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# TELAAH SOSIOLOGIS PENYEBAB PELANGGARAN PENGUASAAN TANAH DI LINGKUNGAN PESISIR DI KABUPATEN LAMPUNG SELATAN

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***ABSTRACT***

*Cultivation in coastal area usually did for business activity purpose against the villagers without giving concern for the nature & ecosystem impact. Coastal area have high level of potential conflict either marine aspect nor land authorization. Misuse & violation against coastal area indicate by construction frequently founded along shoreline. Restricted ban against shoreline is a prohibition that require villagers to not build a construction long 100 meters from shoreline. The law against shoreline intend to protect the villagers from tsunami and environmental damage thru human behavior. South Lampung District have high potential level of tsunami by reason the location is close to Krakatau Mountain. In advance of Tsunami 2018 which rushed Banten & South Lampung District throw a big disadvantage and had public nor government attention. In fact, there are a lot of construction who violate shoreline regulation. This research using empiric method which elaborate with direct observation. Faced by the low government supervision reveal the low level of villagers legal awareness about obligations and social function of the land as well as urgency of the preservation of environmental functions on the coast.*

***Keywords:*** *Offense, land tenure, environmental function*

**ABSTRAK**

Masyarakat wilayah pesisir kerap menggunakan pesisir untuk melakukan kegiatan usaha tanpa memikirkan dampak terhadap lingkungan & ekosistem. Wilayah pesisir rentan menjadi sumber konflik baik dari segi kelautan maupun penguasaan atas tanah wilayah pesisir. Penyalahgunaan & pelanggaran terhadap wilayah pesisir ditandai dengan kerap ditemukan bangunan yang berdiri di sepanjang pesisir yang melanggar ketentuan Garis Sempadan Pantai (GSP). Larangan mendirikan bangunan di sepanjang garis sempadan pantai adalah larangan terhadap masyarakat untuk tidak mendirikan bangunan di sepanjang 100 meter dari garis pantai. Peraturan mengenai Garis Sempadan Pantai sejatinya bertujuan untuk melindungi masyarakat dari bahaya tsunami dan kerusakan lingkungan yang ditimbulkan oleh ulah manusia. Wilayah Kabupaten Lampung Selatan merupakan wilayah yang rentan akan bahaya tsunami dikarenakan lokasinya yang berdekatan dengan Gunung Krakatau. Pada Tsunami 2018 silam, wilayah Kabupaten Lampung Selatan merupakan salah satu wilayah yang terdampak bencana Tsunami Selat Sunda. Diketahui banyak ditemukan bangunan yang rusak akibat peristiwa Tsunami 2018 silam pada wilayah Lampung & Banten. Kerugian yang ditimbulkan oleh tsunami 2018 silam telah menarik perhatian publik & pemerintah. Fakta menunjukan bahwa banyaknya bangunan yang berdiri melanggar ketentuan GSP. Penelitian ini menggunakan metode penelitian empiris melakukan pengumpulan data pustaka, observasi dan wawancara. Hasil penelitian terdapat kurangnya pengawasan yang dilakukan oleh pemerintah yang menyebabkan adanya kesadaran hukum yang kurang memadai dari masyarakat wilayah pesisir.

**Kata Kunci:** Pelanggaran, Penguasaan Tanah, Fungsi Lingkungan

## 1. PENDAHULUAN

Wilayah pantai dan pesisir merupakan sumber daya alam terpenting penunjang kehidupan masyarakat yang tinggal di daerah pesisir karena terdapat banyak kegiatan yang dapat dilakukan dengan memanfaatkan sumber daya alam tersebut. Kawasan sepanjang pantai merupakan kawasan terpenting dalam penguasaan dan penggunaan tanahnya, karena selain untuk dimanfaatkan juga untuk melakukan kegiatan usaha.

Kompleksitas yang terdapat antara sistem alam dan interaksi dalam pengelolaan sumber daya alam memperjelas urgensi merawat sumber daya alam melalui aturan-aturan yang dikeluarkan baik oleh pemerintah pusat maupun daerah. Aturan yang diberlakukan secara ketat berdampak pada kelestarian lingkungan (Sugandi, 2011).

Salah satu pemanfaatan daerah pesisir pantai adalah *resort* dan penginapan yang banyak diminati oleh wisatawan sejatinya merugikan para wisatawan itu sendiri. Kerugian tersebut terjadi karena kendati mereka memiliki hak untuk menikmati keindahan pantai, akan tetapi dikarenakan penginapan tersebut didirikan di wilayah garis pantai maka mereka pun secara tidak langsung mengganggu ekosistem pantai. Perpres No 51 Tahun 2016 Tentang Garis Sempadan Pantai di dalamnya menjelaskan bahwa sempadan pantai adalah daratan sepanjang tepian pantai yang lebarnya proporsional dengan bentuk dan kondisi fisik pantai minimal 100 m dari titik pasang tertinggi ke darat (Kalalo, 2016).

Pemanfaatan daerah pesisir pantai ini, sebagai akibat dari pertumbuhan penduduk yang tinggi sehingga membuat menjamurnya bangunan baik permanen maupun semi permanen di sepanjang pesisir pantai Lampung berakibat pada kegiatan penimbunan lahan di area Garis Sempadan Pantai (untuk selanjutnya disebut GSP). Sebagai contoh, di daerah Cungkeng, Pulau Pasaran telah diterbitkan larangan mendirikan bangunan di sepanjang pesisir pantai namun tidak diindahkan oleh masyarakat setempat. Terlihat ratusan bangunan pemukiman penduduk berdiri di GSP dan jumlah terus bertambah yang ditandai dengan adanya beberapa bangunan yang masih baru (ww.lampost.co). Penguasaan tanah di daerah pesisir dengan banyaknya pendirian penginapan kerap kali pembangunan di Kawasan pesisir itu mengabaikan ketentuan yang mengatur mengenai Garis Sempadan Pantai (GSP).

Akan tetapi bila dilihat secara perspektif sosiologis, daerah sepanjang pesisir pantai juga rawan akan bencana. Bencana sering dipahami sebagai apa yang dirasakan oleh masyarakat sekitar mengenai pengalaman emosional terhadap kejadian yang menimpa hidup mereka. Umumnya dalam pengelolaan bencana alam di Indonesia masih bersifat reaktif. Hal ini membuktikan bahwa faktor-faktor yang berhubungan dengan peningkatan kapasitas adaptasi dalam menghadapi bencana merupakan pilihan kebijakan yang wajib diadopsi dan diimplementasikan. Kesiapsiagaan merupakan faktor penting dalam mitigasi bencana. (Rohani Budi Prihatin,2018)
Melihat mitigasi bencana di Indonesia yang belum baik, menjadikan tsunami yang terjadi pada tahun 2018 telihat terjadi begitu dahsyat dengan memporak porandakan banyak bangunan di sepanjang GSP. Hal ini juga diakibatkan oleh dilanggarnya aturan GSP tersebut menimbulkan kerusakan yang sangat serius pada saat terjadi bencana.

Hingga kemudian Pemerintah Lampung dan Banten membuat suatu kebijakan dengan memberlakukan sanksi tegas bagi mereka yang melakukan pelanggaran terhadap ketentuan sempadan pantai. Pelanggaran yang terjadi merupakan bentuk pelanggaran terhadap RTRW Lampung Selatan. Kebijakan tersebut hadir dalam rangka juga turut melestarikan fungsi lingkungan yang sempat terganggu akibat penguasaan lahan sepanjang GSP yang tidak


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semestinya. Sehingga berdasarkan latar belakang yang disampaikan, maka ditemukan permasalahan terkait dengan penegakan hukum atas pelanggaran ketentuan GSP sepanjang pesisir pantai di Kabupaten Lampung Selatan, dan terkait dengan pelanggaran tersebut dengan pengaruhnya terhadap fungsi lingkungan pesisir di sepanjang pantai Kabupaten Lampung Selatan. Oleh karenanya berlandaskan dari permasalahan-permasalahan tersebut, diharapkan dengan penelitian ini mampu mengetahui pengaruh Tsunami Selat Sunda terhadap penegakan hukum dalam pelanggaran ketentuan GSP sepanjang pesisir pantai dan pengaruhnya terhadap Kecamatan Kalianda dan mengetahui pengaruh penegakan hukum atas pelanggaran ketentuan GSP pasca tsunami terhadap fungsi lingkungan pesisir di sepanjang pantai di daerah Lampung Selatan. Dengan terpecahkannya permasalahan dan tujuan tersebut, maka diharapkan penelitian ini memberikan manfaat bagi masyarakat di pesisir pantai Kabupaten Lampung Selatan agar senantiasa menaati aturan pendirian bangunan di sepanjang garis GSP yang nantinya akan bermuara pada terciptanya kelestarian lingkungan hidup di daerah garis pantai tersebut.

## 2. METODE PENELITIAN

Penelitian ini merupakan penelitian empiris sosiologis. Sumber data yang digunakan adalah data primer dan data sekunder. Data primer adalah data dan informasi yang diperoleh secara langsung dari sumber pertama yang terkait dengan permasalahan yang akan dibahas. Data sekunder adalah data dan informasi yang diperoleh dari buku-buku sebagai data pelengkap sumber data primer. Sumber data sekunder penelitian ini adalah data dan informasi yang diperoleh dengan melakukan kajian Pustaka seperti buku-buku ilmiah, hasil penelitian dan sebagainya. Penelitian ini juga menggunakan tiga jenis alat pengumpulan data, yaitu studi kepustakaan, observasi dan wawancara untuk mendapatkan hasil yang semaksimal mungkin. Studi dokumen dilakukan di Perpustakaan Fakultas Hukum Universitas Tarumanagara, dimana dilakukan pemilihan buku-buku yang berkaitan dengan kesadaran hukum, dan penegakan hukum. Selanjutnya setelah melakukan studi dokumen Peneliti melakukan Observasi wilayah yang dilakukan dalam kurun waktu 14 (empat belas) hari, dengan melihat gejala-gejala sosial dan hukum dari masyarakat wilayah pesisir. Adapun Wawancara dilakukan 4 (empat) Kecamatan berbeda yaitu, Kecamatan Rajabasa, Kecamatan Kalianda, Kecamatan Katibung dan Kecamatan Sidomulyo. Peneliti melakukan wawancara dengan tokoh-tokoh masyarakat di 4 (empat) kecamatan tersebut, kemudian dengan Sekretaris Desa Maja, Sekretaris Kecamatan Kalianda, Kepala Desa Pauh Tanjung Iman, Staff Bagian Pajak Bumi dan Bangunan, Camat Rajabasa, Staff Kecamatan Rajabasa, Badan Pemasyarakatan Desa Kunjir, Kepala Desa Tarahan, KAPOLSEK Kalianda, dan terakhir adalah wawancara dengan Kepala BNPB Lampung Selatan.

## 3. HASIL DAN PEMBAHASAN

Pemanfaatan lahan merupakan hal pokok yang selalu melekat pada manusia sepanjang masa hidupnya mulai dari proses kelahiran hingga proses kematian. Peningkatan jumlah penduduk setiap tahunnya membuat lahan semakin sempit dikarenakan tingkat kebutuhan & pemanfaatan akan lahan semakin tinggi. Peningkatan kebutuhan akan lahan yang semakin tinggi akibat meningkatnya kepadatan penduduk tidak jarang menimbulkan konflik atau penyalahgunaan fungsi lahan (Iswandi Umar, 2017).

Tingkat pertumbuhan penduduk yang tinggi membuat pemanfaatan akan sumber daya alam tidak memperhatikan kemampuan daya dukung lingkungan sehingga terjadi penurunan kualitas lingkungan. Kawasan pesisir merupakan kawasan dengan tingkat mobilitas dan pemanfaatan yang tinggi membuatnya harus selalu siap dalam menghadapi berbagai akibat yang ditimbulkan dari setiap aktivitas yang dilakukan (Hidayah & Suharyo, 2018).

Alih fungsi lahan akibat pertumbuhan penduduk tidak dapat dihindarkan. Marak ditemukan bangunan-bangunan di sepanjang bibir pantai harus segera mendapat perhatian yang serius. Penjelasan tersebut juga mengingat bahwa wilayah pesisir identik dengan daerah rawan bencana. Bencana yang kerap timbul di wilayah pesisir adalah Tsunami.

Pengelolaan dan perlindungan akan kawasan pesisir dan pulau-pulau kecil sejatinya diatur melalui Hak Penguasaan Perairan Pesisir (HP3). Dalam sistem pengelolaannya, Kawasan pesisir ternyata tidak dapat dipisahkan dari status fungsi kepemilikan lahan pada Kawasan tersebut. Segala pemberian dan kepemilikan hak atas tanah diatur secara penuh oleh Undang-Undang Pokok Agraria & peraturan yang berkaitan dengannya. Ketergantungan masyarakat Indonesia akan laut yang begitu tinggi ditandai dengan sebanyak 51,43% nelayan menggantungkan hidupnya pada kegiatan penangkaran ikan di laut. Dari sektor ekonomi, laut juga memberikan kontribusi yang besar dalam peningkatan ekonomi di Indonesia (Badan Pusat Statistik, 2018).

Berbicara mengenai pelanggaran GPS pada daerah HP3. Sejatinya aspek penegakan hukum di Indonesia sudah mengakomodirnya. Hukum sebagai kaidah yang hidup dalam masyarakat yang bersifat memaksa serta memberikan sanksi terhadap para pelanggarnya. Hukum dalam pembentukannya mengedepankan kepentingan negara dan juga kepentingan umum masyarakat yang terdapat di dalamnya. Hukum merupakan kaidah yang hidup dalam masyarakat yang bersifat memaksa serta memberikan sanksi terhadap para pelanggarnya. Hukum dalam pembentukannya mengedepankan kepentingan negara dan juga kepentingan umum masyarakat yang terdapat di dalamnya (Jainah, 2012). Akan tetapi pelanggaran hukum biasanya terjadi akibat penegakan hukum yang dilakukan oleh aparat adalah lemah maka masyarakat menggambarkan hukum sebagai sesuatu yang tidak ada sehingga enggan untuk tunduk kepada peraturan yang berlaku (Jainah, 2012).

Kebijakan hukum di Indonesia dapat diartikan sebagai kebijakan yang menghasilkan peraturan perundang-undangan dan penerapan hukum akan suatu peraturan perundang-undangan. Asas desentralisasi dan otonomi daerah yang dianut oleh pemerintah Indonesia menjadikan segala urusan yang ada dilimpahkan kepada daerah masing-masing. Pemberlakuan otonomi daerah memungkinkan setiap daerah di Indonesia memiliki kewenangan penuh dalam pengelolaan sempadan pantai (Sanjiwani, 2016).

Termasuk dalam hal ini, kebijakan untuk menanggulangi penguasaan tanah dengan banyak dibangunnya bangunan yang melanggar ketentuan GSP. Berdasarkan hasil penelusuran yang telah dilakukan oleh team di lapangan, diketahui bahwa hampir Sebagian besar masyarakat dan bahkan aparat desa tidak mengetahui ketentuan mengenai garis sempadan pantai (GSP). Mereka menjelaskan bahwa sebagian besar bangunan yang berada di Kawasan garis sempadan pantai Lampung Selatan telah memiliki sertifikat hak milik. Bangunan yang memiliki sertifikat hak milik tersebut merupakan bangunan-bangunan tua yang sudah berdiri sejak lama sebelum diberlakukan peraturan mengenai GSP. Dalam hal ini aparat desa tidak dapat melakukan banyak untuk menindak bangunan yang melanggar GSP. Warga pesisir pantai Lampung Selatan juga tidak mengindahkan konsekuensi akan bahaya akibat banyak dibangunnya bangunan di sepanjang GSP dengan konsekuensi apabila ia mendirikan bangunan yang berdekatan dengan bibir pantai, tetapi mereka memilih untuk tetap tinggal dikarenakan tidak ada ganti rugi yang diberikan. Harga tanah yang cukup mahal dan pendapatan yang tidak maksimal membuat masyarakat terpaksa untuk membeli atau menempati tanah yang berdekatan dengan kawasan GSP untuk tempat tinggal.


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Konsekuensi itu harus dihadapi oleh masyarakat takala terjadi bencana tsunami pada tahun 2018. Akan tetapi Pasca Tsunami yang menerjang 2018 silam, banyak warga yang memilih untuk tetap tinggal di rumah yang sama walaupun tempat tinggal mereka sudah rata dengan tanah dan berada di dalam kawasan GSP. Pemerintah sudah memberikan sosialisasi dan imbauan kepada mereka untuk mencari lokasi baru untuk tinggal tetapi tidak dipedulikan oleh warga sekitar. Sanksi yang diberikan kepada mereka yang membangun atau mendirikan bangunan di kawasan garis sempadan pantai (GSP) hanya berupa teguran.

Pemerintah daerah setempat memiliki peran serta yang besar untuk terciptanya kesadaran hukum masyarakat Kabupaten Lampung Selatan mengenai ketentuan garis sempadan pantai (GSP). Apabila bangunan telah melanggar ketentuan GSP sebaiknya tidak diberikan izin untuk mendirikan bangunan di lokasi yang sama pasca terjadinya tsunami atau tidak diberikan bantuan kepada mereka yang mendirikan bangunan melanggar ketentuan GSP. Pada penelitian ini ditemukan bahwa aparat kepolisian enggan memberikan sanksi bagi mereka yang melanggar ketentuan GSP karena sebagian besar dari mereka telah menempati lahan tersebut lama sebelum peraturan mengenai GSP diundangkan oleh pemerintah dan pemerintah daerah setempat. Sikap hukum masyarakat pesisir terhadap penguasaan tanah wilayah pesisir masih menganut pola pikir yang sama, namun hal ini dapat berubah, apabila ada perhatian khusus dari pemerintah setempat. Kurangnya sosialisasi mengakibatkan pola pikir dan perilaku masyarakat tetap pada keadaan yang tidak pada standar. Kesadaran hukum berkaitan dengan nilai-nilai yang tumbuh dan berkembang dalam suatu masyarakat yang mana masyarakat menaati hukum bukan karena paksaan, melainkan karena hukum itu sesuai dengan nilai-nilai yang ada dalam masyarakat itu. Kesadaran hukum berkaitan pula dengan efektivitas hukum dan wibawa hukum. Sebagaimana yang telah disinggung secara singkat pada bagian sebelumnya bahwa kemajuan teknologi transportasi yang diiringi dengan perbaikan penambahan infrastruktur membuat banyak orang dari berbagai wilayah melihat bahwa keindahan alam sepanjang pesisir pantai Kabupaten Lampung Selatan memiliki potensi dan membuka peluang untuk orang mencari nafkah dan bertempat tinggal secara menetap di kawasan tersebut. Tekanan penduduk di berbagai kota besar seperti Jakarta dan kota besar lainnya juga keinginan orang dari berbagai daerah yang situasinya tidak berbeda jauh atau bahkan relatif lebih miskin dari taraf hidup masyarakat Kabupaten Lampung Selatan membuat banyak orang melakukan migrasi dari daerah asalnya untuk memperbaiki taraf hidup.

Sejatinya apabila kita melihat dalam Undang Undang Nomor 5 Tahun 1960 tentang Peraturan Dasar Pokok-Pokok Agraria dalam Pasal 6 dinyatakan bahwa “Semua hak atas tanah mempunyai fungsi sosial.” Yang mana pasal tersebut selanjutnya dinyatakan sebagai salah satu asas hukum tanah yang diistilahkan asas fungsi sosial hak atas tanah. Keberadaan fungsi sosial tersebut menjadi landasan yang fundamental bagi terwujudnya tanah yang bermanfaat bagi sebesar-besar kemakmuran rakyat di negara kesejahteraan (Rejekiningsih, 2016). Terkait dengan keberadaan asas fungsi sosial hak atas tanah pada negara hukum sebagai salah satu asas hukum agraria, memiliki peran yang sangat penting dalam mewujudkan tujuan negara dalam konsep *welfare state* seperti Indonesia. Terkandung makna dalam asas fungsi sosial hak atas tanah, adanya pemenuhan hak atas tanah untuk sebesar-besar kemakmuran rakyat sebagaimana ketentuan dalam konstitusi UUD NRI Tahun 1945 (Rejekiningsih, 2016). Oleh karenanya tanah dalam GSP tersebut hendaknya dipergunakan untuk kemakmuran rakyat bersama, terutama rakyat yang bermukim di wilayah sepanjang pantai tersebut, bukan dijadikan komoditi untuk kepentingan pribadi semata.

Kemudian, meskipun tanah memiliki fungsi sosial, akan tetapi perlu dipahami juga terdapat sebuah pembatasan atas pemilikan dan penguasaan hak atas tanah dalam perspektif reforma agraria. Merujuk pada Pasal 7 UUPA melarang pemilikan dan penguasaan tanah yang melampaui batas. Ketentuan ini bertujuan untuk mencegah dan mengakhiri *groot-grondbezit* yaitu bertumpuknya kepemilikan tanah di tangan golongan orang-orang tertentu. Apabila tanah sepanjang pantai yang GSP tersebut tetap dikuasai oleh pihak-pihak tertentu saja, tentu selain mengabaikan fungsi sosial tanah juga akan melanggar pembatasan hak tanah. Apabila hal ini tidak diatasi maka akan terjadi kesenjangan dan rasa ketidakadilan bagi masyarakat. Mereka yang memiliki modal besar akan berkuasa sementara masyarakat yang memiliki keterbatasan akan merasa dirugikan. Sementara negara selama ini terkesan lebih pragmatis melakukan pembiaran dengan dalil tidak melanggar ketentuan yang berlaku (Reki, 2018).

Faktor lain yang menjadi penyebab semakin masifnya pelanggaran atas ketentuan garis sempadan pantai di kawasan pesisir Kabupaten Lampung Selatan adalah kurangnya pemahaman aparatur desa, kecamatan hingga kabupaten demikian juga dengan tokoh masyarakat, tokoh pemuda, dan tokoh agama tentang perlunya kepatuhan terhadap ketentuan garis sempadan pantai yang tidak hanya menyangkut soal keindahan, kebersihan, dan keamanan di sekitar kawasan pesisir tetapi juga mencakup keselamatan penduduk yang banyak bermukim di wilayah tersebut. Jika terjadi fenomena alam seperti air pasang, badai, maupun gempa bumi serta letusan gunung api yang dapat memicu terjadinya gelombang tsunami. Oleh karenanya adalah mendesak untuk secara intensif dilakukan sosialisasi dan internalisasi berbagai ketentuan tentang pemanfaatan sumber daya di kawasan pesisir maupun laut terutama bagi aparatur pemerintah mulai dari desa hingga kabupaten demikian juga para tokoh masyarakat, tokoh agama, dan tokoh pemuda yang dalam banyak hal dapat berkontribusi untuk membangun kembali kesadaran hukum warga masyarakat tentang arti penting ketentuan garis sempadan pantai dengan segala latar belakang diberlakukan ketentuan tersebut.

