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Debt Guarantee Settlement Patterns in Minangkabau

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Abstract: Debt collateral is often unacceptable to the execution of debt collateral because there is coercion and leads to court so that many debts are not collected. In Minangkabau customary law, there is no compulsion to pay off debts. This research answers how people make debt-receivables agreements and must be repaid by the debtors in the Minangkabau customary law arrangement in Sungai Dareh village, West Sumatra. This research method is through observation and interviews of local customary leaders. The implementation of the pattern of execution of debt collateral settlement in Minangkabau is motivated by the legal relationship between the creditor and the collateral in the form of land. The creditor only has the right to cultivate or take the proceeds from the land given by the debt recipient until the debt is paid off or redeemed by the debt recipient, so that debt settlement will never transfer ownership rights to the land. In an urgent situation, the creditor can transfer the debt to the new lender, which stops the legal relationship between the first creditor and the debt recipient and creates a new legal relationship between the second creditor and the debt recipient. Creditors' rights remain a priority, and there is no time limit in paying off debts. This debt settlement is very different from debt settlement in positive law in Indonesia. The creditor has the right to sell the land as collateral for the debt if the debt cannot be settled after a certain period, which results in the loss of ownership of the debt recipient over the land that is used as debt collateral. There is a need for positive legal reform in Indonesia regarding the execution of debt guarantees.

Keywords: Debtguarantee, rights, ownership.

INTRODUCTION

Fulfilling human needs in the form of social interaction is through debt or borrowing, which is better known as a credit (Feigenberg & Pande, 2013, pp. 1–35; Parlor & Winton, 2013, pp. 25–45). This understanding is also found in Article 1754 of the Civil Code (KUHPer) which explains that:

“The Lending-Borrowing Agreement is an agreement whereby one party gives the other party a certain amount of goods that are used up due to use, on the condition that the latter party will give back several goods of the same kind and condition”.

In its development, the law of debt creates legal problems, which damage social interaction itself. This occurs when the debtor is unable to return the amount owed to the creditor. To free creditors from worries about being harmed, the debtor submits an item as collateral (Diamond & He, 2014, pp. 719–762; Lusardi & Tufano, 2015, pp. 332–368; Tje'Aman, 1989, p. 38; Van Binsbergen *et al.*, 2010). The item that is used as collateral for credit is the land, although goods other than the land can also be used as collateral for debts. In positive law, the land which is used as the object of collateral is bound with a security right the use of land as credit collateral is based on the consideration that land is safest and has a relatively high economic value.

In addition to the relatively high economic value (Marnita, 2017; Nurjannah, 2018, pp. 195–205; Winarno, 2016, pp. 28–35), the selection of the Mortgage as a guarantee binder is the ease in carrying out its execution, which gives more hope to creditors. to obtain debt repayment without further legal problems.

In practice, not all lenders bind collateral in the form of land with Mortgage Rights, but with bonds that only apply and are recognized in the customary area in Minangkabau known as

Pagang-Pawn (Sardjito, D. A, 1950; Sasongko, 2014). In this customary area, the provision of ordinary debt is accompanied by the granting of land tenure rights as collateral, and uniquely there is no settlement until it is executed in court.

Based on the above rationale, this study identifies a pattern of a legal settlement of the imposition of land rights which is used as the object of collateral in the form of execution of Mortgage Rights as regulated in positive law and the rules of Pawnshop according to Minangkabau customs. Also, this study also analyzes how the differences between Pawn Merchants implemented in Minangkabau and Mortgages regarding debt collateral in the form of land, and identifies the Pawn Merchant Execution and Mortgage Execution processes resulting in the birth of the enacted law.

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METHOD

The focus of the study was in the Minangkabau customary area within the jurisdiction of West Sumatra Province. The approach is based on legal phenomena considering that the object is the activities of community life presented in a qualitative descriptive form accompanied by explanations and interpretations of answers to problems, and content analysis (Holstein & Gubrium, 2009; McConville & Chui, 2007; Watkins & Burton, 2017). Data collection captures the phenomenon through participatory observation. The data consists of primary data and secondary data. Primary data includes official documents related to land collateral as credit collateral, while secondary data includes; books that discuss the execution of Mortgage Rights and the execution of Pawn Merchants.

The next technique is interviews with the executors of the mortgage execution and the execution of Pawns in the research area, as well as the policymakers associated with this research. Meanwhile, the number of respondents was determined using the snow-ball technique, and then the researchers conducted triangulation (Moleong, 2017).

