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Legal Protection for Creditors for Guaranteed Objects that Become the Object of Civil Disputes

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Abstract. *Banking credit is generally accompanied by material collateral, especially land mortgages, as an instrument to secure the repayment of creditors' receivables. However, in practice, legally bound collateral objects often become the object of civil disputes due to third-party ownership claims, certificate cancellation lawsuits, or inheritance disputes, while the Mortgage Law has not explicitly regulated the position of creditors in such conditions, resulting in a normative vacuum that is detrimental to creditors with good intentions. This study aims to analyze the form of legal protection for creditors holding material collateral when their collateral objects become the subject of civil disputes, as well as the legal consequences for creditors' rights if a court decision states that the collateral object has transferred ownership to another party. This study uses a normative juridical method with a statutory and conceptual approach. The data sources used are secondary data in the form of primary, secondary, and tertiary legal materials, collected through document studies or library materials, then analyzed qualitatively using a deductive method to formulate legal principles that answer the research problem. The results of the study indicate that the legal standing of creditors holding mortgage rights is basically strong through the principles of parate execution, droit de préférence, and droit de suite, but is conditional because it depends on the procedural validity of the deed granting mortgage rights and the principle of nemo plus juris. The normative vacuum in the UUHT is answered through the construction of "Legal Protection for Creditors with Registered Good Faith Criteria" so as to provide legitimacy for creditors with good faith. Legal protection is available preventively through banking prudence and legal due diligence, as well as repressively through judicial intervention, derden verzet, default lawsuits, and alternative dispute resolution, the effectiveness of which is determined by the strength of evidence of the validity of the mortgage rights and the good faith of the creditor.*

Keywords: *Civil; Creditors; Legal; Mortgage; Protection.*

1. Introduction

Credit provision is essentially a legal relationship in the form of a debt agreement between the bank as creditor and the public as debtor, which emphasizes the agreement of the parties. This agreement is based on the principle of freedom of contract as stipulated in Article 1329 of the Civil Code, which states that everyone is in principle authorized to enter into an agreement as long as it does not violate Article 1320 of the Civil Code or the debtor fulfills the legal requirements of an agreement. Through this agreement, the debtor is obliged to repay the loan to the creditor within a predetermined period along with interest payments.

Banks must prudently grant credit in accordance with banking regulations, which require all banking business activities to be based on economic democracy and to apply the principle of prudence. Banks are required to have sufficient confidence in the good faith, capability, and ability of borrowers to fulfill their obligations as agreed. To build this confidence, banks must first conduct a comprehensive evaluation of the prospective borrower's condition. This credit assessment process plays a crucial role because the results of the analysis will determine the quality of the bank's managed credit portfolio.

The most common collateral used in lending is immovable property, particularly land, because land has high economic value and is relatively stable, making it less susceptible to depreciation. The function of collateral in the credit analysis process is to protect the creditor against the risk of the debtor defaulting on their loan.

In practice, there are debtors who are often found in a state of failure to fulfill their debt payment obligations. In accordance with Article 6 of the Mortgage Law, in the event of default, the first mortgage holder is authorized to sell the collateral object through a public auction under his own authority to pay off the receivables. However, this execution process is often hampered by various obstacles. One of the problems that creditors often face in executing the collateral object is resistance from the debtor to the auction process of the mortgage object. This phenomenon generally arises when a debtor who has been declared in default of a credit agreement shows an objection if his collateral object is auctioned at a value below market value.[1]

A problem loan occurs when a debtor defaults, either by delaying or completely stopping payment of installments or interest that have matured. In this context, problem loans include the category of bad debts, although it should be emphasized that not all problem loans are automatically classified as bad debts. If a debtor fails to fulfill their obligations properly (default), the creditor has several rights that can be claimed.

[1] Ryan Dwitama Hutadjulu, Lastuti Abubakar, and Tri Handayani, 2023, "Legal Consequences for Banks of Cancellation of Mortgage Rights Through a Permanent Court Decision", USM Law Journal, 6.1, p. 210, https://journals.usm.ac.id/index.php/julr/article/view/6646.

It can be concluded that a credit agreement is not simply a mechanism for borrowing and repayment, but rather a complex legal relationship with all its consequences. Therefore, a thorough understanding of applicable regulations is crucial before entering into an agreement. This is crucial to mitigate the risk of future legal disputes that could potentially harm the parties.[2]

In practice, there is a significant gap from what should be normatively applicable. In practice, it is not uncommon for collateral objects that have been legally bound by creditors to later become the object of disputes in civil cases in court. These disputes can arise from various reasons, including ownership claims from third parties who feel entitled to the land or objects used as collateral, lawsuits to cancel land title certificates that form the basis for binding collateral, inheritance disputes over collateral objects, or overlapping ownership due to defects in land administration. When such disputes arise, creditors are in a very vulnerable position. On the one hand, creditors have transferred funds to debtors relying on collateral that appears legally valid, but on the other hand, the right to enforce the collateral is threatened with being hampered or even rendered impossible due to ongoing disputes in court.

This gap poses a serious research problem because existing positive law does not comprehensively and firmly regulate how the creditor protection mechanism works when the collateral object is dragged into a civil dispute. The Mortgage Law does not explicitly regulate the fate of the creditor's collateral rights when there is a third party lawsuit against the collateral object, nor does it regulate the legal consequences for the creditor's rights if the court ultimately declares that the ownership of the collateral object does not belong to the debtor but to another party. This normative vacuum (rechtsvacuum) creates legal uncertainty and has the potential to greatly harm creditors in good faith who have previously fulfilled all collateral binding procedures according to applicable provisions.