Padahal pelanggaran atas ketentuan garis sempadan pantai perlu diminimalisir mengingat bahwa ketika GSP terus digerus untuk kepentingan-kepentingan pribadi, maka akan sulit untuk dilakukan sebuah upaya pelestarian dan upaya konservasi untuk menjaga kelestarian ekosistem pesisir dan pulau-pulau kecil yang sebetulnya adalah surga sumber daya alam bagi masyarakat itu sendiri. Guna mendukung upaya konservasi dan pelestarian ekosistem pesisir pantai sesuai dengan ketentuan dalam UU No. 27 Tahun 2007 tentang Pengelolaan Wilayah Pesisir dan Pulau-Pulau Kecil, maka perlu adanya suatu penegakan hukum yang baik dan ideal bagi pelanggaran-pelanggaran tersebut.

Selanjutnya ketika pada awal tahun 2020 penyisiran pantai juga meliputi Kecamatan Kalianda, yang berdasarkan hasil observasi maupun keterangan tokoh masyarakat dan tokoh pemuda setempat maupun warga masyarakat yg bekerja sebagai nelayan diketahui bahwa sejak terjadinya peristiwa tsunami di akhir tahun 2018 tidak ada perubahan yang signifikan atas perilaku warga masyarakat tentang kebiasaan membuang limbah. Jika pada awal tahun 2019 terlihat warga masyarakat mengalami trauma akibat tsunami maka pada awal tahun 2020 terlihat bahwa warga masyarakat terkesan lupa dengan dahsyatnya amukan gelombang tsunami. Tidak bisa dipungkiri bahwa hidup harus terus berlanjut dan untuk itu setiap orang yang sudah dewasa harus menekuni kembali pekerjaan atau profesi tertentu sebagai sumber mata pencaharian yang mendatangkan penghasilan untuk memenuhi kebutuhan hidup. Namun demikian, sepatutnya tiap orang yang tinggal di pesisir apalagi mereka yang pernah mengalami terjangan gelombang tsunami dapat mengambil hikmah dari bencana tersebut dengan menjalankan usaha dan bertempat tinggal yang lokasinya relatif aman jika sewaktu-waktu terjadi kembali gelombang tsunami maupun terjadi


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gelombang pasang yang setiap waktu tertentu terjadi secara berulang. Aparatur Sipil Negara di tingkat Desa/Kelurahan, Kecamatan dan Kabupaten yang bertugas di bidang ketertiban perlu membangun komitmen menegakkan aturan tentang GSP dengan mengadakan patroli berkala secara terus menerus lakukan pengawasan dan penertiban penguasaan tanah di pesisir yg melanggar aturan GSP dengan menjalin kerjasama dengan aparat kepolisian di tingkat Polsek dan Polres, bahkan berkoordinasi dengan pejabat di tingkat Provinsi dan Polda. Tindakan pencegahan seyogyanya tidak hanya berupa pelaksanaan *workshop* dalam rangka pembentukan tim mitigasi dan penanganan bencana tsunami. Lebih dari upaya untuk melibatkan segenap unsur masyarakat seperti Remaja Masjid, Karang Taruna, Pramuka, OSIS, Kelompok PKK, hobi dan minat dan sebagainya menjadi penting dan strategis dalam upaya persuasif kepatuhan atas aturan GSP dan langkah preventif berupa internalisasi secara berkesinambungan dalam wujud penanaman kembali pohon *mangrove* dan terumbu karang sebagai aktivitas wisata alam, sebagai upaya pelestarian fungsi lingkungan pesisir yang pada akhirnya memberi peluang terbukanya lapangan kerja yang lebih luas dengan tetap mengindahkan berbagai aturan hukum terkait, khususnya penguasaan tanah di pesisir, lingkungan hidup maupun penanganan bencana.

## 4. KESIMPULAN

Sikap hukum warga masyarakat Kabupaten Lampung Selatan yang bermukim di kawasan pesisir Kecamatan Kalianda, Rajabasa, dan Katibung yang kurang memahami penguasaan tanah di wilayah pesisir terbentuk akibat pembiaran terhadap pelanggaran atas penguasaan tanah di pesisir. Pembiaran tersebut seperti pembiaran terhadap pembangunan jalan, pendirian rumah dan tempat usaha yang makin mendekati bibir pantai sehingga melanggar ketentuan yang berlaku.

Kurangnya pemahaman tersebut diperparah dengan lemahnya penegakan hukum atas pelanggaran ketentuan GSP tersebut juga terjadi pasca tsunami yang dialami. Kegagalan-kegagalan pemerintah untuk memberikan pemahaman yang komprehensif tersebut telah mengakibatkan gangguan terhadap kelestarian fungsi lingkungan karena kerusakan terumbu karang dan padang lamun di sepanjang pesisir Kabupaten Lampung Selatan.

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# PENGATURAN BANK TANAH DALAM UNDANG-UNDANG CIPTA KERJA DAN IMPLIKASI KEBERADAAN BANK TANAH TERHADAP HUKUM PERTANAHAN DI INDONESIA

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***ABSTRACT***

*Land is one of sources of natural wealth as stated in Article 33 of the 1945 Constitution and is implemented based on the national land law as regulated in Agrarian Law. Government must manage land for the greatest prosperity of the people. The problems in land management is difficulty in carrying out a land acquisition for public interest. Many lands controlled by land brokers/speculators have been abandoned. This condition causes national development to become obstructed and requires enormous financing. The government formed a land bank which is regulated in Law Number 11 of 2020 concerning Job Creation. This research is intended to describe and explain regulation of Land Bank in the Job Creation Act and Government Regulation of Land Bank Agency and the implications for national land law. This study uses normative legal research with conceptual and statutory approach. The legal materials consist of primary, secondary, and tertiary legal materials. The land bank regulation contains the establishment of Land Bank Agency, functions, objectives, institutional structure of Land Bank, the assets of Land Bank Agency, land rights granted to Land Bank Agency, and position and nature of land bank. It is feared that existence of Land Bank will deviate from the objectives of agrarian reform and the principles of national land law because there are vague, unclear, and potentially contain conflicts of interest and abuse of authority. There is a need for changes to a numbe of applicable provisions in a comprehensive and systematic manner and socialization of the existence of a land bank.*

***Keywords****: Agrarian reform, land banking, land law*

**ABSTRAK**

Tanah merupakan salah satu sumber kekayaan alam yang dicantumkan dalam Pasal 33 UUD 1945 dan dilaksanakan berdasarkan hukum tanah nasional dalam Undang-Undang Pokok Agraria. Pemerintah memiliki kewajiban untuk mengelola tanah bagi sebesar-besarnya kemakmuran rakyat. Permasalahan dalam pengelolaan tanah adalah kesulitan melakukan pengadaan tanah bagi kepentingan umum. Banyak tanah yang dikuasai oleh makelar atau spekulan tanah yang diterlantarkan. Kondisi ini menjadikan pembangunan nasional menjadi terhambat dan memerlukan pembiayaan yang begitu besar. Untuk mengatasi hal tersebut pemerintah membentuk Bank Tanah yang diatur dalam Undang-Undang Nomor 11 Tahun 2020 tentang Cipta Kerja. Penelitian ini ditujukan untuk menguraikan dan menjelaskan pengaturan Bank Tanah dalam UU Cipta Kerja dan PP Badan Bank Tanah serta implikasi yang ditimbulkan terhadap hukum tanah nasional. Penelitian ini menggunakan penelitian hukum normatif dengan menggunakan pendekatan konseptual dan perundang-undangan. Bahan hukum penelitian menggunakan bahan hukum primer, sekunder, dan tersier. Dari hasil penelitian, pengaturan bank tanah memuat tentang pembentukan Badan Bank Tanah, fungsi, tujuan, struktur kelembagaan Bank Tanah, kekayaan Badan Bank Tanah, hak atas tanah yang diberikan kepada Badan Bank Tanah, serta kedudukan dan sifat bank tanah. Keberadaan Bank Tanah dikhawatirkan akan menyimpang dari tujuan reforma agraria dan asas-asas hukum pertanahan nasional karena terdapat ketentuan yang sumir, tidak jelas, dan berpotensi mengandung konflik kepentingan dan penyalahgunaan wewenang. Perlu adanya perubahan terhadap sejumlah ketentuan yang berlaku secara komprehensif dan sistematis serta diperlukan sosialisasi terhadap keberadaan Bank Tanah sehingga solusi Bank Tanah dapat menyelesaikan masalah pertanahan.

**Kata Kunci**: Bank tanah, hukum pertanahan, reforma agraria

## 1. PENDAHULUAN

Tanah merupakan salah satu kekayaan alam yang sangat mempengaruhi kehidupan manusia. Tanah selain memiliki fungsi ekonomis juga memiliki fungsi sosial dan fungsi produksi yang mendukung dan mendorong kesejahteraan manusia melalui pemanfaatan, pemilikan, dan


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pendayagunaan tanah. Mengingat pentingnya fungsi tanah, negara memiliki kewajiban untuk mengelolanya bagi kemakmuran rakyat sebagaimana diatur dalam pembukaan Undang-Undang Dasar Tahun 1945 (UUD 1945) di mana salah satu tujuan negara untuk mewujudkan kesejahteraan rakyat. Upaya mensejahterakan rakyat tersebut secara konkret disebutkan dalam Pasal 33 ayat (3) UUD 1945, bahwa "Bumi, air, dan kekayaan alam yang terkandung didalamnya dikuasai oleh negara dan dipergunakan untuk sebesar-besarnya kemakmuran rakyat". Dasar konstitusi tersebut menempatkan negara sebagai pemangku kewajiban untuk menguasai tanah sebagai permukaan bumi maupun kekayaan yang terkandung di dalam tanah tersebut untuk kemakmuran rakyat. Wilayah geografis Indonesia yang begitu luas dimana 1/3 (sepertiga) dari luas wilayahnya terdiri dari daratan atau sekitar 1,9 juta $km^2$ harus dikuasai dan dikelola oleh negara. Pengaturan pertanahan setelah Indonesia merdeka diatur melalui Undang-Undang Nomor 5 Tahun 1960 Tentang Peraturan Dasar Pokok-Pokok Agraria ("UUPA") sebagai hukum pertanahan nasional yang menggantikan sejumlah peraturan pertanahan kolonial yang merugikan rakyat Indonesia dan mengakhiri dualisme dalam hukum pertanahan di Indonesia.

Seiring dengan perkembangan zaman, kebutuhan manusia akan tanah semakin meningkat namun tidak diiringi dengan ketersediaan tanah yang memadai. Keberadaan UUPA yang hanya memuat pokok penyelenggaraan pertanahan dinilai perlu diikuti dengan pembentukan peraturan di bidang pertanahan lainnya untuk melengkapi dan menyempurnakan UUPA mengingat kebutuhan masyarakat akan kepastian hukum dan keadilan untuk mengatasi dan menyelesaikan berbagai permasalahan di bidang pertanahan semakin tinggi. Salah satu permasalahan pertanahan di Indonesia adalah terkait dengan penyediaan tanah khususnya untuk pembangunan bagi kepentingan umum. Seringkali pelaksanaan program pembangunan nasional terkendala pengadaan atau pembebasan lahan. Walaupun menurut UUPA negara memiliki hak menguasai tanah bukan berarti negara dapat dengan mudah memperoleh tanah untuk pembangunan. Hak menguasai negara terhadap tanah hanya sebatas untuk mengatur dan menyelenggarakan peruntukan, penggunaan, persediaan dan pemeliharaan bumi (tanah), menentukan dan mengatur hubungan-hubungan hukum antara orang-orang dengan bumi (tanah), menentukan dan mengatur hubungan-hubungan hukum antara orang-orang dan perbuatan-perbuatan hukum yang mengenai bumi (tanah).

Dalam kenyataannya tanah-tanah yang ada di wilayah Indonesia sebagian besar telah terbagi-bagi dan dimiliki oleh individu dan/atau badan hukum tertentu yang digunakan untuk meningkatkan taraf hidup, alat produksi, dan aset untuk keperluan investasi. Oleh karena itu, meskipun terdapat kebutuhan pembangunan nasional, negara tidak bisa serta merta langsung menggunakan lahan atau tanah tersebut. Apabila tanah tersebut telah dimiliki seseorang maka negara harus melakukan pembebasan atau pengadaan lahan dengan membayarkan sejumlah uang pengganti untuk lahan yang akan digunakan tersebut kepada pemilik lahan. Menjadi permasalahan adalah pada waktu pemerintah memulai suatu pembangunan tetapi lahannya belum tersedia sehingga ketika melakukan pembebasan lahan untuk pembangunan pembiayaan yang dikeluarkan menjadi semakin besar dan mahal mengingat harga tanah khususnya di perkotaan yang semakin sedikit sehingga harganya tidak sesuai dengan nilai jual objek pajak melainkan disesuaikan dengan harga pasar yang sangat tinggi. Belum lagi terdapat mafia-mafia atau makelar tanah yang membeli tanah untuk dijual kembali pada masa mendatang dengan harapan harga tanah akan semakin tinggi. Hal-hal seperti ini menjadikan tanah sebagai komoditas perdagangan yang tunduk pada hukum permintaan dan penawaran sehingga proses pengadaan atau pembebasan lahan menjadi terhambat dan berlarut-larut. Dalam Pasal 6 UUPA menyatakan bahwa semua hak atas tanah memiliki fungsi sosial dimana penggunaan lahan harus disesuaikan dengan keadaannya dan sifat haknya.

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Ketentuan tersebut menjadi landasan bahwa tanah harus dipergunakan untuk mewujudkan sebesar-besarnya kesejahteraan sosial bagi rakyat Indonesia.

Dalam hukum tanah nasional terdapat hak menguasai negara atas tanah dan hak yang dapat dimiliki secara perseorangan. Sesuai dengan ketentuan Pasal 28H ayat (4) UUD 1945, menyatakan bahwa "Setiap orang berhak mempunyai hak milik pribadi dan hak milik tersebut tidak boleh diambil alih secara sewenang-wenang oleh siapapun". Namun dalam ketentuan Pasal 33 ayat (3) UUD 1945 menyatakan bahwa tanah dikuasai negara dan diperuntukan bagi sebesar-besarnya kemakmuran rakyat. Dari ketentuan ini, terdapat persimpangan kapan hak atas tanah dapat menjadi milik pribadi perseorangan dan tanah yang dapat dimiliki negara untuk mewujudkan kesejahteraan rakyat dengan pencabutan hak atas tanah untuk kepentingan umum. Dalam hal ini, Abdul Latif dan Hasbi Ali menyatakan bahwa dari kedua ketentuan tersebut tidak terdapat pertentangan tetapi merupakan suatu hubungan hukum yang umum dan khusus (Latif dan Ali, 2011). Untuk menghindari terjadinya kesulitan pengadaan tanah bagi kepentingan umum, pemerintah menggagas konsep Bank Tanah (*Land Banking*) yang bertujuan untuk mendata, menghimpun, dan mendistribusikan tanah-tanah yang menurut keadaan dan sifatnya dapat dimasukkan ke Bank Tanah. Pengaturan Bank Tanah secara yuridis digagas dalam Undang-Undang Nomor 11 Tahun 2020 tentang Cipta Kerja yang diatur dalam Bab VIII tentang Pengadaan Tanah, Bagian Keempat tentang Pertanahan, Paragraf 1 (Satu) tentang Bank Tanah, Pasal 125-135. Dalam tulisan ini akan dikaji mengenai pengaturan Bank Tanah berdasarkan Undang-Undang Nomor 11 Tahun 2020 tentang Cipta Kerja dan implikasi keberadaan Bank Tanah terhadap perkembangan hukum pertanahan khususnya dalam rangka menunjang penguatan program Reforma Agraria di Indonesia.

## 2. METODE PENELITIAN

Metode yang digunakan dalam penelitian ini adalah metode penelitian hukum normatif (Soekanto & Mamudji, 2014) atau penelitian hukum doktrinal (Suteki & Taufani, 2018) yaitu penelitian hukum yang meletakkan hukum sebagai sebuah bangunan sistem norma. Sistem norma yang dimaksud adalah mengenai asas-asas, norma, kaidah dari peraturan perundang-undangan, putusan pengadilan, perjanjian serta doktrin (ajaran) (Fajar & Achmad, 2017). Dalam penelitian ini dilakukan dengan pendekatan konseptual (*conceptual approach*) dan pendekatan peraturan perundang-undangan (*statute approach*) dengan mengkaji semua peraturan perundang-undangan yang saling bersangkut paut serta asas-asas hukum dan doktrin-doktrin atau pandangan dari para ahli dalam ilmu hukum. Pengumpulan data dalam penelitian ini melalui studi kepustakaaan menggunakan data sekunder dengan bahan hukum primer, sekunder, dan tersier (Marzuki, 2019). Bahan hukum primer terdiri dari Undang-Undang Dasar Tahun 1945, Undang-Undang Nomor 11 Tahun 2021 tentang Cipta Kerja, Undang-Undang Nomor 5 Tahun 1960 tentang Peraturan Dasar Pokok-Pokok Agraria, Peraturan Pemerintah Nomor 64 Tahun 2021 tentang Badan Bank Tanah, Peraturan Pemerintah Nomor 2 Tahun 2012 tentang Pengadaan Tanah Bagi Pembangunan Untuk Kepentingan, Peraturan Pemerintah Nomor Nomor 19 Tahun 2021 tentang Penyelenggaraan Pengadaan Tanah Bagi Pembangunan Untuk Kepentingan Umum. Sedangkan data sekunder diperoleh dari hasil penelitian, tulisan-tulisan ilmiah, dan doktrin para ahli diantaranya teori-teori kemanfaatan hukum, kepastian hukum, keadilan hukum, dan teori cita hukum yang menjadi dasar analisis terhadap pelaksanaan dan pengaturan konsep Bank Tanah di Indonesia sebagaimana diatur dalam Undang-Undang Nomor 11 Tahun 2020 tentang Cipta Kerja dihubungkan dengan Peraturan Pemerintah Nomor 64 Tahun 2021 tentang Badan Bank Tanah sebagai peraturan pelaksananya. Keseluruhan data tersebut akan dianalisis dengan metode analisis kualitatif.


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## 3. HASIL DAN PEMBAHASAN

### Pengaturan Bank Tanah Dalam UU Cipta Kerja

Dalam era pembangunan yang semakin pesat dan ketersediaan lahan yang semakin terbatas, isu tanah/lahan menjadi salah satu isu yang memiliki kompleksitas tinggi dalam pelaksanaan hukum pertanahan di Indonesia. Setidaknya terdapat 8 (delapan) isu pertanahan yang sering terjadi berdasarkan frekuensinya, yaitu: (a) konflik kepemilikan lahan hutan akibat kepemilikan peta-peta tersendiri oleh instansi pemerintah; (b) konflik penetapan hak dan pendaftaran tanah yang disebabkan kesalahan data dari pemohon atau ketidaktelitian pejabat pendaftaran tanah yang menimbulkan kerancuan pada sertifikat hak atas tanah; (c) konflik terhadap tata letak atau batas tanah akibat kesalahan pengukuran tanah; (d) konflik pengadaan tanah untuk kepentingan umum khususnya berkaitan dengan ganti rugi atas objek pengadaan tanah; (e) konflik terhadap tanah objek landreform/reforma agraria karena kesalahan pendaftaran nama petani yang ternyata bukan petani atau terjadi kesalahan terhadap pihak siapa ganti rugi tersebut seharusnya dibayarkan atau tanah program landreform belum dibayar ganti rugi pelepasan haknya kepada pemilik tanah; (f) konflik tuntutan ganti rugi atas tanah partikelir; (g) konflik atas tanah ulayat yang diakui sepanjang ada peraturan daerah yang mengatur keberadaannya; dan (h) konflik terkait pelaksanaan putusan pengadilan yang amar putusannya berbeda atau bertentangan satu sama lain atas objek hak atas tanah yang sama (Djaja, 2018). Kompleksitas permasalahan isu pertanahan tersebut terjadi berulang-ulang dan berkepanjangan yang tentunya merugikan hak-hak pemilik tanah. Pemerintah berupaya mencari solusi dan jalan keluar atas masalah pertanahan tersebut salah satunya melalui pembentukan dan pengadaan Bank Tanah. Selain untuk mengatasi konflik pertanahan yang berlarut-larut, Pembentukan Bank Tanah juga dilatarbelakangi karena amanat UUD 1945 khususnya Pasal 33 dan Pasal 2 UUPA bahwa tanah harus dipergunakan secara maksimal untuk sebesar-besarnya kemakmuran rakyat. Negara memiliki kewajiban untuk mengatur kepemilikan dan memimpin penggunaan tanah sesuai dengan peruntukannya. Namun, seringkali dijumpai tanah-tanah yang terlantar dan tidak jelas peruntukannya dan menimbulkan makelar-makelar tanah yang menjadikan tanah sebagai objek spekulasi dan mengambil untung dari setiap proyek pembangunan pemerintah yang menyebabkan pembangunan nasional sulit dilakukan.

Untuk menjawab sejumlah tantangan tersebut dibentuk Bank Tanah untuk mendukung reforma agraria dalam rangka meningkatkan tata kelola pertanahan yang lebih baik guna mewujudkan kesejahteraan rakyat. Pembentukan Bank Tanah tersebut digagas dalam ketentuan UU Cipta Kerja pada Bab VIII tentang Pengadaan Tanah dan PP Badan Bank Tanah. Berdasarkan ketentuan UU Cipta Kerja, Bank Tanah akan diselenggarakan oleh suatu Badan Bank Tanah sebagai suatu badan khusus yang mengelola tanah. Namun, pada bagian penjelasan tidak disebutkan bentuk hukum Bank Tanah tersebut apakah berbentuk badan hukum BUMN, PERUM, atau Badan Layanan Umum yang berada di bawah naungan instansi pemerintah yang membidangi urusan pertanahan yaitu Kementerian Agraria dan Tata Ruang. Sementara itu dalam Pasal 1 angka 1 PP Badan Bank Tanah dijelaskan bahwa Badan Bank Tanah sebagai badan hukum indonesia yang dibentuk oleh pemerintah pusat yang diberikan wewenang khusus untuk mengelola tanah. Rumusan ini kembali tidak menegaskan bentuk badan hukum yang dimaksud. Selain itu, Pasal 125 ayat (3) UU Cipta Kerja menyatakan bahwa kekayaan dari Badan Bank Tanah berasal dari kekayaan negara yang dipisahkan dan Pasal 1 Angka 4 PP Badan Bank Tanah dijelaskan bahwa Kekayaan Bank Tanah adalah semua kekayaan yang dikuasai Bank Tanah baik berwujud atau tidak berwujud yang bernilai atau berharga akibat kejadian di masa lalu yang memberikan manfaat di masa yang akan datang. Sementara itu, dalam Pasal 127 UU Cipta Kerja dan Pasal 4 PP Badan Bank Tanah dijelaskan bahwa Badan Bank Tanah dalam menjalankan tugas dan wewenangnya bersifat transparan, akuntabel, dan non-profit. Penegasan terhadap status hukum Badan Bank Tanah ini menjadi penting agar tercipta kepastian hukum dan sesuai dengan prinsip tata kelola pemerintahan

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yang baik (*good governance principle*) dalam penyelenggaraan pengelolaan tanah sehingga tidak terjadi tumpang tindih kewenangan dan penyalahgunaan aset dan kekayaan negara yang yang dapat merugikan masyarakat.

