

## **The Legal Position of the Electronic Mortgage Rights Certificate as a Evidence Tool in Indonesian Civil Law Procedure**

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### **ABSTRACT:**

*Along with technological developments in 2019, the Ministry of Agrarian Affairs and Spatial Planning / National Land Agency of the Republic of Indonesia introduced the Electronic Mortgage (HT-el) service. This service creates a conflict of norms because the UUHT, as the highest legal basis in the scope of Mortgage Rights, does not regulate the making of Mortgage Rights electronically. This study analyzes electronic mortgage certificates' legal position as evidence and executorial power of electronic mortgage certificates. The research method used is normative legal research using a statutory approach and a conceptual approach. The results showed that HT-el certificates could not be used as evidence because the ITE Law has confirmed that the documents used in law enforcement in civil, criminal, and state administrative procedures are not allowed in digital form. HT-el certificates also do not have executorial power because their creation deviates from the provisions stipulated in the UUHT.*

**KEY WORD:** *Mortgage Rights, Electronic Evidence, Electronic Mortgage Certificate*

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### **I. INTRODUCTION**

Lending provides many opportunities for job creation because credit has provided opportunities for people to develop a business. Thus, the unemployment rate is expected to decrease. Through the distribution of funds to the community, the state's main objective, namely improving the welfare of the people, can begin to be achieved with the presence of many new jobs. All of these activities are carried out to help accelerate the equitable distribution of economic growth to achieve an increase in the standard of living of the people at large.

To maintain credit business institutions' health, especially banks, this credit business should be accompanied by guarantees; this is to provide security in providing credit and certainty of repayment of the credit. It is appropriate for creditors and recipients, and other parties involved in it to receive protection through a guarantee institution that can provide legal certainty for all parties involved in the credit business (Yulianto; 2004).

One of the guarantee institutions that support credit activity is Mortgage Rights which are used as collateral for collateral in land. Mortgage Rights is a term in the National Security Law referred to by Law Number 5 of 1960 concerning Basic Agrarian Regulations (UUPA). Article 51 of the UUPA stipulates that security rights can be borne by ownership rights, business use rights, and building use rights as regulated by law. Based on these provisions, Law No. 4/1996 concerning Mortgage Rights to Land and Land-Related Objects (UUHT) was promulgated.

The Mortgage Agreement is a follow-up agreement (accessoir) that follows the main agreement. The principal agreement can be a debt agreement or a credit agreement with a debt or credit agreement with guarantees. The mortgage is not a guarantee right that is born because of the law but is born out of a deal. Therefore, it must be agreed beforehand between the creditor and the debtor in the debt agreement or credit agreement that the collateral object will be saddled with a Mortgage (Dewi: 2012).

Globalization has entered a new era called the Industrial Revolution 4.0. The Industrial Revolution 4.0 will fundamentally disrupt various human activities in multiple fields, not only in technology but also in other areas such as economy, society, and politics. Human life is increasingly developing in various sectors of life; this development coincides with current technological developments that increasingly influence the current human mindset (Amalia et al; 2020). Along with products in society regarding technology and information, various kinds of activities that lead to electronics have emerged and the realm of law where electronic evidence

is becoming known. The electronic evidence in question is in the form of Electronic Information and Electronic Documents; electronic evidence can be said to be valid when using a system regulated by law, such as being guaranteed its integrity, correctness, authenticity, and can be accounted for its appearance which can also be accessed to explain a situation (Arkisman & Lafitri; 2020).

Along with technological developments that lead to entirely digital things, in 2019, the Ministry of Agrarian Affairs and Spatial Planning / National Land Agency introduced the Electronic Mortgage (HT-el) service. The HT-el service is based on the Regulation of the Minister of Agrarian Affairs and Spatial Planning / Head of the National Land Agency Number 5 of 2020 concerning Electronically Integrated Mortgage Services (Permen ATR / Ka. BPN No. 5 Th. 2020). The birth of HT-el services, on the one hand, provides convenience and affordability in the implementation of public services. On the other hand, it creates a conflict of norms because the UUHT, as the highest legal basis in the scope of Mortgage Rights, does not regulate electronic mortgage making. This has the potential to make the HT-el certificate the main product of HT-el services without executorial power so that, in this case, the creditor becomes a party prone to lose.

## **II. RESEARCH METHODOLOGY**

The present study uses normative legal research methods conducted to find solutions to existing legal problems. The research approach used is the statute approach and the conceptual approach.

## **III. DISCUSSION**

The term Mortgage Rights is taken from the term guarantee institution in customary law. In customary law, the term mortgage rights is known in West Java, also in some areas in Central and East Java it is known as *jonggolan* or the term *a jeran* which is a guarantee institution in customary law whose objects are usually land and houses. The term security right through the Basic Agrarian Law has been upgraded to a term of guarantee rights institution in the national legal system. The security right as a guarantee rights institution for the land is expected to be a mortgage substitute from the Civil Code (Usman; 2009).

