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Mortgage Rights Affected by the Use of Abandoned Land as Object of Mortgage in Indonesia

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Abstract

The provision of credit is always carried out with the provision of guarantees in the form of land mortgage. There is an absence of legal provisions in the settlement of land cases when an abandoned land is used as an object of mortgage, leading to an urgency of repayment and settlement of the receivables. This study aimed to examine how the creditor, the holder of the mortgage, is affected by abandoned land provisions in the Indonesian Mortgage Law, particularly when the party providing the mortgage (debtor) fails to fulfill his promise. The focus in this study is on Law Number 4 of 1996 which regulates the Mortgage Rights promulgated in the Law of the Republic of Indonesia. The data was collected through library research and field research methods which gave the access to primary legal materials, laws and regulations. A descriptive analytical research method was used to analyze the data with the type of normative legal research and a normative juridical approach. The study found that often the debtors intentionally mortgaged a land as object of mortgage that was destined to be abandoned by the government. The study recommends the law to include the provision of a second collateral and allow the mortgage holder to suggest some other land as a mortgage if the original object of mortgage is declared as an abandoned land by the government.

Keywords: mortgage rights, abandoned land, mortgage law, land as object of mortgage,

Introduction

The Mortgage right is a temporary derivative or a secondary right and falls under a legal regime guaranteeing land rights to its citizens. This right is not exempt from the imposition of abandoned land provisions. When applied, it seems to undermine the principle of *preference* as a priority creditor's right for the legal regime to guarantee it exclusively in the context of debt repayment obligation. In a country like Indonesia, where economic development is mostly supported by loan capital, the implementation of the mortgage right is like a burden for the government. The

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objective of mortgage cannot be avoided as a provision from the abandoned land, because if it results in the end of the mortgage, it is the failure of the legal regime. The mortgage should remain the guarantee that a legal regime gives in order to repay debts. By ending the mortgage, it might also mean that receivables are biased. The meaning or nature of the collateral law also goes at stake and it cannot be then guaranteed as secured a law.

It is conceivable that almost the Right to Cultivate (HGU) and the Right to Build (HGB) in Indonesia are the objectives of the mortgage right. The conflict of power that binds the specific right attached to mortgage right is weakened by the existence of the abandoned land provision. There are at least 8.3 million hectares of land in Indonesia earmarked as abandoned land. Sometimes, when a vacant land is not utilized, it has the potential to become an abandoned land. Most of this land has been assigned the right to use the land in different ways including the right to construct a building on it. However, these rights are not practiced according to their respective rights. Often, the validity period of rights is expired, the issuance of certificate is not requested within the stipulated time.

The provision of abandoned land is contrary to the concept of ownership of the Indonesian nation's land in the practice of the UUPA. These provisions are considered to have violated the conceptual values of the meaning of the specific right attached to the mortgage. This poses a serious threat to the loss of the object of the mortgage, and the potential for the loss of receivable to be received by the mortgage holder (creditor) in a credit agreement. The mortgage right also contributes significantly to the development of the national economy in order to obtain large fund as capital for business actors. Limited capital is always an obstacle to the participation of economic actors in the economic development. As development activities increase, there is also a need for more funds, most of which can be obtained only through banking credits.

This study aimed to examine the legal provisions applicable in the settlement of land cases when an abandoned land is used as an object of mortgage but the creditor, the holder of the mortgage, is affected by abandoned land provisions in the Indonesian Mortgage Law. On the other hand, the party providing the mortgage (debtor) is reluctant to voluntarily fulfill his performance, and the mortgage holder (creditor) needs to perform a forced execution or ask for the state enforcement, for example a court, to intervene either in the form of execution or compensation. This study will also study whether the law proves itself strong enough to regulate the behavior of people as members of a society and establishes order among members of that society.

The focus in this study was on Law Number 4 of 1996, as mandated in Article 51 of Law Number 5 of 1960, which regulates the Mortgage Rights promulgated in the Law of the Republic of Indonesia. It is called Law Number 4 of 1996 concerning Mortgage on Land and Object Related to Land (hereinafter abbreviated as UUHT). It was published in the State Gazette of the Republic of Indonesia of 1996 at Number 42 with an additional sheet, Number 3632. With the creation and promulgation of the Mortgage Law, theoretically, it completed the unification of national land law (Sjahdeini,1999) to become the only institution that could guarantee the protection of land rights (Hadjon, 1987).

The next section presents previous studies, with an emphasis on the mortgage law, mortgage rights and the impact on the banking and business sector. It is followed by sections on problems statement and theoretical framework. Based on the data made available through desk research and documentation study, findings are presented in the Results section, followed by a discussion section. In the end there is a conclusion comprising limitations and recommendations of the study.

Literature Review

Mortgage Rights

A mortgage right is a strong material right. Mortgage rights came into being due to the registration requirements of the object of mortgage. Hence, if the object of mortgage was a land, it was necessary to determine the mortgage rights over the land, whether it was the creditor's or the debtor's right. The land as object of mortgage became a legal subject because in many cases, the land mortgaged was treated as an abandoned land with no clarity about the material right or the guarantee of the right ownership. The material right on such a land mortgaged included three rights viz., Property Right; Right to cultivate and Right to Build (Article 4 paragraph 1 UUHT). Additionally, the object of mortgage is also mentioned in Article 3 PP-PPTT, where these three land rights are seen as strong material rights and can be categorized as rights of an abandoned land. The government's policy of issuing PP-PPTT, results in the abolition of land rights, which seriously affects the mortgage rights of the Mortgage holders.

A problem arises in the scenario when the mortgage is removed because the land is abandoned. (Directorate of State Land Management, 2013). The UUHT does not regulate such a situation and this results in a legal vacuum in the UUHT, that. Moreover, the abolition of land rights does not actually abolish the existing principal agreement. This weakens the position of preference rights of Mortgage holders in terms of reclaiming their rights as Mortgage holders who have a special position in repaying their receivables is still a problem in itself since the enactment of PP-PPTT. On the other hand, the PP-PPT also does not regulate the procedure for Mortgage rights holders to get their money back from the debtors. This will be very difficult and very detrimental for the mortgage holder if it is deleted because it is declared as abandoned land. This condition is contrary to the position of the mortgage holder's preference rights as stipulated in Article 1132 of the Civil Code.