Bank Tanah berfungsi untuk melaksanakan perencanaan, perolehan, pengadaan, pengelolaan, pemanfaatan, dan pendistribusian tanah untuk kepentingan umum, kepentingan sosial, kepentingan pembangunan ekonomi, pemerataan ekonomi, konsolidasi lahan, dan reforma agraria sebagaimana diatur dalam Pasal 126 Ayat (1) UU Cipta Kerja. Dalam rangka mendukung reforma agraria, tanah yang tersedia pada bank tanah wajib dialokasikan 30% (tiga puluh persen) untuk kepentingan Reforma Agraria. Adapun program Reforma Agraria terdiri dari penataan aset dan penataan akses. Penataan aset meliputi kegiatan redistribusi lahan dan legalisasi aset sedangkan penataan akses dilaksanakan berbasis klaster dalam rangka meningkatkan skala ekonomi, nilai tambah serta mendorong inovasi kewirausahaan subjek Reforma Agraria. Pengaturan mengenai reformasi agraria telah diatur secara rinci dan komprehensif dalam Peraturan Presiden Nomor 86 Tahun 2018 tentang Reforma Agraria (Perpres Reforma Agraria). Dalam ketentuan tersebut, pelaksanaan tugas Badan Bank Tanah dalam hal Reforma Agraria perlu dibatasi mengingat terdapat Gugus Tugas Reforma Agraria yang juga berfungsi untuk mengkoordinasikan penyediaan tanah untuk penataan aset sebagaimana diatur dalam Pasal 20 Perpres Reforma Agraria. Tidak ada ketentuan dalam UU Cipta Kerja maupun PP Badan Bank Tanah yang mengatur secara komprehensif, tegas, dan jelas mengenai batasan fungsi dan wewenang dari Badan Bank Tanah sehingga berpotensi terjadi sengketa kewenangan instansi pemerintahan lainnya (terkhusus Gugus Tugas Reforma Agraria). Perihal lain yang juga perlu disoroti mengenai rumusan Pasal 50 PP Badan Bank Tanah yang menyatakan bahwa apabila terdapat ketentuan yang memberikan pilihan tidak mengatur, tidak lengkap, atau tidak jelas dan/atau adanya stagnasi pemerintahan, maka Menteri dapat melakukan diskresi untuk mengatasi persoalan konkret dalam penyelenggaraan urusan pemerintahan di bidang Bank Tanah. Ketentuan ini sangat rentan dan sensitif dari multitafsir dan memicu penyelewengan wewenang. Rumusan tersebut memberikan wewenang yang sangat luas bagi menteri terkait untuk mengeluarkan diskresi tanpa disertai adanya mekanisme *check and balance* serta pertanggungjawaban yang transparan terkait pelaksanaan diskresi tersebut. Dalam penyelenggaraan jabatan publik penting untuk diadakan pembatasan dalam melaksanakan fungsi dan wewenang dari suatu badan pemerintahan. Wewenang diartikan sebagai kekuasaan untuk melakukan tindakan di lapangan hukum publik (Atmosudirdjo, 1998). Wewenang tersebut tidak hanya meliputi wewenang membuat keputusan pemerintah (*bestuur*), tetapi meliputi wewenang dalam rangka pelaksanaan tugas, dan memberikan wewenang serta distribusi wewenang utamanya ditetapkan dalam peraturan perundang-undangan. Menurut Henc Maarseveen, wewenang memiliki 3 (tiga) unsur yaitu: (1) pengaruh untuk mengendalikan perilaku subjek hukum, (2) dasar hukum di mana wewenang harus didasarkan pada hukum yang jelas, (3) konformitas hukum bahwa hukum menghendaki standar yang jelas (untuk wewenang umum), dan standar khusus (untuk jenis wewenang tertentu) (Hardjon, 1997).

Dalam mendukung penyelenggaraan Badan Bank Tanah, sumber kekayaan yang diperoleh berasal dari: (1) anggaran pendapatan dan belanja negara; (2) pendapatan sendiri; (3) penyertaan modal negara; dan (4) sumber-sumber lain yang sah sesuai dengan ketentuan peraturan perundang-undangan. Berdasarkan Pasal 43 PP Badan Bank Tanah disebutkan bahwa modal Bank Tanah sebesar Rp2.500.000.000.000 (dua triliun lima ratus miliar rupiah). Di samping sumber-sumber pendanaan sebelumnya, Pasal 44 PP Badan Bank Tanah memberikan ruang kepada Badan Bank Tanah untuk memperoleh dana berupa pinjaman. Hal tersebut menimbulkan permasalahan apabila Badan Bank Tanah memperoleh pinjaman (utang) menjadi tanggungan utang negara atau badan hukum yang dapat dipailitkan oleh kreditur (pemberi pinjaman) apabila Badan Bank Tanah di


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kemudian hari tidak mampu membayar pinjaman tersebut mengingat pengelolaan dan pengadaan tanah di Indonesia relatif membutuhkan biaya yang besar. Dari sumber-sumber tersebut, negara mendukung penyelenggaraan badan bank tanah dengan APBN dan PMN. Sementara itu, di tengah pandemi Covid-19 negara membutuhkan pembiayaan APBN yang cukup besar sehingga keberadaan Badan Bank Tanah akan menambah beban keuangan negara yang seharusnya dapat dimanfaatkan untuk kepentingan rakyat. Untuk pendapatan sendiri dari Badan Bank Tanah juga berpotensi menyimpang dari ketentuan Pasal 127 UU Cipta Kerja yang menyatakan bahwa Bank Tanah bersifat non-profit. Berdasarkan pasal 30 PP Bank Tanah, pendapatan sendiri berasal dari pemanfaatan aset, hasil sewa, sewa beli, penjualan aset, kerja sama pengembangan usaha, perolehan hibah atau tukar menukar, bunga atau imbalan bank, hasil usaha, dan/atau hasil lainnya yang sah yang ditetapkan dengan keputusan Kepala Badan Pelaksana. Apabila Badan Bank Tanah memperoleh pendapatan dari selisih jual beli tanah yang dikelola maka tidak terdapat perbedaan antara negara dan makelar atau calo tanah lainnya dan hasil lainnya yang tidak jelas dari rumusan tersebut justru menjabarkan negara sebagai "Tukang Palak resmi" atas tanah. Di sini justru negara inkonsisten dengan tujuan bernegara melainkan berbisnis dengan rakyatnya sendiri. Sumber kekayaan yang berasal dari sumber lain juga tidak jelas apa saja sumber yang dimaksud. Ketentuan ini dinilai berpotensi untuk memberikan legitimasi kepada penguasa memungut iuran dari rakyat guna mendukung penyelenggaraan negara, misalnya pemerintah menerbitkan Peraturan Pemerintah Nomor 25 Tahun 2020 tentang Penyelenggaraan Tabungan Perumahan Rakyat di mana terdapat kewajiban bagi aparatur sipil negara (ASN), pejabat negara, dan pekerja/buruh BUMN, BUMDes, dan BUMS wajib sebagai peserta membayar iuran sebesar 2.5% dari gaji pokok. Hal tersebut akan memberatkan masyarakat di tengah pandemi Covid-19 ini dan dana iuran tersebut berpotensi digunakan untuk pembiayaan Badan Bank Tanah.

Dalam Pasal 129 UU Cipta Kerja disebutkan bahwa tanah yang dikelola oleh Badan Bank Tanah diberikan hak pengelolaan dan di atas tanah hak pengelolaan dapat diberikan hak guna bangunan, hak guna usaha, dan hak pakai. Terhadap hak guna bangunan di atas tanah hak pengelolaan dapat diberikan perpanjangan dan pembaharuan hak apabila telah dipergunakan sesuai dengan pemberian haknya. Dalam rangka mendukung investasi, pemegang hak pengelolaan badan bank tanah diberi kewenangan untuk: (a) melakukan penyusunan rencana induk; (b) membantu memberikan kemudahan perizinan berusaha/persetujuan; (c) melakukan pengadaan tanah; dan (d) menentukan tarif pelayanan. Dari rumusan tersebut, negara hanya memfokuskan diri pada upaya untuk mengundang investasi dan tidak menunjukan keberpihakan pada rakyat kecil dengan adanya tarif pelayanan untuk memperoleh hak atas tanah sebagaimana yang telah ditentukan. Selain itu, tidak ditentukan berapa kali dan berapa lama perpanjangan dan pembaharuan pemberian hak guna bangunan di atas tanah hak pengelolaan tersebut. Apabila mengacu pada Pasal 35 UUPA disebutkan bahwa HGB dapat diberikan untuk jangka waktu paling lama 30 tahun dan dapat diperpanjang untuk 20 tahun. Kemudian tidak jelas prosedur yang harus dilakukan kepada Badan Bank Tanah apabila rakyat atau pemerintah memerlukan tanah untuk kepentingan umum atau untuk pembangunan nasional. Secara umum fungsi Bank Tanah untuk mengadakan perencanaan, perolehan, pengadaan, pemanfaatan, dan pendistribusian tanah bagi kepentingan umum dan pembangunan yang terencana dan futuristik memang sangat diperlukan mengingat negara sebagai pemegang hak penguasaan atas tanah sebagaimana diatur dalam UUD 1945 dan UUPA. Namun demikian, pengelolaan tanah oleh Bank Tanah harus berimbang mengingat adanya kewenangan bagi Bank Tanah dalam melakukan kerja sama dengan pihak lain sehingga jangan sampai tanah justru dikuasai oleh pemodal-pemodal dengan dalih investasi justru menguasai lahan di Indonesia.

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Secara kelembagaan berdasarkan Pasal 130 UU Cipta Kerja Jo. Pasal 31 PP Badan Bank Tanah, organ Badan Bank Tanah terdiri dari: (a) komite yang diketuai oleh Menteri di bidang pertanahan dan anggota merupakan menteri atau kepala lembaga terkait yang ditetapkan melalui keputusan presiden yang berwenang menetapkan kebijakan strategis; (b) dewan pengawas berwenang memberikan nasihat dalam penyelenggaraan Bank Tanah yang terdiri dari 7 orang yang terdiri dari 4 orang unsur profesional yang diseleksi oleh pemerintah pusat dan dimintai persetujuan Dewan Perwakilan Rakyat. Sedangkan 3(tiga) orang dipilih oleh pemerintah pusat; dan (c) badan Pengurus yang terdiri dari Kepala dan Deputi yang ditetapkan, diangkat, dan diberhentikan oleh Ketua Komite yang bertanggung jawab atas pelaksanaan Bank Tanah serta mewakili Bank Tanah di dalam dan di luar pengadilan. Organ Badan Bank Tanah tersebut, tidak lazim digunakan dalam organ badan hukum Indonesia. Badan hukum Indonesia yang dikenal di Indonesia antara lain Perseroan Terbatas (RUPS, komisaris, direksi), Yayasan (pembina, pengawas, pengurus), Koperasi (rapat anggota, pengawas, pengurus), BUMN/BUMD (RUPS, komisaris, direksi), dan Perum (menteri, dewan pengawas, direksi). Komposisi Komite Badan Bank Tanah terdiri dari menteri dibidang pertanahan, keuangan, pekerjaan umum dan perumahan rakyat, dan menteri/kepala lembaga yang ditunjuk oleh presiden. Ketentuan ini menyebabkan menteri-menteri yang bersangkutan merangkap jabatan. Dalam penyelenggaraan pemerintahan yang baik, mekanisme rangkap jabatan sangat berisiko mengandung konflik kepentingan yang bertentangan dengan prinsip menciptakan tertib penyelenggaraan administrasi pemerintahan dan mencegah terjadinya penyalahgunaan wewenang. Sedangkan komposisi dewan pengawas diisi oleh 4 (empat) orang profesional dan 3 (tiga) orang dipilih pemerintah pusat. Ketentuan ini tidak memiliki dasar hukum yang jelas mengenai jumlah dewan pengawas 7 (tujuh) orang yang sangat besar dan berpotensi sebagai upaya untuk membagi-bagi kekuasaan kepada orang-orang yang dinilai berjasa bagi presiden yang menjabat dan tidak ada alasan 3 orang harus dipilih oleh pemerintah pusat dan tidak seluruhnya berasal dari unsur profesional yang dipilih melalui rekrutmen dan seleksi yang terbuka dan partisipatif.

Dalam rangka melaksanakan Badan Bank Tanah diperlukan suatu peraturan pelaksana yang diamanatkan dalam undang-undang berupa peraturan pemerintah. UU Cipta Kerja dalam Pasal 185 huruf a menyatakan bahwa peraturan pelaksana wajib ditetapkan paling lama 3 (tiga) bulan. Namun, sejak UU Cipta Kerja diundangkan pada tanggal 2 November 2020, baru peraturan pemerintah mengenai Bank Tanah diterbitkan pada tanggal 29 April 2021, yang berarti terbit 5 bulan sesudah diperintahkan oleh UU Cipta Kerja. Apabila didasarkan pada Undang-Undang Nomor 12 Tahun 2011 tentang pembentukan peraturan perundang-undangan dan perubahannya, pengaturan mengenai Bank Tanah telah bertentangan dengan asas kedayagunaan dan kehasilgunaan serta asas ketertiban dan kepastian hukum. Setiap Peraturan Perundang-undangan dibuat karena memang benar-benar dibutuhkan dan bermanfaat dalam mengatur kehidupan bermasyarakat, berbangsa, dan bernegara. Dengan berlakunya ketentuan mengenai Bank Tanah dinilai belum tepat dilaksanakan saat ini mengingat negara tengah berjuang melawan pandemi Covid-19 dan mendorong perbaikan ekonomi. Sedangkan terhadap materi muatan peraturan perundang-undangan harus dapat mewujudkan ketertiban dalam masyarakat melalui jaminan kepastian hukum. Dengan tidak adanya peraturan pelaksana dari UU Cipta Kerja dalam jangka waktu yang telah ditentukan oleh undang-undang menimbulkan ketidakpastian hukum dalam penyelenggaraan bank tanah di Indonesia. Dalam teori perundang-undangan terhadap hierarki perundang-undangan yang tersusun dalam suatu susunan bertingkat yang merupakan sokoguru sistem hukum nasional (Wahjono, 1992). Dalam hal ini pembentukan peraturan perundangan-undangan di level bawah tidak boleh bertentangan dengan peraturan perundang-undangan yang lebih tinggi kedudukannya dalam hierarki peraturan perundang-undangan (*Lex superior Derogat Legi Inferior*).


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**Implikasi Bank Tanah Terhadap Hukum Pertanahan Nasional**

Secara umum, pengertian Bank Tanah adalah setiap kegiatan pemerintah untuk menyediakan tanah yang akan dialokasikan penggunaannya di masa mendatang (Maria, 2005). Bank Tanah secara teoritis memiliki fungsi, yaitu: (a) penghimpun Tanah (*land keeper*) atau pencadangan tanah; (b) pengamanan tanah (*land warantee*); (c) pengendali penguasaan tanah (*land purchaser*); (d) pengelola tanah (*land management*); (e) penilai tanah (*land appraisal*); dan (f) pendistribusi tanah (*land distributor*) yang kemudian diadopsi dalam UU Cipta Kerja (Limbong, 2013). Bank tanah berdasarkan sifatnya terbagi menjadi 2 (dua), yaitu: (1) Bank tanah Publik, yaitu bank tanah yang penyelenggaraannya melibatkan lembaga-lembaga publik; dan (2) Bank Tanah Swasta, yaitu bank tanah yang dijalankan oleh swasta (Flechner, 1974). Berdsasrkan Pasal 7 dan 8 PP Badan Bank Tanah, Bank tanah menghimpun atau memperoleh tanah yang berupa tanah bekas hak, kawasan dan tanah terlantar, tanah pelepasan kawasan hutan, tanah timbul, tanah hasil reklamasi, tanah bekas tambang, tanah pulau-pulau kecil, tanah yang terkena kebijakan perubahan tata ruang, tanah yang tidak ada pengasaan diatasnya, tanah pemerintah pusat, daerah, BUMN/BUMD, badan usaha, badan hukum, dan masyarakat yang diperoleh dengan pembelian, hibah, tukar menukar, pelepasan hak, dan perolehn bentuk lainnya yang sah yang dikelola dan didayagunakan serta didistribusikan sesuai dengan pemanfaatannya. Keberhasilan dalam pelaksanaan bank tanah dapat dipengaruhi oleh beberapa faktor, diantaranya (a) regulasi, pembentukan peraturan mengenai bank tanah agar dapat mewujudkan keadilan dan kesejahteraan bagi rakyat melalui pendistribusian tanah, menyediakan tanah secara fisik guna kesinambungan pembangunan baik untuk kepentingan umum maupun kepentingan komersial, dan mengendalikan harga tanah; (b) kelembagaan bank tanah, dalam hal ini UU Cipta kerja hanya menyatakan bahwa Badan bank tanah merupakan badan khusus yang mengelola tanah; (c) pembiayaan bank tanah, penyelenggaraan bank tanah akan sangat bergantung pada sumber dana yang stabil dan berkelanjutan mengingat biaya yang dibutuhkan untuk pengadaan tanah dan operasional lembaga bank tanah yang sangat besar; dan (d) faktor lainnya seperti *political will* dari pemerintah utamanya dalam pembuatan regulasi; Rencana tata ruang wilayah; dan sumber daya yang berkualitas dan profesional agar pelaksanaan bank tanah menjadi lebih efisien (Limbong, 2013)

Pembentukan Bank Tanah tidak terlepas dari upaya pemerintah yang berusaha untuk menyediakan tanah bagi pembangunan dan untuk kepentingan umum agar tanah tidak dikuasai oleh para mafia tanah yang menyengsarakan rakyat. Bank Tanah memang tidak dikenal dalam sejumlah peraturan yang berlaku sebelum UU Cipta Kerja. Konsep Bank Tanah dilaksanakan oleh Badan Bank Tanah dengan mengadakan tanah sebagai lokasi proyek pembangunan pemerintah jauh-jauh hari sebelum dilaksanakannya pembangunan untuk persiapan rencana pembangunan di masa depan. Kebutuhan tanah telah tersedia jauh sebelum pembangunan sehingga proses pembebasan lahan tidak mengalami kendala dan harga yang harus dibebankan pada APBN tidak menjadi sangat mahal akibat permainan jual beli tanah yang dilakukan oleh spekulan/mafia tanah setelah rencana pembangunan telah ditetapkan lokasi proyeknya. Apabila dilihat dari fungsi bank tanah untuk menyediakan tanah bagi kepentingan umum, sebelumnya juga telah ditetapkan Peraturan Pemerintah Nomor 19 Tahun 2021 tentang Pengadaan Tanah Bagi Pembangunan Untuk Kepentingan Umum. Peraturan Pemerintah tersebut memberikan kewenangan negara untuk mengambil hak atas tanah warga negara melalui mekanisme ganti rugi/ganti untung yang ditujukan bagi pembangunan untuk kepentingan umum didasarkan atas Rencana Tata Ruang Wilayah dan prioritas pembangunan yang tercantum dalam Rencana Pembangunan Jangka Menengah, Rencana Strategis, Rencana Kerja Pemerintah/Instansi yang bersangkutan. Pembentukan Bank Tanah sebagai badan hukum yang mewakili negara melakukan pencadangan tanah untuk keperluan negara. Peraturan Pemerintah tersebut tidak mengakomodir kewenangan bagi negara untuk

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menyimpan tanah untuk kepentingan pembangunan di masa mendatang sehingga pencadangan tersebut berlandaskan pada proyek yang akan dilaksanakan.

Sejarah penyediaan tanah di Indonesia melalui praktik-praktik penyediaan dan penjualan tanah kepada masyarakat telah dimulai sejak zaman Belanda yang waktu itu dikenal melalui lembaga *Grond Bedrift* di beberapa *Gementee* di Jawa, seperti Batavia Semarang, dan Surabaya. Lembaga tersebut kemudian berubah menjadi Perusahaan Tanah dan Bangunan setelah kemerdekaan Indonesia (Tisnawan, 2005). Perusahaan tersebut menyediakan tanah dan membangun sarana dan prasarana pendukung kemudian dibagi menjadi kapling-kapling untuk dijual dengan harga di bawah pasar kepada pegawai atau karyawan. Dalam perkembangannya pemerintah mendirikan perusahan yang berfungsi mengelola kawasan industri rangka menyediakan tanah untuk kegiatan industri seperti *Jakarta Industrial Estate Pulo Gadung* (JIEP) di Jakarta dan *Surabaya Industrial Estate Rungkut* (SIER) di Surabaya. Perusahaan tersebut melakukan pengadaan dan pembelian tanah, kemudian dimatangkan dan dijual kembali untuk kegunaan pembangunan pabrik atau industri lainnya (Ganindha, 2016).

Keberadaan Bank Tanah sebagaimana yang telah diatur dalam UU Cipta Kerja tentu membawa konsekuensi terhadap hukum pertanahan nasional. Dalam ketentuan pasal 129 UU Cipta Kerja memberikan kewenangan kepada Badan Bank Tanah untuk mendukung investasi berwenang melakukan pengadaan tanah dan Bank Tanah memiliki atau memperoleh hak pengelolaan sebagaimana diatur dalam Pasal 137 UU Cipta Kerja. Ketentuan ini berpotensi memberikan kewenangan untuk mengambil tanah-tanah sepanjang digunakan untuk kegiatan investasi, menyusun rencana peruntukan, penggunaan, dan pemanfaatan tanah sesuai dengan rencana tata ruang, menggunakan dan memanfaatkan seluruh atau sebagian tanah hak pengelolaan untuk digunakan sendiri atau dikerjasamakan dengan pihak ketiga, dan menentukan tarif dan menerima uang pemasukan/ganti rugi dan/atau uang wajib tahunan dari pihak ketiga sesuai dengan perjanjian. Praktek-praktek seperti ini mirip dengan prinsip *domain verklaring* yang terjadi pada masa penjajahan belanda di mana pemerintah dapat mengambil tanah-tanah rakyat (Wardhani, 2020). Prinsip tanah mengandung fungsi sosial sebagaimana dimuat dalam Pasal 6 UUPA menjadi tidak lagi bermakna karena hak pengelolaan lahan (HPL) yang merupakan hak menguasai negara memungkinkan bagi penerima HPL untuk mengeksploitasi tanah demi kepentingan golongan tertentu saja. HPL yang merupakan HMN sejatinya berada di bawah hak bangsa Indonesia sebagai hak bangsa Indonesia yang harus dipergunakan sebesar-besarnya kemakmuran rakyat dan kemudian pengaturan dan pengelolaannya dilimpahkan kepada negara untuk diperbuat secara adil. Dalam pasal 129 UU Cipta Kerja mengatur bahwa Bank Tanah diberikan hak pengelolaan yang dapat diberi HGU, HGB, dan HP. Dalam UUPA pasal 28 ayat (1) disebutkan bahwa HGU merupakan hak untuk mengusahakan tanah yang dikuasai langsung oleh negara guna perusahaan pertanian, perikanan atau peternakan. Dari ketentuan tersebut jelas bahwa HGU hanya dapat diberikan secara langsung oleh negara bukan oleh Bank Tanah yang dilimpahkan kewenangan oleh negara untuk memberikan HGU. Sementara itu, Pasal 40 PP Badan Bank Tanah menyatakan bahwa penyerahan hak atas tanah tersebut dilakukan dengan perjanjian dan dapat dibebani dengan hak tanggungan. Dengan perjanjian, masa pemanfaatan lahan yang diberikan dapat diperpanjang dengan bebas sesuai dengan kesepakatan para pihak sebagaimana diatur dalam hukum perdata yang akan bertentangan dengan UUPA yang memberikan jangka waktu hak atas lahan.

