

Legal Certainty of the Deed of Granting Mortgage Rights on Certificates in Forest Area

Ratna Nurliana

Faculty of Law, Universitas Islam Sultan Agung (UNISSULA) Semarang, Indonesia,
E-mail: ratnanurlianafh@gmail.com

Abstract. Land has economic, social, and strategic value and can be used as collateral in financing activities through Mortgage Rights as regulated in Law Number 4 of 1996 concerning Mortgage Rights. Mortgage Rights are born after being registered based on the Deed of Granting Mortgage Rights (APHT) made by the Land Deed Making Official (PPAT). In practice, problems arise when the land certificate used as the object of APHT is located in a forest area so that the Mortgage Rights cannot be registered at the Land Office. This condition creates legal uncertainty for creditors, debtors, and PPAT, and has the potential to cause losses for financial institutions. This study aims to analyze the legal certainty of APHT for certificates included in forest areas as well as the resolution mechanisms and policies that can be implemented to ensure such legal certainty. This research uses normative legal research methods with a statutory and historical approach. The legal materials used include primary, secondary, and tertiary legal materials, which are analyzed qualitatively using the theories of legal certainty, legal protection, and authority. The results of the study indicate that APHT for certificates located in forest areas cannot provide legal certainty because Mortgage Rights do not arise if they are not registered at the Land Office. Data asynchronization between the National Land Agency and the Ministry of Environment and Forestry is the main factor causing this problem. In addition, limited access and integration of forest area data causes PPAT to experience difficulties in determining the status of land objects before making APHT. The resolution mechanisms that can be carried out include administrative settlement through verification and synchronization of land and forest area data, legal settlement through lawsuits or cancellation of certificates, and strengthening the policy of integrating land and forestry information systems to ensure legal certainty for the parties.

Keywords: Deed of Granting Mortgage Rights; Forest Areas; Land Certificates; Legal Certainty; Mortgage Rights.

1. Introduction

Land is an asset that has economic, social and strategic value for human life and national development.¹In the Indonesian land law system, land not only functions as a place to live and a source of livelihood for human life, but can also be an object of guarantee or collateral in financing activities.²For the purposes of such guarantees, agrarian law recognizes the institution of Mortgage Rights, which is a material guarantee for land and objects related to land, as regulated in Law Number 4 of 1996 concerning Mortgage Rights for Land and Objects Related to Land.³Mortgage Rights provide a preferred position to the creditor and only arise on condition that registration is carried out at the Land Office based on the Mortgage Rights Granting Deed (APHT) made by the Land Deed Making Officer (PPAT).

APHT as an authentic deed made by PPAT functions to confirm the existence of an agreement granting Mortgage Rights and is the basis for recording in the land book at the Land Office.⁴The validity of the Mortgage Right as a new material guarantee is valid and binding on third parties after registration at the Land Office.⁵Therefore, the creation of an APHT must be based on a land object that is legally valid, has a certificate, and is not located in an area that is normatively excluded from the granting of land rights.

In practice, significant problems arise when land certificates designated as APHT objects are located within forest areas. Forest areas, as defined by forestry laws and regulations, are specific areas designated by the government and maintained as permanent forests.⁶Land within forest areas is under state control and cannot be encumbered with land rights, except under certain, strictly regulated circumstances. Therefore, such land is not eligible for APHT (Land Use Right) or Mortgage Rights.

This issue not only invalidates the collateral but also results in the APHT being unable to be registered, preventing the mortgage from being created. Consequently, the creditor's legal standing is unprotected. This results in the financial institution losing certainty of collateral, the debtor potentially encountering difficulties in the financing process, and the Land Deed Official (PPAT) being held liable if deemed to have been careless in ensuring the legality of the land.

¹Boedi Harsono, 2008, *Indonesian Agrarian Law: History of the Formation of the Basic Agrarian Law, Its Contents and Implementation*, Djambatan, Jakarta, p. 18.

²Urip Santoso, 2012, *Agrarian Law: A Comprehensive Study*, Kencana, Jakarta, p. 357.

³Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land.

⁴Boedi Harsono, Loc. Cit. p. 395.

⁵Urip Santoso, 2013, *Property Guarantee Law in Indonesia*, Kencana, Jakarta, p. 112.

⁶Siti Aminah, 2016, *Forestry Law and Land Rights*, Prenadamedia, Jakarta, p. 75.

