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Original Research Article

Legal Reconstruction of Agreements Defaulting with Guaranteed Liability Rights Based on Pancasila Justice Values

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Abstract

The problem studied in this research are what are the weaknesses of the current regulation on defaulting on agreements with mortgage guarantees and how is the reconstruction of the regulation of defaulting the agreement with the guarantee of mortgage rights based on the value of Pancasila justice using a sociological juridical research approach, descriptive research specifications, primary and secondary data sources, data collection methods using literature studies and field studies, data analysis using qualitative. The results of the study shows that the Weaknesses in the regulation of default on agreements with mortgage guarantees currently is that there are weaknesses, namely from the aspect of legal substance, legal structure and legal culture. From the aspect of legal substance, there are legal rules regarding the implementation of the encumbrance of Mortgage Rights in a credit agreement. Aspects of the legal structure are still not synergized by law enforcement officers and take sides with one party, in fact often do not side with consumers. From the legal culture, it is necessary to socialize to the community to emphasize the existence of legal protection. Therefore the Reconstruction of the regulation of default of agreement with guarantee of mortgage based on the value of Pancasila justice is by reconstructing Law Number 8 of 1999 concerning Consumer Protection in Article 2, Article 6, Article 14 Paragraph (3) and Article 20 Paragraph (1) of the Law. Number 4 of 1996 concerning Mortgage on Land and Objects Related to Land and the Civil Code Article 1243.

Keywords: Legal Reconstruction, Defaulting, Liability Right, Justice Value.

INTRODUCTION

Generally, in providing credit, the Bank always requires the debtor to pledge the collateral in order to secure the interests of the bank if the debtor is negligent or in default in credit payments. If the debtor is negligent, the bank will sell the collateral either by auction or privately. The things in the credit agreement (*standard clause*) have been written in advance and the customer only has the choice to refuse or accept the agreement without participating in formulating the contents of the credit agreement (Yopiza, 2022).

The inclusion of the standard clause shows the unequal position between the bank and the debtor customer. This can be used by the bank to make clauses that are burdensome to the debtor customer; on the other hand, the bank is protected because the debtor customer is burdened with a number of obligations that supposed to be the bank's.

The inclusion of standard clauses in bank credit agreements that impose obligations on debtor customers with the aim of protecting the interests of creditors is very unfair and violates Article 18 paragraph (1) letter h of Law Number 8 of 1999 concerning Consumer Protection. The article states that what is meant by standard clauses are any regulations or provisions and conditions that have been prepared and determined in advance unilaterally by business actors as outlined in a document and/or agreement that is binding and must be fulfilled by consumers. The judges' considerations in giving decisions related to default disputes are, first, the conclusion of evidence. In the proceedings at the trial between the Plaintiff and the Defendant may submit evidence to strengthen the reasons of each party second, legal consideration. In the legal considerations that there are cases of default, the author agrees with what is used as the basis for the judge in making decisions regarding the settlement of default disputes in the contract. The judge first looks at

the facts before making the decision. The thing that strengthens the judge's belief in deciding the case that Defendant is considered to be in default/broken promise because he has neglected his obligations/never again paid the principal financing and profit margin to the Plaintiff, the proof can be assessed from the evidence in the form of a letter submitted by the Plaintiff entirely which acknowledged/justified by the Defendant, it does not need to be proven. Similarly, the argument of the Plaintiff's claim must be proven and in this case it has been proven that the Defendant has defaulted (Masturoh, 2022).

The standard clauses in the above credit agreement are clearly unfair and detrimental to the customer as a debtor. The position of the customer is so weak compared to the Bank. This is inversely proportional to when the customer becomes a creditor in the form of demand deposits, time deposits, savings or other equivalent forms, as there is no collateral provided by the bank, except for the bank's trust capital.