Ketentuan yang bermasalah lainnya terkait pembentukan Badan Bank Tanah yang diatur dalam Pasal 125 ayat (1) UU Cipta Kerja, terdapat kekhawatiran bahwa Badan Bank Tanah tidak menjalankan tugas dan wewenanngnya secara berintegritas, jujur, dan amanah. Banyak kasus korupsi yang terjadi akhir-akhir ini melibatkan sejumlah pejabat negara dalam kasus korupsi yang


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tertangkap tangan oleh komisi pemerantasan korupsi. apalagi dalam isu-isu pertanahan yang selama ini dianggap banyak dikuasai oleh oknum-oknum makelar, pungutan liar dalam proses perizinan, dan sebagainya. Sangat terbuka potensi bagi pejabat tanah untuk mengakomodir kepentingan pemilik modal saja dengan diiming-imingi sesuatu kemudian menjalin kerjasama merugikan kepentingan rakyat dengan dalih demi kepentingan nasional. Dalam Pasal 126 UU Cipta Kerja, Bank Tanah mengadakan tanah untuk mendukung Reforma Agraria dinilai tidak sejalan dengan tujuan reforma agraria untuk mengurangi ketimpangan kepemilikan tanah, mengurangi konflik, sengketa, dan perkara agraria, mewujudkan akses masyarakat ekonomi lemah pada sumber ekonomi yang maksimal sehingga tercapai kemakmuran dan kesejahteraan rakyat. Hak pengelolaan lahan yang diberikan pada Bank Tanah dinilai tidak berbeda jauh dengan prinsip tanah partikelir yang memuat hak pertuanan sebagaimana masa penjajahan belanda. Prinsip *land reform* yang terkandung dalam UUPA akan tercerabut dari akarnya apabila bank tanah tetap dilaksanakan. Oleh karenanya, pembentukan Bank Tanah harus memuat keseimbangan antara pengadaan tanah untuk kepentingan nasional dan pengadaan tanah untuk Reforma Agraria sehingga rakyat kecil khususnya petani, pekebun, dan penggarap lahan memperoleh akses untuk memanfaatkan tanah negara sebaik mungkin untuk mewujudkan tujuan Reforma Agraria.

Keberadaan perangkat hukum menjadi faktor pendukung terlaksananya Badan Bank Tanah. Perangkat hukum harus mampu diformulasikan untuk mencapai tujuan hukum dimana menurut Gustav Radburch terdapat 3 (tiga) nilai dasar atau cita hukum, yaitu: (1) Kepastian Hukum (*Rechtssicherheit*); (2) Keadilan (*Gerechtigkeit*); dan (3) Kemanfaatan Hukum (*Zweckmassigkeit*) (Rahadjo, 2012). Nilai kepastian hukum dalam pengaturan Bank Tanah memberikan kewajiban bagi negara untuk membentuk hukum dalam wujud peraturan perundang-undangan yang secara khusus dan komprehensif mengatur pelaksanaan Bank Tanah di Indonesia. Dalam pandangan Jan Michiel Otto, kepastian hukum memungkinkan tersedianya aturan yang jelas, konkrit, dan mudah diperoleh yang diterbitkan dan diakui keberadaannya, instansi pemerintah menerapkan, tunduk, taat pada aturan hukum, dan warga masyarakat menyesuaikan perilaku mereka terhadap aturan tersebut (Shidarta, 2006). Nilai keadilan dalam pelaksanaan Bank Tanah ditujukan untuk menciptakan keseimbangan hak dan kewajiban di antara para pemangku kepentingan, disatu sisi rakyat sebagai pemilik tanah dan pemerintah yang menyelenggarakan pengadaan tanah melalui Bank Tanah tidak dirugikan. Aristoteles membedakan keadilan menjadi 2 (dua), yaitu: (1) Keadilan Distributif yang memberikan seharusnya memberikan insentif atau perlakuan khusus bagi pemilik hak atas tanah yang telah melepaskan haknya untuk kepentingan pembangunan nasional; dan (2) Keadilan Kumulatif yang memberikan hak yang sama bagi setiap orang tanpa memperhatikan prestasinya di mana dalam pelaksanaa Bank Tanah memberikan kesempatan yang sama bagi setiap orang untuk memiliki tanah melalui proses redistribusi lahan yang menjadi bagian dari wewenang bank tanah (Friedrich, 2004). Setiap orang memiliki hak sesuai dengan prestasinya. Sedangkan nilai kemanfaatan hukum dalam pelaksaaan bank tanah ditujukan untuk menciptakan sebesar-besarnya kemakmuran dan kesejahteraan bagi seluruh rakyat Indonesia sebagaimana diamanatkan dalam pasal 33 UUD 1945. Dalam teori utilitarianisme yang dikemukakan oleh Jeremy Bentham. Menurut Darji Darmodiharjdo, tujuan hukum adalah untuk memberikan kemanfaatan dan kebahagiaan yang sebanyak-banyaknya rakyak yang didasari pada kondisi sosial bahwa setiap rakyat mendambakan kebahagiaan dan hukum merupakan salah satu alatnya (Rhiti, 2011).

Adapun pelaksanaan Bank Tanah secara umum memiliki kelebihan dan kekurangan. Kelebihan konsep bank tanah (Tanawijaya, 1995), yaitu: (a) tanah yang dikuasai oleh Bank Tanah lebih sesuai dengan RTRW karena sebelum pembelian tanah telah disesuaikan dengan RTRW dan peruntukan tanah itu sendiri; (b) dapat menyediakan tanah dengan luas tertentu, cepat, murah, dan

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tepat waktu; (c) bersedianya informasi yang cepat dan akurat tanpa harus melakukan serangkaian perizinan dan pembelian aset yang tidak wajar; (d) Bank Tanah dapat mengendalikan harga tanah, terlaksananya subsidi silang, dan pendayagunaan pembangunan yang sesuai dengan rencana tata ruang.

Sedangkan kerugian dari Bank Tanah, berupa: (a) masyarakat pemilik tanah dapat tergoda untuk cepat menjual tanahnya dengan alasan penjualan tersebut dilakukan karena adanya peruntukan dan penggunaan tanah tersebut oleh pihak pemerintah; (b) penjualan tanah didasarkan pada harga dasar (NJOP) tanah, sedangkan setelah dimatangkan dan dikembangkan oleh pengelola (bank tanah) dikhawatirkan akan dijual kembali dengan harga yang lebih tinggi; (c) tanah sudah menjadi komoditas perdagangan yang bertentangan dengan fungsi sosial tanah dalam Pasal 6 UUPA dan Pasal 13 UUPA yang melarang adanya kegiatan monopoli di bidang agraria oleh perseorangan atau badan hukum.

Beberapa negara telah menggunakan Bank Tanah untuk menjamin ketersediaan tanah di masa mendatang. Di Belanda, praktek bank tanah ditujukan untuk kegiatan bank tanah yang bersifat umum di mana pemerintah melakukan kegiatan-kegiatan menyelenggarakan penyediaan, pematangan dan penyaluran tanah publik dan tanah privat dengan ditentukan lebih dahulu penggunaannya. Di Jepang terdapat kebijakan bahwa orang yang membeli tanah dan menjual kembali dalam waktu kurang dari 10 (sepuluh) tahun maka dikategorikan sebagai makelar/spekulan tanah dan akan dikenai beban pajak yang sangat tinggi (Mutia, 2004).
Keberadaan Bank Tanah secara konseptual memiliki tujuan yang sangat baik untuk menjamin ketersediaan tanah dan mengurangi kesenjangan akan kepemilikan tanah bagi masyarakat. Konsep yang baik harus didukung dengan sistem hukum yang baik. Perangkat hukum yang mengatur bank tanah harus jelas, komprehensif, dan berkeadilan di mana didalamnya harus ada keterbukaan, pengawasan, dan partisipasi masyarakat sebagai tindakan preventif untuk mencegah terjadinya penyimpangan kewenangan dari Badan Bank Tanah. Hal ini sejalan dengan pendapat Lawrence M. Friedman yang menyatakan bahwa sistem bukum terdiri dari sub-sub sistem yaitu substansi hukum (*legal substance*), struktur hukum (*legal structure*), dan budaya hukum (*legal culture*), dan ketiganya harus berfungsi dan bekerja sama untuk mencapai suatu tujuan (Friedman, 2011). Pelaksanaan Bank Tanah harus harus didukung dengan hukum yang adil dan mampu merealisasikan tujuannya mewujudkan kesejahteraan rakyat dan bangsa Indonesia bukan sebaliknya menambah kerumitan masalah pertanahan yang terjadi secara berlarut-larut dan merugikan hak-hak rakyat.

## 4. KESIMPULAN DAN SARAN

Dalam UU Cipta Kerja menjadi landasan hukum pembentukan Badan Bank Tanah yang berfungsi untuk mengadakan tanah yang diperuntukan bagi pembangunan nasional dan kepentingan umum. Pembentukan Bank Tanah ditujukan guna mencegah timbulnya mafia/makelar/calo yang memainkan harga tanah sehingga menghambat proses pengadaan atau pembebasan lahan untuk pembangunan. Secara umum, UU Cipta Kerja mengatur fungsi, tujuan, sumber kekayaan, struktur kelembagaan, dan status hak atas tanah yang dapat diberikan dari/kepada Bank Tanah. Walaupun demikian, pengaturan mengenai Bank Tanah dalam 10 pasal dari Pasal 125 hingga Pasal 135 UU Cipta Kerja dan PP Badan Bank Tanah masih terlalu sumir, multitafsir, memberikan kewenangan yang sangat besar bagi organ Bank Tanah yang berpotensi terjadi penyimpangan kewenangan dan merugikan hak-hak masyarakat kecil pemilik tanah. Kedudukan dan fungsi Bank Tanah secara normatif sangat dibutuhkan bagi pembangunan. Namun, pengaturan Kelembagaan, wewenang, dan sumber kekayaan badan bank tanah secara substansial tidak jelas struktur dan bentuk badan hukum yang digunakan, tidak relevan dengan kondisi pandemik Covid-19, membuka ruang


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konflik kepentingan, bagi-bagi kekuasaan, serta tumpang tindih dan penyalahgunaan wewenang oleh penyelenggara negara.

Dalam Pengaturan Bank Tanah dalam UU Cipta Kerja masih terdapat beberapa ketentuan yang dinilai bermasalah yang menyimpang dari konsep hukum pertanahan yang selama ini diatur dalam UUPA. Permasalahan tersebut diantaranya hak guna usaha di atas tanah hak pengelolaan yang tidak dikenal dalam hukum pertanahan nasional, potensi menyimpang dari hak bangsa Indonesia atas tanah, dan tumpang tindih dengan konsep Reforma Agraria yang telah lebih dulu dilaksanakan. Selain itu, Pengaturan Bank Tanah juga menyimpangi asas-asas hukum. Penyimpangan terhadap asas kepastian hukum, keadilan, dan kemanfaatan hukum dapat terjadi dalam pelaksanaan bank tanah sepanjang tidak diikuti dengan adanya sistem hukum yang baik berupa peraturan/instrumen hukum, aparat penegak hukum, dan budaya hukum yang hidup di masyarakat termasuk penerimaan masyarakat terhadap hukum itu sendiri.

**Saran**

Pemerintah diharapkan dapat melakukan perubahan atau revisi terhadap Pasal 125-135 UU Cipta Kerja dan PP Nomor 64 Tahun 2021 tentang Badan Bank Tahap secara komprehensif, sistematik, dan partisipatif khususnya terkait dengan bentuk badan hukum yang digunakan, sumber kekayaan Badan Bank Tanah, mekanisme pengawasan terhadap Badan Bank Tanah, tumpang tindih wewenang karena mengingat terdapat norma-norma yang sumir, kurang jelas, dan kurang lengkap dalam UU Cipta Kerja dan PP Badan Bank Tanah sehingga berpotensi merugikan hak-hak warga negara dan menjadi instumen penindasan rakyat alih-alih mewujudkan kesejahteraan rakyat.

Pemerintah perlu melakukan sosialisasi terhadap keberadaan Bank Tanah dan kedudukan Badan Bank Tanah kepada masyarakat dengan tujuan untuk menimbulkan kesadaran, kepatuhan, dan penerimaan rakyat sehingga diharapkan praktik-praktik makelar/spekulan tanah dan ketersediaan tanah untuk kepentingan umum dapat dipenuhi untuk mewujudkan pembangunan nasional demi kesejahteraan rakyat.

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Paper Title:

*The legal binding force of a sale and purchase deed containing falsified data (case study of the Depok District Court decision number 226/Pdt.G/2018/Pn.Dpk)*

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Prof. Dr. Ir. Agustinus Purna Irawan

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# The Legal ~~Strength~~ Binding Force of A Sale And Purchase Deed ~~Whose Data is~~Containing Falsifiede Data (Case Study of the Depok District Court Decision Number 226/Pdt.G/2018/PN~~n~~.Dpk)

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**ABSTRACT**

The officials appointed to handle land-related deeds (*Pejabat Pembuat Akta Tanah*/PPAT) has a very important role in land registration, namely helping the Head of Regency/Municipal Land Institution (BPN) to carry out certain activities in land registration, but in practice there are~~is~~ various forms of legal violations committed in those activities, among them being the falsification of data either carried out by an observer or other parties. The problem faced at hand is how to determine the legal force of the sale and purchase deed wh~~ose~~ data is falsifiede ~~data~~ based on the Depok District Court Decision Number 226/Pdt.G/2018/PN.Dpk; and to what extend is~~how~~ ~~can~~ the responsibility of PPAT ~~against the~~with regards to said deed, which has been declared null and void by the court ~~of sale which declared null and void by the court~~. The research method used in writing this thesis is a normative juridical research method. The results showed that ~~b~~ based on the Decision of the Depok District Court Judge Number 226/Pdt.G/2018/PN.Dpk. there is clearly a juridical defect in AJB No. 156/8/Sawangan/1997 dated July 28th, 1997 which was made before Soekaimi, S.H., PPAT for the Bogor Regency area so that the deed did not meet the material requirements of an authentic deed and resulted in the cancellation of the deed by a court decision. PPAT needs to better understand the existing provisions to avoid ~~being~~ committing (un)intentional violations subject to sanctions, even~~ed~~ to the point of ~~with respect to~~ dismissal, ~~either with respect~~ honorably or ~~disrespect~~otherwise, as well as demands for compensation from the aggrieved parties. ~~and~~ PPAT in carrying out their duties must ~~be~~ hold themselves~~based~~ on high morality and integrity ~~towards~~ expected from the profession and position as PPAT.

***Keywords:*** *Legal Binding Force~~Power~~, Sale and Purchase Deed, Falsified~~e~~ Data.*

## 1. INTRODUCTION

Land is a property that has a high selling value because of its function as a means and source of community life. The function of land has developed so that the community's need for land rights also continues to develop. The constant availability of land and the increasing need for land due to the very high population growth in Indonesia makes the land supply unbalanced with the land needs so that it can trigger various kinds of problems.[1]

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One of the efforts to reduce land problems or conflicts is to urge land owners to register the land they own or control, to ensure legal certainty and legal protection of land rights. Knowing the development of state land regulation is also very necessary in terms of clarifying the meaning of state land and its control authority. Understanding the regulation of the state's right to control land before and after the enactment of Law Number 5 of 1960 concerning Basic Agrarian Regulations (hereinafter abbreviated as UUPA), as well as the implementing regulations will be very useful for setting and determining future policies on state land.

Government Regulation Number 24 of 1997 concerning Land Registration (hereinafter abbreviated as PP No. 24/1997) states that land registration aims to provide legal certainty and legal protection to holders of rights to a registered plot of land so that they can easily prove themselves as holders of land rights. the rights in question.[2] Registering– soil carried out on areas of land and apartment units. Land registration activities are carried out on property rights, use rights, building rights, use rights, management rights, property rights over flat units, mortgage rights and state land.[3]

Notaries and PPAT are very different legal institutions, as well as their authority. Even so, there are indeed many notaries who also work as PPAT. Concurrent professional positions are indeed allowed by the laws and regulations in Indonesia. Broadly speaking, a notary is a public official who is authorized to make authentic deeds and other authorities as referred to in Article 1 number 1 of Law no. 2 of 2014 (hereinafter abbreviated as UUJN).

The notary has the authority to make an authentic deed to be used as evidence, including the deed of sale and purchase of land rights as stated in Article 15 paragraph (2) letter (f) UUJN. The existence of PPAT is shown in Government Regulation Number 24 of 2016 concerning Amendments to Government Regulation Number 37 of 1998 concerning the Regulation of the Position of Land Deed Maker Officials which is a regulation of the existence of PPAT in carrying out some of the functions of public law in the realm of private law in the form of making authentic deeds containing a summir clause or run away.

Authentic deeds as the strongest and most complete evidence have an important role in every legal relationship in people's lives, both in various business relationships, activities in banking, land, social activities, and others. The need for written evidence in the form of authentic deeds is increasing in line with the growing demands for legal certainty in various relations at the national, regional and global levels. Through an authentic deed, a person's rights and obligations can be clearly determined, guarantee legal certainty, and at the same time are expected to avoid disputes.

In writing this thesis, the author raises the case in the Decision of the Depok District Court Number 226/Pdt.G/2018/PN.Dpk. This case began on May 9, 2018 when the Plaintiff made a Request for Information on the Status of Ownership Certificate Number 519 for an object located in Pangkalan Jati, Sawangan District (now Cinere), Depok City, registered in the name of Sri Suharnani covering an area of 220 square meters to the Co-Defendant 2.

On May 28, 2018, Co-Defendant 2 informs that the Certificate of Property Rights No. 519–/–Pangkalan Jati, originally written on Ny . Sri Suharnani obtained based on the Sale and Purchase Deed Number 06/SW/1983 drawn up by Dwi Swandiani, S.H. as PPAT. Based on the Sale and Purchase Deed Number 156/8/Sawangan/1997, the rights have been transferred to Tirta Tjakradi Surya. With the entry of the blocking note from Sri Suharnani based on a letter dated April 17, 1998, the Sale and Purchase Deed Number 156/8/Sawangan/1997 drawn up by Soekaimi, S.H., ~~PPAT~~ was confiscated by the Depok Police, and while the signatures of Sri Suharnani and Imam Soeryanto on the Sale Deed The purchase was declared counterfeit so that until now the Certificate of Ownership Number 519/Pangkalan Jati is still registered in the name of Tirta Tjakradisurya.

Furthermore, on June 4, 2018, the Plaintiff filed an Application for Clarification of the Sale and Purchase Deed Number 156/8/Sawangan/1997 which was addressed to Co-Defendant 1 and received an answer that the first sheet of the Sale and Purchase Deed was in Co- Defendant 1. Archives in the Office Land of Depok as Co-Defendant 2 shows that the Deed of Sale and Purchase Number 156 of 1997 drawn up by PPAT Soekaimi, S.H. is the Deed of Sale and Purchase Number 156/05/Gn.Putri/1997, dated September 11, 1997. Based on this answer, it can be concluded that the Deed of Sale Purchase Number 156/8/Sawangan/1997 dated July 28, 1997 was not made by PPAT Soekaimi, S.H., so Co-Defendant 1 could not

show the requested Sale and Purchase Deed and the Certificate of Ownership Number 519/Pangkalan Jati is currently controlled by the Plaintiff.

Certificate of Ownership No. 519 Pangkalan Jati on the land was lost and the Plaintiff has reported it to the Police, but the Decree of the Land Office of Depok City records the transfer of rights from the Plaintiff to the Defendant based on the Deed of Sale and Purchase No. 156/8/Sawangan/1997 made by Soekaimi, S.H., as PPAT. This indicates an error and/or negligence by PPAT, both in ensuring the selection of rights and the identity of the appearer before signing. It appears that the actions taken by PPAT are actions that are contrary to the applicable laws and regulations and violate the general principles of good governance as referred to in Article 53 paragraph (2) letters a and b of Law no. 5 of 1986 in *conjunction* with Law No. 9 of 2004 resulting in losses for the Plaintiff .

The legal facts in this case show that based on the results of the Criminal Laboratory, the signature of the plaintiff (land owner) at AJB was allegedly fake and that this forgery was carried out by Co-Defendant I. Furthermore, the decision of the Depok District Court Number 226/Pdt.G/2018/ PN.Dpk stated that the Deed of Sale and Purchase Number 156/8/Sawangan/1997 dated July 28, 1997 drawn up by Co-Defendant I regarding the grading legal event regarding the transfer of rights/sales and purchases of land and buildings based on the Certificate of Ownership No. 519, Pangkalan Jati, Sawangan District (now Cinere), Depok City is null and void and has no binding legal force.

The legal issue in this case is that there has been a rebuttal from the holder of the PPAT protocol, the late Soekaimi, S.H. Therefore, the author is of the opinion that it is necessary to carry out further investigations regarding PPAT's involvement in the implementation of AJB which was ultimately canceled by the Judge's Decision in case Number 226/Pdt.G/2018/PN.Dpk. considering that there are parties who are greatly harmed by the emergence of the AJB, so that later it can be determined the extend of responsibility of the PPAT can be determined, in itsboth administratively, civily and criminal aspectsly. Based on the description of the above background, the problems faced in this research is: How enforceable is the deed of sale for which data are false data ified according toby the Depok District Court's Decision No. 226/ Pdt.G/2018/ PN.Dpk?; and wWhat is the PPAT's responsibility for the sale and purchase deed which is declared null and void by the court?

## 2. METHOD

The type of research used is normative legal research, namely research that provides a systematic explanation of the rules governing a certain legal category, analyzes the relationship between regulations that explain areas of difficulty and possibly predicts future development.[4] The reason the author chooses this method in order to find a coherent truth is to get something that is axiologically a value or determination/rule as a reference to be studied.

This research is carried out with a *case approach*, namely by examining the case in the Depok District Court Decision Number 226/Pdt.G/2018/PN.Dpk, which is analyzed using several theories as analytical tools in dissecting and explaining the legal issues involved. raised in this study. The author describes the basic theories chosen to explain the object under study, including the theory of the Sale and Purchase Deed, the theory of legal protection, the theory of responsibility, the theory of identity forgery, and the theory of land registration. Legal analysis is carried out on matters that include legal risks arising from several problems related to the applicable legal rules so that appropriate conclusions and suggestions are obtained.