In the context of a civil dispute over collateral, the creditor is the most disadvantaged party. First, during the dispute process, the creditor cannot immediately execute the collateral even if the debtor has defaulted, because the ownership dispute that is still being examined by the court can become a de facto obstacle to the implementation of the execution. Second, if the court ultimately rules in favor of the debtor or a third party and declares that ownership of the collateral has transferred, the creditor faces the risk of losing the main means of repayment of his debt, while the debtor's personal liability may not be sufficient to cover all of the creditor's debts. Third, the applicable civil procedural law does not provide a clear and firm mechanism for how creditors holding collateral can defend and fight for their rights in civil cases involving their collateral. This situation

[2] Ervira Sekar Langit and Erny Herlin Setyorin, 2022, "Legal Protection for Defaulting Debtors in Home Loan Agreements Secured by Mortgage Rights", Bureaucracy Journal: Indonesia Journal of Law and Social-Political Governance, 2.2, p. 787, https://doi.org/10.53363/bureau.v2i2.107.

creates a situation of real injustice for creditors who are essentially good-faith parties in the legal relationship of the collateral.

Based on this construction, this study focuses on analyzing two issues: first, how is the position and legal protection for creditors (holders of material collateral) when their collateral objects become disputed in civil cases in court. And second, how is the legal reasoning of the Panel of Judges in deciding cases related to legal protection for creditors over the rights of collateral objects. This study aims to determine and analyze the position and legal protection for creditors (holders of material collateral) when their collateral objects become disputed in civil cases in court, as well as to determine and analyze the legal bases and methods of reasoning (legal reasoning) used by the Panel of Judges in considering cases related to legal protection for creditors over the rights of collateral objects.

2. Research Methods

This research uses a normative legal research type with the types and sources of data used being secondary data which includes primary legal materials, secondary legal materials, and tertiary legal materials, which are collected through document study or literature study methods, then analyzed using deductive methods as the main method and inductive methods as complementary methods, through the stages of identifying legal principles, formulating legal definitions, establishing legal standards, to compiling legal rules in order to answer the problem formulation and achieve research objectives.

3. Results and Discussion

3.1. Legal Status and Forms of Legal Protection for Creditors Holding Security Rights over Collateral Objects that Become Disputed in Civil Cases

This credit relationship is established after both parties sign a written agreement, generally outlined in a credit agreement. To secure debt repayment, banks typically require collateral in the form of the debtor's land, which can be seized at any time through auction if the debtor defaults. However, this execution is only taken as a last resort, after various settlement steps through deliberation and prior warnings have been taken. Among various forms of collateral, a land mortgage is considered the most secure and effective instrument for creditors.[3]

In the practice of lending, the existence of material collateral plays a very strategic role for creditors. Every loan disbursement carries the risk of default by the debtor, so creditors often hold material collateral as a legal instrument to provide repayment certainty.

[3]Mochammad Alief Wahyu Firmansyah and Abraham Ferry Rosando, 2023, "Legal Protection for Creditors Due to the Elimination of Land Ownership Rights as an Object of Mortgage Guarantee," SEIKAT, 2.6, p. 601, https://doi.org/10.55681/seikat.v2i6.1069.

Through the principle of droit de preference, the creditor holding the collateral right obtains a priority position compared to other concurrent creditors, while through the principle of droit de suite, the right remains attached to the collateral object wherever the object changes hands. These two principles form the normative foundation that places the creditor holding the collateral right in a strong legal position, as expressly constructed in Law Number 4 of 1996 concerning Mortgage Rights.

Land is one of the central objects of regulation in agrarian law, as the topmost layer of the earth's surface. It is interesting to note that the definition of "land" referred to in the Basic Agrarian Law (UUPA) of 1960 is not land in the physical sense or its various scientific aspects in general, but rather land in the legal sense, namely that which is directly related to land rights as part of the earth's surface. This is explicitly regulated in Article 4 paragraph (1) of the UUPA, which determines various kinds of rights to the earth's surface referred to as "land" which can be granted to and owned by individuals, either alone or together with other people, as well as by legal entities.[4]

Referring to Article 4 of the Basic Agrarian Law (UUPA), land is defined as the surface of the earth, while land rights are a certain part of the earth's surface that is limited by two dimensions, namely length and width. As a form of material guarantee for property, mortgage rights are regulated in Article 4 paragraph (1) of Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land. The encumbrance is registered with the authorized agency in the field of land registration and mortgage rights, provided that the owner of the collateral object has given written approval. This process is realized through a deed of collateral binding made before a notary/PPAT.

Through a mortgage, the creditor obtains collateral over the debtor's property and the authority to execute it if the debtor defaults on its debt. This instrument also provides legal certainty and protection for all parties from the outset of the loan. In banking practice, mortgages are commonly used as collateral for property-related loans, such as home ownership loans (KPR) and investment loans in the real estate sector. These requirements include a valid certificate of ownership or use rights, and the land must not be disputed.

If the debtor defaults and the creditor exercises rights over the property, the creditor is obligated to sell it to pay off the debtor's remaining debt, with the proceeds of the sale initially earmarked for the settlement of said obligation. Although it provides legal certainty and protection, mortgage registration still requires written consent from the owner of the collateral before it can be recorded with the relevant registration agency. If a dispute arises, it can be resolved through civil litigation in the competent court.

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[4]Nomensen Sinamo and Rasmon Sinamo. 2023, National Agrarian Law & Land Policy, Jakarta: Jala Permata Aksara.

Beyond general property collateral, there are also special collateral for certain objects such as airplanes, ships, and trains, whose financing transactions must comply with the provisions applicable to each type of collateral. In short, mortgages play a role in providing legal certainty and security in lending and borrowing activities. Both creditors and debtors need to understand the provisions of Law Number 4 of 1996 and ensure they have obtained written consent from the owner of the collateral object before registration is carried out. It should also be noted that if the land rights used as collateral are cancelled, the mortgage rights attached to it essentially remain, but may be lapsed if the transfer is not carried out at the end of the term.

