage right due to release by the mortgage holder is carried out by providing a written statement regarding the release of the mortgage right by the mortgage holder;
3. clearance of mortgage rights based on a court order;

¹M. Khoidin, SH, M.Hum., CN, 2017, Collateral Law (Collateral Rights, Mortgage Rights, and Execution, Mortgage Rights), Laksbang Yustita Surabaya, Surabaya, p. 82.

4. the elimination of rights to land burdened with mortgage rights.

The characteristics of the mortgage itself consist of: giving a priority position (preference) to its creditors; always following its object in the hands of whoever it is; fulfilling the principles of specialization and publicity; and easy and for the implementation of its execution.²

Furthermore, in detail, Sutan Remy Sjahdeini mentions the principles of mortgage rights which are spread across various articles of mortgage rights laws, namely:³

1. The mortgage right provides a priority position for the creditor holding the mortgage right.
2. Mortgage rights cannot be divided.
3. Mortgage rights can only be imposed on existing land rights.
4. Mortgage rights can be imposed not only on the land but also on objects related to the land.
5. Mortgage rights can also be imposed on objects related to land that will only exist in the future.
6. The mortgage is of an accessory nature.
7. Mortgage rights can be used as collateral for new debts that will arise.
8. Mortgage rights can guarantee more than 1 (one) debt.
9. The mortgage right follows its object in the hands of whoever the mortgage right object is in.
10. The above mortgage rights cannot be seized by the court.
11. Mortgage rights can only be imposed on certain land (principle of specialization).
12. Mortgage rights must be registered (publicity principle).
13. Mortgage rights can be given accompanied by certain promises.
14. The object of the mortgage may not be agreed to be owned by the mortgage holder himself if the debtor defaults on his promise.
15. The execution of mortgage rights is easy and certain.

As an accession right, the birth of a mortgage right is based on the principal agreement, namely a debt agreement. The granting of a mortgage right is preceded by the debtor's promise to grant a mortgage right to the creditor as a guarantee for debt repayment. The promise is stated and is an inseparable part of the debt agreement, then the Deed of Granting of Mortgage Rights (APHT) is given and by the Land Deed Making Officer (PPAT).⁴

The binding of credit guarantee with mortgage rights is carried out if the customer or debtor who receives credit from the bank, makes immovable goods

²Maria SW Soemardjono, 1996, Mortgage and Fiduciary Rights, Citra Aditya Bakti, Bandung, p. 2.

³Sutan Remy Syahdeini, Mortgage Rights: Principles, Basic Provisions and Problems Faced by Banking, Airlangga University Press, p. 3.

⁴M. Khoidin, SH, M.Hum., CN, Op.Cit., p. 84.

in the form of land (land rights) with or without objects that are not related to the land (for example buildings, plants, statues, and so on) as collateral without the debtor physically handing over the collateral to the creditor, meaning that the collateral is physically still controlled by the person concerned and its ownership remains with the original owner, but because it is used as collateral for debt with the holding of a mortgage agreement, so that the authority of the mortgage grantor to carry out legal acts with third parties or other acts that result in a decrease in the value of the collateral is limited by the mortgage rights held by the bank as the holder of the mortgage rights. The mortgage rights are declared to have been born on the date of the land book mortgage rights complete with the documents required for its registration. Also, the termination of the mortgage rights is based on Article 18 paragraph (1) of the Mortgage Rights Law, that the mortgage rights terminate or are removed due to several things as follows:⁵

1. The deletion of the debt causes the mortgage as an accessoir right to be deleted. This occurs because the mortgage is there to guarantee the repayment of the debt from the debtor's debt which is the main agreement. Thus, the deletion of the debt also deletes the mortgage;
2. Release of the mortgage right by the mortgage holder. The elimination of the mortgage right due to release by the mortgage holder is carried out by providing a written statement regarding the release of the mortgage right by the mortgage holder;
3. clearance of mortgage rights based on a court order;
4. the elimination of rights to land burdened with mortgage rights