The data obtained were analyzed by descriptive analysis, then interpretive analysis was carried out by identifying and mapping the life of the people in Minangkabau as well as problematic analysis of the factors that pushed and hindered credit implementation as a strategic recommendation for the execution of the mortgage and the execution of the Pawnshop.

RESULT AND DISCUSSION

Most commercial loans are made on a secured basis, yet little is known about the relationship between collateral and credit risk. Several theoretical studies find that when borrowers have private information about risk, the lowest-risk borrowers tend to pledge collateral. In contrast, conventional wisdom holds that when risk is observable, the highest-risk borrowers tend to pledge collateral. An additional issue is whether secured loans (as opposed to unsecured borrowers) tend to be safer or riskier than unsecured loans. Empirical evidence presented here strongly suggests that collateral is most often associated with riskier borrowers, riskier loans and riskier banks (Berger, 1990).

One of them is Law No. 4 of 1996 concerning Mortgage Rights, which regulates the agreement between the parties receivable and owed, as is well

known, bad credit is a serious problem faced by the banking industry in Indonesia. with what has been regulated in the Mortgage Rights Law. The problem that will be investigated is "Settlement of Bad Loans with a Guaranteed Title to Land according to Law Number 04 of 1996 concerning Mortgage Rights", as well as the obstacles faced in resolving bad credit and how to overcome them. The method used in this legal research is normative juridical research (normative law). Each bank should

thoroughly assess the five basic principle factors before giving credit decisions to prospective creditors, so that confidence can be obtained from the customer's good faith and ability to pay off their debts. From the research carried out, it is obtained the results regarding the procedures for settling bad debts that are secured by land certificates as collateral for repayment of certain debts (Winarno, 2016).

The Difference of Mortgage Rights and Pawn Merchants

Mortgage Right

The term Mortgage Rights arose and came into effect after RI Law Number 4 of 1996 was enacted on April 9, 1996. According to the provisions of Article 1 paragraph (1) Law, Number 4 of 1996 what is meant by Mortgage Rights are:

"Mortgage rights over land and objects related to land, hereinafter referred to as Mortgage Rights, are collateral rights imposed on land rights as referred to in Law Number 5 of 1960 concerning Basic Agrarian Principles, following or not including objects. Other objects which constitute an integral part of the land, for the settlement of certain debts, which give priority to certain creditors over other creditors."

The general explanation of the law above states that Mortgage Rights are Mortgage Rights imposed on land rights. Often found in the field objects in the form of buildings, plants, and works of work become one unit with the collateral land.

In the Indonesian Dictionary, the definition of dependents is understood as goods that are used as collateral for loans received (Partanto & Al Barry, 1994; Sugono, 2008). Meanwhile, according to E. Liliawati Muljono, what is meant by Mortgage Rights is a Collateral Right that is imposed on the right to land as referred to in the Basic Agrarian Law and other objects that are attached to the land, which aims to pay off

certain debts, besides, it provides a key position for certain creditors against other creditors (Berger & Udell, 1990, pp. 21–42; “The Guarantee Function in Providing Credit,” 2013; Winarno, 2016).

From the above definition, it can be concluded that Mortgage Rights are collateral rights over land for the settlement of certain debts, which give priority to other creditors. Therefore, in the agreement to grant guarantee rights over land with mortgage rights, there are two parties, namely the party who gives the mortgage right and the party who receives the mortgage right, following Article 8 paragraph (1) of Law Number 4 of 1996 stipulates that the provider of the mortgage right is an individual or a legal entity that has the authority to take legal actions against the object of the dependent right concerned. Meanwhile, the recipient of the mortgage right according to Article 9 of the UUHT, can be an individual or a legal entity that is the party in the debt. In this regard, Arie S. Hutagalung explained that the guarantee agreement or security right is additional to certain debt and credit relationship, so the process of charging the Mortgage is preceded by the holding of a debt agreement between the debtor and creditor, which is the main agreement (Hogg, 2019; Hutagalung, 2002).