Mortgage is actually based on an agreement, additional to the main loan agreement (debt-receivable agreement). In principle, every loan agreement that is attached with a mortgage guarantee, it must automatically be followed by a Mortgage Guarantee agreement. A Mortgage agreement protects the lender of money, if the mortgage provider does not fulfill its debt obligations. There are two basic things that must be considered in the Mortgage Right, namely the object (e.g., land, property, etc.) that is borne and the debt which is the subject of the agreement which essentially leads to the need of a mortgage. There are substantive explanations that when a loan agreement uses a Mortgage agreement, there are two legal subjects, namely the holder of the Mortgage (creditor) and the party providing the Mortgage (debtor). The holder of the Mortgage has the right to get an achievement, while the holder of the

Mortgage is obliged to fulfill the achievement. The right of the mortgage holder to get the achievement is protected by sanctions, which means that the mortgage holder is given the ability by law to force the mortgage giver to complete the implementation of the promised achievement.

The UUHT does not regulate debt status of Mortgage Rights if land rights are related to an abandoned land. In other words, there is a legal vacuum in UUHT, since the UUHT does not stipulate that the main agreement should be canceled with the abolition of Mortgage Rights. The UUHT also does not regulate the procedures for Mortgage holders to re-obtain their loan money if the object of mortgage is an abandoned land. However, the UUHT protects the rights of the mortgage holder by ordering the nullification of the mortgage as per the provisions of the abandoned land. This results in an unclear status of the debt or the loan given to the debtor (Poesoko, 2008)

As said earlier, mortgage rights of a land are the result of an agreement between the holder of land rights and the prospective mortgage holder. These rights are specified in accordance with the Deed of Granting Mortgage Rights (APHT). In principle, every mortgage agreement is subject to the Agreement Article 1313 of the Civil Code, according to which one or more people bind themselves together to a commitment (Harahap, 1982). Hence, an agreement is a legal relationship of wealth or property between two or more people that gives strength to the rights of one party to obtain achievements (rights and obligations) and at the same time obliges the other party to fulfill the achievement.

Mortgage as collateral for debt repayment

There are various types of land rights according to the Indonesian Basic Agrarian Law (UUPA), but not all land rights can be used as collateral for debts and are encumbered with Mortgage Rights. When a mortgage is used as a collateral for debt repayment, it gives the creditor a special position over other creditors. Hence, if the debtor is a defaulter, the holder of the Mortgage Right has the right to sell the object of mortgage (e.g., the land that is used as collateral) through a public auction according to the provision of the applicable law and regulation, with prior right over other creditors. This priority position, of course, does not reduce the preference for state receivables according to the applicable legal provisions (General Explanation point 4, Law concerning Mortgage Rights on Land and Objects Related to Land) Implementation of Mortgage Right (in practice).

There are however often obstacles in carrying out the execution of the selling of the object of mortgage used as collateral if there is a breach of contract (*wanprestatie*) committed by the debtor. Theoretically, there may be a clash of binding force between the *executoir beslag* (implementation of the execution based on court decision/court fiat), *conservatoir beslag* (confiscation of collateral because the debtor is in a litigation with a third party in court) and *parate executie* (direct execution of collateral object without court fiat). This condition is further exacerbated by the presence of abandoned land provision, which regulates that the state can take land as object of HGU (Right to Cultivate), HGB (Right to Build) and Right of Ownership even though mortgage right is attached to it as regulated in PP 11 of 2011 concerning Control and Utilization of Abandoned Land.

In this case, each scenario has a different legal institution. The *conservatoir beslag* and *executoir beslag* come from the judicial process supervised by the case, the abandoned land comes from a violation of control (not ownership) while *parate executie* come from the regime exclusive of guarantee law as the implementation of creditor's preference right in the mortgage law regime. Article 6 UUHT states that if the debtor is in breach of contract, the holder of the first Mortgage has the right to sell the object of the mortgage on his own power through a public auction and take repayment of his receivables from the proceeds of the sale. This provision is reinforced by Article 20 paragraph (1) letter A of UUHT which also states the same law that if the debtor is in breach of contract, the first Mortgage holder can sell the object of the mortgage: "if the debtor is in default, then based on the executorial title attached to the Mortgage certificate as referred to in Article 14 paragraph (2) UUHT, the object of the mortgage is sold through a public auction according to the procedure specified in the laws and regulations for the settlement of the debt of the mortgage holder with prior right over other creditors." However, Article 20 paragraph (2) UUHT states "if there is an agreement between the giver and the holder of the mortgage, the sale of the object of the mortgage can be carried out under the hands, otherwise the highest price will be obtained through the auction that would benefit all parties".

On close examination of the above-mentioned Articles and the embedded provision, it seems that the law logically executes the mortgage holder's reference correctly, but in practice it often becomes a problem for the mortgage holder to carry out the *parate* execution of the abandoned land, if it is used as an object of mortgage. Owing to this, the mortgage cannot escape to face *Conservatoir Beslag*, *Revindicatoir Beslag* and *Executoriale Beslag* nor from the land which is the object of mortgage since in the court it is declared as an abandoned land.

Mortgage Law in Indonesia

The Mortgage Law brought fresh air in the development of the business world in Indonesia, since businessmen desperately needed a stimulation of funds for the purpose of establishing and developing their businesses. In contrast to other securities for mortgage, regulated in Articles 1162 to 1232 of the Indonesian Civil Code, the Mortgage Law did not only approve land as a collateral (object of Mortgage) but also the building on it can be used as collateral. This collateral was applicable as both individual and legal entity and could raise fund as initial capital to conduct a business or a business activity and support people's development as well as boost the national economy.