However, what needs to be considered is if a plot of land that has land rights that are burdened by mortgage rights, but the land burdened by mortgage rights is undergoing land acquisition. Land acquisition according to Article 1 number 2 of Law Number 12 of 2012 concerning Land Acquisition for Development and Public Interest is "an activity to provide land by providing adequate and fair compensation to the entitled party. Among the dilemmas is how the agreement between the creditor (bank) and the debtor in the mortgage right along with the object of the mortgage right being in a government project that is included in the land acquisition area. Where, on the one hand the debtor as the one who owes the creditor, but on the one hand the object of the mortgage right will be land acquisitioned by the government. What is of concern is the existence of the agreement between the debtor and creditor related to the mortgage right agreement whose object is affected by land acquisition. In addition, the status of the mortgage object which is under the control of the creditor, but must be deleted due to land acquisition. In addition, there is no explicit regulation regarding land acquisition for land that still has mortgage rights. Based on the

⁵ibid., pp. 79-80.

descriptions above, the author is interested in following up in the form of a journal.

2. Research Methods

This research uses a sociological juridical approach method which uses specifications analytical descriptive. The data used includes secondary data and primary data. Data retrieval comes from primary legal materials, secondary legal materials, and tertiary legal materials.⁶

3. Results and Discussion

3.1. Legal Certainty of the Elimination of Mortgage Rights on Ownership Rights Due to Land Acquisition for Public Interest

Land as a natural resource is a gift from God Almighty to the Indonesian people. Therefore, it is only natural that land is managed as well as possible so that its use can provide prosperity for the people as mandated in Article 33 paragraph (3) of the 1945 Constitution. Land is the surface of the earth, as stated in Article 4 of the Basic Agrarian Law (hereinafter referred to as "UUPA"). Thus it is clear that land in the legal sense is the surface of the earth. Meanwhile, land rights are rights to a certain part of the earth's surface, which has two-dimensional boundaries with length and width.⁷

The basis of legal certainty in written legal regulations as the implementer of the Basic Agrarian Law Number 5 of 1960, allows interested parties to easily know the applicable laws and the authority and obligations that exist over the land they own. Because human needs for land are currently increasing. This is due to the increasing population, while on the other hand the land area does not increase.

Land rights thus contain the authority, as well as the obligation for the holder of the rights to use, in the sense of controlling, using and taking advantage of a certain plot of land that is being claimed. Its use contains the obligation to maintain the sustainability of its capabilities and prevent its damage, in accordance with the purpose of granting and the contents of the rights and the use of the land as stipulated in the spatial plan of the relevant region. The holder of the rights to land is not permitted to act arbitrarily on his land, because in addition to the authority he has, he also has certain obligations and must pay attention to the prohibitions that apply to him. The social function of each right to land must also always be a guideline for the holder of the rights to land. The main source in the development of national land law is customary law.

The issuance of Law Number 4 of 1996 concerning Mortgage Rights on Land and

⁶ Soejono Soekanto, 2007, Introduction to Legal Research, UI Press, Jakarta, p. 45.

⁷ Boedi Harsono, 2007, Indonesian Agrarian Law. History of the Formation of the Basic Agrarian Law and its Implementation, Djambatan, Jakarta, p. 18.

Objects related to land, the provisions regarding mortgages on land contained in Book II of the Civil Code and the provisions regarding Creditverband contained in Staatsblad 1908 Number 542 are declared no longer valid, because they are considered no longer in accordance with the needs of credit activities, in connection with the development of the Indonesian economic system. In Book II of the Civil Code, it is regulated regarding the definition, how to distinguish objects and property rights, both property rights that provide enjoyment or provide guarantees.

In personal guarantees, the creditor's rights can only be maintained against the particular guarantor. This means that in personal guarantees the principle of equality applies, namely that there is no difference between receivables that come first and those that come later. All creditors' receivables against the guarantor's assets have the same status and are paid off *pari passu* and *pro rata* (in accordance with the provisions of Article 1132 of the Civil Code).⁸

Collateral in the form of material collateral is institutionalized in the form of mortgage, Mortgage Rights, fiduciary, and pledge. The provisions in Article 1 number 1 of the UUHT formulate the definition of Mortgage Rights, namely: Mortgage Rights are security rights imposed on land rights as referred to in Law Number 5 of 1960 concerning Basic Agrarian Principles, including or not including objects that are an integral part of the land, for the settlement of certain debts that give a priority position to certain creditors over other creditors.⁹

As material collateral, mortgage rights have the principles and characteristics of material rights, namely as follows:¹⁰

1. Mortgage rights cannot be divided (*ondelbaarheid*) or cannot be separated (*onsliptbaarheid*);
2. Mortgage Rights contain partial shares which are a deviation from the nature of Mortgage Rights which cannot be divided.¹¹

⁸Kartini Muljadi and Gunawan Widjaja, 2007, Series on the Law of Property, Special Rights, Pawns and Mortgages, Kencana, Jakarta, pp. 64-66.