One of the root problems arises from the lack of synchronization of land and forest area data. There has been an overlap between the National Land Agency's land registration maps and the Ministry of Environment and Forestry's forest area maps. Certificates issued by the National Land Agency may be located in areas that are still spatially registered as forest areas by the Ministry of Environment and Forestry. Delays in the issuance of these certificates often occur due to the lengthy process from designation to forest area determination, inaccurate forest area maps, or the lack of comprehensive boundary delineation. This results in communities possessing land for generations, then obtaining certificates, but legally, the land remains within the forest area.

This policy disharmony has given rise to multiple legal issues. From an agrarian law perspective, land certificates are strong evidence of land rights. However, from a forestry law perspective, land rights cannot be granted within forest areas. This normative tension creates legal uncertainty for communities, Land Deed Officials (PPAT), and financial institutions. When APHT is based on a certificate that overlaps with a forest area, the Land Office cannot register mortgage rights. This results in the APHT losing its legal function and diminishing certainty for interested parties.

This issue also impacts the position of Land Deed Officials (PPATs) as public officials. PPATs are obligated to ensure the accuracy of the legal and physical data of land objects before issuing deeds. However, PPATs' ability to verify forest area status is limited in practice, given that access to forest area data is not real-time and is not fully integrated with the land system. As a result, PPATs may issue APHTs based on certificates that are administratively legal but spatially problematic. Furthermore, the uncertainty of certificate status also endangers the banking sector, which requires valid collateral to mitigate credit risk.

The case that occurred in the Limited Liability Company PT. BS (Persero), Tbk KD Branch Office regarding the object of land rights that became collateral for Mortgage Rights but could not be registered for Mortgage Rights at the National Land Agency Office KU because the object of land rights that became collateral was included in the Forest Area and the credit facility for the debtor had been fully disbursed by the creditor. This caused losses for the creditor and caused problems because if the collateral object experienced a default, the creditor could not execute the collateral object.⁷

⁷Interview with (Rizal) KU Notary Staff, October 30, 2023.

PPAT as an official who makes a request to check land rights before making APHT administratively cannot determine whether the land rights that are used as collateral are included in the Forest Area or not because administratively PPAT is not an official who has the authority to do so. The problem with APHT that has been made by PPAT for collateral rights occurs when PPAT wants to register the mortgage rights at the BPN KU office because when checking the certificate, the results of the check issued by BPN do not explain whether the land rights are included or not in the Forest Area.

The emergence of cases of APHTs that cannot be registered because the certificates are located within forest areas demonstrates the urgent need to ensure legal certainty in the application of Mortgage Rights. Legal certainty is a fundamental principle in national law, as stipulated in Article 3 of Law Number 5 of 1960 concerning Basic Agrarian Regulations (UUPA).⁸, and is a principle in every civil contract. Uncertainty about land status can ultimately hamper economic activity, reduce trust in land administration, and give rise to potential disputes between communities, government agencies, and businesses.

Taking into account the complexity of the problem, it is important to conduct a more in-depth study regarding the legal certainty of APHT for certificates within forest areas, which includes:

1. legality of certificates located in forest areas;
2. legal protection for the parties; and
3. settlement mechanisms available in positive law in Indonesia.

This research is expected to not only provide conceptual and normative understanding, but also contribute to improving the land administration system, integrating forestry and land policies, and improving regulations to create legal certainty and justice for the community and the business world.

This research aims knowing and analyzing the legal certainty of deeds granting mortgage rights to certificates included in forest areas.

2. Research Methods

In compiling this research, the author used a normative juridical approach. The research specifications used in this study are normative. The data collection method is from a literature study and the data analysis method in this study is a normative juridical analysis.

⁸Article 3 of Law Number 5 of 1960 concerning Basic Agrarian Regulations.

3. Results and Discussion

3.1. Legal Certainty of Deeds Granting Mortgage Rights on Certificates Within Forest Areas.

The legal certainty of the deed of granting mortgage rights (APHT) for land certificates whose objects are included in forest areas is basically weak or imperfect because the object of the mortgage right must be a legitimate land right and can be burdened with mortgage rights. If the land is located in a forest area, a conflict arises between land law and forestry law which affects the validity of the APHT and the process of registering and encumbering land rights at the Land Agency Office.