Based on this, the author feels this problem needs to be raised in a study titled "Legal Reconstruction of Agreements Defaulting with Guaranteed Liability Rights Based on Pancasila Justice Values" where the authors raise 2 (two) main issues as follows:

1. What are the weaknesses of the Regulation on Agreements Defaulting with Guaranteed Liability Rights in Indonesia Currently?
2. How is the reconstruction of the regulation of Agreements Defaulting with Guaranteed Liability Rights based on the Pancasila justice value?

METHOD OF RESEARCH

This study uses a constructivist legal research paradigm approach. The constructivism paradigm in the social sciences is a critique of the positivist paradigm. According to the constructivist paradigm of social reality that is observed by one person cannot be generalized to everyone, as positivists usually do.

This research uses descriptive-analytical research. Analytical descriptive research is a type of descriptive research that seeks to describe and find answers on a fundamental basis regarding cause and effect by analyzing the factors that cause the occurrence or emergence of a certain phenomenon or event.

The approach method in research uses a method (*socio-legal approach).* The sociological juridical approach (*socio-legal approach*) is intended to study and examine the interrelationships associated in real with other social variables (Toebagus, 2020).

Sources of data used include Primary Data and Secondary Data. Primary data is data obtained from field observations and interviews with informants. While Secondary Data is data consisting of (Faisal, 2010):

1. Primary legal materials are binding legal materials in the form of applicable laws and regulations and have something to do with the issues discussed, among others in the form of Laws and regulations relating to the freedom to express opinions in public.
2. Secondary legal materials are legal materials that explain primary legal materials.
3. Tertiary legal materials are legal materials that provide further information on primary legal materials and secondary legal materials.

Research related to the socio-legal approach, namely research that analyzes problems is carried out by combining legal materials (which are secondary data) with primary data obtained in the field. Supported by secondary legal materials, in the form of writings by experts and legal policies.

RESEARCH RESULT AND DISCUSSION

1. Weaknesses of the Regulation on Agreements Defaulting With Guaranteed Liability Rights in Indonesia Currently

Mortgage according to Article 1 point 1 of Law no. 4 of 1996 concerning Mortgage Rights is defined as "*Security Rights on 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 of Agrarian Principles which including or not including 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*."

The existence of legal rules regarding the implementation of the encumbrance of Mortgage in a credit agreement seen from the elaboration of Law Number 4 of 1996 there are several main elements of Mortgage which should aim to provide certainty and protection, but often the regulations in the law are still not firm in in favor of consumers (Widodo, 2018).

The decision of the Constitutional Court Number 21/PUU-XVIII/2020 states that Article 14 paragraph (3) of Law Number 4 of 1996 concerning Mortgage on Land and Objects Related to Land insofar as the phrase "*executory power*" and the phrase "*equal to a court decision that has permanent legal force*" is contrary to the 1945 Constitution of the Republic of Indonesia and has no binding legal force as long as it is not interpreted "against Mortgage guarantees for which there is no agreement on breach of contract (default) because the Debtor experiences coercive circumstances (*Overmacht/Force Majeure*) then the Debtor is given the right to prove it in court before the execution of the Mortgage Guarantee is carried out". Article 20 paragraph (1) of Law Number 4 of 1996 concerning Mortgage on Land and Objects Related to Land insofar

as the phrase "*breach of promise*" is contrary to the 1945 Constitution of the Republic of Indonesia and has no binding legal force as long as does not mean "*the debtor does not carry out the obligations of the engagement and there is an element of error on the part of the debtor*".

In the Fiduciary agreement, it is also mentioned about default, even if the debtor or guarantee is breach of contract, execution of the collateral object can be carried out (Article 29 of Law Number 29 of 1999 concerning Fiduciary Guarantees).

Credit provided by banks of course contains risks, therefore based on the Decree of the Board of Directors of Bank Indonesia No.27/162/KEP/DIR dated March 31, 1995 concerning Guidelines for the Preparation of Credit Policy (PPKPB) for Commercial Banks, in order to protect and securing public funds and in order to maintain the health and business continuity of banks, in the implementation of lending, banks are required to adhere to sound credit principles as outlined through a bank credit policy in written form.