⁹Rachmadi Usman, 2011, Property Law, Sinar Grafika, pp. 305-306.

Slamet Khudhon, Umar Ma'ruf, "The role of land deed making officials (PPAT) in making land sale and purchase deeds using checks as a means of payment", *Sulitan Agung Notary Law Review*, Volume. 5, no. 1, March 2018. <https://jurnal.unissula.ac.id/index.php/akta/search/authors/view?firstName=Umar&middleName=&lastName=Ma%E2%80%99ruf&affiliation=Fakultas%20Hukum%20UNISSULA&country=ID?firstName=Umar&middleName=&lastName=Ma%E2%80%99ruf&affiliation=Faculty%20Law%20UNISSULA&country=ID>

¹¹ Raden Hamengku Aji Dewandaru, Umar Ma'ruf, "Legal study on the obligation for notaries and PPATs who hold concurrent positions to be domiciled in one area or work region", *Sulltan Agung Notary Law Review*, Volume.4, No. 2, 2017

<https://jurnal.unissula.ac.id/index.php/akta/search/authors/view?firstName=Umar&middleName=&lastName=Ma%E2%80%99ruf&affiliation=Fakultas%20Hukum%20UNISSULA&country=ID?fir>

3. The right of mortgage follows the object being pledged (*droit de suite*) in the hands of whoever it is;
 4. Mortgage rights must be registered (publicity principle);
 5. Mortgage rights can be accompanied by certain promises stated in the APHT.
 6. Tiered Mortgage Rights (there are higher rankings among creditors holding Mortgage Rights);
 7. Mortgage rights encumber certain land rights (principle of specialization);
- Law Number 5 of 1960 states in Article 27 that ownership rights are revoked if:

1. the land falls to the state,
 - a) due to the revocation of rights under Article 18;
 - b) due to voluntary surrender by the owner;
 - c) because of abandonment;
 - d) due to the provisions of Article 21 paragraph (3) and 26 paragraph (2).
2. the land was destroyed.

Explanation of Article 27 Land is abandoned if it is intentionally not used in accordance with its condition or the nature and purpose of its rights. Law Number 5 of 1960 in its regulations apparently determines that in the first place land that falls to the state is due to the revocation of rights based on Article 18. This shows the existence of public interest, namely the interests of the nation and state, so that land acquisition is needed for development.

This unbalanced condition of land needs and availability continues and will cause problems in land use, including:

- a. Reduction in the area of fertile agricultural land to become residential land, industrial land and other non-agricultural needs;
- b. The occurrence of clashes of interests in various development sectors (for example between forestry and transmigration, mining and plantations and so on);
- c. The decline in the quality of residential environments due to flooding, lack of clean water both in terms of quantity and quality;
- d. The expansion of critical land due to land use that is not in accordance with its potential, the occurrence of erosion, flooding and sedimentation, as well as;
- e. The use of land for various activities will produce waste that can cause water and air pollution.

Law Number 5 of 1960 Concerning Basic Agrarian Principles, Article 18 states For the public interest, including the interests of the nation and state and the common interests of the people, land rights may be revoked, by providing appropriate compensation and in a manner regulated by law. Explanation of Article 18 This article is a guarantee for the people regarding their rights to land.

Revocation of rights is possible, but is bound by conditions, for example it must be accompanied by the provision of appropriate compensation.

UUPA is based on the essential nature of human nature as an individual and social being as intended by the second principle of Pancasila, therefore in addition to collective rights, namely the right to control from the state which is the highest right that covers the entire earth, water, space and natural resources contained therein, there are also individual (private) rights to land as stated in article 16 of UUPA. In accordance with this description, it can be understood that the elimination of land ownership rights can occur because the land is needed for development in the public interest. Its implementation is of course carried out by providing appropriate compensation in accordance with applicable laws and regulations. The existence of regulations regarding the elimination of land ownership rights shows that Law Number 5 of 1960 concerning Basic Agrarian Principles has become the legal basis for the government to regulate land use.