Violation of the provisions of mortgage rights can result in legal consequences in the form of obligations to compensate or even debt relief, as stipulated in Article 24 of Law Number 4 of 1996. In practice, mortgage rights are commonly used in banking credit transactions and are seen as a strong form of collateral, so banks are required to always comply with applicable legal provisions to protect debtor rights. Adequate understanding of the regulations regarding mortgage rights and their legal implications will help creditors and debtors carry out credit transactions better and minimize potential risks in the future.[5]

However, this normative power often confronts a far more complex reality. In practice, objects that have been encumbered with collateral rights in good faith are not always free from legal issues that stand alone outside the debt-to-credit relationship between creditors and debtors. Ownership disputes, overlapping certificates (duplicate certificates for the same object), inheritance disputes, joint property disputes, and even the imposition of a seizure by a third party are some examples of circumstances that can drag collateral objects into the realm of separate civil cases. At this point, tension arises between laws that promise a strong and prioritized position for creditors, while on the other hand, creditors are often not parties to the main case disputing their collateral objects, so that their interests are vulnerable to being neglected in the litigation process that proceeds without their direct involvement.

1) Legality of Material Collateral as the Foundation of a Creditor's Position

One of the instruments that need to be considered by the Creditor before giving credit to the debtor is the legality of the material collateral as the foundation of the creditor's position. The legality of the material collateral instrument is the starting point that determines the strength of the creditor's legal position, so that the issue of the validity of the guarantee deed is often questioned when the collateral object enters the realm of civil disputes. In the practice of encumbrance of mortgage rights, creditors generally first obtain a Power of Attorney to Encumbrance of Mortgage Rights (SKMHT) from the debtor, namely a power of

[5]Budi Harsono. 2007, Towards the Improvement of National Land Law, Jakarta: Trisakti University Publisher.

attorney that authorizes the creditor to encumber mortgage rights on immovable objects belonging to the debtor, such as land or land and buildings on it, as collateral for debt repayment.

The existence of SKMHT basically functions to protect the interests of creditors so that they are not harmed if the debtor then defaults or does not act in good faith in paying off his obligations. In accordance with Article 15 paragraphs 3 and 4 of Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land, SKMHT must be immediately followed up with the preparation of a Deed of Granting of Mortgage Rights (APHT), which is no later than one month for registered land rights, and no later than three months for unregistered land rights.

APHT made before a Notary who is also a Land Deed Making Officer (PPAT) is an authentic deed that has perfect evidentiary power, so that its legality is based on a clear legal basis, namely Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary, and Law Number 4 of 1996. This authentic nature is what makes APHT the legal foundation for the position of the creditor holding the mortgage right as described in the previous discussion, as well as being a point that needs to be considered when the validity of the encumbrance procedure is later questioned in a civil dispute involving the collateral object.[6]

In terms of its binding force, evidence in civil cases can be categorized into several qualifications, namely weak evidence, perfect evidence, definite or decisive evidence (beslissend bewijs), binding evidence (verplicht bewijs), and refutable evidence (tegen bewijs). As a deed that meets the authentic qualifications according to Article 1868 of the Civil Code, the deed has perfect evidentiary force, as affirmed in Article 1870 of the Civil Code.

Referring to Article 1870 of the Civil Code, an authentic deed has complete evidentiary power that is binding, both against the parties who made it and their heirs. Thus, an authentic deed can be said to have complete evidentiary power and is binding. Furthermore, Habib Adjie argues that the evidentiary power inherent in an authentic deed actually consists of three types, namely external evidentiary power (uitwendige bewijskracht), formal evidentiary power (formale bewijskracht), and material evidentiary power (materiele bewijskracht).[7]

However, in practice, not all land title certificates are supported by authentic and legally valid acquisition grounds. This acquisition ground, commonly referred to as the "rights basis," is the starting point for the birth of a certificate, which can be a

[6]Arina Ratna Paramita and Djumadi Purwoatmodjo, 2022, "Legal Analysis of the Deed of Power of Attorney to Encumber Mortgage Rights (SKMHT) Regarding Creditor Protection", Notarius, 15.2, p. 807, https://doi.org/10.14710/nts.v15i2.42672.
[7]Selamat Lumban Gaol, 2019, "The Position and Power of the Deed of the Land Deed Making Official in the Evidence System Based on National Land Law", Scientific Journal of Aerospace Law, 10.1, pp. 87–117, https://doi.org/10.35968/jh.v10i1.407.

deed of sale, a certificate of inheritance, a deed of gift, or a court decision. However, many certificates are based on legally flawed rights, including document forgery, legally invalid transactions, physical possession of land without a clear legal basis, or the issuance of certificates for land objects that are actually still under dispute. This situation gives rise to tension between the principle of formal-documentary legality on the one hand, and the principle of substantive validity on the other, thus giving rise to complex legal issues that are not simple.

The issue of normative inconsistencies in the legal basis can manifest in several ways. First, the falsification of documents used as the basis for initial legitimacy, such as inauthentic Deeds of Sale and Purchase, fictitious inheritance statements, or letters of recognition of rights issued by local officials without a valid basis. Second, the transfer of rights that does not meet the specified formal requirements, for example, land sales transactions conducted without involving the Land Deed Official (PPAT), gifts exceeding the legitime portie, inheritances divided without the consent of other legitimate heirs. Third, the emergence of weaknesses in the certification administration process, such as the bypassing of formal procedures that should be followed, errors or negligence by National Land Agency (BPN) officials in verifying the substance of documents, or failure to implement public announcement procedures as mandated in Articles 26 to 30 of Government Regulation Number 24 of 1997.[8]

This situation creates a legal paradox: administrative products that should guarantee legal certainty actually have the potential to become a source of prolonged agrarian disputes, due to their lack of substantive legal validity. This illustrates that the Indonesian land law system actually strives to balance formal-administrative legal certainty with validity based on classical civil law principles. However, in judicial practice, judges' interpretations of this issue still show heterogeneity, as there are variations in approach between decisions that emphasize the protection of certificate holders and decisions that emphasize the importance of the validity of the legal basis for issuing certificates. These differences in approach, in turn, give rise to normative uncertainty and the lack of a unified, established jurisprudential perspective.