According to Article 10 paragraph (1) of Law Number 4 of 1996 the promise to provide Mortgage Rights must be stated and is an inseparable part of the debt and credit agreement. Then paragraph (2) states that the granting of mortgage rights is carried out by making a Deed of Granting Mortgage Rights (APHT) by the Official of Making Land Deeds (PPAT) under the prevailing laws and regulations. This means that the agreement granting power to impose mortgage rights is made by the parties as outlined in the authentic PPAT certificate (Satrio, 1997). In Article 14 paragraph (1) of the UUHT, it is stated that the existence of a Mortgage Right is indicated by the issuance of a Certificate of Mortgage Rights from the Land Office following the prevailing laws and regulations. The debt/credit agreement will be returned within a certain time as agreed (Supramono, 2014, p. 9). The repayment period for this loan is strictly determined, namely when exactly the debtor is required to pay off his debt. The obligation to pay off this debt is possible in two ways, in installments (usually sacrificed, the guarantee is tied to the Mortgage) or paid off at once.

Installments as a way of paying off debts are usually specified in the debt agreement, both in amount and time. The obligation to pay in installments is the main

door for a debtor to break a promise which in legal terms is better known as default (Marjasa, 2017; Sull et al., 2015; Yahman, 2017, 2019). If the debtor is declared in default, the creditor has the right to sell the debtor's property by auction where the proceeds are to pay off the debtor's debt and interest, and if there is any remaining, the proceeds will be returned to the debtor (Foos et al., 2010, pp. 2929-2940; Tje'Aman, 1989).

Pawnbroker

Unlike the Mortgage Rights, the Pawnshop consists of two words, namely pagang and pawn. Pagang is a person who holds a Pawn object. While pawning is known by several terms that apply in each customary law community, among others: “*adolsande*” (Java); “*ngajual, akad, gade*” (Sundanese); “*dondon*” (Tapanuli); “*dondonsusut*” (Mandailing) or pawn (gade), “*manggadai*” (Minangkabau and selling Riau and Jambi pawns) (Hadikusuma, 1978; Sudiayat, 1978).

The object of pawning in Minangkabau is the land, be it rice fields, fields or fields. Thus, the definition of pawning according to Minangkabau custom is the transfer of power to exploit the land from the pawner to the pawner recipient. The definition of pawning according to customary law was put forward by SofyanAsnawi as quoted by MochtarNaim, pawning is a relationship between the creditor/pawn holder and the land owned by the debtor, provided that the land is under the control of the lender/creditor/pawn holder (Naim, 1968; Sasongko, 2014). As long as in his control, all the produce of the land becomes the right of the lien holder, it can be interpreted that this is the interest on the debt. Redemption of pawned land is largely determined by the willingness and ability of the land to be paid. Barend Ter Haar believes that the pawn is an agreement that causes the land to be handed over to receive a certain amount of money, with the agreement that the landowner has the right to return the land to himself by paying the same amount of money. Such agreements or transactions by Van Vollenhoven were called Vervanding's pawning of land (Haar, 1976).

In the pawnshop, there is no obligation for the pawner (the debtor) to pay debt installments. Because the return of the object of the pledge is done by redemption by the giver of the pledge. There is no period in the pawnshop because the pawner can ask for additional pawning in the form of gold or rupiah according to the agreement with the pawn holder.

A pawn in Minangkabau does not recognize the terms of the principal and additional agreements. The Minangkabau people, especially those in the Dareh River, only know one agreement, namely the pawning agreement. This agreement directly states that the party who gives the pledge shall hand over his plot of land to the recipient of the pledge, who then also hands over gold/money or other forms. This agreement was then stated on a piece of paper signed together, including the "*mamak inyiakdatuak*" (Pengulu) who gave and received the pledge, which they called the "Pawn Seal".

Unlike the accounts payable / credit agreement made by PPAT and the copy is submitted to both parties, there is no copy of the pawnshop. The Pawn Seal is only kept by the pledge recipient, who if at any time there is a request for "additional *pagang*" (increasing the amount of debt) is directly written on the Pawn Seal, then signed by the pledge giver. There is only one agreement, there is no additional agreement or even an addendum. Just one agreement that binds them, but they are subject to that one agreement. There is no concern that the pledge recipient of the land pledge recipient will be transferred and vice versa, there is no doubt that the pledge recipient will not be returned.

In stark contrast to the accounts receivable in the banking world where the agreement is multi-layered and made by the PPAT, there are still concerns that the creditors (banks) will not be repaid, on the part of the debtors (customers) are also worried that the goods that are the object of the dependence will change hands to another election.