3.2. Legal Consequences of the Elimination of Mortgage Rights on Ownership Rights Due to Land Acquisition for Public Interest

The specialty of mortgage rights as collateral is that mortgage rights provide a priority position to the mortgage holder in fulfilling his receivables if the mortgage provider defaults or in other words cannot fulfill his promised performance. By not being able to fulfill the promised performance, the mortgage holder can immediately execute the collateral object that is used as collateral for the mortgage provider's debts. The position of the creditor after the abolition of land ownership rights as the object of the mortgage collateral will change. Where initially the creditor was positioned as a preferred creditor or a creditor whose debt repayment was prioritized will change to a concurrent creditor. If HT is abolished, the creditor's position becomes a concurrent creditor. Where, the creditor no longer has privileged rights but only has the position of an ordinary creditor. Of course this makes the creditor no longer guaranteed and can potentially bring huge losses to the creditor.¹²

Based on the provisions of PMNA/KBPN No. 5/1998 concerning Changes in Building Use Rights or Land Use Rights for Residential Houses burdened with Mortgage Rights to Ownership Rights, the following provisions apply:

1. Changes to the rights are requested by the land rights holder with the consent of the mortgage rights holder.
2. Changes to these rights result in the mortgage rights being removed.
3. The Head of the Land Office, due to his position, registers the removal of the

¹² Iga Gangga Santi Dewi., The Role of the Sub-district Head as a Land Deed Making Official (PPAT) in Land Sale and Purchase, *Pandecta*, Volume 5. Number 2. July 20 10 [Pandecta](http://journal.unnes.ac.id/njuindex.php/pandecta)

mortgage rights burdening the HGB/Use Rights which are changed to Ownership Rights, together with the registration of the Ownership Rights concerned.

4. To protect the interests of creditors/banks which were originally secured by mortgage rights over the HGB or Hak Pakai which became invalidated, before the change in rights is registered, the holder of the land rights can provide SKMHT with the object of the Hak Milik obtained as a change to the HGB or Hak Pakai.
5. After the change in rights has been made, the land rights holder can make an APHT for the relevant Property Rights in accordance with the applicable provisions by appearing in person or through a SKMHT.

The elimination of land ownership rights for public interest according to laws and regulations can be seen in Law Number 5 of 1960 and other applicable laws and regulations. Between laws and regulations, there are harmonious and appropriate legal provisions regarding the elimination of land ownership rights for development in the public interest.

In accordance with Law Number 5 of 1960, Article 18, there are several elements that must be met in relation to the elimination of land ownership rights, such as:
1. The existence of public interest, including the interests of the nation and state;
2. The existence of appropriate compensation in accordance with applicable laws and regulations;
3. The existence of legal guarantees for the people regarding their rights to land if needed for the public interest. Land acquisition is: "the revocation of rights to land and objects on it by the government to be used as a means of public interest". Explanation: "the implementation of the revocation of these rights is accompanied by the provision of compensation to people or parties who have rights to the land and objects in a manner regulated by law."¹³

In the 1960 UUPA as a political basis for land, there are no provisions that explicitly mention land acquisition. Article 18 of the 1960 UUPA, for example, only regulates if the land will be used for public interest, including the interests of the nation and state and the common interests of the people. For this purpose, land rights can be revoked by providing appropriate compensation and in accordance with the method regulated by law. The term land acquisition is found in Permendagri No. 15 of 1975. Land acquisition is defined as releasing the legal relationship that originally existed between land rights holders by providing compensation. Land acquisition for government interests is carried out by a land acquisition committee. The committee is tasked with conducting inspections/research and determining compensation. The formation of the Committee is determined by the Governor of the regional head for each

¹³Yusriyadi, 2010, *Industrialization & Changes in Social Function, Land Ownership Rights*, First Edition, Genta Publishing, Yogyakarta, p. 160.

Regency/City in the relevant province.¹⁴

In relation to the provision of compensation as regulated in Article 76 of Government Regulation No. 39 of 2023, the following forms of compensation are also regulated:

- a. Money;
- b. Replacement land;
- c. Resettlement;
- d. Share Ownership;
- e. Other forms agreed to by both parties.