This issue is further complicated by the absence of technical regulations from the Supreme Court specifically governing judicial action on certificates based on legally flawed rights. The only relevant reference, albeit partial, is Supreme Court Circular Letter (SEMA) Number 4 of 2016, which only addresses the protection of parties acting in good faith, without addressing the fundamental issue of the validity of the certificate issuance process itself. This regulatory vacuum ultimately opens up

[8]Nur Hidayani Alimuddin, 2021, "Implementation of Electronic Certificates as a Guarantee of Legal Certainty of Land Ownership in Indonesia", SASI, 27.3, pp. 335–345, https://doi.org/10.47268/sasi.v27i3.509.

too much room for interpretation for judges, resulting in disparities in decisions in cases with relatively similar characteristics.[9]

This situation places the creditor holding the collateral rights in a paradoxical position. On the one hand, the creditor has fulfilled all of its legal obligations in accordance with the provisions of the UUHT and the Fiduciary Law and has acted in good faith; however, on the other hand, the protection that should be attached to it through the principles of droit de suite and droit de préférence is potentially undermined by a dispute over the validity of the right that is not its fault and is beyond its control.

2) Forms of Legal Protection for Creditors Holding Property Security Rights

Legal protection for creditors can basically be divided into two forms, namely preventive legal protection and repressive legal protection. Preventive protection is a form of protection provided from the initial stage, namely before a dispute or violation of rights arises, through legal instruments designed to prevent losses, such as the obligation to make an authentic deed by a Notary/PPAT, registration of mortgage rights that embody the principle of publicity, and other procedural provisions in the UUHT that guarantee the validity and certainty of the encumbrance of collateral from the beginning. Meanwhile, repressive protection is a form of protection that is only provided after a violation of rights or a dispute has arisen, which is realized, among other things, through legal remedies in judicial institutions or other dispute resolution mechanisms, to restore the creditor's rights that are disturbed due to legal problems affecting the object of their collateral.

These two forms of protection are essentially complementary and cannot be viewed separately, because the strength of preventive protection that has been built since the guarantee imposition stage will greatly determine the effectiveness of repressive protection that can be taken by creditors when a dispute actually occurs. Starting from this framework of thought, the following discussion will describe in more detail the forms of legal protection available to creditors holding property security rights, both preventive and repressive, as an answer to the formulation of the problem regarding what form of legal protection is actually provided by the national guarantee law system to creditors in their position.[10]

a. Preventive Legal Protection in Credit Provision:

a) Implementation of prudential banking principles/caution in providing credit by applying 5c analysis: character, collateral, capacity, capital and condition of economic;

[9]Ni Made Silvia Gayatri, I Putu Gede Seputra, and Luh Putu Suryani, 2021, "Cancellation of Land Ownership Certificates Due to Administrative Defects", Jurnal Analogi Hukum, 3.1, pp. 79–83, https://doi.org/10.22225/ah.3.1.2021.79-83.

[10]Rachmadi Usman. 2021, Legal Aspects of Banking in Indonesia, Jakarta: Gramedia Pustaka Utama, p. 18.

b) Implementation of the principle of publicity by registering collateral objects;

c) Drafting clear, firm and non-multi-interpretable clauses in the creation of deeds.

b. Repressive Legal Protection in Credit Provision:

The selection and effectiveness of each legal remedy depend heavily on the characteristics and root causes of the civil dispute surrounding the collateral. Therefore, before further elaborating on the mechanisms for implementing these remedies, it is important to first systematically map the various forms of civil disputes that commonly involve collateral objects in their own legal context, regardless of the debt-to-credit relationship between creditors and debtors. There are two main avenues within the legal system for resolving disputes: litigation and non-litigation.

3.2. Legal Reasoning of the Panel of Judges in Harmonizing Legal Protection for Creditors Regarding the Rights of Collateral Objects

In essence, the drafters of the 1945 Constitution of the Republic of Indonesia laid the constitutional foundation for law to function as a means of social change (law as a tool of social engineering). This can be traced to the formulation of the preamble to the 1945 Constitution, which reflects the nation's founders' awareness of the importance of law as an instrument for the development of a new Indonesian society. In this context, the judiciary, as a judicial authority, essentially carries out two main functions: law enforcement (rechtstoepassing) and legal discovery (rechtsvinding).

The function of law enforcement is an effort to make positive law the basis for resolving legal disputes, so that positive law gains its authority in protecting the interests of every citizen. In carrying out this function, judges are fully bound by the provisions of applicable positive law. On the other hand, the function of legal discovery is carried out by judges to formulate legal rules that are extracted from the values that exist and develop in society, especially for disputes that are not yet regulated by positive law, or those that have been regulated but the regulations are unclear. Through this function, the justice-seeking public can obtain a sense of substantive justice, and as an implication, the resulting judge's decision has the potential to become a new source of law (judge-made law). Thus, in carrying out the function of judicial power, judges do not merely act as mouthpieces of the law (la bouche de la loi), but also carry out legal discovery to reach decisions that reflect a sense of justice for the disputing parties.[11]

Every decision rendered by a judge should encompass three components of legal objectives simultaneously. According to Gustav Radbruch, an ideal judge's decision is one that proportionally embodies the elements of justice (gerechtigkeit),

[11]Moh Kusnardi and Ibrahim Harmaily, 2010, Indonesian Constitutional Law, Jakarta: Center for Constitutional Law Studies, Faculty of Law, University of Indonesia, p. 149.

expediency (zweckmässigkeit), and legal certainty (rechtssicherheit). However, in reality, these three legal objectives are often in conflict with each other, both in tension between justice and legal certainty, and in tension between justice and expediency. Therefore, a scale of priorities is necessary, namely, there must be at least one legal objective that is prioritized in every regulation and application of law.