Land guarantee rights institutions have the following characteristics:

1. *Droit de preferent* means giving a position or preceding the holder to it, as regulated in Article 1 number 1 and Article 20 paragraph (1) of the UUHT. The preferred creditor as HT holder has the right to sell through a public auction of land which is pledged as collateral with the right to precede other creditors.
2. *Droit de suite* means always following an object guaranteed in the hands of whoever the item is, which is regulated in Article 7 of the UUHT. This characteristic is one of the unique guarantees for the interests of the Mortgage holder.
3. Fulfill the principles of specialty and publicity to bind third parties and provide legal certainty to interested parties.
4. Easy and sure execution of execution. If the debtor is in default / in default, an auction of the object used as collateral can be auctioned immediately. It's easy because without having to file a lawsuit in court, it requires a long and definite execution called *parate execution*, which is regulated in Article 224 HIR (Dewi; 2012).

According to Moch. Isnaeni, in granting mortgage rights, there is protection for debtors and third parties; this protection is characterized by three things: First, the provision of authentic deeds aimed at realizing protection guarantees for parties related to collateral rights. Second, there are unique and publicity requirements that guarantee that the party giving the guarantee object will be sold by auction if the conditions are met. The result will be taken in the amount of the outstanding debt. Third, the prohibited promise means that the interests of the debtor of the guarantor of the security right will be protected by a commitment that is prohibited from being made between the holder of the mortgage right and the guarantor of the security right which has been stated in Article 12 of the UUHT that there is protection of the interests of the debtor and the giver of the security right, namely the right holder. The dependent is prohibited from becoming the owner of the mortgage object if the debtor fails his / her promise (Isnaeni; 2016).

The process of imposition of Mortgage Rights is carried out through 2 stages of activity; first, granting Mortgage Rights, namely by doing a Deed of Granting Mortgage Rights (APHT) by the Land Deed Making Official (PPAT), which is preceded by a guaranteed receivable agreement. Second, the registration stage of Mortgage Rights by the Land Office is when the Mortgage Rights are born. The Land Office carries out registration of Mortgage Rights by making a land title and recording it in the land book of land rights, which are the Mortgage Rights object and copying the records on the certificate of land title concerned. As proof of the existence of Mortgage Rights that have been registered by the Head of the National Land Agency, a certificate of Mortgage Rights is issued (Utomo; 2020).

Article 6 of the UUHT stipulates that if the debtor is in default, the first Mortgage holder has the right to sell the Mortgage object at his power through a public auction and take the repayment. The Mortgage Holder can separate the execution, which means that the Mortgage holder does not need to obtain approval from the guarantor of the Mortgage, or does not need to ask for a decision from the local district court if he will execute

the Mortgage on the object of the debtor's guarantee in the event the debtor is in default. Holders of Mortgage Rights can directly request the head of the Auction Office to carry out an auction of the object of the Mortgage Rights concerned. The right to sell the Mortgage item on its power is one manifestation of the preferred position held by the holder of the Mortgage Rights.

The Land Office in stages carries out the HT-el system's implementation according to the readiness of supporting data. Four types of Mortgage services can be submitted through the HT-e system, including registration of Mortgage Rights, transfer of Mortgage Rights, change of creditor names, and abolition of Mortgage Rights. To create an effective and efficient system, comprehensive cooperation from interested parties is required (Imanda; 2020).

There are three pillars of the implementation of Electronic Mortgage Rights, including:

- a. The three elements, namely the Bank, PPAT, Land Office, are the elements of human resources that determine HT-el's implementation quickly and by what is faced by the Government and the community. The three pillars of the elements mentioned above, namely the Bank, PPAT, and Land Office, have the function of assisting the Government's tasks;
- b. In providing HT-el services, it needs to be supported by sophisticated equipment that can be a means of data storage and data transmission to be mutually integrated between the regional Land Office and the Regional Office of the Provincial National Land Agency. An HT-el service is a form of service provision from the Ministry of ATR / BPN in facilitating services to the public by taking advantage of developments in information technology;
- c. The regulation regarding HT-el is a series of mortgage service processes in maintaining land registration data which is carried out through an integrated electronic system (Nadira; 2020).