Compensation for land controlled in the form of customary rights, then the implementation of compensation is given in the form of construction of public facilities or other forms that are beneficial to the local community. Provisions on customary land Article 41 of Government Regulation No. 39 of 2023 are an effort to accommodate claims of customary rights of the community that still exist in several regions. Because if it is not accommodated regarding the recognition, it can trigger conflict between the community and the local government. Therefore, this regulation has been very accommodating to the development of society in the region, especially regarding land issues.

The compensation referred to in this regulation concerns the basis for calculation in making compensation payments or land rights that will be taken for development in the public interest. The placement of standards that will be taken for development in the public interest is almost the same as the loss standards found in several countries. This can be seen for example in Brazil, where the guidelines used in providing compensation for land acquisition use the estimated value factor for tax collection purposes, location, land condition (maintained/not) and market value for the last five years of other comparable land rights, as considerations in determining the amount of compensation.¹⁵

Memory of the Explanation of the Basic Agrarian Law, in the General Explanation of Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles, II, Basics of National Agrarian Law, emphasizes apart from property rights as hereditary rights, the strongest and fullest that people can have On land, cultivation rights, building use rights, use rights, rental rights and other rights are also held which will be determined by other laws (Article 4 jo 16). Article 4 paragraph (1) Based on the State's right to control as intended in Article 2, it is determined that there are various rights to the surface of the earth, called land,

¹⁴Supriadi, 2010, *Agrarian Law*, 1st Ed., 4th Printing, Sinar Grafika. Jakarta, p. 79.

¹⁵HAW, Widjaja, 2000, *Implementation of Pancasila Values & Human Rights in Indonesia*, PT Rineka Cipta, Jakarta, p. 74.

which can be given to and owned by people, either alone or together with other people. other people and legal entities.

The elimination of land ownership rights according to Law Number 5 of 1960 concerning Basic Agrarian Principles and other applicable laws and regulations shows that land acquisition for development in the public interest requires a legal basis in order to provide legal certainty, justice and benefits for the community. The implementation of land acquisition for development in the public interest certainly requires deliberation and public consultation efforts with all interested parties so that it can run according to plan and all parties are treated fairly through the provision of appropriate and proper compensation.

4. Conclusion

The elimination of land ownership rights that are used as collateral for mortgage rights due to land acquisition for public interest will also automatically cause the mortgage rights to be eliminated. This means that the mortgage rights can no longer be used as collateral for a principal agreement that has been made previously. This is as regulated in Article 18 of the UUHT. The elimination of mortgage rights as collateral cannot result in the elimination of the principal agreement in this case the debtor's debt to the creditor. Where, the debtor still has an obligation to pay off a number of his debts to the creditor as agreed in the principal agreement in Law Number 5 of 1960 concerning Basic Agrarian Principles has provided legal certainty regarding the elimination of land ownership rights that can be caused because the land falls to the state and the land is destroyed. The state has the power to regulate and organize the allocation, use, supply and maintenance of land. The position of creditors after the elimination of land ownership rights as collateral for mortgage rights will change. Where initially the creditor was positioned as a preferred creditor or a creditor whose debt repayment was prioritized will change to a concurrent creditor. If the mortgage rights are eliminated, the creditor's position becomes a concurrent creditor. Where, the creditor no longer has privileged rights but only has the position of an ordinary creditor. Of course this makes the creditor no longer guaranteed and can potentially bring huge losses to the creditor, Elimination of land ownership rights for the public interest according to Law Number 5 of 1960 concerning Basic Agrarian Principles and other applicable laws and regulations can be implemented by considering the provision of appropriate and fair compensation according to applicable laws and regulations. Law Number 2 of 2012 concerning Land Acquisition for Development in the Public Interest, is the legal basis for implementing the method of providing compensation to the entitled party and must be in accordance with the implementing provisions as stated in Government Regulation No. 19 of 2021 in conjunction with Government Regulation No. 39 of 2023 concerning the Implementation of Land Acquisition for Development in the Public Interest and Regulation of the Minister of ATR/Head of BPN No. 19 of 2021 concerning Provisions for the

Implementation of Government Regulation No. 19 of 2021 concerning the Implementation of Land Acquisition for Development in the Public Interest so that in the future there will be no problems arising from land acquisition where the object of the land acquisition is being pledged to a bank/creditor.

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