In this case, Gustav Radbruch is known as an adherent of the principle of priority (prioritätsprinzip), which places justice as the goal of law that must be prioritized first, then followed by utility, and at the final level, legal certainty. This justice must be upheld professionally and proportionally, the level and size of which are measured through tender feelings as a manifestation of conscience, as it arises from a person who always draws closer to God Almighty through worship in accordance with the religion and beliefs he adheres to.[12]

The fundamental conflict between passive and active judges in civil dispute resolution fundamentally impacts legal certainty and the limits of a judge's authority. Both in theory and practice, there is a contradiction regarding how judges should act when examining and adjudicating a civil case—actively or passively.

The judge's involvement in civil case evidence as previously described would not actually pose a problem if Indonesian civil procedural law consistently adhered to the principle of passive judges as stipulated in the Regulation op de Rechtsvordering (Rv), a principle that places the scope of the main case entirely determined by the disputing parties. However, in the current practice of positive civil procedural law, the principle adopted is not the principle of passive judges, but rather the principle of active judges originating from the Herziene Indonesisch Reglement (HIR). In this principle of active judges, the adage applies that judges only base their decisions on the events presented by the parties (secundum allegata iudicare). M. Yahya Harahap describes this phenomenon as a symptom of the emergence of a new school of thought in the realm of civil procedural law, which seeks to totally oppose the idea of passive judges by introducing the principle of active, argumentative judges.

This situation demonstrates a contradiction between the theory and practice of civil procedural law in Indonesia. As is known, the principle of passive judges originates from Rv, namely the provisions of civil procedural law that originally applied to Europeans and Eastern Foreigners in Indonesia, while the principle of active judges used in the practice of civil case resolution originates from HIR. Interestingly, although the principle formally adopted in practice is the principle of active judges, the paradigm commonly used by judges in resolving civil cases in

[12]M. Syarifuddin, 2021, Reform of the Criminal Justice System in Modern Justice Practice: A Legal Heuristics Approach, Inaugural Speech Delivered at the Acceptance Ceremony for the Position of Non-Permanent Professor in the Field of Criminal Law at the Faculty of Law, Diponegoro University, Semarang: UNDIP Press, p. 9.

reality still tends to be the paradigm of passive judges. This is reflected, among other things, in the persistence of decisions that are incomplete in resolving cases, thus potentially giving rise to new disputes in the future, as well as decisions that, although condemnatory in nature, cannot be executed in practice. This condition makes an in-depth study of the dynamics of the contradictions in the application of these two principles relevant, especially in relation to the concept of formal truth and the quality of law enforcement in the field of civil law in Indonesia.

Provisions regarding the principle of a passive judge can be found in several laws and regulations. In the HIR, these provisions are contained in Article 178 paragraphs (2) and (3), Article 133, and Article 227, which essentially stipulate that a judge is obliged to adjudicate all parts of a lawsuit and is not permitted to issue a decision on a case that is not contested, or to issue a decision exceeding what is demanded (ultra petita). Similar provisions can also be found in the Rechtsreglement voor de Buitengewesten (R.Bg.), namely Article 189 paragraphs (2) and (3), which essentially prohibits a judge from deciding beyond what is demanded, while also emphasizing that the extent of the disputed object is determined by the parties. Meanwhile, in the Rv, provisions regarding the principle of a passive judge can be seen in Article 206, which stipulates that if the opposing party deems it necessary to add evidence, the judge is obliged to provide an additional period of time for the purposes of such proof.

Based on the provisions above, it can be concluded that the principle of the judge's passive attitude is a principle that stipulates that the judge is limited to only receiving and examining matters submitted by the plaintiff and defendant. In relation to the civil case process, the judge is therefore only authorized to seek and discover formal truth, which is realized in accordance with the basic reasons and facts presented by the parties during the trial process. This principle also stipulates that the judge is not permitted to take an active initiative by asking the parties to submit or add necessary evidence.[13]

Sudikno Mertokusumo is one of the legal experts who consistently recognizes the existence of both principles of active judges and passive judges and consistently uses both terms in his various references. According to Sudikno Mertokusumo, the principle of passive judges cannot be interpreted as a form of total or absolute passivity of judges in examining and deciding cases, but rather relates to the scope or extent of the main points of the dispute, which in principle are determined by the parties to the case and not by the judge. On the contrary, the principle of active judges is a principle that must be upheld by judges in examining and deciding civil cases, considering the position of judges as leaders of the trial who are required to strive to resolve disputes effectively and fairly, while simultaneously overcoming

[13]Sunarto, 2024, The Meaning of Law Enforcement and Justice in Civil Cases, Inaugural Speech Delivered at the Ceremony for Acceptance of the Position of Honorary Professor in the Field of Law at the Faculty of Law, Airlangga University, Surabaya: Airlangga University, pp. 10-12.

all obstacles and barriers faced by justice seekers (justiciabelen) in order to implement a fair trial.

Thus, the judge's passive attitude in examining civil cases must be interpreted in a limited way, namely that the scope or extent of the subject matter of the dispute is determined by the parties to the case, not by the judge. In addition, the parties in principle have the freedom to terminate the dispute they have submitted to the court, according to their wishes, at any time during the trial process. If the disputing parties have decided to end their dispute and no longer wish the case to be examined further, the judge cannot obstruct this desire, because the initiative and extent of the subject matter of the dispute are entirely in the hands of the parties, while the judge is only authorized to seek formal truth.