A land right, which is the object of Mortgage Right, has a limited scope as expressly regulated in Article 4 (1) UUHT which reads: "Land rights that can be encumbered with Mortgage Rights include: a. Right of ownership; b. Right to Cultivate (HGU); and c. Right to Build (HGB)." In addition to land rights, paragraph 2 of Law no. 4 of 1996 (as referred to in paragraph (1)), states that, when a land right grants the Right of Use the state land according to the applicable provisions, it has two more provisions: first, it must be registered; second, its transferable nature can also be encumbered with Mortgage Right.

To make it easier for business actors to carry out their business and to create a sense of security for both creditors and debtors in the event of a default, the Mortgage

Law stood as a regulation that guaranteed clear and firm legal certainty. It provided a sense of security to business actors in running their business at national and global levels. The Mortgage Law also ensured that investors could approach Mortgage Institutions to supply large amounts of funds for business activities through credit agreements. The Law ensured that debts and receivables could run according to the plans and applicable regulations. According to Article 1 of Law Number 4 of 1996 concerning Mortgage on land and object related to land (UUHT), Mortgage is the only guarantee for land. Conceptually, every material law works on the principle that the safest method for guaranteeing receivables to the creditor is to make him available the mortgage rights.

The Mortgage law strategically allowed land to act as an exclusive object of debt guarantee and object of mortgage because it is a fixed object that does not perish; it is easy to execute as an object of mortgage; its price fluctuation is always on the increase side; and lands are protected by the state because they are registered as evident form their mortgage certificate. Moreover, a land cannot be confiscated because it has an executive title issued by the judicial authorities. Such land title deeds are permanent and binding legal force which can be directly carried out for *parate* or direct execution (Sofwan,1975).

Banking sector

A bank as a financial institution in the credit sector has a major influence in determining the smooth flow of funds. It plays a vital role in managing the funds traffic and contribute to the economic development of Indonesia (Sutanto,1995). Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land, does not limit the lending of capital to banks only. This means that other legal entities and individuals can also become creditors in the institutions guaranteeing land rights or mortgage rights. However, banks still remain the safest financing institution for the availability and disbursement of large amounts of funds. However, one of the obstacles for economic actors to obtain large loan disbursement is the requirement of a guarantee or collateral security. This is often seen as a difficult prerequisite in credit agreements. However, Article 1, point 11, Law Number 10 of 1998, concerning Amendment to Law Number 7 of 1992 concerning Banking, states that collateral is not an absolute requirement for the *principle of contract*.

In practice, however, the banking sector only requires that a credit or a borrowing contract be followed by a collateral contract or to act as an *accessor of contract*. It is though alleged that creditors tend to prefer material guarantees (*zekerheid*) compared to non-material guarantees (*btorgtoch/personal guarantees*). A material right provides a more sense of security and certainty in the return of receivable to creditor, namely by binding certain object as collateral (Hasan,1996). In fact, given the importance of these credit funds in the development process, it is appropriate for credit givers and recipients to receive exclusive legal protection through a strong guarantee institution and can also provide legal certainty for all interested parties (Sutanto, 1995).

The approval of land by the bank as a collateral, of course, has the aim of guaranteeing the repayment of credit and interest to be obtained which has been agreed in the Deed of Granting Mortgage Right (APHT) through the sale of collateral,

either directly or under the hand in the event the debtor defaults, so it is necessarily a collateral binding institution that provides legal certainty and protection for all related parties (debtors, creditors and interested third parties).

Problem statement

All provisions on an abandoned land becomes a problem if there is a mortgage agreement on the land. The Law states that there will be losses for holding Mortgage Rights on a land which is declared as an abandoned land. The problem is greater for the creditor because if such a land is given as a collateral in a mortgage for the settlement of receivables, the rights of the Mortgage Rights holders are lost because, according to the PP-PPTT provisions, such a land declared abandoned is controlled by the state and no individual has a right to mortgage such a land (Poesoko 2008) Article 18 UUHT further states that Mortgage Rights are abolished due to the abolition of land rights burdened with Mortgage Rights (Article 18 letter d of UUHT).

However, the abolition of the Mortgage Rights on an abandoned land does not cause the cancellation of the main loan agreement (Badruzaman, 2004). Hence, the abolition of the land rights does not automatically eliminate the Mortgage Rights. The Mortgage Rights remain attached to the land, though the land rights may have been declared nullified (Badruzaman, 2004). This is in line with Sumardjono (1998) who stated that the determination of land as an abandoned land could have an impact on the mortgage holder if the land in question is made into a mortgage but if the land rights are nullified, the Mortgage Rights are also terminated but the burdensome debt continues (Sumardjono,1998)

A discrepancy emerges when the UUHT stipulates that the holder of Mortgage Rights (even of an abandoned land) has a special priority position as a creditor over other creditors. This means that if the mortgage giver goes bankrupt, the mortgage holder still gets special treatment and enjoys a priority for the settlement of his receivables. At the same time, if the mortgage giver assumes the rights to the land which the government declares as an abandoned land, and is declared as the state land to be utilized for the benefit of the community. The government may utilize this land under agrarian reform programs or state strategic programs. In such a situation, despite being the preferred Mortgage holder, the creditor loses the land rights on the ground that it was an abandoned land.

The Mortgage Law thus works in unison with Law Number 5 of 1960 concerning Basic Agrarian Regulation or better known as the Basic Agrarian Law (hereinafter abbreviated as UUPA). The UUPA coordinates with the Mortgage Law and succeeds in regulating in general the legal consequence of land affected by the provision on abandoned land, namely nullifying by all 3 laws, viz., Article 27 UUPA for Property Right, Article 34 UUPA (BAL) for Business Use Right and Article 40 BAL for Building Use Right. The provision of the legal rules of the three law are considered empirically failed, and in fact are not effective in the field as a binding land law regime.