Authors The data collection techniques used in this study was to review the body of literature (-*library research*-), namely by cp Collecting legal materials from secondary legalaw sources derived from articles, journals, and interviews with some of the relatedrelevant practitioners speakers. This study uses data analysis techniques with deductive logic or processing legal materials in a deductive way, namely by explaining something general and then drawing more specific conclusions.

## 3. DISCUSSION

### 3.1 The Legal Strength Binding Force of the Sale and Purchase Deed whichose Data is Falsifiede Data Based on the Decision of the Depok District Court Number 226/Pdt.G/2018/PN.Dpk.

Of course, a PPAT in carrying out the duties and authorities of his position sometimes makes mistakes, especially with regard to the procedure for making a deed,

both regarding formal and material requirements. One of the mistakes made by PPAT is, for example, an error regarding the PPAT's inability to make an authentic deed, which results in the loss of the authenticity of the deed he made, or the strength of the proof of the deed is no longer complete/perfect evidence between and for the parties concerned, but relegated to a deed/letter under the hand. PPAT mistakes can be made intentionally or unintentionally by the PPAT concerned, or even due to an error on the part of the appearing party, for example in the case that the appearer provides false data to the PPAT.[5]

~~False information~~Falsified data submitted by the appearer in making the PPAT deed resulted in an agreement not meeting the subjective requirements of the agreement because of a defect of will. What is meant by agreements containing defects in the element of will are agreements which "at the time of birth" contain defects in the will. Articles 1322 to 1328 of the Indonesian Civil Code regulate agreements that have been closed on the basis of a defect in the will. In such a group of agreements, by doctrine, agreements containing elements of heresy, coercion, or deception are included at the time of the birth of the agreement.

In the making of the deed, of course, there was an agreement between the PPAT and the appearers, and in the cases raised in this discussion, one or the appearers in fact provided false data. As a result, the agreement which is then made contains a defect of will because of the ~~false information~~falsified data submitted by one of the presenters and which is stated in the PPAT agreement/deed. Indeed, in this case it is necessary to implement the precautionary principle by PPAT in order to avoid problems.

The precautionary principle in the practice of PPAT is reflected and explained more clearly in Perkaban No. 1 of 2~~016~~006. The provisions of Article 22 of the PPAT Position Regulations are re-described in Perkaban No. 1 of 2~~016~~006 which is the implementing regulation, one of which is in Article 53 and Article 54.[6] In Article 53 Perkaban No. 1 of 2~~016~~006 it is determined that the PPAT deed is made by filling in the form of the deed whose form has been determined. Filling in the form of the deed in the context of making the PPAT deed must be carried out in accordance with the correct incident, status and data and supported by documents in accordance with the legislation. Furthermore, in Article 53 paragraph (3) and paragraph (4) Perkaban No. 1 of 2~~016~~006 it is reiterated that the making of the PPAT deed is witnessed by 2 (two) witnesses who have fulfilled the requirements in accordance with the legislation.[7]

The application of the PPAT prudence principle in carrying out the duties of the position is also reflected in Article 54 paragraph (1) Perkaban No. 1 of 2~~016~~006, which states that prior to the making of the deed, the PPAT is obliged to check the suitability/validity of the certificate and other records at the local Land Office by explaining the intent and purpose. This provision was born in order to provide legal certainty and protection for the parties regarding the object to be transacted, especially regarding the authenticity of the evidence of ownership of land rights.

For each PPAT, the PPAT Code of Ethics also applies which regulates the prohibitions and obligations within the PPAT's scope of office. One of the obligations of PPAT is to work responsibly, independently, honestly, and impartially, as regulated in Article 3 letter f Attachment to the Decree of the Minister of Agrarian and Spatial Planning/Head of the National Land Agency Number 112/KEP-4.1/IV/2017 concerning Ratification of the Code of Ethics for the Association of Land Deed Authors ("PPAT Code of Ethics").

Sometimes even though they have been meticulous and careful in making an authentic deed, PPAT may still be sued by the appearer or a third party for the authentic deed he made. So some PPATs are looking for ways to protect themselves from the demands of the parties or third parties. One way that PPAT can do is to include a clause at the end of the body of the deed which reads~~-~~:

> "The appearers in this deed state that they have understood ~~and understood~~ the contents of this deed, so that the appearers hereby declare full responsibility for this matter and release PPAT and the witnesses for any lawsuits from the appearers and third parties from any and all consequences arising from this deed of the making and implementation of this deed.~~-~~"

Another clause which specifically address the possibility of risk on PPAT with regards to falsified data submission by the parties could read as follows:

"The appearers in this deed hereby guarantee and attest to the truth of their identity as provided by the identification document(s) presented to me and have acknowledged to bear full responsibility with regards to it."

Thesesis clauses can be said to contain the principle of exoneration, a term that is also often used in consumer protection law. It can be said that the exoneration clause is used as a shield that allows the exclusion of obligations or responsibilities of a party in an agreement. The inclusion of a liability exemption clause in most Notary Deeds or PPATs Deeds is carried out by Notaries/PPATs as a form of guarantee of protection for Notaries/PPATsthemselves in carrying out their positions in making authentic deeds.

In accordance with the **theory of legal protection**-, of course, the inclusion of a clause on the release of the responsibilities of a Notary/PPAT makes a Notary/PPAT feel more confident in carrying out their duties, because the more protection they have in addition to the legal protection provided by UUJN. With the inclusion of a clause in the release of the Notary/PPAT responsibility in the deed, the Notary or PPAT reaffirms to the parties against the unlawful acts in bad faith such as falsification of document data, providing false informationfalsified data, and others that are carried out under the responsibility of the parties themselves and not the responsibility of the parties themselves. the responsibility of the Notary/PPAT.

The inclusion of a clause on the release of the Notary/PPAT responsibility will protect the Notary/PPAT if it is true that it can be proven that those appearing in bad faith came to the Notary/PPA to make an agreement that is contrary to the law, decency, and public order by providing false informationfalsified data to the Notary/PPAT—. Notary/PPAT guarantees that at a certain place and time, the appearers are right to carry out legal actions and declare as written in the deed, but Notary/PPAT does not guarantee the truth of what is stated by the appearers.

Based on this, from the point of view **of legal certainty theory** , the act of falsifying identity is an act that is not commendable, and this will be revealed when the proof is carried out. The act of forgery of identity has criminal sanctions, both for the appearer and for PPAT if involved. The crime in the form of forgery of letters is in the form of forgery of letters in the main form as stated in Article 263 of the Indonesian Criminal Code-.

If a Notary/PPAT makes a deed with a false identity, a fake signature, or a forged document provided by his/her appearer, the Notary/PPAT deed will harm the other party or one of the third parties, so that the Notary/PPAT can be considered guilty or negligent in carrying out his/her duties. As a form of protection for a Notary/PPAT against the bad faith of the appearer, the Notary/PPAT can include an exemption clause in the deed regarding the responsibility of the appearer for the identity, signature and documents.

Referring to the Depok District Court Decision Number 226/Pdt.G/2018/PN.Dpk. that according to Article 1869 of the Civil Code, an authentic deed may decrease or be degraded in its evidentiary power from having perfect evidentiary power to only having proof of power as written underhand, if the public official who made the deed is not authorized to make the deed or if the deed is defective in its form. . If the objective conditions are not met, then the agreement is null and void without the need for a request from the parties, thus the agreement is considered to never exist and does not bind anyone. An agreement that is absolutely void can also occur, if an agreement made is not fulfilled, even though the law has determined that the legal act must be made in a predetermined way or is contrary to decency or public order, because the agreement is considered non-existent, then it is no longer valid. there is another basis for the parties to sue each other or sue in any way and form.[8]

A notarial deed / PPAT can be canceled is a party deed that does not meet the two elements above. The cancellation of a notarial deed is a statement of the cancellation of a legal action against a claim from a party who is justified by law to demand the cancellation. Here, in fact, there is a legal action that contains defects, but according to the law, the action still has legal consequences as expected/intended by the perpetrator, it's just that the agreement that arises based on the agreement, on the demands of the other party, can be canceled. Cancellation is carried out by the judge at the request of the party who is given the right by law to sue as such. [9]

On the other hand, the legal act of buying and selling must also be clear (*terang*) and cash (*tunai*). Terang Clear means that the act of transferring rights to land and/or buildings must be carried out before the customary head, who acts as an official who

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bears the order and validity of the act of transferring rights, so that the act is known to the public. Cash means that the act of transferring rights and paying the price areis carried out simultaneously. Cash because it is through a paymentid in cash. The buyer does not pay the rest, then the seller cannot claim the basis for the sale and purchase, but the legal basis for the debt.[10]

The author agrees inconcurs with the Depok District Court Decision Number 226/Pdt.G/2018/PN.Dpk, where in this case the PPAT has carried out the profession in accordance with its authority as the Land Deed Maker Official. PPAT is only responsible to the extent of the formal truth of a document, and therefore to check the material information of the data is not the responsibility of PPAT. However, in this case there has been a clear loss sufferedfelt by the original owner of the land due to the authentic deed made by PPAT without checking the material truth first.

Referring to this, the agreement is basically divided into 2 types, namely that it does not meet the subjective requirements, namely it can be canceled (*voidable*) by the court and does not meet the objective requirement, namely void by law, where this does not need a court decision. Therefore, the author is of the opinion that the sale and purchase deed whose data is false data is null and void, in which case there is no need for a court decision, but there must be further examination related to PPAT's involvement in the implementation of the sale and purchase which was ultimately canceled by the Judge's Decision. in case Number 226/Pdt.G/2018/PN.Dpk, because in this case there are parties who are very disadvantaged related to the emergence of AJB itself, so that later there will be responsibility from the notary in the form of administrative, civil and criminal liaresponsibility. Based on this, the author is of the opinion that the cause of the annulment of the deed in the Depok District Court Decision Number 226/Pdt.G/2018/PN.Dpk was because it did not meet the subjective requirements, as explained above, so it was canceled by the court.

Regarding the decision of the Depok District Court Number 226/Pdt.G/2018/PN.Dpk, the author agrees with the opinion of Mr. Ramon Wahyudi as a Depok District Court Judge who stated that the decision was the authority of the judge, where in the AJB made by PPAT Soekaimi, S.H, M.Kn. there has been clearly a juridical defect, so that the deed does not meet the material aspects of an authentic deed, which results in the deed being annulled by a court decision.

Referrings to the theory of identity falsification, where forgery is a type of violation of truth and belief, with the aim of obtaining benefits for oneself or others. Regarding indications of identity falsification, either by the appearers or by PPAT, it is necessary to further carry out a separate further examination of the parties involved in the deed to determine which party will be held accountable for the crime of forgery. Based on the foregoing, of course PPAT must check the correctness of the material to ensure the formal correctness of the transaction object data submitted by the appearers. The aim is to provide legal certainty for the parties who make the deed before the PPAT. It is a material obligation for PPAT to ensure the truth of the data presented by the appearers. This procedure must be carried out in accordance with the implementing regulations and procedure for land registration which, in the author's opinion,, so it is necessary to be amended the previous procedure, so that it shall applyies to all PPATs in the future landin the buying and selling process.

### 3.2 PPAT's Liability for the Sale and Purchase Deeds That Is Declared Nnull and Vvoid by the Court

Referrings to the **theory of responsibility**, where a person is said to be legally responsible for certain actions when that person can be subject to a sanction in the case of an act that is against the law.[11]

One of the PPAT responsibilities related to the PPAT authority based on the PPAT Position Regulations is to make evidence in the form of an authentic deed regarding legal actions related to land rights that can provide legal certainty for the parties. This authority then becomes an offense or act that must be accounted for by PPAT.

Analyzing the Decision of the Depok District Court Number 226/Pdt.G/2018/PN.Dpk, it can be found that there are several PPAT responsibilities with respect to the deed he made which was declared null and void or contained legal defects that harmed other parties or other people, including the following:

1. **Administrative Responsibilities**
   In land administration in Indonesia, PPAT officers have a very important role. For example, PPAT is the spearhead in the context of land

administration. For this reason, the element of prudence is very necessary for PPAT in carrying out their duties. This also means that PPAT itself must be able to work professionally with high dedication to obey and obey the rule of law a PPAT person is temporarily dismissed if he commits a minor violation of the prohibitions and obligations of a PPAT, while a serious violation is dismissed as a PPAT member. Dismissal of PPAT can occur because in carrying out his duties he commits minor or serious violations.

2. **Civil Liability**
   Civil liability, which in this case is the responsibility of the PPAT related to negligence, negligence, and/or intentional in making the deed of sale and purchase that is not in accordance with the formal requirements and material requirements of the procedure for making the PPAT deed, can be sued from the PPAT concerned. As a result, not only can the PPAT be subject to administrative sanctions but also does not rule out the possibility of being sued for compensation by the parties who feel aggrieved.
   In relation to the making of PPAT deeds that have legal defects, what is often found is that the PPAT concerned does not pay much attention to and consistently applies the existing rules, while the element of intent to harm the parties or third parties is very rarely found. However, even for negligence.
   PPAT must remain responsible for compensating for losses suffered by the parties in the form of reimbursement of costs and compensation for errors due to intentional or negligence in the form of carelessness, inaccuracy, and inaccuracy in the implementation of PPAT's legal obligations in making the deed of sale and purchase of land causing The exercise of a person's subjective rights will be disturbed if it causes a real loss to the parties or one of the parties.
3. **Criminal Liability**
   The imposition of criminal sanctions against PPAT can be carried out as long as a PPAT has committed an act that is included in the category of criminal offense according to the Criminal Code of the Republic of Indonesia as well as other laws and regulations that specifically regulate criminal acts, one of which is by making a fake letter, ordering other people to falsify data, or falsify deeds, which actions can qualify as a crime.
   It is clear that the deed made by PPAT is one of the crucial data sources for the maintenance of land registration data. Therefore, PPAT is obliged to carefully examine all the requirements for buying and selling land for the validity of the legal action concerned, namely the material requirements and formal requirements. Material requirements will determine the validity of the sale and purchase of the land. Meanwhile, the formal requirements as evidence requirements are related to the PPAT notarial deed made before the PPAT.

## 4. CONCLUSION

~~Based on the things that have been described in the previous chapters~~In light of the above elaborations, it can be concluded that:

1. Based on the Decision of the Depok District Court Judge Number 226/Pdt.G/2018/PN.Dpk. there is clearly a juridical defect in AJB No. 156/8/Sawangan/1997 dated July 28~~th~~, 1997 which was made before Soekaimi, S.H.~~,~~, PPAT for ~~the~~ Bogor Regency area so that the deed did not meet the material requirements of an authentic deed and resulted in the cancellation of the deed by a court decision. ~~False information~~Falsified data can be given or used by several parties in the transfer of land rights, either from the ~~opposing~~ party or the PPAT. ~~False information~~Falsified data submitted by the appearer in making the deed results in an resulting deed~~agreement~~ not meeting the subjective requirements of an~~the~~ agreement, because of a defect of will. Meanwhile, if the involvement of PPAT is related to the use of false data, it is necessary to carry out further examination of the parties in the deed to be held accountable for the crime of forgery, considering that PPAT only formulates the wishes of the parties so that their actions are stated in the form of an authentic ~~deed of~~ PPAT deed.
2. PPAT is fully responsible for the deed he~~it~~ makes. However, regarding the alleged use of false data, of course, proof of this claim must be presented and verified~~done~~, in which the parties who feel aggrieved and who intent~~want~~ to sue PPAT must first be able to prove several

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things, including: a) the existence of a loss; b) the causal relationship between the losses suffered and the violation or negligence of the PPAT~~ there is a causal relationship~~; and c) the violation (action) or omission is caused by an error for which the responsibility can be borne by the PPAT concerned. ~~False information~~Falsified data submitted by the appearers is entirely the responsibility of the appearers, while PPAT in this case is neither responsible nor liable for any losses arising from the presence of false statements of the appearers. ~~Regarding T~~the exoneration clause~~, of course,~~ can be incorporated in the deed as an exception to obligations or responsibilities in an agreement that limits, or even completely eliminates, the responsibility that w~~sh~~ould otherwise be imposed on the PPAT ~~and its appearers, depending on the aspect of truth~~with regards to the use of falsified data.

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# RIGHT OF DENIAL ON IMPLEMENTING THE POSITION OF NOTARY (ANALYSIS OF THE CONSTITUTIONAL COURT NUMBER 16 / PUU-XVIII / 2020)

Retno Indrianita Pratiwi, Benny Djaja

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# Introduction


**The position of Notary** was born helping and serving people who need authentic written evidence regarding conditions, events or legal actions.

**Article 1 paragraph (1) of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004** concerning the Position of Notary hereinafter referred to as The Regulation Of Notary Position

**The importance of the existence** of a notary in the society and of responsibility attached to a notary when carry out about duties that makes the notary's position require legal protection in carry out of job duties

Maintaining the confidentiality of all matters regarding deeds made by a notary is a must. This is based on the oath of office in the Notary Position Regulation.

**A Notary is a citizen who has the same position before the law** as stated in Article of the 1945 Constitution of the Unitary State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution), Article 27 paragraph (1) and 28D paragraph (1) of the 1945 Constitution. 27 paragraph (1) of the 1945 Constitution states, "All citizens shall have the same position in law and government and are obliged to uphold the law and government without exception".

In relation to the above, there is a decision by the Constitutional Court with decision Number 16 / PUU-XVIII / 2020, in which the Indonesian Prosecutors' Association conducted a judicial review of Article 66 paragraph (1) The Regulation Of Notary Position to the Constitutional Court (MK), because prosecutors cannot examine notaries without the permission of the Notary Honorary Council (MKN).

# Methods

## Research Method & Approach

Normative research method & statutory approach (Statue Approach).

## Types Of Legal Materials

secondary data, that is primary legal materials, secondary legal materials, tertiary legal materials.

## The legal material Collection techniques

Library research activities

## The Analysis

Qualitative analysis

# Findings and Discussions

**a. Constitutional Court Decision Number 16 / PUU-XVIII /2020**

In the Decision of the Constitutional Court Number 16/PUU-XVIII/ 2020, the Petitioner is the Association of Indonesian Prosecutors represented by Setia Untung Arimuladi, S.H., M.Hum as the Chairperson of PJI as Petitioner I, Olivia Sembiring, S.H., M.H as Petitioner II, Dr. Asep N. Mulyana, S.H., M.Hum as Petitioner III, Dr. Reda Manthovani, SH, LLM as applicant IV, and R. Narendra Jatna, SH, LLM as petitioner V, who feel their constitutional rights have been impaired by the phrase "with the approval of the Notary Honorary Council" in Article 66 paragraph (1) The Regulation Of Notary Position places the Notary Honorary Council has absolute and final authority to approve or not approve the notary's summons to attend the case examination.

# Findings and Discussions

**b. Legal Protection Against the Obligations of Notary Public in Carry out Their Position Related to the Constitutional Court Decision Number 16 / PUU-XVIII / 2020**

- Notaries have the obligation to make evidence in the form of an authentic deed, where this authentic deed contains the wishes of the parties who appear before the notary. The notary only states the wishes of the Article 1 paragraph (3), Article 27 paragraph (1), Article 28D paragraph (1) and Article 28I paragraph (1) UUD 1945.
- Notary when making an authentic deed, there are 3 (three) groups of legal subjects, namely the parties concerned, witnesses and Notaries. In this situations, the Notary is not a party in making the deed. Notary is only an official due to his authority to make an authentic deed based on the wishes of the parties/parties.

# The role of the Notary Honorary Council regarding the summons of a Notary in criminal case examination is as follows:

The Notary Honorary Council has the authority to grant temporary approval to law enforcers.

The Notary Honorary Council conducts an examination hearing with the notary before giving approval or rejection to the law enforcers.

The Notary Honorary Council can accompany the Notary in the process of examining a criminal case.

# Conclusions

One of the legal protections for notaries is through the presence of the Notary Honorary Council in conducting an examination before deciding to take a photocopy of the Minuta deed.

If the Examining Panel considers that the Notary Public has carried out the task, and the implementation of the task is in accordance with the laws and regulations and it is deemed that there is no violation in carrying out the duties related to the making of the deed, the Examining Panel will reject the request for summons to the notary that has been submitted.

# Suggestion

In view of the notary's responsibility in carry out his obligation to keep the contents of the deed confidential, it is necessary to establish specific implementing regulations to provide legal protection to notaries in carry out occupational secrets.

Notaries in carry out their duties and positions must be more careful in making deeds so as to minimize the possibility of errors that may cause harm to the parties in the deed.

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# Legal Consequences Against Notary with Convicted Status bBy Court Decisions

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**ABSTRACT**

Notary is one of the legal professions that carry out some of the duties of state administration to provide legal services to the general public in the civil sector. law. Moreover, until now there is no professional standard for notary services or SOPs in providing services to the community, so that notary in carrying out their positions are vulnerable to potential legal problems, driving members of this profession to be quite apprehensive because many were reported by their clients against the deed they made or matters under their authority. The reporting continues until the trial stage until the court's decision that determines the notary as a convict. Performing actions by deceiving, embezzling and falsifying in the position of a notary can indeed be categorized as a disgraceful act and a form of violation of obligations that are prohibited in the position of a notary and a code of ethics, which can be subject to temporary dismissal, where UUJN stipulates the length of the temporary sentence is determined at the longest 6 (six) months. In addition to the legal implications, of course there are things that need to be investigated further if a notary is temporarily dismissed for a criminal case whose sentence is less than 5 (five) years, of course the dismissal and reappointment have mechanisms and procedures.

***Keywords:*** *Notaries, Vviolation, Ccourt.*

## 1. INTRODUCTION

The Unitary State of the Republic of Indonesia (NKRI) with the 1945 Constitution of the Republic of Indonesia (UUDNRI 1945) as the written legal basis confirms that Indonesia is a state of law. As the law states, this means that all actions taken by governments and citizens are bound by the rules -law yes ng force and position the same in the eyes of the law.

That the existence of law made by the state aims to regulate and protect society in order to create order and peace. The existence of law in society is not only to maintain order, but also to limit actions that are detrimental to the community and as a means of solving legal problems that occur in the community. Thus, it can be said that all activities and community action or legal professions such as notaries for example, can not be separated from the rules of law and for the party that violate legal rules that may be penalized in accordance with the follow actions .

A notary is one of the legal professions that carries out part of the task of administering the state to provide legal services to the general public in the civil sector. Such authority is obtained through attribution which is delegated based on statutory provisions, so that the notary has authority to make important documents in the form of a deed otenti k and authority of the other concerns the legal acts, as well as the determination of the desired agreement by the parties expressed in an authentic deed.

One of the reasons behind the state giving broad authority to the notary profession is because the Indonesian state as a state of law guarantees certainty, order and legal protection to every citizen based on truth and justice. Therefore, in order to fulfill the interests, then the required written evidence of authentic nature, where it is the authority of the notary.