Indonesia previously had regulations on electronic data as stipulated in Law Number 11 of 2008 concerning Electronic Information and Transactions as amended by Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Electronic Information and Transactions (ITE Law). In Article 5 of the ITE Law, it is stipulated that:

- (1) Electronic Information and/or Electronic Documents and/or their printouts are valid legal evidence.
- (2) Electronic Information and/or Electronic Documents and/or their printouts as intended in paragraph (1) are extensions of valid evidence by the applicable Procedural Laws in Indonesia.
- (3) Electronic Information and/or Electronic Documents shall be declared valid when using Electronic Systems by the provisions regulated in this Law.
- (4) Provisions regarding Electronic Information and / or Electronic Documents as intended in paragraph (1) do not apply to:
  - a. a letter which according to the law must be in writing; and
  - b. a letter and its documents which, according to the law, must be made in the form of a notary deed or a deed prepared by the deed maker official.

Electronic documents can be used as valid evidence. According to the ITE Law, an electronic document is declared valid to be used as evidence when using a reliable and secure electronic system and meets the following minimum requirements:

1. Can display electronic information and/or electronic documents in their entirety by the retention period stipulated by statutory regulations.
2. Can protect the availability, integrity, authenticity, confidentiality, and accessibility of electronic information in the electronic system's operation.
3. Can operate by the procedures or instructions in the operation of the electronic system.
4. Equipped with procedures or instructions that are announced in a language, information, or symbols that can be understood by the party concerned with the operation of the electronic system, and
5. Have a sustainable mechanism to maintain the novelty, clarity, and accountability of procedures or instructions.

The enactment of the ITE Law in Indonesia has not been in synergy with the applicable procedural law. Electronic service law products (digital public services) are not yet valid as evidence in various judiciary types in Indonesia. The Civil Procedure Code in effect in Indonesia is still guided by Article 164 HIR and Article 1866 of the Civil Code, which stipulates that evidence recognized in a civil case is writing, witnesses, allegations, confessions, oaths.

The Civil Procedure Code that applies in Indonesia is still guided by Article 164 HIR, which determines that the evidence recognized in a civil case is Evidence law in Indonesia, legally formal, has not accommodated electronic documents or information as evidence in dispute resolution through courts (Prayuti, et al; 2019) In the ITE Law, "land documents are strictly regulated (forcing) they are prohibited from being made digitally," which is the highest norm mandate in establishing a digital law code for land services. The provisions of Article 5 paragraph (4) have excluded documents used to enforce civil, criminal, and state administrative procedures, which are not allowed in digital form.

The mortgage certificate is an official deed (ambtelijk acte) which only contains the official's statement regarding the existence of a mortgage right, the type of land right that is the object of the mortgage right, and the name of the mortgage holder. The mortgage certificate only contains a constitutive statement from the official who issued the deed. The statement in the mortgage certificate is a copy of the mortgage land book made by the official. Making the mortgage land book is a part of the mortgage registration process to fulfill the principle of publicity. In the mortgage certificate, there are no clauses or articles governing the guarantor's rights and obligations and recipient of the mortgage right (Kaligis; 2015).

Delegation of authority for the issuance of Permen ATR/Ka. BPN No. 5 th. 2020 is not included in the UUHT, so in this case, it indeed leads to an ATR/Ka Regulation. BPN No. 5 th. 2020 cannot be enforced until there is a delegation of authority that provides legal certainty for. Permen ATR/Ka. BPN No. 5 th. 2020 to implement electronic mortgage registration. Regarding the registration of mortgage rights, the UUHT should still be enforced as statutory regulations with a higher hierarchy than Permen ATR/Ka. BPN No. 5 th. 2020. The introduction of HT-el services is considered a step forward in making it easier for people to get public services through technological developments. Such a step ahead is only for the State administration's purposes, not for the sake of proof.

Conceptually, the preference right (the creditor's right to take precedence through the sale of the object of collateral because the debtor breaches the promise) and is born after the Certificate of Mortgage issue is issued. The concrete thing is that the preference right cannot exist without an executorial title attached to the HT-el Certificate cover. However, the HT-el certificate has a legal requirement to have the power of execution (title executorial) in its issuance must meet the UUHT procedural-mechanism. The UUHT has limited standard procedures, meaning that outside the UUHT procedure, it is considered that the HT Certificate does not have the power of proof; consequently, the title of execution attached to the HT certificate has no binding strength.

#### IV. CONCLUSION

HT-el certificates cannot be used as evidence in Indonesian procedural law because evidence recognized in civil procedural law in Indonesia only includes writing, witnesses, allegations, confessions and oaths. In addition, the provisions in the ITE Law have emphasized that documents used in the process of enforcing civil, criminal and state administrative procedures are not allowed in digital form. The Certificate of Mortgage which is made electronically deviates from the procedures stipulated in the UUHT which hierarchically has a higher position than the Regulation of the Minister of Agrarian and Spatial Planning / Head of the National Land Agency, so that it will make the resulting product defective in procedure and has no executorial power.

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