The term "passive" in this context thus simply means that the judge does not determine the scope of the dispute and is not permitted to add to or reduce the scope of the dispute from what has been determined by the parties. The emergence of a civil case essentially arises from the initiative of the plaintiff, not from the initiative of the judge, as per the principle of nemo iudex sine actore. The initiative to file and carry out a civil case rests entirely with the interested parties and is not an authority that can be exercised by the judge.[14]

One of the principles that must be upheld by judges in the judicial process is the principle that every dispute must have a final resolution (litis finiri oportet). This principle requires that every case submitted to the court be resolved through a decision and cannot be resubmitted for the same case (ne bis in idem). Thus, the principle of litis finiri oportet essentially mandates that every case must have certainty regarding its final resolution.

The concept of formal truth in civil cases remains a matter of debate among academics and legal practitioners, as it is seen as no longer entirely relevant and tends to deviate from a sense of substantive justice. The contemporary civil procedural law paradigm should begin to consider giving the concept of formal truth equal meaning to the concept of material truth as adopted in criminal procedural law. In classical theory, civil procedural law is often said to seek only formal truth (formele waarheid), while criminal procedural law seeks material truth (materiële waarheid). The concept of formal truth in civil procedural law essentially arises because the burden of proof is borne by the parties to the case. However, after the judge in the trial process has accommodated and accepted all the facts and evidence presented by the parties, the judge's next task is to determine the truth based on the results of the evidence that has been conducted, based on applicable law in both the narrow and broad senses as well as the legal consciousness and ideals (rechtsidee) that he adheres to.

[14]Ibid, pp. 13-14

The judge's efforts to find material truth in civil trials should be supported by the application of the principle of active judge (dominus litis), especially in the process of proof, as is commonly applied in criminal cases and state administrative cases. If explored further, the principle of proof in general is always aimed at obtaining the real truth (materiële waarheid). Thus, in order to find material truth, the judge in the proof of civil cases ideally should not only accept the truth that is apparent and appears in court in the form of concrete evidence, or solely rely on the facts and matters presented by the parties, but continue to strive to explore and pursue the material truth actively.

The principle of dominus litis is essential to balance the positions of the parties in the evidentiary process in court. Although doctrinally, the positions of the parties in a civil case are considered balanced, in practice, this position is not always balanced, especially when the parties to the case involve a plaintiff in the form of a community (either an individual or a civil legal entity) and a defendant in the form of a government (a State Administrative Agency or Official). In such conditions, an imbalance of power relationship occurs, so the urgency of balancing the positions of the parties becomes very important. This is because, when examined from the position between the plaintiff and the defendant, the defendant generally has access to much greater information in the evidentiary process compared to the opportunity that the plaintiff has. Therefore, the judge cannot be negligent or free from the principle of the judge's activeness, because this has the potential to be very detrimental to the plaintiff. Thus, the principle of the judge's activeness is essentially a means for the judge to explore material truth during the evidentiary process.[15]

To strengthen and confirm the theoretical framework regarding the judge's legal reasoning as described above, the author conducted interviews with two high court judges who have experience handling disputes over property rights, namely Mr. Ahmad Yasin, High Court Judge of West Nusa Tenggara,[16] and Mr. Fransiskus Arkadeus Ruwe, High Judge at the Makassar High Court.[17] The results of the two interviews provide a practical picture of how the legal construction of material guarantees, legal discovery (rechtsvinding), the tension between legal certainty and substantive justice, and the assessment of good faith in providing evidence as described above, are actually applied in daily judicial practice, while also showing variations in emphasis between the two as a reflection of the dynamics of judges' legal reasoning in handling similar cases.

In line with the first benchmark in interpreting the concept of "judging according to law" explained previously, that every judge's decision must have a legal basis that existed before the disputed act occurred, Mr. Fransiskus Arkadeus Ruwe

[15]Ibid, pp. 17-20
[16]Interview with Mr. Ahmad Yasin, SH, MH (High Judge of West Nusa Tenggara), July 28, 2026
[17]Interview with Mr. Fransiskus Arkadeus Ruwe, SH, MH (High Court Judge of Makassar), August 4, 2026

emphasized that in examining disputes regarding collateral objects, judges must first understand the legal construction of Mortgage Rights which are accessoir to the principal debt agreement, the legal rules of obligations originating from the Civil Code and permanent jurisprudence, as well as the principles regulated in Law Number 4 of 1996 concerning Mortgage Rights and Law Number 42 of 1999 concerning Fiduciary Guarantees. The essence of Mortgage Rights according to him is a guarantee of debt repayment, not the original right to the collateral object itself, a relevant affirmation to place the creditor's rights proportionally before third party claims. Regarding the validity of the basis for the creditor's rights, due to its accessory nature, the validity of the principal agreement becomes an absolute requirement, which is then tested further through the principle of creditor prudence which is carried out to the maximum, in the form of in-depth research on the authority of the subject and certainty of the status of the collateral object, as well as the involvement of a Notary/PPAT or other public official in the collateral binding procedure, so that the collateral obtains formal legitimacy.