Given the breadth of notary authority that the state has given, the government issues legal regulations to regulate all notary activities, ranging from authorities, obligations to prohibitions that are not allowed to be violated because there are sanctions from such actions. The regulation is contained in Law Number 2 of 2014 as a substitute for Law Number 30 of 2004 concerning the Position of Notary (hereinafter referred to as UUJN) whose existence is made to define and determine all obligations given by the government to this profession so that the aim of establishing a profession that is independent and serve the community can be realized as expected .

Profession as a notary is a legal profession in practice requires scientific specialty that according Habi b adjie called the office of the *ice oterik* ,which means that it should be studied specifically , in this case through the special education and have the skills and capabilities are adequate for running notarial duties. Therefore, carrying out the profession as a notary is required to comply with all legal provisions that govern it and avoid potential violations of the law regulated in the UUJN and the Notary Code of Ethics Likewise,in carrying out his duties, he must also be careful, thorough and impartial and master specifically in the field of notary science and in general master in the field of law.

In providing services to the community, sometimes notaries fall or are vulnerable to legal problems because of their behavior in carrying out their positions which ultimately leads to legal

problems. Moreover, until now there is no professional standard for notary services or SOPs in providing services to the public, so that notaries in carrying out their positions are vulnerable to potential legal problems.

In practice, it is often the events in which the notary as officials who are authorized by the state experience a state of considerable concern due to being reported by the client with regards to the deed he made or things under its authority. The reporting continues until the trial stage until the court's decision that determines the notary as a convict.

In carrying out their duties and authorities to make authentic deeds, not a few notaries are entangled in legal cases or made suspects in criminal cases such as fraud, embezzlement, and forgery or ordering to forge a deed or signature. At least, based on the author's search, it was found that court decisions that dragged a notary into convict status, including:

1. The case of forgery that occurred in Pekanbaru as stated in the decision Number 137/Pid.B/2016/PN.Pbr *juncto* Decision Number 166/PID.B/2016/PT. PBR , with the defendant PS , Bin Slamet Basoeki, was declared to have been legally and convincingly proven guilty of participating in the criminal act of Forging Authentic Deeds and was sentenced to 1 (one) year and 6 (six) months in prison.
2. The embezzlement case that occurred in Balikpapan as stated in the decision Number 685/Pid.Sus/2019/PN Bpp *juncto* the Decision Number 69/PID/2020/PT SMR with the defendant ASC , was declared proven and legally and convincingly guilty of committing the crime of embezzlement by receiving a sentence 2 (two) years in prison.
3. The fraud case that occurred in Surabaya as stated in the Decision Number 2200/Pid.B/2020/PN Sby with the defendant DC , was legally and convincingly found guilty of committing a criminal act of fraud and was sentenced to 1 (one) year and 6 (six) months in prison.

Based on the description of the cases above, that the position of a notary is very vulnerable to being entangled in criminal cases due to his carelessness or carelessness in carrying out his duties and authorities. Surely there will be implications for the law of the position of the notary when dismissed, which sanctions the UUJN least have sanctions from the mildest to the most severe level yes i tu sanctions in the form of a written warning, suspended, honorable discharge, or a dishonorable discharge.

The sanctions for temporary dismissal are explained in Article 9 letter e of the UUJN which is then reaffirmed in Article 86 letter e of the Regulation of the Minister of Law and Human Rights Number 19 of 2019 concerning Terms and Procedures for Appointment, Leave, Transfer, Dismissal, and Extension of the Office of a Notary (hereinafter referred to as Permenkumham 19/2019) , the notary is temporarily dismissed because he is undergoing a period of detention or punishment." Meanwhile, for dishonorable dismissal based on Article 13 of the UUJN, it is applied to a notary who based on a court decision has committed a criminal offense which is punishable by 5 (five) years in prison or more. Thus, it can be interpreted that for a notary whose sentence is or based on a court decision that decides a sentence of less than 5 (five) years, then according to the law, the sanction given is a temporary suspension. However, if the court's decision to punish the notary for more than 1 (one) year is it in accordance with Article 9 Paragraph (4) of the UUJN which confirms that the temporary suspension is valid for a maximum of 6 (six) months, especially for a notary who commits a disgraceful act and violates the obligations and prohibitions of positions as well as the notary code of ethics.

Performing actions by deceiving, embezzling and falsifying in the position of a notary can indeed be categorized as a disgraceful act and a form of violation of obligations that are prohibited in the position of a notary and a code of ethics, which can be subject to temporary dismissal, where UUJN stipulates the length of the temporary sentence is determined at the longest (six) months, whereas if you look at the existing cases , the notary is subject to a sentence of more than 1 (one) year and above whether it can be categorized as a temporary sentence considering that the punishment for dishonorable dismissal is applied to a notary who commits a crime whose sentence is 5 (five) years or more.

In addition to the legal implications, of course there are things that need to be investigated further if a notary is temporarily dismissed for a criminal case whose sentence is less than 5 ( five ) years, of course there are mechanisms and procedures for the dismissal and reappointment . Therefore, d ith the enactment as a convict by the decision of the Court , the authors wanted to investigate further about the result of the law notary status as a convicted by a court ruling which of his prior status of the convicted person in advance as a suspect which of these positions writer would describe about how UUJN regulate the duties and authorities of a notary who has the status of a suspect who later becomes a convict based on a court decision as well as regarding the mechanism of temporary dismissal and reappointment for notaries who have passed the detention or sentence period. This needs to be studied because the UUJN does not clearly regulate how to re-appoint a notary who is temporarily dismissed for committing a crime whose sentence is less than 5 ( five ) years.

## *1.1. Related Work*

Based on the description above, the title of the research entitled : Legal Consequences Against Notaries With Convicted Status By Court Decisions

*1.1.1. The legal consequences for a notary who has the status of a convict by a court decision.*

Notaries who are entangled in a criminal act include fraud, embezzlement and forgery until the court there are factors that cause this phenomenon to occur, namely because "the notary has deviated from the provisions of Article 4 paragraph (1) in conjunction with Article 16 paragraph (1) letter a UUJN regarding the oath of office and obligations that must be adhered to in carrying out their positions, namely trustworthy, honest, thorough, independent, and impartial in legal actions. UUJN regulates 4 (four) levels of sanctions, namely written warnings, temporary dismissal for 3 months and 6 months, respectful dismissal, and dishonorable discharge. If the notary is caught in a legal case and has the status of a suspect, the notary can still carry out his duties and authorities as long as the Decree on the appointment as a notary has not been revoked and the judge's decision does not have permanent legal force. However, there are things that need to be anticipated and criticized, namely if the notary is in detention or in prison and is still making a deed. Such a condition is not justified because it is not in accordance with the inherent dignity and honor of the position, namely trust as a notary based on the code of ethics and applicable law. This means that even though the notary concerned is in custody and there has been no revocation of the letter of appointment, in order to maintain the honor of the notary, he should not make a deed. Even though a notary has been named a suspect, he still has to put forward the principle of the presumption of innocence before a court judge's decision has permanent legal force.

1.1.2. *The mechanism for reappointment of the position of a notary who is temporarily dismissed due to committing a crime whose sentence is less than 5 ( five ) years.*

Notaries who have been dishonorably dismissed can submit an application to the Minister for reappointment as Notary. The application is submitted by a Notary who has been dismissed with a return decision who stated that he was not legally proven to have committed a crime punishable by imprisonment of 5 (five) years or more. With this application, the Minister is expected to make changes to the decision of dishonorable dismissal that has been issued previous. The changes in question can be in the form of or revocation of the decision to dismiss dishonorably.
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## *1.2. Our Contribution*

Based on the background and problem formulation, the objectives in this research are to find out the legal consequences of a notary who has the status of a convict by a court decision and to find out the mechanism for reappointment of the position of a notary who is temporarily dismissed due to committing a crime whose sentence is less than 5 ( five ) years.

## *1.3. Paper Structure*

This paper structure is using research method to collect data, manage data, and conclude data according to the problem formulation. This legal research is to study the particular law. This legal research is carried out with a series of scientific activities based on methods, systematics, and a certain thought. The definition of normative research is research that provides a systematic explanation of the rules governing a certain legal category, as well as analyze the relationship between regulations and future development. The author uses three legal materials that obtain from the results of a literature review, library material, and legal material.

# BACKGROUND

## *2.1. Legal Basic Value Theory*

Basically, the existing laws are codified in the form of legislation was deliberately created, operated and developed through the mechanism of law *(rule of recognition)*, dispute resolution *(rule of adjudication)* , and changes to the law *(rule of change)* . The existence of the law not only aims to provide security and order and ensure their well-being gained by the community of negara as an umbrella society, will but to create relationships and regularly between community members needed an order, or better known as *potato societas ibi ius* or if there is a society there is law. Because of this order, life becomes orderly.
The existence of law is very important and needed to regulate human behavior in order to create peace and order in society. Law that regulates, compels, and protects every individual from the threat of danger and to protect the rights of everyone and maintain a balance between the interests that exist in the life of the nation and the state. Law as an order supported by norms
In addition, law also has a purpose as stated by Aristotle, a philosopher and thinker from Greece who said that the purpose of law is solely to achieve a better human life. Therefore, to obtain a better life, law is needed. Another view is also put forward by Hobbes which states that the purpose of law is none other than to create

social order. John Locke also stated the purpose of the law is to preserve the natural rights, namely the right to life, the right to liberty, and property. Likewise , Jeremy Bentham is of the view that the main purpose of law is to achieve security for its citizens.

## 2.2 Legal Certainty Theory

One of the legal goals that society aspires to is the creation of legal certainty. Legal certainty can be reflected in a set of laws and regulations that legally regulate clear legal norms . If legal norms do not clearly regulate matters that can cause a notary to be declared bankrupt, then the law does not represent all thoughts or ideas regarding legal certainty.

Although the legal certainty is reflected in the form of legality, would be but the rule of law does not mean only the rules that concrete containing articles of the law, but the need for constancy in the judge's decision in the case between the verdict of the judge's ruling that other words for similar cases have been decided. That means that legal certainty may be achieved through positivist legal regulations, but at the level of practice in court there must also be a consistent attitude from judges as implementers of the rules that have been made so as to create legal certainty. One of the determining factors for achieving legal certainty as described previously is that the rules may not have multiple interpretations and restrictions on interpretation, so a strict consideration is needed in making laws but must also pay attention to the most fundamental nature of the law itself, namely morality. The strict consideration of laws without the risk of multiple interpretations and also restrictions on interpretation will only reduce the morality that is behind legality. The law feels like a shell, is technical-instrumental in nature, and its implications in the application of the law can fall into practices that are wrong from human expectations.

Therefore, Frans Magniz Suseno once argued that behind legality there is actually an ethical legitimacy that makes the legitimacy of state authorities based on moral principles, while legality also gives functions to the state so that these functions are carried out in accordance with the applicable legal corridors. Legality is therefore not the same as ethical legitimacy, because legality is presented to prevent the decline of a country into oritarian conditions and practices. Therefore, Magnis Suseno, legality is an important element in the concept of the rule of law because morally, the state can be organized and carry out its duties based on the principle of legal certainty.

Justice is part of the purpose of law in addition to certainty and expediency. In John Rawls' view, justice concerns the principle of freedom and freedom that is evenly distributed to everyone, and able to reorganize the socio-economic gaps that occur so that they can provide reciprocal benefits.

The theory of justice was chosen in this study due to looking at the legal rules regarding temporary dismissal in the case of a notary who is a convict. Performing actions by deceiving, embezzling and falsifying in the position of a notary can indeed be categorized as a disgraceful act and a form of violation of the obligations prohibited in the position of a notary and a code of ethics, which can be subject to a temporary dismissal sanction, where UUJN regulates the length of time the temporary sentence is determined no later than 6 (six) months, whereas if you look at the existing cases, the notary is subject to a sentence of more than 1 (one) year and above whether it can be categorized as a temporary sentence considering that the punishment for dishonorable discharge is applied to a notary who commits a crime whose sentence is 5 (five) years or more.

Meanwhile, in Article 13 of the UUJN, the Notary is dishonorably dismissed by the Minister because he was sentenced to imprisonment based on a court decision that has permanent legal force for committing a crime punishable by imprisonment of 5 ( five ) years or more. Referring to the article above, it can be interpreted that the notary has the status of a convict, then the punishment that can be imposed is temporary dismissal if the sentence is less than five years and otherwise will be sentenced to dishonorable discharge if sentenced to five years or more.

## 2. CONCLUSION

1.Notary are public officials, so they must at all times maintain their honor and dignity and display a good personality based on the applicable code of ethics and positive legal rules. When a notary commits an act that violates the rule of law until a criminal sentence is imposed, the UUJN will impose administrative sanctions which can be in the form of a written warning, temporary dismissal to dishonorable discharge.

2. In connection with the case studied in this study, a notary was sentenced to a criminal sentence for forgery, embezzlement, fraud and returned to carrying out his position as a notary while undergoing parole. The practice of the notary public is due to the fact that the MPN does not carry out its duties, functions and obligations properly. The MPD which is domiciled in the city/regency is obliged to find out notary in their area who are unable to serve the community, including notary who are serving a period of detention. MPD's failed to report to MPW and subsequently resulted in a notary who underwent a period of detention and was later sentenced to a criminal by the court not temporarily dismissed by the Ministry of Law and Human Rights. Moreover, the crime of forgery, fraud and embezzlement by a notary has fulfilled the classification of actions subjecting the notary in question to be dismissed with disrespect for the MPN proposal according to Article 12 UUJN. The threat of punishment of more than 5 (years) also fulfills the element that the notary can be dismissed with disrespect directly by the said Ministry.

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*Juridical Review of the Form of the SKMHT which is made by a Notary according to Article 38 of Law Number 2 of 2014 concerning amendment to Law Number 30 of 2004 concerning Notary position*

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# JURIDICAL REVIEW OF THE FORM OF THE SKMHT DEED WHICH IS MADE BY A NOTARY ACCORDING TO ARTICLE 38 OF LAW NUMBER 2 OF 2014 CONCERNING AMENDMENT TO LAW NUMBER 30 OF 2004 CONCERNING NOTARY POSITION

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**ABSTRACT**

Law becomes an inseparable part of people's lives, this results in legal systems and norms in society itself. The purpose of the existence of a legal system and legal norms is to uphold and regulate the balance between personal interests and common interests to avoid a conflict. The quality of legal perfection is verified into factors of justice, welfare and concern for the people and others. Law continues to grow and develop in society and must continue to be formed to achieve the expected goals. Based on the contents in this thesis, there are problems, namely the first how the form of the SKMHT deed made by a Notary based on Article 38 UUJN, the second. What are the legal consequences for the SKMHT deed made by a Notary that is not in accordance with the form of the deed according to Article 38 of the UUJN? overrides the Notary who made the SKMHT deed based on the PerKaban format No. 8 of 2012. The author also conducted interviews with BPN officials and also Notaries.

***Keywords****: Form Of Deed, Notary, Power of Attorney Imposing Mortgage, Notary Position.*

## 1. INTRODUCTION

Law becomes an inseparable part of people's lives, this results in legal systems and norms in society itself. The purpose of the existence of a legal system and legal norms is to uphold and regulate the balance between personal interests and common interests to avoid a conflict. The quality of legal perfection is verified into factors of justice, welfare and concern for the people and others.[1] Law continues to grow and develop in society and must continue to be formed to achieve the expected goals.

Theoretically, laws and regulations describe a system that does not want and does not support a conflict between the elements or parts contained in it. Legislation must be interrelated and be part of an integrated system. The need for harmonious and integrated laws and regulations is urgently needed to create order, guarantee certainty, and provide legal protection for legal subjects and objects that have been regulated by law.

In practice, the limited capability of the stakeholders in understanding and interpreting the existing regulations has an impact on the ineffective application of the law. In addition, the plurality of laws currently in force in Indonesia has created an unavoidable problem of norm disharmony which has consequences for the emergence of other legal issues and causes the law to lose its purpose, namely to create certainty, justice and its usefulness.

In practice, the limited capability of the stakeholders in understanding and interpreting the existing regulations has an impact on the ineffective application of the law. In addition, the plurality of laws currently in force in Indonesia has created an unavoidable problem of norm disharmony which has consequences for the emergence of other legal issues and causes the law to lose its purpose, namely to create certainty, justice and its usefulness.

One part of the importance of legal harmonization that is oriented towards legal protection is related to the Power of Attorney for Imposing Mortgage Rights (SKMHT) made before a Notary.

Based on article 15 paragraph 1 of Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land (UUHT). "The Power of Attorney to impose Mortgage must be made with a Notary deed or PPAT deed".[2] Through this provision, a Notary is authorized by law to make SKMHT. In accordance with the sound of article 15 (1) of the UUHT, the authority of a notary to make the SKMHT can be done by making a notarial deed or by using a blank deed as issued by BPN-RI. However, with regard to filling out the SKMHT form, there are things that are not in line with the provisions in Law Number 2 of 2014 concerning Notary Positions (UUJN), resulting in the deed losing its authenticity if the person filling out the SKMHT form is a person. Notary Public.

If viewed from the provisions of Article 96 (1) of the Regulation of the State Minister/Head of the National Land Agency Number 3 of 1997 concerning Provisions for the Implementation of Government Regulation Number 24 of 1997 concerning Land Registration and seeing the sound of the SKMHT form which is Attachment 23 of the PMNA/KaBPN mentioned above, it can be seen that there is only one form of SKMHT that can be made either by a notary or by a PPAT. If we look at the provisions contained in article 15 (1) of the UUHT, the form of SKMHT can be made with a notarial deed either made in the form of a notary deed itself or by using a form of SKMHT issued by BPN-RI.

That SKMHT made in the presence of Land Deed Making Officials, Substitute Land Deed Maker Officials, Temporary Land Deed Maker Officials, and Special Land Deed Making Officials must comply with the provisions contained in the Regulation of the Head of the National Defense Agency of the Republic of Indonesia (Perkaban) Number 8 of 2012 concerning Amendment to the Regulation of the State Minister of Agrarian Affairs/Head of the National Defense Agency Number 3 of 1997 concerning Provisions for the Implementation of Government Regulation Number 4 of 1997 concerning Land Registration. It can be emphasized that the Perkaban only applies to Land Deed Making Officials, Substitute Land Deed Making Officials, Temporary Land Deed Making Officials, and Special Land Deed Making Officials, especially in making SKMHT, and does not apply to SKMHT made by a Notary. SKMHT made before a Notary must follow the provisions regarding the form of the deed as stated in Article 38 of the UUJN.[3]

Unlike the case with a Notary, a Land Deed Making Official (PPAT) is subject to the provisions stipulated in Government Regulation Number 37 of 1998 concerning the Regulation of the Position of the Land Deed Maker Official and its implementing regulations. In filling it out, the blank deed must be done by filling out the available deed form completely in accordance with the instructions for filling it out. As for a Notary, because at the time of filling out the SKMHT form, the Notary acts in his position as a Notary, the Notary, apart from being guided by the instructions for filling out the SKMHT form, is also bound by the provisions contained in the Civil Code (KUHPer) and the Indonesian Civil Code. The Notary Position Act (UUJN) which is the main guideline for a Notary in carrying out his position, so that the SKMHT made by the Notary meets the requirements to be declared as a notary deed which has the power as an authentic deed.

This research is interesting because there are two different rules governing the form of deed that can be made by a Notary. The problem that arises here is that the form of the deed regulated in Perkaban Number 8 of 2012 is different from the form of the deed regulated in Article 38 of the UUJN.

The authority of a notary is to make an authentic deed. The authenticity of a notarial deed comes from Article 1 (1) of the UUJN which reads: “Notary is a public official who is authorized to make authentic deeds and other authorities as referred to in this law.[4] From the provisions of Article 1 (1) of the UUJN, a Notary is appointed as a "Public Official" (openbaar ambtenaar), thus the deed made by the Notary in his position has the nature of an authentic deed, as contained in Article 1868 of the Civil Code which reads: An authentic deed is a deed which, in the form determined by law, is made by or in the presence of public officials in power for that purpose at the place where the deed was made.[5]

In Article 15 paragraph (1) of the UUJN that a Notary has the authority to make a deed, and the terms and conditions of a Notary deed are based on the provisions of Article 38 of the UUJN. So if it turns out that there is a Notary making SKMHT which in the formal aspect of the deed follows the provisions of the Perkaban, it is clear that the SKMHT deed made by the Notary does not meet the requirements as a Notary deed according to Article 38 UUJN or the Notary does not need to make an SKMHT deed following the provisions of the Perkaban above.[6]

To understand the notary deed, it is necessary to relate it to Article 1868 of the Civil Code. Article 1868 of the Civil Code is a source for the authenticity of a Notary deed as well as the basis for the legality of the existence of a Notary deed (and deeds drawn up before a Public Official) with the following requirements:

1. The deed must be made by (door) or before (ten overstan) a public official.
2. The deed must be made in the form determined by law.
3. The public official by or before whom the deed was made, must have the authority to make the deed

Based on the provisions of Article 1868 of the Civil Code, one of the conditions for a notarial deed to be considered an authentic deed is if the deed is made in the forms

determined by law. Regarding the forms of a notary deed, this has been regulated in Article 38 of the UUJN which reads:

1. Each Notary deed consists of:
    a. the beginning of the deed or the head of the deed
    b. deed body.
    c. the end or closing of the deed..
2. The beginning of the deed or the head of the deed contains:
    a. title of deed;
    b. deed number;
    c. hour, day, date, month, and year; and
    d. full name and domicile of the Notary.
3. The body of the deed contains:
    a. Full name, place and date of birth, nationality, occupation, position, position, residence of the appearers and/or the person they represent;
    b. Information regarding the position of acting against;
    c. The contents of the deed which is the will and desire of the interested party; and
    d. Full name, place and date of birth, as well as occupation, position, position, and residence of each identifying witness.
4. The end or closing of the deed contains:
    a. Description of the reading of the deed as referred to in Article 16 paragraph (1) letter I or Article 16 paragraph (7)
    b. Description of the signing and place of signing or translation of the deed if any
    c. Full name, place and date of birth, occupation, position, position, and residence of each witness to the deed.
    d. Description of the absence of changes that occurred in the making of the deed or a description of any changes that may be in the form of additions, deletions, or replacements.
5. Deeds of Substitute Notaries, Special Substitute Notaries, and Temporary Notary Officials, in addition to containing the provisions as referred to in paragraph (2), paragraph (3), and paragraph (4), also contain the number and date of appointment, as well as the official who appointed them.