Such a scenario where the creditor's rights are hampered due to the nullification of mortgage rights of an abandoned land, there rises a conflict between the principles and legal rules of state finances related to the government asset land and the legal method of providing land mortgage rights to general public. The state finance law argues that every state asset must be defended against loss by means of a criminal

act, while the mortgage legal regime regulates the object of dependents as exclusive and binding. This means that both government asset land and mortgage object cannot be treated the same as land rights. These are actually not only subject to the principles and rules of land law, but are also subject to the principles and rules of state finance law and guarantee law.

It is imperative in such a situation to examine the status of the Preference Right since there exists no study on the binding strength of the Preference Rights that have been held by mortgage holders since the promulgation of this PP-PPTT. It is also essential to understand how, as a result of the abolition of land rights as collateral for Mortgage Rights, PP PPTT automatically ruled out the existence of Preference Rights from Mortgage holders. An in-depth study is needed to find out and understand the power of the articles in the PP-PPTT which led to abolish the legal status (position) of the right of Preference of the Mortgage Right holder. In the Indonesian Law, the right of preference is a right with a privileged status for the holder of the Mortgage to take precedence in paying off the debt if the giver of the Mortgage fails to pay the debt, by setting aside concurrent and separatist creditors.

Based on the description of the problem above, this study states the following research questions:

1. How can the position of preference right of mortgage holder be strengthened and made the basis for resolving a land case subject to the provision of an abandoned land?
2. How is the legal protection of mortgage object affected by the provision of an abandoned land?

Theoretical Framework

This study is based on the premise that individual rights to land are parts of basic human rights and must be protected. Therefore, to solve the problems constrained in the abandoned land scenario and nullification of mortgage rights of the Rights holder, this study aimed to seek solutions in various theories, viz.: Natural Law Theory to study the Human Rights (*menchenrechten*) under the principles of natural law; the Theory of State Control Right, to study the concept of the State of Welfare Law (*welfrastate*); and Legal Protection Theory. To examine the concept of the Mastering State (*verorgaang* state). This section describes each theory in detail in the light of the problems stated in this study:

Natural Law Theorya

Mortgage right is a derivation of individual rights to land. Individual right to land is a natural right given by God to people. According to Grotius, natural law has a few characteristics (Keraf, 1997) as follows: (1) it is a kind of divine command, a function of divine origin, written in the minds and souls of humans that everything on earth belongs to God. (2) it is the supreme law from which the rules of justice are derived and which contains the principle of justice as a source of positive law. (3) it represents reason as a universal element that distinguishes humans from other creatures and is used to make law for all times and places. (4) it is a rational structure that reflects the nature of rational human beings or the law of rational beings. According to the Natural Law theory, therefore, all humans have a strong desire to live in a society peacefully

and orderly in accordance with the standards of our minds, and in a reciprocal harmony with other beings.

The rule of justice is based on two tendencies. (1). Everyone has to defend his life and challenge harmful tendencies; and (2) everyone is allowed to earn for himself, to master things that are useful for his life. Hugo Grotius as a supporter of humanism, views humans as individuals and recognizes that individuals have certain rights. This applies to every individual in society. Samuel Pufendorf (1632-1694) viewed that humans having two basic tendencies fundamental to their nature: (1) Natural law leads humans to protect their own lives and everything that belongs to them; (2) Natural law requires humans not to interfere with society. In this regard, Thomas Hobbes (1588-1679) said that the social nature of man only has meaning insofar as it supports the existence of each individual's life (Badruzaman,1997).

Natural law is binding, but not because it is God's command, but also because humans themselves are able to reflect on their thoughts, to understand natural law with their minds, and that recognize that natural law contains correct and valid rational rules. In this regard, John Locke believed that God is the creator of law, and strongly wants law to be a rule for life. Locke argued that God has made the law known to all humans, so that anyone who tries diligently to know will be able to understand it. The main point of natural law according to John Locke is that humans are once born with the right to survive (Badruzaman,1997). Therefore, all human beings who are equal and independent must not harm each other in terms of life, health, freedom or property and whatever is deemed suitable for the survival of each person, as long as he can maintain his life and does not leave his place voluntarily.

From the description of natural law above, it becomes increasingly clear that the theory of natural law inspired the origin of the concept of exclusive individual ownership including the mortgage regime and is part of natural human rights and is bestowed by God on humans eternally. Therefore, land rights (human right in the narrow sense) were originally a product of natural law. This is in accordance with the views of Thomas Aquinas (1225-1275) who postulated that natural law is the part of the perfect law of God and that it is known through human reason (Noor,2006). Each position is determined by God, but all people regardless of their status are subject to God's authority who is given a unique individual identity that is separate from the state, thus, everyone has an autonomous individual. This is consistent with Hugo Grotius's view of the existence of natural law, which is the basis of all positive laws or written laws that can be rationalized on a non-empirical basis.

Grotius's views were refined by his followers and turned into a theory of natural rights, recognizing the meaning of subjective individual rights. John Locke postulated that all individuals are endowed with an inherent right to life, freedom, and property which is their own property and cannot be transferred or revoked by the state, in order to avoid the uncertainty of life in nature. This infers that humans have taken part in a social contract in which inalienable rights are handed over to the control of the state. (Noor, 2006)

Theory of State Control Right

The Theory of State Control Right stipulates that a state does not have any ownership relationship with land, but a controlling relationship. Hence, all land under

a state is understood as the concept of state control rights (*verorgaangstaat*) (Ardiwilaga, 1962). Regarding the right of state control, Manan (1995) asserted that the meaning of state control is the state's authority to regulate (*regelen*), manage (*bestuuren*) and supervise (*tozihhouden*) as regulated in Article 33 paragraph (3) of the Indonesian 1945 Constitution. The substance of state control is that behind the right, power or authority granted, it contains the state's obligation to use and utilize economic resources for the greatest prosperity of the people. The implementation of state ownership right (Article 2 of the UUPA) and social function of land right (Article 6 of the UUPA) which are implemented in the concept of abandoned land provisions often clash with the concept of Indonesian land ownership. The state which is formulated as one that controls, in the field acts as the owner, because of the implementation of the determination of the abandoned land (Manan, 1995; Manan, 2006).