The Deed of Granting of Mortgage Rights must be registered so that the principle of publicity and transparency applies to it, this is based on Article 13 of the UUHT which requires the granting of Mortgage Rights to be registered at the Land Office. Registration of the granting of Mortgage Rights is an absolute requirement for the birth of Mortgage Rights and binding the Mortgage Rights to third parties. By registering/registering this granting of Mortgage Rights, third parties can find out about the existence of a Mortgage Right burden on a land, because the data from this registration is open to the public.⁹ So the position of the deed granting mortgage rights whose certificate is in a forest area (problematic) is unable to obtain and fulfill the principle of publicity so that the position of the APHT as a deed to obtain legal certainty for the execution of mortgage rights on the collateral object is not fulfilled.

According to the author, if the Certificate is declared defective or void if the certificate is cancelled, or the land is declared part of a permanent forest area, then the object of the Mortgage Right loses its legal basis. As a result, the APHT can lose its binding force, which has implications for the Mortgage Right being threatened with cancellation, the creditor loses material collateral over the object of the mortgage right. Because the principle of the Mortgage Right is that "the right of collateral follows the validity of the land rights."

3.2. Settlement Mechanism and Policy to ensure legal certainty for Deeds of Granting Mortgage Rights for Certificates Within Forest Areas

The settlement mechanism and policy to guarantee legal certainty of the Deed of Granting Mortgage Rights (APHT) for certificates included in forest areas is basically aimed at resolving conflicts between land, banking, and forestry laws. Legal certainty is needed so that community rights are protected, creditors obtain definite guarantees and the state continues to maintain forest areas. This is stated

⁹Muhammad Yasmin, 2022. The Status of Mortgage Deeds That Do Not Include the Bank's Power of Attorney. Thesis, Faculty of Law, Hasanuddin University, pp. 22-23.

and bound by Law Number 4 of 1996 concerning Mortgage Rights, Law Number 5 of 1960 concerning Basic Agrarian Principles and Law Number 41 of 1999 concerning Forestry, as well as Presidential Regulation Number 88 of 2017 concerning Settlement of Land Control in Forest Areas.

A Deed of Mortgage Grant (APHT) for a land title certificate later discovered to be located in a forest area raises legal issues because the collateral object is potentially legally flawed. This situation can disrupt legal certainty for both creditors and debtors, particularly regarding the validity of the mortgage and the execution of the collateral. According to the author, to ensure legal certainty, the following mechanisms are needed to resolve this issue:

a. Forest Area Status Verification

The primary step is to determine whether the land is truly a forest area, whether the area has been newly designated or already designated, and when the certificate was issued. This is crucial because, according to Constitutional Court Decision No. 45/PUU-IX/2011, forest areas must be designated, delimited, mapped, and designated. If they haven't been definitively designated, their forest area status remains open to debate.

b. Settlement through Accelerated Implementation of Agrarian Reform.

Land Objects of Agrarian Reform (TORA) is land controlled by the state and/or land that has been owned, controlled, or utilized by the community which is then designated for the implementation of agrarian reform through land redistribution activities or asset legalization.

The TORA concept is divided into 3 parts, namely:

1) TORA Forest Area

A forest area is a specific area designated and/or maintained by the government to maintain its existence as permanent forest. In the implementation of agrarian reform, not all forest areas can be designated as TORA. Only certain areas, based on inventory, verification, and government policy, can be released or have their status changed for the purposes of agrarian reform.

In the context of agrarian reform, TORA sources from forest areas arise because there are many communities who have long lived, cultivated, or utilized land that is still administratively recorded as a forest area.

2) TORA Non-Forest Area

Non-Forest Area is all land that is outside the forest area designated by the government. TORA sources from non-forest areas are the sources most often found in agrarian reform practices.

These lands generally have the status of state land or land that can legally be allocated for the purposes of agrarian reform.

3) TORA Results of Agrarian Conflict Resolution

Agrarian conflict is a dispute related to the control, ownership, use or utilization of land between the community, government, business entities or other parties.

Presidential Decree No. 62 of 2023 introduces a significant innovation by making the results of agrarian conflict resolution a source of TORA. This means that once the conflict is resolved and community rights or interests that must be protected are identified, the land subject to the conflict can be designated as TORA.¹⁰

Within the framework of national agrarian policy, TORA is the primary objective used by the government to achieve a more equitable structure for land ownership, use, and utilization. TORA serves as an instrument for reducing inequality in land ownership, improving community welfare, and resolving various agrarian conflicts.