## 2. METHOD

The methods used in writing this proposal are as follows: (1) Type of Research: The type of research in this legal research is normative or doctrinal legal research.[6] Doctrinal or normative research is research that provides a systematic explanation of the rules governing a category.[7] (2) Nature of Research: The nature of legal research has a distinctive character, namely its descriptive nature. As a descriptive science, legal science studies the purpose of law, values of justice, the validity of the rule of law, legal concepts, and legal norms. As an applied science, legal science establishes standard procedures, provisions, and signs in carrying out legal activities. (3) Data Source: (a) Primary legal materials are materials used, consisting of statutory regulations, official records, minutes of making legislation and judges' decisions. In this study, the primary legal materials used were the 1945 Constitution of the Republic of Indonesia; Code of Civil law; State Law of the Republic of Indonesia Number 5 of 1960 concerning Basic Regulations on Agrarian Principles; State Law of the Republic of Indonesia Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land; State Law of the Republic of Indonesia Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of a Notary; Regulation of the Head of the National Land Agency Number 8 of 2012 changes to the Regulation of the Head of the National Land Agency Number 3 of 1997 concerning Provisions for the Implementation of Government Regulation Number 24 of 1997 concerning Land Registration, (b) Secondary Legal Material: Secondary legal materials are defined as legal materials that provide an explanation of primary legal materials. In this case, it consists of laws, scientific books and research results, (c) Tertiary Law Material: Tertiary legal materials are materials that provide instructions or explanations for primary and secondary legal materials. In this study the tertiary legal materials used include dictionaries (laws), encyclopedias. (4) Data Analysis Techniques: The data analysis used in this study is qualitative data analysis techniques, namely the efforts made by collecting data, synthesizing, searching and finding important patterns. (5) Research Approach: in legal research, there are several approaches. With this approach, researchers will get information from various aspects regarding the issue that is being tried to find answers to. There are 2 (two) kinds of approaches, namely: (a) statute approach: The statutory approach is an approach taken by reviewing all laws and regulations related to the legal issues being handled, (b) Case Approach: The case approach is an approach that is carried out by examining cases related to the issues at hand which have become court decisions that have permanent legal force, namely: the 1945 Constitution of the Republic of Indonesia; Code of Civil law; State Law of the Republic of Indonesia Number 5 of 1960 concerning Basic Regulations on Agrarian Principles; State Law of the Republic of Indonesia Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land; State Law of the Republic of Indonesia Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of a Notary; Regulation of the Head of the National Land Agency Number 8 of 2012 changes to the Regulation of the Head of the National Land Agency Number 3 of 1997 concerning Provisions for

the Implementation of Government Regulation Number 24 of 1997 concerning Land Registration

## 3. DISCUSSION

### *3.1 Issue*

The problems that will be studied by the author in writing this proposal are: (1) What is the form of the SKMHT deed made by a Notary based on Article 38 of the UUJN? (2) What are the legal consequences for the SKMHT deed made by a Notary that is not in accordance with the form of the deed according to Article 38 of the UUJN?

### *3.2 Implementation of the Making of the SKMHT Deed by a Notary Judging from Article 38 of the UUJN-P.*

In Chapter IV, in carrying out his office, a Notary is subject to Law no. 2 of 2014 concerning Amendments to Law No. 30 of 2014 concerning Notary Positions (UUJN-P). Article 1 (1) UUJN-P states that: "Notaries are public officials who are authorized to make authentic deeds and have other authorities as referred to in this law or based on other laws". Furthermore, Article 1 (7) UUJN-P states that: "A Notary Deed, hereinafter referred to as a Deed, is an authentic deed made by or before a Notary according to the form and procedure stipulated in this law.[8] Furthermore, Article 1 (7) UUJN-P states that: "A Notary Deed, hereinafter referred to as a Deed, is an authentic deed made by or before a Notary according to the form and procedure stipulated in this law.[9]

From these two provisions, it can be concluded that a notary is a public official who has the authority to make authentic deeds, where the form and procedure of the notarial deed must be in accordance with those stipulated in UUJN-P. Therefore, ideally, a notary when carrying out his position cannot be separated from all the provisions stipulated in UUJN-P, as well as regarding the form and procedure for making each deed must be in accordance with the provisions stipulated by UUJN-P.

This is different from its implementation in the field where from the results of the research that the author did, it was found that the notary in making the SKMHT deed there are two forms of deed, namely the form of the deed that follows the provisions of Article 38 UUJN-P and the form of the deed that follows the Perkaban Number 8 of 2012.

As the author has stated in the previous chapter, that according to Article 15 paragraph (1) of Law Number 4 of 1996 concerning Mortgage on Land and Objects Related to Land (UUHT). "The Power of Attorney to impose Mortgage must be made with a Notary deed or PPAT deed..." . With this provision, the notary is given the authority by law to make SKMHT. The SKMHT deed has been regulated in Perkaban Number 8 of 2012 which in the attachment of Letter H (Attachment 23) Article 96 states that the form of the SKMHT deed is different from the form of the Notary deed as regulated in Article 38 UUJN-P. Thus, there are two different rules governing deed with different forms that can be made by a Notary.

It is interesting to observe the results of the author's interviews with the Head of BPN and also with the Notary who made the SKMHT deed referring to Article 38 of the UUJN-P and referring to Perkaban Number 8 of 2012. According to Notary Maya Sayuna, SH.MKn who is domiciled in Central Timor Regency. South and has a working area in East Nusa Tenggara Province, that it is true that there are 2 conflicting rules in making a deed by a notary, but to make a SKMHT notarial deed of the two rules is an option for a notary as long as there is no prohibition from BPN and to bridge the burden credit with SKMHT criteria without a time limit, for example credit below 75,000,000. Credit for project work guaranteed by a personal certificate, KPR. While the SKMHT with the PPAT format, I use it for general charges, but I am still constrained by certain things to make a direct APHT.

This was confirmed by the Head of the BPN of Timor Tengah Selatan Regency who said that regarding the format of the SKMHT deed made by a Notary, it was an option for the Notary to follow the form of the deed according to UUJN-P or Perkaban. If seen in the Perkaban, it is clearly written that the format of the SKMHT deed must follow the Perkaban No. 8 of 2012 however, for Perkaban it is usually only to bind PPAT and for Notaries it is still subject to the form of a deed according to Article 38 UUJN-P.

Different conditions occur in Kupang City, according to Notary Hengki Famdale, that BPN's policy is very decisive for Notaries in making SKMHT Deeds, either following the SKMHT deed format regulated in Perkaban No. in this case is UUJN-P.

What happened in Kupang City, BPN requires Notaries to make SKMHT Deed using Perkaban No. 8/2012 format. Thus, Notaries in Kupang City do not have the option to make SKMHT deed according to the form regulated in UUJN-P.

Observing the form of the deed regulated in the two regulations, the writer will then make a juridical analysis of the different forms of the deed, especially with regard to the procedure for filling it out at the beginning of the deed or the head of the deed and the end of the deed: (1) Beginning of deed: (a) If you follow PERKABAN Number 8 of 2012, at the beginning of the deed/head of the deed, before the title of the deed, the name of the Notary is made. The inclusion of the Notary's namehead and the inclusion of a Notary Appointment Decree and Notary's address are not contained in Article 38 of the UUJN-P, so the question is whether the formal inclusion of the Notary's header and name has violated the provisions of Article 38 UUJN-P? According to the author, the SKMHT made before a Notary but the form is not appropriate because it uses a Notary's letterhead which is contrary to Article 38 of the UUJN-P, especially at the beginning of the deed. This is in accordance with the

opinion of Habib Adjie, who stated that the SKMHT deed made before a Notary using the PERKABAN version of the SKMHT deed was called an Oplosan deed because it violated the formality of the deed and violated Article 38 UUJN-P. (b) The second difference at the beginning of the deed, from the two provisions, is the information regarding the hours of making the SKMHT deed. In Perkaban No. 8 of 2012 there is no information regarding the time of making the deed at the beginning of the deed. According to the author, the provisions regarding this hour are very important to maintain the quality of a deed, because in practice there is often a term known as a "deed factory", where in one day a notary can make hundreds of deeds. With the provisions regarding this hour, it can be ascertained whether the deed has been carried out fairly or not. (2) End of deed: The difference in the final form of the deed in the second regulation can be described as follows: Observing the description of the final form of the deed/closing of the deed as regulated in the two regulations, it can be seen that the end or closing of the Deed stipulated in the form of the SKMHT Deed issued by BPN RI according to PERKABAN Number 8 of 2012 there is a difference with the end of the deed stipulated in the UUJN -P. According to the author, there are 3 (three) different important things that have consequences for the authenticity of the deed, namely: (a) There is no information on the place of signing the Deed, (b) There is no translation of the Deed (if any); and (c) A description of the absence of changes that occur in the manufacture. Deed or description of any changes that can be in the form of additions, deletions, deletions with replacements/ Renvoi. Regarding the information regarding the place where the deed was signed, one of the requirements of an authentic deed is the authority of the official who made the deed at the place where the deed was made. The authority of the Notary can be seen through the information regarding the place of signing of the deed listed at the end or closing of the deed. Therefore, the inclusion of information regarding the place where the deed was signed is very important to be able to determine that the deed has been made before an authorized Notary. If the Notary makes a deed outside his area of office, the deed only has the power of proof as an underhand deed. The absence of inclusion of the place of signing the deed in the SKMHT has also violated the provisions contained in Article 1868, Article 1869 of the Civil Code, Article 1 point (1), Article 1 point (7), Article 38 paragraph (4) UUJN-P, so it can be concluded that if a deed is defective in its form, it cannot be treated as an authentic deed.

The services provided by a notary must be professional where in carrying out his position he must be responsible for all legal actions he takes. In addition, a notary in carrying out his position must also be trustworthy, honest, thorough, independent, and impartial. Good, quality and positive service for the community can only be achieved by fulfilling all the provisions contained in the laws and regulations, especially UUJN-P and must also pay attention to the Notary Code of Ethics that has been agreed upon by the Notary Organization.

The right to sue by the client to a notary is regulated in Article 84 of UUJN-P which reads: "Actions of violation committed by a Notary against the provisions as referred to in Article 16 paragraph (1) letter i, Article 16 paragraph (1) letter k, Article 41, Article 44, Article 48, Article 49, Article 50, Article 51, or Article 52 which results in a deed only having the power of proof as an underhand deed or a deed being null and void may become a reason for the party suffering the loss to claim reimbursement of costs. , compensation, and interest to the Notary.

The claim for compensation to the notary referred to in Article 84 of the UUJN-P is due to the actions of the notary who violates or does not follow the provisions contained in the UUJN-P so that the notary deed only has the power of proof as an underhand deed and/or even cause the deed to be null and void.

If we look at the strength of the proof of SKMHT made by a notary who is only guided by the method of filling out the SKMHT as stipulated in Perkaban No. 8 of 2012, which does not meet the formal requirements of a notary deed, the notary can be sued by a client who requests that the SKMHT be made by a notary, because the SKMHT only has the power of proof as an underhand deed. And because of that, it is a natural thing that this causes great losses for the client because the SKMHT cannot be used as the basis for making APHT which results in the result that the Mortgage cannot be registered at the Land Office.

It is important for the Notary in making each deed to carefully and thoroughly pay attention to and comply with all the provisions contained in the UUJN-P and the Notary Code of Ethics, so that the power of proof as an authentic deed of the deed made by the notary cannot be disputed by anyone. and everyone will acknowledge that the notarial deed has perfect evidentiary power. And if this happens, the notary will avoid all demands for the deed he made and can maintain the dignity and integrity of the notary in the eyes of the public.

In this study, the authors found an example of a legal case for making an SKMHT deed made by a Notary following the form of a deed regulated in Perkaban Number 8 of 2012 (attached). This case should be a lesson for Notaries so that in making the SKMHT deed it is subject to UUJN-P.

In this section we will analyze the legal consequences of the SKMHT deed that do not meet the requirements as an authentic deed and the legal consequences that must be borne by a Notary if the SKMHT he makes only has the power of proof as a private deed: (1) Legal consequences of the SKMHT deed: Based on the description above, it can be seen that several formal requirements related to the form of the deed cannot be fulfilled by the SKMHT deed format regulated in Perkaban Number 8 of 2012, especially those relating to the beginning of the deed and

the end/closing of the deed, if it is associated with the form of the deed. which is regulated in Article 38 UUJN-P. With the non-fulfillment of several conditions relating to the form of the deed, the SKMHT deed made before a Notary using the Perkaban deed format Number 8 of 2012 does not meet the requirements as an authentic Notary deed. Whereas Article 1869 of the Criminal Code states that "A deed which has no power or cannot affect the employee referred to above, due to a defect in form, cannot be treated as an authentic deed, but nevertheless has the power of being handwritten if it is signed by the parties." Likewise with Article 41 of the UUJN-P which states that: "Violations of the provisions as referred to in Article 38, Article 39 and Article 40 result in the deed only having the power of proof as a private deed. If the two provisions above are related to Article 1 point 7 UUJN-P which states that: "A Notary Deed, hereinafter referred to as a deed, is an authentic deed made by or before a Notary according to the form and procedure stipulated in this law", then it can be said that the Notary deed which is not in accordance with the form stipulated in UUJN-P, because there is a defect in its form, the Notary deed cannot be used as an authentic deed. The legal consequence is that the deed only has the power of proof as an underhand deed, if the deed is signed by the parties. In the opinion of G.H.S. Lumban Tobing, related to the difference between an authentic deed and a private deed, namely, an underhand deed never has executorial power and the possibility of the loss of an underhand deed is greater than an authentic deed. An authentic deed has the power of proving birth in accordance with the principle of acta publica probant seseipsa, while a private deed has no birth power. This means that the deed under the hand is valid only if the party who signed it has acknowledged the truth of the signature, meaning that if the signature has been acknowledged as true by the party concerned, then the deed is valid as perfect evidence for the parties concerned. Article 1875 of the Civil Code). [10] By not fulfilling the authentic requirements for the form of the deed, according to the author, the SKMHT made by the Notary cannot be used as the basis for making APHT. As it is known that, when SKMHT cannot be used as the basis for making APHT, the creditor will be threatened not to have rights as a concurrent creditor who has executive power over the object being guaranteed because general guarantee provisions will apply, thus the SKMHT will also be null and void. (2) Legal consequences for Notaries: In providing services to the community, a Notary as a professional must be responsible to himself and to the community. Being responsible to oneself means working for integrity, morals, intellectuals and professionalism as a part of life. In his service, a person who works professionally always maintains the noble ideals of the profession in accordance with the demands of his conscience, not just seeking personal gain. Being responsible to the community means a willingness to provide the best possible service according to his profession, without discriminating, and being responsible for all risks that arise as a result of the services provided by Notary services.

Thus, a Notary has a big responsibility for the Deed products he makes, by presenting a good and correct Deed, of good quality and having a positive impact. This hope can only be realized if a Notary in his work is submissive and obedient to the UUJN-P and the Notary Code of Ethics.

The main authority of a notary is to make an authentic deed. Authority that does not exist in other professions, therefore the authenticity of a notary deed is a very important thing. That is why a client entrusts a notary to make an authentic deed regarding all actions, agreements and provisions desired by the appearer to make a deed that has perfect evidentiary power. Once the importance of perfect evidence, a notary can be sued to replace costs, compensation and interest by parties who suffer losses caused by a deed made by a notary who only has the power of proof as an underhand deed as stipulated in UUJN-P

If you look closely, there is no special article in UUJN-P which regulates civil sanctions against Notaries. Articles containing civil sanctions against Notaries are scattered in several articles in the UUJN-P. In relation to the violation of the form of the deed which has consequences for the authenticity of the deed, it can be seen in the provisions of Article 44 paragraph (5), Article 48 paragraph (3), Article 49, Article 50 paragraph (5), Article 51 paragraph (4) UUJN-P , which in essence emphasizes that a deed that does not meet the requirements of an authentic deed results in the deed only having evidentiary power as an underhand deed can be a reason for the parties who suffer losses to demand reimbursement of costs, compensation and interest to a Notary. Thus it can be interpreted that there is a space opened by UUJN-P for Notaries to be sued in a civil manner by parties who feel aggrieved in the deed, because originally the deed was expected to be perfect evidence but because of an error in making the deed, it violated the provisions of the authentic deed as regulated in UUJN-P. Civil court lawsuits can be in the form of ordinary compensation, compensation and interest to a Notary.

Sanctions are a means of coercion as well as punishment and also so that the parties obey the provisions specified in the regulations/agreements. According to Philipus M Hadjon, sanctions are tools of power that are public law used by the authorities as a reaction to non-compliance with administrative law norms.

In a legal rule the inclusion of sanctions is an obligation, this is because if a legal regulation cannot be enforced if at the end it does not include sanctions.

There is no point in enforcing legal rules when they cannot be enforced through sanctions and enforce the rules intended procedurally (procedural law).

In this study, the authors found an example of a legal case that was brought to the Court regarding the making of an SKMHT deed made by a Notary following the form of a deed regulated in Perkaban Number 8 of 2012 (case

evidence attached). This case should be a lesson for Notaries so that in making the SKMHT deed it is subject to the UUJN-P so that it does not cause legal consequences for the deed and also for the Notary himself.

## 4. CONCLUSION

The conclusion of the thesis entitled Juridical Review of the Form of Authentic Deed Made by a Notary According to Article 38 of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning Notary Positions:

1) Power of Attorney for Imposing Mortgage Rights (SKMHT) made before a Notary using the format of the SKMHT deed according to letter H (Attachment 23) Article 96 paragraph (1) PERKABAN Number 8 of 2012 concerning Amendments to PMNA/Ka BPN RI Number 3 of 1997 concerning Provisions for the Implementation of PP No. 24/1997 on Land Registration do not meet the formal requirements as an authentic deed and are contrary to Article 1868 of the Civil Code, Article 1 Number (7) and Article 38 of the UUJN-P.
2) The legal consequences that can arise from the SKMHT deed that do not meet the requirements as an authentic deed result in the SKMHT deed only having proof of power as an underhand deed, and therefore the deed cannot be used as the basis for making APHT This condition has legal consequences for the Notary because if the parties feel aggrieved from the deed, then according to the provisions of Article 44 paragraph (5), Article 48 paragraph (3), Article 49 paragraph (4), Article 50 paragraph (5), Article 51 paragraph (4) UUJN-P, then there is an opportunity for the parties to sue in a civil manner through the District Court for reimbursement of costs, compensation and interest to a Notary.

The Author's Suggestion on the Juridical Review of the Form of Authentic Deed Made by a Notary According to Article 38 of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of a Notary:

1) A firmness is needed from the government, especially between the Ministry of Agrarian Affairs and Spatial Planning / Head of the Indonesian National Land Agency to coordinate with the Ministry of Law and Human Rights of the Republic of Indonesia in implementing regulations governing the SKMHT deed made by a Notary in order to create harmonization between norms in accordance with the scope of authority of each ministry. who supervises the Notary and PPAT.
2) At the practical level, it must be avoided with a good and correct understanding of the Hierarchy of Indonesian Laws and Regulations, and putting the public interest above sectoral interests.
3) For NNotaries should carry out their positions professionally and consistently with UUJN-P and not be affected by disharmony of understanding that is built on a normative and practical level regarding the SKMHT deed, so that in making the SKMHT deed the reference is the SKMHT material according to the UUHT, while the form of the Notary SKMHT deed must be guided by in Article 38 UUJN-P. In addition, there needs to be courage from a Notary or INI (Indonesian Notary Association) to conduct a judicial review of Perkaban No. 8 of 2012 to the Supreme Court of the Republic of Indonesia to obtain legal confirmation and certainty for a Notary who makes an SKMHT deed so that in practice there is no longer a difference of opinion either between notary and BPN.
4) Banking parties must make preventive efforts in overcoming the problem of differences between norms governing the SKMHT deed so that it can provide legal certainty for the SKMHT deed. The preventive effort that the author means is to make a binding statement or agreement to the debtor so that it does not legally question the form of the SKMHT deed as a justification in the event of a conflict in the future.

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*Analysis of Article 6 of Law Number 4 year 1996 concerning Mortgage Rights and Article 1400 of the Indonesian Civil Code on Subrogation*

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# ANALYSIS OF ARTICLE 6 OF LAW NUMBER 4 YEAR 1996 CONCERNING MORTGAGE RIGHTS AND ARTICLE 1400 OF THE INDONESIAN CIVIL CODE ON SUBROGATION

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## ABSTRACT

The problem of guaranteeing mortgage rights on the debtor's property will not actually occur if the debtor fulfills the obligations as stated in the principal credit agreement. However, it often happens that debtors as credit recipients cannot fulfill their obligations as agreed. Article 20 paragraph 1 of the law on mortgage rights has regulated the protection for creditors. The creditor has the authority to execute the guarantee provided by the debtor once a state of default is established. This is a juridical normative legal research with a statutory approach and a conceptual approach. The research results show that in the event where the debtor is in default, then subrogation can be carried out, namely the reimbursement of the creditors' rights to payment by a third party. Subrogation occurs either by agreement or by law, and is different from debt relief in that it involves a third party who pays the recurring debts to the creditors, not with the aim of releasing the debtor from his obligation to pay the debt but replacing the position of the former creditor. With regards to mortgages as collateral in debt and loan agreements, if the debtor does not change the object of collateral as agreed in the initial agreement, then the same provisions on mortgage will be applicable to the new creditor.
*Keywords:* Mortgage, subrogation.

## INTRODUCTION

Every collateral arrangement that is executed between the creditor and the debtor begins with a credit agreement. The credit agreement is a principal agreement that is real in nature with collateral as guarantee against default, setting out the terms and conditions of certain borrowing arrangement between a creditor and a debtor, which is sometimes followed by an additional, *accessoir* agreement to secure certain collateral for repayment. Additional agreements are needed for the purpose of providing guarantees to creditors to ensure that creditors' security is more securely guaranteed[1]**.** The existence of these agreements until its expiration is determined by the existence of its principal agreement, starting at the time the credit agreement is entered into and followed by the delivery of money from the creditor to the debtor, marking the birth of a debt.

Creditors acknowledge that there are always risks entail in the credit realization process, one of which is the event of default. Loan recipients or debtors who at the beginning of the agreement were deemed worthy of receiving credit/loans in many cases turned out to be unable to settle their obligations as set forth in the credit agreement e.g., unable to complete payments or to pay the installments before they are due. Anticipating such risk that the loan is not returned in accordance with the agreement, in terms of granting credit, the creditor must apply sound credit principles, offset by conducting an assessment of the debtor him/herself using the 5C prudential principles (character, capacity, capital, and conditions of economic).

[1]Frieda Husni Hasbullah, Civil Material Law Volume II: Guaranteed Rights, (Jakarta: Ind-Hill Co, 2005), p. 6.

Collateral is property or assets belonging to the debtor that is promised to the creditor in the event that the debtor is unable to repay the loan. If the debtor is unable to pay or fail to pay, the creditor can execute his right for repayment by privately selling the collateral or placing it for sale by means of auction, either action followed by returning the excess amount of gain to the debtor. Regarding the collateral as requested by the creditor and submitted by the debtor as security, there exist various kinds of guarantees i.e., material guarantees for movable objects as well as for immovable goods, such as goods which in their nature and forms are declared by law as immovable objects and land parcels with ownership entitlements and rights as regulated in the law which can be encumbered by mortgage rights. Among others, mortgage rights can be imposed on land pieces with varying titles, namely ownership rights, cultivation rights, and building use rights. Credit guarantees often use mortgage rights over land in particular because land parcels are considered to increase in value from time to time so that its economic value becomes higher.