The second paragraph of the Preamble to the 1945 Constitution emphasizes that there is a desire to create a prosperous country. The Article 33, paragraph (3) of the 1945 Constitution, further regulates that the earth, water and natural resources are controlled by the state and used for the greatest prosperity of the people. Article 28 H paragraph (4) of the 1945 Constitution also states that everyone has the right to have private property and this property right cannot be taken over arbitrarily by anyone. Thus, the Indonesian constitution too considers the property right as rationale, which equally applies on the mortgage right over land as a reflection of human right. In principle, in Indonesian culture, the interests of the community are prioritized over individual interest, as a result of which special rights apply, different from universal human rights that apply to human beings (Nasution, 1998).

Legal Protection Theory

State Ownership Rights under Article 33, Paragraph (3) of the 1945 Constitution, inspired the origin of Article 19 of the UUPA, because one of the substantial concepts of state control rights is the obligation to manage land rights (*bestuuren*). Specifically, for legal protection for land rights, it has been regulated in Article 19 paragraph (1) of the UUPA, which reads: to ensure legal certainty by the government, land registration is carried out throughout the territory of the Republic of Indonesia. This article also defines the functions and obligations of the state to provide legal protection for basic individual rights to land. This means that the state will only be able to protect individual rights if they are registered in the state administration (land registration administration). The state will also be responsible to create a system of legal protection of land rights through the concept of land registration (strength binding registration/*bestuuren* function in the state administration system).

Research Method

- *Research design*

The current research adopted a descriptive analytical research method with the type of normative legal research, and a normative juridical approach. This method is recommended if a research emphasizes the science of law, but in addition it also tries to examine the legal rules that apply in a society (Soemitro, 1990). This method requires an in-depth analysis of the secondary data related to the subject of research

which, in the current research, is the study of the position of Preference Rights of the mortgage holder over the object of mortgage if it is subjected to the land rights affected by the provisions of abandoned land.

Owing to the nature of the problem which required a study of legislation and its relation to implementation in practice, this method was found much appropriate. This method enables to describe and analyze the facts in a systematic, factual, and accurate manner with positive legal theories concerning the problems studied (Ali 2009) Finally, this method is also appropriate to study legal issues, understand facts with symptoms related to the object of research, and provides a complete and comprehensive picture of the problem under study.

- *Data collection technique*

The data was collected from various techniques such as library research and field research. The library research allowed the researchers to assess primary legal materials, the relevant laws and regulations. Some of the laws studied included Code of Civil law; Law Number 5 of 1960 concerning Basic Regulation on Agrarian Principles; Law Number 4 of 1996 concerning Mortgage on land and objects related to land; Government regulation of Republic of Indonesia Number 11 of 2010 concerning Control and Utilization of Abandoned Land; Regulation of the Head of the National Land Agency of the Republic of Indonesia Number 4 of 2010 concerning Procedures for Controlling Abandoned Land; and Regulation of the Head of the National Land Agency of the Republic of Indonesia Number 5 of 2011 concerning Procedure for Utilization of State Land, Former Abandoned Land. The secondary data obtained from library research is the most appropriate method to obtain concepts, theories and information as well as conceptual thoughts from previous researchers in the form of legislation and other scientific works (Ibrahim, 2006).

The technique of field research involved the activity of collecting, researching, and reflecting on primary data obtained directly from the field to support secondary data. This field research also aimed to triangulate the findings of secondary data.

- *Data analysis*

A qualitative juridical analysis method was used to analyze the data obtained from the field research and library documentation. This method involved norms, principles, and understanding related to Mortgage Law, and existing statutory regulation as positive legal norms which were then analyzed qualitatively in order to draw a conclusion.

Results and Discussion

The implementation of *parate* execution of Mortgage object encountered very serious obstacle in practice. This has been going on since the enactment of Law no. 5 of 1960 (UUPA) up to Law no. 4 of 1996 (UUHT), and its impact is still being felt today. Until now, the State Receivable and Auction Service Office (KP2LN) has always been powerless in using the *parate* of execution of Mortgage object without a court fiat. This means that the sterilization/impeachment of Article 6 UUHT has taken place. The main trigger was the decision of the Supreme Court of the Republic of Indonesia (MARI) No. 3210K/Pdt/1984, which came into force on January 30, 1986. The Legal

Consideration (*Ratio decidendi*) of the decision stated that if the auction was carried out by the Head of the Bandung State Auction Office itself, then the public auction was contrary to Article 224 HIR, and therefore, it should be considered invalid (Poesoko, 2008).

The MARI Decision No. 3210K/Pdt/1984 is reinforced by book II of the Guideline for the Supreme Court of the Republic of Indonesia, which requires the execution of Mortgage Right by fiat/order of the Head of the District Court. This condition is further exacerbated by the provision on abandoned land as regulated in PP No. 11 of 2010, which stipulates that the object of mortgage can end if the land is declared abandoned, without considering the position of the mortgage holder's preference right as the main principle in conceptual values (essential meaning) guarantee law.

- *Legal protection for mortgage holder (preference right) for mortgage object affected by abandoned land provision*

The power to bind the privilege of preference right owned by mortgage holder on land that burdens mortgage rights is very dependent on the legal system that overshadows it. As understood, mortgage as a legal regime does not stand alone. Mortgage rights are very dependent on the legal regime of the object of the mortgage, namely the law of land (National Land Law) which is sourced from Law Number 5 of 1960 concerning Basic Agrarian Regulations. Article 19 of the UUPA paragraph 2 letter c which essentially states that the proof of rights as a product of land registration is not absolute, but is strong.