Regarding evidence, in positive law, the deed issued by PPAT is a letter with perfect evidentiary power. Meanwhile, in Minangkabau customary law, the *mamak* as the head of the inheritance applies a higher position (Observation March 18, 2019). The high position of the *mamak* for the *kamanakan* / nephew children is directly related to the obligations of the *mamak* itself. Especially in the pawnshop Mamak Kaum (Penghulu; Datuak Sati) should convey to nephews' children until the last descendants when the pawn is redeemed. The goal is that the pawner (the debtor) will never lose ownership of the object of the pledge.

The involvement of the *mamak* in ensuring the return of the pawning object to the pawner suggests that in the Sungai Dareh community the power to utilize

the pawning object lies with the pawn recipient (the creditor). Although in practice the pawning recipient can cooperate with the pawner with the "*siduoi*" system, with the profit sharing according to the initial agreement that the pawnshop is to help each other. According to customary law, it is not a multi-layered agreement, but activities before the agreement itself which are layered, namely asking for approval which is carried out in stages as follows: First, approval from the clan (tribe), namely the consent of the family (*saparuik*); second, the approval of the Head of *Waris Mamak*, namely the elder man in the family; third, the agreement of the customary leader, namely people with *sako*.

The pawner and the pawner have a mutually beneficial position. When the pawner needs a fast time fee, he can receive it in the form of money, gold, or rupiah which is measured by the area of the land being pawned with an interpretation based on the agreement of both parties. If the paddy field is a guarantee or as a *sando* (Sandra), it may be redeemed by the pawner or heir regardless of the number of lineages (Interview with Penghulu; Datuak Sati). Redemption is made only in the amount of the loan, not to exceed. In Minang there is a saying "*salangkembali, gadaibatauri*", which means that there is no interest in lending and borrowing which is burdened with the pawnshop trader.

Some requirements in the pawning agreement that need to be considered are that all heirs must agree, if this is not fulfilled, the pledge is invalid. The minimum amount of pawning is one harvest. Then the pawn holder can work on the land/rice fields that are pawned through the whole system with a third party. The pawn holder may not transfer the pledge to a third party without the pledge's approval, on the other hand, the pawner is obliged to agree to the transfer of the pledge to a third party if he cannot redeem it, while the pawn holder needs money. The next condition is that the price of the pledge can be added during the Pawnshop period, but the redemption cannot be made in installments. The right to work and the right to redeem in a pawnshop is inherited from the heirs of each party. The pledge recipient and the pawner are not bound by compensation for damage to the object of the pledge. If there is damage to the mortgage object, the pawn recipient has two choices, first to repair it and return to work on it. The next option returns the pawned object to the pawner. If what is being pawned is coconuts, cloves, and other hard plants, then the recipient of the pawn has the right to take the garden products and is not allowed to cut down the trees (Navis, 1984).

Comparison of Pawn Merchant Execution and Mortgage Rights

Pawn Merchant Execution

The execution of pawn traders is not by selling the object of the pawn because in Minangkabau it is known as the *PusakoSalingkaSuku*. Therefore, there is a difference between a pawnshop and a mortgage. To protect the interests of a pledge recipient who at any time requires money, the following things can be done:

1. The recipient of the pledge can pawn the land which is the object of the pledge to a third party. This treatment is known as "*onderverpanden*". When an incident "*onderverpanden*" occurs, there are two pawning relationships. First, the pawning relationship between the original pledge and the recipient of the pawn. The second is the pawning relationship between the next pawner (in this case the first pawn recipient) and a third party (the second pawner).
2. The pledge recipient pawns the land to a third party who is directly the party who receives the pledge. So that in the event known as "transferring" there is only one pawning relationship, namely between the *sipenggadai* and the new pawn recipient.

The incident "*onderverpanden*" or "moving the pawn" above in the Dareh River area is known as "*Mangisa Pawn*", which is transferring the pawn to a third party. If the employer needs money then he may transfer the lien to someone else. There are two ways to transfer the pawning: First, between the original pawner and the original pawn recipient (openly). Second, between the original recipient who became the new seller and the third party who became the new *pawawai* (secretly) (Sudiyat, 1978, p. 30).