The encumbrance of mortgage on the rights over land is intended as guarantee in paying off the debtors' debts to creditors due to certain loan/credit agreement, expressed in the form of collateral agreement, which is an accessoir to a debt agreement. The term “accessoir” implies that collateral agreement is an additional agreement whose nature and existence depends on the main agreement. Therefore, the accessoir nature inherent in collateral agreements has various legal consequences, as follows:[2]

a. The constitution and termination of the additional agreement is dependent on the main agreement;
b. If the main agreement is void or cancelled, the additional agreement is also considered void;
c. If the main agreement changes with regards to the responsibilities, then the additional agreement follows suit;
d. If the main agreement is transferred by means of cessie or subrogation, the additional agreement follows suit and is automatically transferred without any special assignment.

Mortgage rights are the only guarantee rights to land that are recognized in accordance with the General Explanation of Mortgage Law, in the third paragraph number 5, which reads as follows: "Mortgage rights are the only [legally acknowledged] institution of guarantee rights over land, ..." Mortgage Law also outlines the provisions regarding guarantees in the form of mortgages in Article 10 paragraphs (1) and (2) which reads:[3]

1. The granting of mortgage rights is preceded by a promise to provide mortgage rights as collateral for the settlement of certain debts, which are set forth in and are an inseparable part of the relevant debt agreement or other agreements that give rise to the debt.
2. The granting of mortgage rights is carried out by making a deed stipulating the granting of mortgage rights by the Land Deed Making Officer (*Pejabat Pembuat Akta Tanah*/“PPAT”) in accordance with the applicable laws and regulations.

The problem of encumbering mortgage rights on the debtor's property will not actually occur if the debtor fulfills the obligations as stated in the principal credit agreement. However, it often happens that debtors as credit recipients cannot fulfill their obligations as initially

[2]Ibid, p. 6-7
[3] Law Number 4 of 1996

agreed. Article 20 paragraph 1 of the Mortgage Law has regulated the protection for creditors, manifested in the form of authority to execute the guarantee provided by the debtor.

Another option that can be taken for consideration in the settlement of the loan/credit agreement is by means of transfer of receivables, which is known as subrogation. Subrogation can occur due to payments made by third parties either directly or indirectly to creditors. The third party then becomes the new creditor to the debtor, in place of the former creditor. Subrogation is one appropriate option to use as a way out of debt problems, especially when large amount of settlement is concerned because the essence of implementing subrogation is basically mutual assistance to the parties involved. Debtors are helped by the third parties who take over their obligation to repay debts although the relief is temporary as payment obligation is transferred to another, newly set creditor. Article 1400 BW regulates the arrangement of subrogation, defining that it takes place when a third party pays to the creditor with the replacement of rights that occur because it is determined by law or through an agreement. It is expressly stated that subrogation is the replacement of rights that is different from debt relief. Subrogation results in the transfer of the rights to claim from creditor to certain third party as new creditor, who has the right to execute the collateral given by the debtor to the former creditor.

**PROBLEM:**

1. How is the settlement of the credit agreement through subrogation carried out if the debtor is unable to fulfill his obligations?
2. How is the terms of mortgage as defined in the credit guarantee after subrogation took place?

## 2. RESEARCH METHODS

This research is a juridical normative legal research with statutory and conceptual approach. The sources or legal materials used in this research are primary, secondary, and tertiary legal materials, which are then analyzed in several stages in the form of discussions in answering the stated problems and producing conclusions.

## 3. DISCUSSION

### 3.1 Mortgage Right

Law Number 4 of 1996 concerning Mortgage Right on Land and Objects Related to Land (hereafter referred to as "Law Number 4 of 1996") defines that mortgage rights on land and objects related to land are security rights that are imposed on land rights, which is an integral part of the land, for repayment of certain debts by prioritizing certain creditors as referred to in Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles (hereafter referred to as "Law Number 5 of 1960"). Law number 4 of 1996 in the explanation also states that mortgage rights are collateral for land for repayment of debts.

Other laws and regulations relating to hypotheek, which was previously regulated in Book II of the Indonesian Civil Code relating to land, and other laws and regulations concerning *Credietverband* in the Staatsblad 1908-542 as amended by the Staatsblad 1937-190, have been deemed no longer in accordance with the needs of credit activities of this time, with the

development of the Indonesian economic system based on Law Number 5 of 1960 Article 57. These provisions are clearly no longer in accordance with the principles applicable in the contemporary national land law, and therefore cannot keep up with recent developments, among others in the adjoining field of credit and collateral rights. It is felt that these provisions do not provide adequate guaranty in legal certainty for credit agreements, which results in different views and interpretations on various issues as well as different implementation of land security law, such as in matters of execution, executorial title, and others.

The right to use certain land parcel/usufructuary rights is not designated in the Basic Agrarian Law as an object of mortgage, because mortgage is only applicable to registered land rights, otherwise they cannot qualify as debt security by not meeting the publicity requirements. However, in recent developments, usufructuary rights are granted in transferable state to individuals or civil legal entities, such as for strata titles, which can be used as collateral and must be registered, hence its current qualification as mortgage object. Equally important, in addition to realizing the unification of national land law, the granting of usufructuary rights means responsibility of land management and cultivation for the holders usually consisting of economically weak groups and who do not have the ability to own land with building rights and property rights, which also open up opportunities to obtain credit by using said rights as collateral.

The implementation of the basic agrarian law which regulates various matters related to mortgage institutions has been adjusted in scope with Law number 4 of 1996 in accordance with the development of the following circumstances:

1. concerning the eligible object of mortgage;
2. concerning the grantor and holder of mortgage rights;
3. concerning procedures for granting, registering, transferring, and canceling mortgage rights;
4. concerning the execution of mortgage rights;
5. regarding the writing off of mortgage rights; and
6. regarding administrative sanctions.

The advantage of mortgage is that it protects the creditor related to the guaranteed execution of the collateral if it turns out that the debtor is in breach of contract, therefore the creditor should not ignore the protection and guarantee offered by mortgage rights. Article 20 of Law Number 4 of 1996 states that:

(1) If the debtor is found to be in breach of contract:[4]
   a. the right of the first Mortgage holder to sell the object of the Mortgage as referred to in Article 6, or
   b. 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 procedures specified in the laws and regulations for the settlement of the Mortgage holder's receivables with priority rights over other creditors.

[4] Article 20 Mortgage Law

(2) Under the agreement between the grantor and the holder of the Mortgage, the sale of the object of the Mortgage can be carried out underhandedly if in this way the highest price can be obtained that benefits all parties.

The execution through the sale of the mortgaged object can be done within a period of 1 (one) month after the written notification is delivered by the creditor as the holder of the mortgage and/or the debtor as the provider of the mortgage. Notifications to interested parties are announced in at least 2 (two) newspapers distributed in the area concerned or through the local media, followed by a waiting period to ensure that execution can be carried out without any objections from the parties involved or other parties. Therefore, it can be concluded that the mortgage can assist the debtor in completing his obligations or assist in paying off the debt should the debtor fails to pay. However, this does not mean that there is total freedom and ease for the creditor in executing the object of collateral.

### 3.2 Subrogation

Subrogation in Article 1400 of the Civil Code is stated as a replacement of rights by a third party who pays settlement to the former creditor(s). Subrogation occurs either by agreement or because it is regulated by law. Subrogation is different from debt relief; it is stated explicitly, a third party pays debts to the creditor not with the aim to release the debtor from his obligation to pay the debt but to replace the position of the former creditor. In subrogation, debt payments made by a third party to creditors are carried out directly or indirectly through the debtor, who entered into an agreement with the creditors. Thereupon, the position of the former creditor is replaced by a new creditor.

Subrogation that occurs by agreement has been regulated in Article 1401 of the Civil Code, whilst the one that occurs because of the law is regulated in Article 1402 of the Civil Code, according to which subrogation occurs without the need for approval between a third party and the former creditor or between a third party and the debtor.[5]

Article 1401 of the Civil Code regulates how third party replace the position of the debtor, that is with the following approval or agreement:

1. If the creditor receives payment from a third party. It is stipulated that the third party will replace the creditor's special rights and rights to claim against the debtor. In sub-order the time of payment must be expressly and precisely stated.
2. If the debtor borrows a sum of money to fulfill his obligations in the form of debt repayment then the debtor declares that the person who helps to pay off the debt will replace the rights of the former creditor, then this subrogation is valid as long as it is made in an authentic deed which contains a loan agreement to pay off the loan and an explanation that the debt is repaid by the new creditor in the form of money the new creditor borrows against the debtor.

Article 1402 of the Civil Code stipulates that subrogations could also occur following the stipulation of the law:[6]

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[5]Suharnoko, SH, MH et. Al, Doctrine of Subrogation, Novation, and Cessie in the Civil Code, Nieuw Nederlands Burgerlijk Wetboek, French Civil Code and Common Law.

[6] Article 1402 of the Civil Code

1. For a person who is himself a person, having debts to pay off another debtor who, based on his privileges or a mortgage, has a higher right.
2. To buy an immovable object, which has used the money of the price to pay off the debtors, to whom the object is tied up in a mortgage.
3. For a person who together with another person or for another person is required to pay a debt with an interest in paying off that debt.
4. For an heir who is receiving an inheritance with the privilege of keeping a record of the condition of the inheritance price, he has paid the inheritance debts with his own money.

Subrogation is regulated in book III of the Civil Code starting from article 1400 to article 1403, which regulates the possible ways of transition that occurs in the transfer of creditor rights by way of law or agreement between the creditor and the debtor to the new creditor. In Article 1403 of the Civil Code, it is determined that the concept of subrogation stipulated in the previous articles occurred both against third parties and against debtors. Subrogation does not reduce the rights of the creditor if he only receives partial payment in the event that he is able to exercise his rights regarding what is accrued to him earlier than the person from whom he receives said partial payment.

Subrogation is carried out by way of payments made by third parties, either directly or indirectly, either known by the debtor or otherwise, which results to the creditor transfer of receivables, either in whole or in part, as well as the creditor being replaced by third parties. In order for a contractual subrogation to be considered valid, the procedure for subrogation arising out of an agreement is as follows:

1. An authentic deed is established regarding a loan of money.
2. The deed must contain detailed information about the loan to pay off the debtor's debt, and the amount of the loan.
3. A statement that the money used by the debtor for payment to creditors comes from a third party stated in the debt settlement sign.

According to the law, subrogation could occur without any agreement between the former creditor and a third party or between the debtor and third parties. Whilst according to the law, subrogation is caused when payments are made by third parties for their own interests and when a creditor pays off the debts of other creditors whose nature of debt precedes them.

### 3.3 Settlement of Credit Agreements Through Substitution if the Debtor is Unable to Fulfill His Obligations

Any agreement regarding indebtedness/borrowing relationship between the parties (creditor and debtor) must be based on a written agreement. The debt agreement is regulated in the Civil Code, which is specifically stated in Article 1754 of the Civil Code, as follows:

> *"A consumer loan is an agreement that stipulates that the first party delivers a number of consumables to the second party on the condition that the second party will return similar goods to the first party in the same amount and condition."*[7]

[7] Article 1754 of the Civil Code

In another article of the Civil Code, namely in Article 1131, it is stated that:

> *"All movable and immovable property belonging to the debtor, both existing and future, shall serve as collateral for the debtor's individual obligations."*[8]

Based on the aforementioned articles, it is stated that collateral agreement is an agreement where the debtor owns the object as collateral for the credit agreement. The guarantee given to the creditor could either be in material or immaterial form. Collateral in material form usually takes the form of material rights, such as guarantees for movable objects. Meanwhile, non-material guarantees are immaterial.[9] While the applicable guarantees are:

1. Pledge;
2. Mortgage;
3. Fiduciary guarantee;
4. Mortgage on ships and aircraft;
5. *Borgtocht*/individual guarantee;
6. Liability guarantee; and
7. warranty agreement.[10]

Next, the scope of the guarantee is divided into two (2) i.e., general and special guarantees[11]. Special guarantees are further divided into two (2) types, namely material and personal guarantees. Material guarantees are immovable objects, which include mortgage, and movable objects.[12] Guarantees in the form of mortgages are clearly regulated in the Law Number 4 of 1996. Article 1 number 1 explains as follows:

> "*Mortgage rights to land and objects related to land, hereinafter referred to as mortgage rights, are security rights imposed on land rights as referred to in Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles, including or not along with other objects which are an integral part of the land, for the settlement of certain debts which give priority to certain creditors over other creditors.*"[13]

Mortgage holders are creditors, namely individuals or legal entities that are designated as parties providing credit facilities. Meanwhile, those who provide mortgage rights are debtors, either individuals or legal entities that have the authority to take legal actions with regards to the collateral in question. In the case of the presence of a third party who is willing to pay off the debt due to the debtor's default, the arrangement is referred to as subrogation. Based on article 1400 of the Civil Code, it is explained that subrogation or the transfer of creditor rights to a third party who pays the creditor can and is possible due to approval rendered in and by the law.

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[8] Article 1131 of the Civil Code

[9] Salim H. S, The Development of Guarantee Law in Indonesia (Jakarta: Raja Grafindo Persada, 2017), p. 7.

[10] Ibid, p.25

[11] Ibid, p. 8

[12] Ibid, p. 8-9

As previously explained, subrogation according to the law means that it occurs without the need for approval between a third party and the former creditor, as well as any agreement between the debtor and a third party. In addition, it is also stated that: "if the receivables guaranteed by mortgage are transferred due to cessie, subrogation, inheritance or other reasons, the mortgage will also be legally valid to the new creditor."[14] Therefore, if the receivables guaranteed with mortgages are transferred due to subrogation, then the mortgages will also be transferred by law to the new creditors.

With the transfer of the mortgage, the next step is that the mortgage must be registered at the land office by the third party as the new creditor. The transfer of mortgage rights to said third party as the new creditor takes effect from the date and day of recording/registration in the land book, i.e., at the latest the seventh day after the documents required in the registration of the transfer of mortgage rights are complete.[15]

In the explanation of Article 16 (1) of Law Number 4 of 1996, it has been explained that the transfer of mortgage rights occurs due to law. The recording/registration of such transfer can be done based on a deed that proves that the guaranteed receivables have been transferred from the former to the new creditor, so it does not need to be proven by any deed issued by the land deed official other than simple alteration on the mortgage certificate indicating such transfer. Thus, if there has been a transfer of receivables through subrogation between the first creditor and a third party, what the debtor is going to need are:

1. the Deed which is used as evidence of the transfer of receivables to the new creditor.
2. Copies of the mortgage certificate and certificate of land title and the land register with remarks from the land office about the mortgage and the creditor.

The next step is to confirm the deed to the first creditor about the transfer of receivables, then register to the land office about the transfer of mortgage rights recipient. If the progress of transfer is not carried out properly, the former creditor will not acquire any benefits over the mortgage arising from the debt agreement between the debtor and the third party as the new creditor.

One of the reasons for the annulment of a debt agreement is the renewal of debt, which is regulated in Article 1381 of the Civil Code in three (3) types of methods as follows:

1. *a debtor makes a new debt agreement for the benefit of the creditor, which subsequently replaces the old debt, which is written off because of it;*
2. *a new debtor is appointed to replace the old debtor who was released by the creditor of his obligations;*
3. *as a result of a new agreement, a new creditor is appointed to replace the former creditor against which the debtor is released.*[16]

In the light of the articles above, it can be concluded that subrogation could classify as the reason for the renewal of debt between creditors and debtors so that the debt agreement between the debtor and the former creditor is canceled. The agreement is renewed between new

[14] Article 16 Paragraph 1 of Law number 4 of 1996 concerning Mortgage Rights.
[15] Article 16 Paragraphs 4 and 5 of Law Number 4 of 1996 concerning Mortgage Rights.
[16] Article 1381 of the Civil Code

creditor and the debtor and just as well the deadline for payment of obligations in the new agreement between the new creditor and the debtor does not keep up the previous payment deadlines.

The renewal of the debt agreement and the deadline in the new agreement means that the former creditor cannot execute the object of the mortgage directly, but in accordance with the deal from both parties regarding the payment of the debt, completely with a new time limit. In the event the former creditor takes no heed to the new arrangement and acts to occupy the collateral without the debtor's knowledge, then the action is included in the category of unlawful act as stated in Article 1365 of the Civil Code as follows;

> *"Every act that violates the law and causes harm to another person obliges the person who caused the loss because of his fault to compensate for the loss."*[17]

The acts that are against the law are acts which:[18]

1. violate applicable laws;
2. violate the rights of others which protection is guaranteed by law;
3. is contrary to the legal obligations of the perpetrator;
4. is contrary to standard of decency; or
5. is contrary to good attitude in society to care for others.

The former creditor taking action to occupied the collateral can be categorized as an unlawful act, if the registration regarding the status of the mortgage at the land office has not been carried out between the debtor and the former creditor but the former creditor has occupied the collateral which is the object of the mortgage is in default and regulated in Article 1234 jo. Article 1238 of the Civil Code, which stated that if the debt agreement between the debtor and the former creditor does not state a clause on obligations and regarding the terms of transfer of mortgage. In the debt agreement, there must be a clause that state that if the transfer of mortgage occurs without the knowledge and/or without any permission of the debtor, then the creditor has canceled.

### 3.4 Mortgage Assigned on Credit Guarantee After Subrogation

The position of the grantor of the mortgage remains as the owner, who also retains the authority to take legal actions against the object that is burdened with the mortgage. In Article 14 paragraph 3 of Law No. 4 of 1996, it is stated that:

> *"The mortgage certificate as referred to in paragraph (2) has the same executorial power as a court decision that has obtained permanent legal force and is valid as a substitute for the grosse acte Hypotheek as long as it concerns land rights.*[19]

*Parate Executie* is the authority possessed by the creditor to bid on his own power the goods that are the objects of collateral if the debtor cannot fulfill his obligations without having

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[17] Article 1365 of the Civil Code

[18] Munir Fuady. Unlawful Acts: A Contemporary Approach, (Bandung: PT. Citra Aditya Bakti, 2013), page 11

[19] Article 44 Paragraph 3 of Law Number 4 of 1996 concerning Mortgage Rights

to first seek approval from the chairman of the court (*fiat executie*). As an embodiment of the position that is prioritized and owned by the mortgagee in case the debtor broke his part of the agreement, the mortgagee can be executed through *parate executie* which is a convenience provided by law. Law No. 4 of 1996 explains that with regards to the exercise of *parate executie*, the agreement must include clearly and unequivocally the terms, conditions, and procedure relating to its execution if the debtor is unable to fulfill his obligations/breach of contract. This contractually established terms, in any case, does not stand alone, but equal protection is expected to be obtained as granted by law. However, this must be followed up again with an affirmation of its validity and subsequent application in the form of promises that must be stated clearly in the deed of encumbrance of the mortgage that was made when the agreement was entered upon by the parties involved.

In Article 1400 of the Civil Code, as previously stated, subrogation can occur either because of the law or because of an agreement. In relation to the latter, Article 1401 of the Civil Code distinguishes the following:

1. Creditor-initiated subrogation: occurs when a third party as a new creditor pays the former creditor. The new creditor will replace his privileges, mortgages, claims, and rights held against the debtor. The event that the creditor initiates subrogation when the new creditor makes a payment must be stated explicitly in a deed as to ease future burden of proof.
2. Debtor-initiated subrogation: occurs when the debtor borrows money from a third party (new creditor) to fulfill his obligations to pay debts to the former creditor. The new creditor will replace the rights previously held by the former creditor. Such subrogation as initiated by the debtor must also be stated in an authentic deed to ensure its validity. Said deed must at last contain a statement that the money borrowed by the debtor from the new creditor will be used to pay off the debtor's debt to the former creditor.

Within the subrogation initiated by the debtor, there are 2 (two) different legal relationships, namely the lending and borrowing of money between the debtor and the new creditor and the paying off of the debtor's debt to the former creditor.[20]

Subrogation due to law occurs because a third party as a new creditor pays the debtor's debt to the former creditor without making an agreement. Based on article 1402 of the Civil Code, this happens when:

1. a creditor pays off another debtor who by virtue of a privilege or mortgage right has a higher priority of settlement;
2. A buyer of a fixed object who has used the money for the price of the object to pay off a debtor to whom the object is bound by a mortgage;
3. A person who together with another person or for another person is obliged to pay a debt, has an interest in paying off the debt, as in the payment by one of the creditors on a debt with several responsibilities or payments made by the guarantor;
4. An heir who receives with privileges, but has paid the entire debt of the testator.[21]

[20]Herlien Budiono, General Teachings of Covenant Law and Its Application in the Notary Field, (Bandung: Citra Aditya, 2010), p. 176

[21]Ibid, p. 176-177

Repayment of debt by a third party or a new creditor without any contractual arrangement is a subrogation that occurs because of the law, in this case a third party or a new creditor paying the debtor's debt because there is an interest in carrying out the settlement without requiring approval between a third party as a new creditor and the former creditor, as stated in Article 1402 (3) of the Civil Code: "that for a person who, together with other people or for other people, is obliged to pay a debt, has an interest in paying a debt, has an interest in pay off the debt." [22]

Subrogation carried out by third parties or new creditors in this case needs to be emphasized that it is not to free the debtor from his debts and obligations but the third party will replace the position of the former creditor with the new creditor. Debtors still have an obligation to settle their obligations, namely paying debts to third parties as new creditors.

From what has been said above, it is clear that both subrogation that is due to agreement and subrogation due to law are related to mortgage rights as objects of collateral in debt and loan agreements, if the debtor does not change the object of collateral as agreed in the initial agreement, then the mortgage will remain and be accepted by the new creditor.

Based on Article 20 paragraph 1 letter a and b of the Mortgage Law, the execution of mortgage rights which will be carried out by the new creditor if the debtor is later found himself in default, can be carried out in three (3) ways, namely:

1. Executorial Title
   Creditors who already hold mortgage certificates can collect receivables from debtors. Creditors can also execute mortgage rights without going through a lawsuit process.
2. Parate Executie
   Creditors take what they are entitled to without an intermediary judge. The sale of mortgage rights is carried out in the manner as regulated in Article 1211 of the Civil Code, with direct assistance by the state auction office without needing to obtain any order or *fiat executie* from the head of the district court.
3. Selling in an Underhanded Manner
   The sale of mortgage is carried out after a notification is rendered from the creditor to the debtor. Submitting to market mechanism, the sale of the mortgage object is expected to achieve the highest sale price point in order to benefit all parties. If no objection is rendered, then by agreement a sale of the object of collateral is made with a power of attorney from the mortgagee.

## CONCLUSION

In the event that the debtor is in default, that is when he is unable to fulfill his obligations to the creditor, then subrogation can be carried out, namely through the settlement of the creditors' rights for payment by a third party. Subrogation occurs either by agreement or because it is regulated by law. It is a different concept from debt relief in that it involves a third party who pays debts to creditors with the aim of not releasing the debtor from his obligation to pay the debt, but said third party simply replaces the position of the former creditor as the new creditor. With regards to mortgages as objects of collateral in debt and loan agreements, if

[22] Sutarno, Legal Aspects of Bank Credit, (Bandung, VC Aditya, 2005), p. 321.

the debtor does not change the object of collateral as agreed in the initial agreement, then the same mortgage will be received by the new creditor as the security of the continuing debts.

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