Based on this, banks as creditors before providing creditors must conduct an economic analysis of prospective debtors with a view to preventing the possibility of arrears or bad loans.

In general, in providing credit, the Bank always requires the debtor to pledge the collateral in order to secure the interests of the bank if the debtor is negligent or in default in credit payments. If the debtor is negligent, the bank will sell the collateral either by auction or privately. The things in the credit agreement (standard clause) have been written in advance and the customer only has the choice to refuse or accept the agreement without participating in formulating the contents of the credit agreement (Nguyen, 2021).

The inclusion of the standard clause shows the unequal position between the bank and the debtor customer. This can be used by the bank to make clauses that are burdensome to the debtor's customer, on the other hand the bank is protected by that, the debtor's customer is burdened with a number of obligations and is the bank's rights that must be fulfilled.

This condition is also exacerbated by the lack of public knowledge or socialization of a legal regulation that one of the very basic principles in contract law is the principle of protection for the parties, especially the injured party (Widodo, 2019). Efforts to make it happen to the aggrieved can do in the form of: Cancellation of the agreement; cancellation of the agreement accompanied by a claim for compensation; fulfillment of the agreement; fulfillment of the agreement accompanied by a claim for compensation; or claim compensation. Meanwhile, for parties who defaulted, protection is given in the form of: The existence of certain mechanisms in terms of terminating the agreement with the obligation to carry out the subpoena and the obligation to decide on reciprocal agreements through the courts (Toebagus, 2022); Restrictions on termination of the agreement; The right to terminate the agreement has not been waived; Termination of the agreement that is not too late and the Default that is accompanied by an element of error. Another form of protection is to give the debtor the opportunity to defend himself, for example: Due to *overmacht* (a state of coercion; stating that the creditor is also negligent and stating that the creditor has relinquished his rights).

2. Reconstruction of the Regulation of Agreements Defaulting with Guaranteed Liability Rights Based on the Pancasila Justice Value

The reconstruction of this mortgage by the author departs from the view that there needs to be a balance criterion to realize commutative justice (fairness of the parties) in a bank credit agreement. If these criteria are not met, then according to law, the credit agreement becomes unbalanced, thus violating the principle of balance. Based on the principle of balance, these criteria can be used as the basis or guidelines for the validity of the agreement, including in bank credit agreements. Determination of these criteria is important, if at any time there is an indication of inequality between the parties in an agreement, then this criterion can be used as a measuring tool to determine the conclusion of the indication. The principle of balance as a principle that is currently developing should be considered in addition to the principle of agreement, the principle of binding force and the principle of freedom of contract.

The balance criteria should not be sought whether the situation or the goals to be achieved are unbalanced, as in the grant agreement. However, it is more of a question, whether at the time of the agreement there was a problem of imbalance in the way the contract was made and whether the agreement in question contained the content or purpose of the agreement and the implementation of achievements that could bring the contract to an unbalanced state.

At the norm level, the content material in the Mortgage Law relating to the position of this parate execution institution is clearly and firmly stated in Article 6 distortion which results in the loss of usefulness and legal certainty aspects of the Mortgage Law itself. Legal norms or rules should be born in order to protect human interests against threats. Apart from that, legal norms or rules also exist to regulate relations between humans. So that there is an order in the relationship between humans and it is hoped that order or stability will be created, including prevention and repressive measures in the event of a conflict or disturbance of interests.

In addition to the inconsistency of the material content in the Mortgage Law relating to the position and existence of the parate execution institution, in practice there are many implementing regulations that are not in sync with the execution through the parate execution institution. For example, the Supreme Court Decision Number 3021 K/Pdt/1984 dated January 30, 1986, and the issuance of SEMA Number 7 of 2012 which actually dwarfed the position of the parate institution for the execution of mortgage rights.