In line with Wirjono Prodjodikoro, he explained that the pawn recipient could find someone else to help him when he needed cash, provided that the pawner at that time could not redeem the mortgage land. The pledge recipient can re-mortgage the land to a third person with an agreement at any time he has the right to redeem the land from the third person (*onderverpanding*). Besides, a pledge recipient can give up his lien as well as control over the land provided he withdraws from the legal relationship with the land (Prodjodikoro, 1986, p. 58). Related to this pawning, R. Subekti said that the right to redeem may not expire, meaning that the pledge recipient has the

right to repeat the mortgage (*hervenpanden*), therefore he cannot demand that his land be redeemed. The pawn recipient cannot automatically become the owner even though it is agreed upon, there are always more transactions in the form of additional money (Subekti, 1991, p. 39). The transfer of the pledge to a third party does not result in a transfer of ownership, the object of the pledge remains the property of the pawner.

Conflicts regarding pawning pawns rarely occur, but how to resolve them is still regulated in case of problems. The implementation of a pawn that is carried out under the nature of mutual trust, opens the opportunity for conflict by the heirs if the pawn has not been redeemed in a long time. To anticipate this problem, the settlement of the *pawning/pawker* dispute settlement is arranged as follows:

1. Settlement through deliberation and consensus between the two parties which is mediated by the head heir;
2. The Settlement at the level of the clan, which involves the *Niniak mamak / pengulu* (the person who knows in the sealed letter), if the leader is dead, it can involve the Sako heir;
3. Through the Nagari Adat Density, namely the settlement involving the Wali Nagari and the Chairperson of the Nagari Adat Density (KAN).

Traditionally, the highest level of dispute resolution is through KAN. The decisions are taken become law and are binding on both parties. This is also accommodated in the West Sumatra Provincial Regulation Number 2 of 2007 concerning Nagari Government Principles which states that Wali Nagari is the Head of Nagari Administration and Nagari Government is held jointly with the Nagari / KAN Consultative Body. Density Adat Nagari as the highest customary consultative representative institution has a duty; first, taking care of customary issues related to Sako and Pusako; second, to settle cases of customs; third, strive for peace between the disputing parties; fourth, developing and preserving culture (Interview with KAN Kamang Magek).

Mortgage Execution

The procedure for the execution of the object of the mortgage are regulated in Article 20 of Law No. 4 of 1996 which in essence contains three ways, namely; first, the holder of the first Mortgage Rights to sell the security right of his power through a public auction as

referred to in Article 6 of the Mortgage Rights Law, which is known as "Parate Execution" (Harsono, 2003, p. 455; Poesoko, 2007, p. 246; Satrio, 1997, p. 276; Bekti, 1991); second, the execution of the executorial title contained in the Mortgage Certificate, as referred to in Article 14 paragraph (2) *in-h-irah* (head of decision) which is included in the Certificate of Mortgage contains the words "For Justice Based on Almighty God", intended to confirm the existence of executorial power in the mortgage certificate, so that if the debtor fails to promise, he is ready to be executed just like a court decision that has obtained permanent legal force. In the execution of the execution, the provisions of Article 14 of the UUHT must be considered which states that the Certificate of Mortgage applies as a substitute for the *hypothek grosse* act as long as the land rights are the object of the Mortgage, the execution is carried out by submitting a request for execution by the creditor of the Mortgage holder to the Chairman of the local District Court. by submitting a certificate of Mortgage Rights as the basis; third, under-hand execution, namely the sale of the object of the Mortgage which is carried out by the insurer as the owner of the land with the consideration that a higher price will be obtained based on the agreement between the provider and the holder of the mortgage and the fulfillment of the conditions contained in Article 20 Paragraph (2) and (3) UUHT.

From the explanation above, the ownership of the object of the Mortgage can change its ownership. The transfer of ownership is without the knowledge of the original owner because the Mortgage holder does not need to seek approval from the mortgage provider to sell the object of the Mortgage.

CONCLUSION

The difference between a pawn trader and a mortgage can be seen that there is no term "default" in a pawn shop, because; first, there is no obligation to pay off debts every month, but instead receive a share of the proceeds from the management of the land which is the object of the pledge; second, there is no time period that forces the pledge to repay the loan at a predetermined time. Whereas in the mortgage, the debtor usually repays the debt for a certain period, so that the term "default" appears.

In the execution of the Pawnshop there is no term of sale which results in the transfer of ownership of the object of the pawn. Although the creditor requires repayment, it can only be done by *mangisa pawning*

(creditors replacement), if there are still residents with the approval of the pawner. Meanwhile, Mortgage Rights, whatever the method of execution, always sell collateral which results in the loss of land ownership rights.

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