The problem arises when the legal system of land registration that produces certificate of right is not in sync with the legal meaning of guarantee in the form of mortgage right. It is vulnerable as the threat of the mortgage agreement looms clearly and cleanly. The result of the declaration of land as abandoned land is the abolition of the rights to land declared as abandoned land whose land status is controlled by the state. A land which is declared as abandoned land, and if it turns out to be an object of Mortgage, then with the abolition of the object of land, the Mortgage is also nullified. However, the debts incurred between the giver and recipient of the Mortgage are not terminated, but the position of the holder of the Mortgage, who was previously domiciled as the holder of the preferred Mortgage, becomes the concurrent holder of the Mortgage.

Article 18 paragraph (4) UUHT states that with the abolition of the mortgage, the debts incurred as the principal agreement will remain. With the abolition of the Mortgage Rights because the abolition of the land rights does not result in the cancellation of the guaranteed debt, the Mortgage Provider still has the obligation to pay off the debt in accordance with the loan agreement that occurred. The abolition of the mortgage does not result in the abolition of the principal agreement, but the abolition of the principal agreement results in the abolition of the mortgage agreement. This opinion does not need to be refuted anymore, because this is as expressly regulated in UUHT.

The specialty of the Mortgage as a guarantee is that the Mortgage Right gives priority to the Mortgage Holder in fulfilling his receivables. If the Mortgage provider defaults or in other words cannot fulfill his promised performance, the Mortgage holder can directly execute the object of collateral which is used as collateral for the

debts of the Mortgage Giver. This right is regulated in Article 20 paragraph (1) UUHT, namely if the debtor promise. This clause is based on two things: first, the right of the first Mortgage holder to sell the object of the Mortgage as referred to in Article 6; second, the executorial title contained in the Mortgage certificate as referred to in Article 14 paragraph (2), the object of the Mortgage is sold through a public auction according to the procedure specified in the law and regulation for settlement of the receivable of the Underwriting Right holder with prior right over other creditors.

Article 6, UUHT, also states how the execution should be carried out, namely: If the debtor is in default, the holder of the first Mortgage has the right to sell the object of the Mortgage on his own power through a public auction and take repayment of his receivables from the proceeds of the sale. The preferential nature and ease of implementation become meaningless if the government declares the land that is the object of the Mortgage Rights as abandoned land. With the abolition of the object of Mortgage, it does not eliminate the debts that occur as the existing principal agreement. However, with the loss of the preferred nature, it creates legal uncertainty for the Mortgage Holder who from the beginning has in good faith and with full confidence has lent money to the Mortgage Giver, but in the future is harmed by action that the Mortgage Holder has never thought about and done.

From a legal perspective, there are no clear rules regarding outstanding debt. Article 18 paragraph (4) UUHT, mentions only the abolition of the mortgage object and does not erase the existing debt. It also does not regulate what the Mortgage Holder must do to get the money back. This requires to browse how to protect the mortgage holder's rights whose object of mortgage is declared as abandoned land. In such a situation, legal protection can be carried out in several ways and according to the conditions behind the process of issuing a determination by BPN to declare a land that is the object of a Mortgage to be abandoned land.

- *Mortgage Agreement: Good or bad intentions*

The condition behind this depends on the provider of the Mortgage, how to anticipate and how to respond to a warning from BPN before establishing a land as abandoned land. In responding to the determination of abandoned land, the mortgage giver can be divided into two criteria, namely those who have good intention and those who do not have good intention. The giver of Mortgage has good intention, of course, since the main agreement was signed, he tries to maintain and care for the object of the Mortgage. Likewise, if you have tried but are still declared as abandoned land by BPN, it will try to fulfill its obligation no matter what.

However, there is also the Mortgage provider who from the beginning did not have good intention to maintain the main agreement that had been made. He also ignored the condition of a land being the object of the mortgage and declared as abandoned land by BPN. Such an attitude of the mortgage giver is certainly very different at different times. There are also different ways of responding and resolving in order to provide protection to the recipient of the mortgage. For the mortgage giver who has good intentions, the steps that can be taken, at the time of the loan agreement is to recognize the main agreement. It is necessary to include a clause that there is an obligation from the mortgage giver to cultivate the land that is the object of the mortgage. It should also include the provision that there is an obligation to replace

the object of the Mortgage if after being agreed to maintain or use the land, it turns out that the grantor of the Mortgage did not implement it; which led the government to declare the land object of the Mortgage as abandoned land.

This mechanism can be implemented at the time the agreement is made. As we know in making an agreement, the parties must include it in the APHT (Deed of Granting Mortgage). This is confirmed in Article 11 UUHT, which in essence with the Deed of Granting Mortgage (APHT) is an authentic deed with a certain form. If not fulfilled, its existence is challenged, the agreement stands invalid, null and void. Likewise, if the contents of the APHT are incomplete, the APHT is null and void and cannot be used as a basis for registration. The content in question is the content that must exist according to the provision. In the APHT, however, the parties, the giver and the recipient of the Mortgage Rights, can include things that can be mutually agreed upon.

- *Protection of Mortgage Rights In the Indonesian Law*

The UUHT determines the contents of the APHT into three types, namely: first, mandatory content which stipulates that if the mandatory contents are not included in full, then this APHT is null and void. This provision relates to the operational principle of Mortgage Right, namely regarding the subject, object and guaranteed debt (Article 11 Paragraph (1) UUHT and its explanation); second, the facultative contents, that are not limitative but enumerative and do not have the effect of invalidating the deed. The parties are free to determine whether the contents are included or not in the APHT. They also contain the promise that APHT should be registered at the Land Office, and acquire the material nature of binding third parties (Article 11 Paragraph (2) UUHT and its explanation); third, the prohibited content, which reiterates the contents of the Article 12 UUHT implying that the promise of giving full authority to the Mortgage Right Holder to own the Mortgage object if the debtor breaks the promise stands null and void by law. This concept is taken from Article 1178 paragraph 1 of the Civil Code, which states that all promises by which the debtor is authorized to own the object given in the Mortgage Right are void. Mortgage holders are prohibited from automatically becoming the owner of the mortgage object in the event the debtor is in default because this is contrary to the purpose of the Mortgage if the debtor breaks the promise, the collateral object is auctioned off to pay off debt to the creditor.