In addition, the Government has provided a mechanism through Presidential Regulation Number 62 of 2023 concerning the Acceleration of the Implementation of Agrarian Reform. This mechanism aims to reduce inequality in land control and ownership, provide legal certainty regarding land rights to communities, resolve agrarian conflicts and disputes, improve community welfare through access to land, promote national economic equality, reduce poverty in rural areas, and increase land productivity.

inventory of land ownership, verification of community rights, research on land history, and settlement of the legal status of land. The form of resolution can be in the form of releasing the forest area, changing the boundaries of the forest area, granting management access, or designating it as TORA (Agrarian Reform Object Land). If the land is finally released from the forest area, the certificate will receive stronger legal certainty, and the APHT and mortgage rights will also receive legal certainty.

¹⁰Presidential Regulation of the Republic of Indonesia Number 62 of 2023 concerning the Acceleration of the Implementation of Agrarian Reform.

c. Synchronization of ATR/BPN and Ministry of Environment and Forestry Data

One of the main causes of conflict is the misalignment of land maps and forest area maps. Therefore, geospatial data integration, cross-agency verification, and a One Map Policy are necessary. This policy is crucial to prevent certificates from being issued over forest areas, allowing Land Officers (PPAT) to ensure the legality of the property, and banks to secure collateral.

d. Implementation of the Principle of Prudence by PPAT and Banks

To ensure legal certainty regarding APHTs, Land Deed Officials (PPAT) and creditors are required to exercise prudence by verifying the status of forest areas, checking spatial planning, reviewing land records, conducting electronic and physical certificate checks, and requesting clarification from forestry agencies if necessary. This approach minimizes the risk of APHT cancellation and improves legal protection for creditors.

e. Settlement through Administrative and Court Routes

If a dispute arises, resolution can be made through administrative channels, such as certificate cancellation, forest area boundary revision, mediation by the ATR/BPN and the Ministry of Environment and Forestry, or legalization through the PPTKH. Dispute resolution can also be made through the courts, such as PTUN lawsuits against certificates, civil lawsuits regarding land rights, or testing the validity of forest area determination. The court will consider several factors, namely the time of certificate issuance, the forest area determination process, the good faith of the rights holder, and the legal certainty of third parties such as banks.

f. Policy Reform for Legal Certainty

Future policies needed include accelerating the determination of definitive forest areas, digital integration of forestry and land maps, requiring forest area inspections before issuing APHTs, increased oversight of Land Deed Officials (PPAT), and harmonizing ATR/BPN regulations with those of the Ministry of Environment and Forestry. This aims to eliminate the issuance of certificates in forest areas, ensuring clear and legitimate APHTs and strengthening legal protection for the public and banks.

Efforts to resolve the issue if someone already has a certificate for land that is included in a Forest Area are carried out by verifying the status of the Forest Area, submitting a resolution through the Settlement of Land Control in the Framework of Determining Forest Areas (PPTKH), utilizing the TORA (Land Object of Agrarian Reform) scheme, submitting a resolution to agrarian conflicts, and the government conducting an evaluation of the issuance of the certificate.

4. Conclusion

The legal certainty of the deed of granting mortgage rights on certificates included in forest areas faces legal problems due to the disharmony between the provisions of land law in the 1960 Basic Agrarian Law (UUPA) and the provisions of forestry law in the Forestry Law Number 41 of 1999 so that the legal certainty of the deed of granting mortgage rights (APHT) on land certificates whose objects are included in forest areas is basically weak or imperfect because the object of mortgage rights must be a legitimate land right and can be burdened with mortgage rights. Legal certainty for the parties can only be realized if there is harmonization of regulations, synchronization of spatial data, coordination between government institutions, and the application of the principles of legal certainty, prudence, and good faith in every process of encumbrance of mortgage rights. These efforts are important to provide legal protection for Creditors and debtors while maintaining the stability of the financing system and land administration in Indonesia. The settlement mechanism to guarantee legal certainty for APHT certificates within forest areas can be carried out through administrative, litigation and non-litigation mechanisms, while To ensure legal certainty for APHT, the government needs to formulate and implement strategic policies, including strengthening the One Map Policy, data integration between the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency and the Ministry of Environment and Forestry, accelerating the definitive determination of forest areas, digitizing the land and mortgage system, strengthening supervision of certificate issuance, reforming land and forestry regulations, and providing legal protection for parties with good intentions. The government needs to harmonize regulations between the 1960 Basic Agrarian Law, Forestry Law No. 41 of 1999, and Mortgage Law No. 4 of 1996 to avoid overlapping regulations regarding land and forest area status. This harmonization is necessary to create legal certainty regarding land rights and mortgage rights. Land Deed Officials (PPAT) need to improve the prudential principle in making APHT, especially in checking the validity of certificate documents by first carrying out a comprehensive check on the land status.

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