In line with the above description that the function of legal discovery is carried out by judges to formulate legal rules from the values that exist in society when positive legal provisions have not or are not clearly regulated, Mr. Ahmad Yasin explained that in the practice of handling property security disputes, judges usually take a systematic and teleological interpretation first, namely interpreting the provisions of property security not standing alone, but linked to the general principles of civil law and the purpose of the formation of laws. If this method is not sufficient, then an analogous interpretation is taken of comparable cases that have been decided, or argumentum a contrario, before finally, in a truly real legal vacuum, the judge adheres to general legal principles such as good faith, propriety, and justice as mandated by Article 5 of Law Number 48 of 2009 concerning Judicial Power. This explanation directly confirms the third benchmark in interpreting the concept of "judging according to law" described previously, that the living law in society is an element that must be considered by judges, while also emphasizing the shift in the role of judges from merely la bouche de la loi to the "mouthpiece" of justice itself. In line with this, Mr. Fransiskus Arkadeus Ruwe added that the most potential norm conflict faced in disputes over objects of material guarantee is when the object of Mortgage or Fiduciary Rights faces confiscation in cases of Corruption, Money Laundering, or general crimes. In such conditions, judges adopt the principles of resolving norm conflicts of lex superior derogat legi inferiori (higher rules trump lower rules), lex specialis derogat legi generali (special rules trump general rules), and lex posterior derogat legi priori (new rules override old rules), while in the case of parallel norm conflicts, a teleological interpretation method is used by referring to the background of the formation of the Mortgage Law and the Fiduciary Guarantee Law. These two explanations complement each other. According to Mr. Ahmad Yasin, the systematic, teleological, and analogical interpretation methods are generally applied to address the lack of rules within the internal scope of property security law. On the other hand, Mr. Fransiskus Arkadeus Ruwe's view regarding the principles of lex superior, lex specialis, and lex posterior is specifically aimed at resolving normative conflicts when property security law clashes with external legal systems, such as criminal law.

The tension between the three objectives of law according to Radbruch, justice (gerechtigkeit), utility (zweckmässigkeit), and legal certainty (rechtssicherheit), is also clearly illustrated in the experiences of the two sources as judges. When asked how the sources balance legal certainty for creditors holding collateral with the protection of third party civil rights, Mr. Ahmad Yasin stated that this issue often becomes an inner struggle in itself, and that his approach is proportional: creditors who are proven to act in good faith and follow the correct collateral binding procedures must be protected by law, because if not, the national credit system can be affected, but if the object of collateral is proven to be flawed, for example obtained from the proceeds of crime, unresolved inheritance disputes, or document forgery, the rights of the injured third party must not be sacrificed just for the sake of formal certainty for the creditor. This view is in line with Radbruch's priority principle (prioritätsprinzip) which places justice above legal certainty, while emphasizing that legal certainty that ignores good faith is not justice, while certainty built on good faith is true justice. This view is consistent with the explanation of Mr. Fransiskus Arkadeus Ruwe, that the principle of droit de préférence and droit de suite as normative rights of Mortgage and Fiduciary Rights holders must be the main reference priority as long as the creditor has implemented the principle of maximum prudence and the guarantee binding process has fulfilled formal legitimacy, while third parties, whether the owner of the object, fellow Mortgage/Fiduciary Rights holders, curators in bankruptcy, or the state in confiscation of criminal cases, obtain the restoration of their rights through a lawsuit for counter-price claims, based on Article 18 of the Mortgage Rights Law and Article 25 of the Fiduciary Guarantee Law. Thus, both Mr. Ahmad Yasin and Mr. Fransiskus Arkadeus Ruwe ultimately placed the good faith and formal legitimacy of the creditor as the main conditions for prioritizing legal certainty, while for third parties who are harmed, the restoration of rights is pursued through civil lawsuits, not by canceling or annulling the guarantee rights that have been legally formed.

The consistency between the normative framework and judicial practice is also evident in the evidentiary dimension. As described above, the evidentiary process in civil cases ideally does not merely stop at formal truth (formele waarheid), but remains directed at exploring material truth (materiële waarheid) through the application of the principle of active judge (dominus litis). Mr. Fransiskus Arkadeus Ruwe explained that the principle of proving good faith is basically negative, namely one party proves the existence of bad faith from the other party, by examining evidence regarding the circumstances or events that occurred at the pre-agreement stage, during the agreement, and after the agreement was closed, including assessing whether the Mortgage and Fiduciary binding agreement contains a defect of will (wilsgebreke), in the form of coercion (dwang), error (dwaling), or fraud (bedrog) as regulated in Article 1321 of the Civil Code, as well as the existence of abuse of circumstances (misbruik van omstandigheden). This explanation is enriched by Mr. Ahmad Yasin, who emphasized that the good faith of the parties, whether creditors, debtors, or third parties, basically cannot be proven directly, but rather inferred from a series of actions and propriety, for example, the creditor's compliance with standard operating procedures for prudence in granting credit, as well as the reasonableness of prices and completeness of documents in transactions conducted by third parties. Such a process of inference requires judges to actively examine the entire series of facts, not just matching formal evidence alone, in line with Mr. Ahmad Yasin's statement that procedural law and formal requirements are essentially established to serve justice, not the other way around. Thus, the two sources complement each other in explaining the dimensions of proving good faith: the doctrinal framework of defective will according to the Civil Code from Mr. Fransiskus Arkadeus Ruwe emphasizes the formal legal basis for assessing bad faith, while the practical indicators put forward by Mr. Ahmad Yasin show how such assessments are actually carried out by judges in everyday court practice. This assertion is also relevant in relation to the first and second benchmarks in interpreting the concept of "judging according to law" as explained previously. Mr. Ahmad Yasin explained that the principles of droit de preference and droit de suite remain the main normative framework in the legal consideration of material guarantees, but both never stand alone and are always tested first by the principle of good faith and the principle of who first obtained the right legally (prior in tempore, potior in jure); in other words, the principle of droit de suite can only be implemented after the judge believes that the guarantee binding itself is valid and does not violate any previously existing rights, so that both principles function as instruments of right execution, not a means to validate a guarantee that is flawed from the start. This view is in line with the explanation of Mr. Fransiskus Arkadeus Ruwe in the previous section, that the two principles are only prioritized after the formal legitimacy of the guarantee binding is fulfilled. In addition, Mr. Ahmad Yasin emphasized that internal guidelines in the form of a Supreme Court Circular Letter and permanent jurisprudence regarding the protection of buyers in good faith have an important role in filling the gap in legislative regulations that do not detail the resolution of conflicts between collateral rights and third party rights in a casuistic manner, while Mr. Fransiskus Arkadeus Ruwe more specifically refers to the Supreme Court Circular Letter Number 7 of 2012, especially Points VII and VIII, as a guideline for judges in deciding cases related to the protection of Mortgage Right holders. These two references strengthen the second benchmark in interpreting the concept of "judging according to law", that the definition of law must be interpreted broadly and not limited to written law alone.