With the issuance of this PP-PPTT, the Mortgage holder can anticipate by including a clause in the main agreement, thus the provisions in Article 11 paragraph (2) UUHT which contains a promise for the consequences of abandoning the Mortgage object in an APHT Deed. This is a form of legal protection for Mortgage holders (creditors), especially when the Mortgage provider is in default or in breach of contract. The second form of protection is when the land object of the Mortgage is declared abandoned, but there is no anticipatory step in the main agreement, so in order to settle the receivables the holder of the Mortgage can make several efforts, namely: declaring the credit agreement to be terminated, and demand the debtor to pay off the existing debt at that time; or, if the debtor does not have the ability to pay off at that time, the creditor can renegotiate with the debtor, namely by offering the debtor to enter into a new credit agreement followed by the making of a New APHT with a different Mortgage object (if the debtor has a new mortgage object).

The problem that needs to be underlined is that the process of issuing a determination letter regarding abandonment of land that has become the object of Mortgage carried out by BPN is not sudden. It goes through several fairly long stages, which include; the identification process, giving the first, second, third warning letters and if the third warning is not also paid attention to by the holder of the land right, then a letter of determination of land abandonment will appear. After the land has become the object of the Mortgage Right, the Mortgage holder should also receive a copy of the warning letter. With the receipt of a copy of the letter from the BPN by the holder of the Mortgage, the holder of the Mortgage should immediately respond to immediately secure the settlement of his receivable, either by giving a direct warning to the holder of the Mortgage, as well as reviewing the content of the loan agreement and existing APHT.

However, in the context of avoiding or responding to the existence of a letter of determination of neglect of BPN, creditors are expected to take preventive legal measures as follows: first, to immediately review (amend) the contents of the ongoing loan agreement, if in reality there are signs that the mortgage provider will abandon the existing mortgage object; second, in the future, in the preparation of existing debt and receivable agreements, the holder of the Mortgage Right can make an agreement or add a certain clause which in essence gives the obligation to the Mortgage Provider not to take actions that will cause the land object of the Mortgage to be neglected and/or declared as abandoned land by the Head of the local BPN. If the mortgage giver violates it or it is found certain actions of the mortgage giver that lead to the process of abandoning the land of the mortgage object, the debt relationship will then end and the mortgage giver must immediately pay off all debts.

That before signing the credit and making the Mortgage Deed (APHT), the Mortgage Right holder should conduct direct research and an assessment of the physical condition of the land rights that will be used as objects of the existing Mortgage Rights. He should find out whether they have been neglected and that whether there are symptoms leading to land abandonment. Another alternative that can be done to provide protection for Mortgage holder is to add provision in the UUHT concerning a clause that specifically regulates obligation to the holder of the Mortgage Right if the land object of the Mortgage is declared as abandoned land by the government. In the event that from the beginning the mortgagee has intended to abandon the land used as the object of the mortgage, there is a need for a firm criminal witness in the form of punishment. This provision can be included in UUHT.

As explained by Sumardjono (1998), a statutory regulation must include 3 (three) principles, namely” first, the fulfillment of the principle of justice in a statutory regulation because it still requires the fulfillment of legal certainty requirements. Legal certainty will be achieved if a regulation is clearly formulated so that it does not lead to various interpretations and can serve as a guide for the same implementation, and that existing regulations will be implemented consistently and consistently. The second principle states that the material of a statutory regulation depends a lot on the process of making it. Transparency in making laws and regulations can add weight to legal certainty. This is because the public can find out about the material to be regulated and are given the opportunity to provide input that can be used as

consideration for the completeness or improvement of the regulation. The third principle that needs to be considered in a statutory regulation are benefits, namely providing the possibility of achieving needs and interest to develop properly. Regulations are obeyed if the community feels confident about receiving such benefits.

The third principle of providing benefits is directly related with the issuance of PP-PPTT in the provisions for the abolition of Mortgage Rights due to the abolition of land rights burdened with Mortgage as referred to in Article 18 paragraph (1). It is time to add witness provisions to this provision. It should also be declared a criminal offense if the object of the Mortgage is declared null and void because it has been intentionally neglected by the grantor of the Mortgage. The grantor of the Mortgage is not willing to replace it with another object as a result of which the object of the Mortgage is declared as abandoned land by BPN.

Moreover, the land given as a substitute for the mortgage object declared as abandoned land must have the same value as land declared as abandoned land. This provision is to reduce losses for the Mortgage holder, as a result of the actions of the Mortgage provider who had been negligent and without the knowledge of the Mortgage Rights holder, who did not use the land of the Mortgage object in order to avoid it getting declared as abandoned land. These provisions are very important when viewed from the side of legal certainty. As we know that the holder of the Mortgage has a priority position in the fulfillment of receivables if the holder of the Mortgage is in default (*droit de preference*). This principle is the spirit of UUHT, without this principle, UUHT will not be meaningful as a guarantee institution. Moreover, with the enactment of PP-PPTT which generalizes the status of land rights to be declared as abandoned land, namely by declaring a land as abandoned land, the land comes under the control of the state. As a consequence, the object of the Mortgage gets destroyed and, as a result, the holder of the Mortgage is harmed.

However, the UUHT continues to provide protection as Mortgage holders still enjoy the benefit, namely the Mortgage Rights that remain the main choice as a guarantee institution. The UUHT is the guarantee to Mortgage holders even if there is the abolition of land rights caused by the issuance of the Land Abandonment Determination Letter (which has become the object of a Mortgage Right) by the Head of the local National Land Agency to destroy legally the object of the Mortgage. But despite the abolition of land mortgage rights, the UUHT's provisions assure that it does not result in the write-off of guaranteed receivable.