This is further exacerbated by the fact that other provisions in this Mortgage Law which have a tendency to belittle may even shift the essential meaning contained in the norms of Article 6. Supreme Court Number 3021 K/Pdt/1984 dated January 30, 1986. Although the Supreme Court Decision Number 3021 K/Pdt/1984 dated January 30, 1986 can be used as jurisprudence, but when viewed from the time the Mortgage Law was enacted at the time the decision was final and binding, obviously can no longer be used as a binding basis.

The background of the birth of the Mortgage Law is the will of the government; in this case it actually has a clear philosophical foundation. The main thing is that the government wants to carry out the mandate of the Agrarian law where there is a provision regarding Mortgage Rights as the basic rule of provisions regarding the guarantee rights institution that can be imposed on land, including or not including objects related to land that have not been formed. In addition, the provisions regarding the Mortgage, which were previously based on Article 57 of the Agrarian Law, are deemed no longer appropriate to the needs of credit activities, in connection with the development of Indonesia's economic system.

Most people think that the content of the Mortgage Law, especially in the context of execution, does not provide clarity and even multiple interpretations, and does not reflect legal certainty. Legal certainty is certainly important, because the law is in charge of creating order in society. Legal certainty is an inseparable feature of law, especially for written legal norms. Law without the value of legal certainty will lose its meaning because it can no longer be used as a behavior guide for all.

In fact, there have been many reviews discussing this matter, even in the 2010-2014 National Legislation Program, the DPR has initiated to also discuss these changes. However, to this day this has not been implemented, and is not even included in the 2014-2018 National Legislation Program. This change is important, given the large amount of material content that even overlaps and has no clear relevance so that doubts can arise in practice. Although those doubts can sometimes be resolved through the interpretation of other legal regulations. This, according to H.L.A Hart (1997), is an example of legal uncertainty.

Justice is generally defined as a fair act or treatment. While fair is impartial and side with the right. Justice according to philosophical studies is when two principles are fulfilled, namely: first, not harming a person and second, treating every human being what is his or her right. If these two can be met then it is said to be fair. In justice there must be a comparable certainty, which if combined from the combined results will be justice (Parameswaran, 2022).

Justice will be felt when the relevant systems in the basic structures of society are well organized which can also find a sense of community justice in the implementation of law enforcement through judges' decisions. In practice, the meaning of modern justice in handling legal problems is still debatable. Thus, the value of Pancasila justice in the regulation of default of agreements with guarantees of mortgages is to emphasize the balance of rights and obligations between debtors as providers of mortgages and creditors as holders of collateral rights in a proportional manner is needed by reconstructing Law Number 8 of 1999 concerning Consumer Protection in Article 2, Article 6, Article 14 Paragraph (3) and Article 20 Paragraph (1) of Law Number 4 Year 1996 concerning Mortgage Rights on Land Along with Objects Related to Land and the Civil Code Article 1243.

CONCLUSION

Based on the results of the research, the following conclusions can be drawn:

1. The Weaknesses in the regulation of default on agreements with mortgage guarantees in Indonesia currently is that there are weaknesses, namely from the aspect of legal substance, legal structure and legal culture. From the aspect of legal substance there are legal rules regarding the implementation of the imposition of Mortgage in a credit agreement seen from the elaboration of Law Number 4 of 1996 where there are several main elements of Mortgage which should aim to provide certainty and protection, but often the regulations in the law is still not firm in its alignment with consumers. This is also supported by the decision of the Constitutional Court Number 21/PUU-XVIII/2020, the debtor is given the right to prove it in court before the execution of the Mortgage Guarantee is carried out. Aspects of the legal structure are still not synergized by law enforcement officials and take sides with one party, in fact often do not side with consumers. From the legal culture, it is necessary to socialize to the community to emphasize the existence of legal protection.
2. The Legal Reconstruction of the agreement default with the guarantee of mortgage rights

based on the value of Pancasila justice is by reconstructing the Law Number 8 of 1999 concerning Consumer Protection in Article 2, Article 6, Article 14 Paragraph (3) and Article 20 Paragraph (1) of the Law Number 4 of 1996 concerning Mortgage on Land and Objects Related to Land and Article 1243 of the Civil Code.

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