Nevertheless, both sources provided complementary explanations regarding the tendency for disparity in decisions in similar cases at various court levels. Mr. Ahmad Yasin argued that the disparity was more due to the case-by-case nature of collateral disputes and the differing weighting of judges' assessments of the principle of droit de preference versus the protection of good faith, rather than reflecting legal inconsistencies. Mr. Fransiskus Arkadeus Ruwe added an explanation from another perspective, namely that the disparity in decisions was also caused by the broad authority granted to judges through the principle of judicial independence which was not always commensurate with the integrity and knowledge of the judges concerned, resulting in differences in constituting and qualifying legal events and formulating verdicts, coupled with the passive attitude of judges in the ethics of adjudicating civil cases when faced with a lack of evidence and arguments from the parties. Both explanations indicate that the disparity in decisions essentially stems from two interrelated factors: the case-by-case factor at the material level of the case, and the capacity and attitude of individual judges in assessing the material. This phenomenon emphasizes the importance of the moral courage of judges as described previously. Regarding the greatest challenge in formulating a decision that harmonizes the interests of creditors and third parties, both speakers provided different but complementary emphases. According to Mr. Ahmad Yasin, this challenge lies in the quality and completeness of the evidence, which is a determining variable for the consistency of legal reasoning amidst the ever-evolving dynamics of collateral disputes, particularly fiduciary collateral transactions over movable property that are vulnerable to change hands. Meanwhile, Mr. Fransiskus Arkadeus Ruwe emphasized that the greatest challenge lies in assessing and apportioning the burden of risk proportionally between creditors and third parties, considering that creditors have already expended funds as part of their core business, while third parties have the potential to lose their rights to the collateral object. In this case, the principle of minimizing the greatest loss for one party while reducing the maximum gain for the other party is seen as a fairly fair approach. These two perspectives are essentially closely related: the quality and completeness of the evidence are prerequisites for judges to be able to accurately assess the proportion of the burden of risk that should be borne by each party, so that these two challenges are actually two sides of the same problem in the effort to achieve a harmonious decision.

Thus, both the normative theoretical study and the empirical findings from interviews with the two sources above show that the legal considerations of the panel of judges in cases of disputes over rights to material collateral objects are always directed at harmonizing legal certainty for creditors holding collateral and the protection of civil rights of third parties, with formal legitimacy and good faith as the main points of support that balance both, and the method of legal discovery and resolution of norm conflicts as the judge's instrument when positive law does not provide a clear answer. The variation in emphasis between Mr. Ahmad Yasin and Mr. Fransiskus Arkadeus Ruwe, both in the method of interpretation, the reasons for the disparity in decisions, and the greatest challenges faced, are not essentially contradictory, but rather a reflection of the diversity of judicial experience that actually complement each other and enrich the understanding of the complexity of the judge's legal reasoning. Formal legal certainty is the initial basis that must be respected, but its implementation remains subject to material

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assessments of the validity of the acquisition of underlying rights, so that it is never intended to stand absolutely above substantive justice which is the spirit of the judicial function itself.

4. Conclusion

Based on the description, it can be concluded that the legal position of the creditor holding the mortgage right is basically strong, supported by the principles of parate execution (parate executie), droit de préférence, and droit de suite, but this strength is conditional because it depends on the procedural validity of the Deed of Granting of Mortgage Rights (APHT) and the validity of the basis of the rights of the collateral object based on the principle of nemo plus juris, so that the position of the creditor remains vulnerable to being questioned when the collateral object becomes a separate civil dispute outside the debt-credit relationship. Legal protection through the litigation route in turn cannot be separated from the legal reasoning of the panel of judges in carrying out the functions of law enforcement (rechtstoepassing) and legal discovery (rechtsvinding), both of which must be directed to realize three legal objectives at once as stated by Gustav Radbruch, namely justice, benefit, and legal certainty, with justice as the main priority when the three are in tension; In this context, although formally Indonesian civil procedural law adheres to the principle of active judges originating from the Herziene Indonesisch Reglement (HIR), the paradigm of passive judges inherited from the Reglement op de Rechtsvordering (Rv) in practice still influences the pattern of case examination, thus giving rise to contradictions between theory and practice which have implications for the relevance of the concept of formal truth and the urgency of applying the principle of dominus litis to explore material truth, especially in cases involving unequal power relations between the parties. The empirical findings from interviews with two High Court Judges strengthen the theoretical framework, by showing that the judges' legal considerations in disputes over rights to material collateral objects are always based on an understanding of the construction of collateral law that is accessoir, the application of systematic, teleological, and analogical interpretation methods, as well as the principles of resolving conflicting norms (lex superior derogat legi inferiori, lex specialis derogat legi generali, and lex posterior derogat legi priori) when positive law does not provide a clear answer, which is ultimately directed at efforts to harmonize legal certainty for creditors holding collateral and the protection of civil rights of third parties, with good faith and the formal legitimacy of the collateral binding as the main fulcrum that balances these two interests, while the disparity in decisions that arise in practice is more due to the casuistic nature of the case and the variation in the capacity and attitude of individual judges, rather than by inconsistencies in legal norms alone. Thus, it can be concluded that formal legal certainty for creditors holding collateral rights remains the initial basis that must be respected, but its implementation is always subject to material assessments of the validity of the acquisition of the underlying rights,so that substantive justice remains the main spirit that animates the entire legal protection mechanism for creditors, both at the normative level of imposing collateral and at the level of its application through the legal considerations of the panel of judges in judicial practice.

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