In this situation, in order to protect the mortgage rights, after receiving the BPN's determination letter of land abandonment, both the giver and the recipient of the Mortgage need to take a few steps. First, it is necessary that the grantor of the Mortgage should have good intentions from the start to pay off the debts. Second, when the main loan agreement is made, it is necessary to include a clause that there is an obligation from the giver of the Mortgage to cultivate the land, which is the object of the Mortgage. There should also be the provision of an obligation to replace the object of the Mortgage, if after being agreed to maintain or use the land, it turns out that the mortgage provider does not implement it, or if the land (the object of the Mortgage) is declared as abandoned land by the government.

- *Prospect of Setting Mortgage Object Affected by Abandoned Land Provision*

The state is always faced with two difficult choices when faced with the problem of regulating land affected by the provisions of abandoned land. First, whether to ease the investing procedures in the context of domestic and foreign investment in order to increase the development of the economic sector; second, how to stop the negligence of land once it is acquired and make it a concrete factor of production. Both these factors are fundamental in improving the welfare of rights holders, which must be pursued continuously. For this reason, the substantial arrangement of the material for abandoned land must reflect the middle point between negative investment actions and land exploitation in the context of economic improvement.

The regulation of abandoned land provisions in the legislation is still experiencing obstacles as a result of the incompatibility of the principles and rules of land law with the guarantee law. Various principles and legal principles of guarantees regulate exclusively the position of subjects and objects of mortgages, while land as objects of mortgages does not guarantee positive principles in the land registration system. As a result, the legal principle of land and mortgage are not yet synergistic, resulting in the threat of weak position of preference rights of mortgage holders on the one hand, because the implementation of direct execution in the event of default (*parate execution*) is feared not to run it smoothly, because it is possible for the object of mortgage to be the object of debt and at the same time the object of the case as long as the debt agreement is in progress.

Conclusion

Mortgage rights are an exclusive legal regime, because they originate from agreements and are derivatives of original land rights (such as Right of Ownership, Right to Cultivate, and Right to Build). Mortgage rights also originate from the provision of the concept of the state control in a law-abiding state. Once a right is enacted, it is the responsibility of the state to protect it. A mortgage right is enacted because there are special registrations that require a mortgage regime to exist as an exclusive legal regime. A mortgage, in line with Article 14 of Law no. 4 of 1996, Article 1178 of the Criminal Code, is a legal protection system, which means that mortgage right exists and protects creditors' receivable if they have been registered and issued a mortgage certificate (Poesoko, 2008).

The study revealed that there exists a legal protection to the Mortgage holder under the law, which states that a mortgage right cannot be abolished immediately. This is stated in the legal principles of the Mortgage Right. The legal principles of Mortgage Right consist of 15 (fifteen) principles, but these principles can be divided into 4 (four) general legal principles. These four legal principles can be defined as legal principle of Mortgage which provides legal protection to the holder of Mortgage Rights. These principles are: giving priority to the mortgage holder over other creditors if the debtor is in default (*doit depreferent*); following the object that is guaranteed in the hand of whoever the object is (*droit de suite*); meeting the principles of specialty and publicity so that it can bind third party and provide legal certainty to interested parties; and promising an easy and sure implementation.

The study also found out that, in response to the letter of determination of abandonment from the Land Office, in the context of settling the receivable, the recipient of the Mortgage Right can take a few steps namely: first, if the mortgage provider has good intention from the start, he can include a clause that the mortgage provider can cultivate the land, which is the object of the mortgage, if abandoned. This clause should be signed at the time of the main loan agreement. Secondly, when the main loan agreement is made, a provision can be included of the obligation to replace the object of the mortgage, if after being agreed to maintain or use the land, it turns out that the grantor of the Mortgage does not implement it, or if the land which is the object of the Mortgage is declared by the government as abandoned land. Third, as a form of protection when the object of Mortgage is declared an abandoned land, and when there is no anticipatory step in the main agreement to settle the receivable of the holder of the Mortgage, the credit agreement should be declare as terminated, debtor may be asked to pay off the existing debt immediately. Fourth, if the debtor does not have the ability to pay off at that time, the creditor can renegotiate with the debtor, namely by offering the debtor to enter into a new credit agreement followed by making a new APHT with a different Mortgage object (if the debtor has an object other Mortgage Right).

Another alternative that can be done to provide protection for Mortgage holder is to add provision in the UUHT concerning a clause that specifically regulates obligation to the holder of the Mortgage Right if the land, object of the Mortgage, is declared abandoned by the government. In this scenario, if it is proved that it was intended to mark the land to be used as the object of the mortgage to be abandoned, from the beginning of the mortgage, there is a need for strict criminal sanction in the form of punishment. The study recommends that PP 11 of 2010 should be empowered to punish all such defaulters who had intentionally mortgaged a land that was destined to be abandoned by the government. This law should act as a guarantee law, given a stronger position compared to the general law on material engagement, and should also regulate the UUHT and all its implementing regulations. It is also recommended to include the provision of a second guarantee for the mortgage, by allowing the mortgage holder to suggest some other land as a mortgage if the original object of mortgage is declared as an abandoned land by the government.

It is also suggested that all parties (the prospective mortgage holder, mortgage giver, Notary/PPAT and witnesses) involved in the agreement to grant mortgage right in the APHT agreement are expected to be more careful in carrying out physical and juridical assessment of the land to be used as an object of Mortgage. This will ensure legal protection and guarantee for the return of receivable to creditor and in future avoid the emergence of land abandonment decision to harm the Mortgage holder. The government should also immediately change or revise UUHT and its implementation rules to provide a stronger and a more balanced legal certainty to Mortgage holders, Mortgage providers, and third parties. It is also suggested that the provision of adding a second land as collateral should be agreed upon in the APHT, if the land that is the object of the mortgage is affected by the provision of abandoned land. These suggestions will address to the weak legal protection provided to the Mortgage Holders in the Government Regulation No. 11/2010.

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