

# The Binding Force Of The Droit De Suite Principle In Land Pledge Regarding The Object Of Encumbrance Right

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## Abstract

The objective of this research is to analyze the legal protection for the holder of the Right of Encumbrance after the encumbered object of the Right of Encumbrance has been tied to the Customary Land Pledge by the grantor of the Right of Encumbrance. The method employed in this research is normative legal research with a statutory approach and within the scope of customary law. The research outcomes can be summarized as follows: the grantor of the Right of Encumbrance (debtor) can transfer the object of the Right of Encumbrance to the holder of the Customary Land Pledge (third party) because there are two provisions in obtaining a loan from guarantee institutions, namely Law Number 4 of 1996 concerning Encumbrance Rights over Land and Related Objects and Government Regulation in Lieu of Law Number 56 of 1960 concerning the Determination of Agricultural Land Area. Therefore, the principle of *droit de suite*, or as a property right, provides legal protection for the holder of the Right of Encumbrance (creditor) regarding the transfer of collateral objects with Customary Land Pledge, which is of a personal nature, resulting in the non-binding of debt repayment on the pledged collateral object that was previously encumbered with the Right of Encumbrance.

**KEYWORDS:** *land pledge, droit de suite principle, object of encumbrance right*

## Introduction

As a financial institution that contributes to the economic activities of a country, banking serves as an intermediary between those who have a



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shortage of funds and those with excess funds. Banks are business entities operating in the financial sector, gathering funds from and for the public, and providing various other banking services.<sup>1</sup> As the primary function of banking defined in Article 3 of Law Number 10 of 1998 concerning Banking, hereinafter referred to as the Banking Law, is to collect and disburse funds to the public.<sup>2</sup>

Credit is one of the primary banking activities. The majority of banks in Indonesia have most of their assets in the form of credit provision. Therefore, it can be said that a significant portion of a bank's operating income is dominated by interest income from the credit extended. Credit is a term derived from the Latin word "*credere*," which means to believe. Hence, it can be affirmed that a debtor is someone who is trusted by the bank.<sup>3</sup> Article 1 number 11 of the Banking Law specifies that credit is a facility for the provision of money or claims that can be equated with it, based on an agreement or borrowing agreement between the bank and another party that obliges the other party as a borrower to repay their debt as agreed upon, including the provision of interest. When providing credit facilities, the bank must be confident that the credit extended will be repaid as agreed upon in the future.<sup>4</sup> Banks have an obligation to implement the principle of prudence in the process of disbursing banking credit as stipulated in Article 8 of the Banking Law,<sup>5</sup> namely:

- (1) In providing credit or financing based on Sharia principles, Commercial Banks are obligated to have confidence based on a

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<sup>1</sup> Gede Ngurah and Ganesha Giri, 'Nasabah Akibat Error System (Studi Kasus Pada Bank Mandiri)' 180, 180.

<sup>2</sup> Andika Persada Putera, 'Prinsip Kepercayaan Sebagai Fondasi Utama Kegiatan Perbankan' (2020) 3 Jurnal Hukum Bisnis Bonum Commune 128, 129.

<sup>3</sup> Etty Mulyati and Fajrina Aprilianti Dwiputri, 'Prinsip Kehati-Hatian Dalam Menganalisis Jaminan Kebendaan Sebagai Pengaman Perjanjian Kredit Perbankan' (2018) 1 Acta Diurnal Jurnal Ilmu Hukum Kenotariatan dan ke-PPAT-an 148, 148.

<sup>4</sup> Irman Widi Kurniawan, Etty Mulyati and Betty Rubiati, 'Analisis Yuridis Hak Eigendom Verponding Sebagai Jaminan Kebendaan' (2020) 2 Jurnal Poros Hukum Padjadjaran 38, 50.

<sup>5</sup> I Made Adi Guntara and Ni Made Ari Yuliartini Griadhi, 'Penerapan Prinsip 5C Sebagai Upaya Perlindungan Terhadap Bank Dalam Menyalurkan Kredit' (2019) Vol 7 No 8 Kertha Semaya : Journal Ilmu Hukum 1, 7.

thorough analysis of the good faith, ability, and willingness of the Customer-Debtor to repay the debt and return the intended financing in accordance with the agreed terms.

- (2) Commercial banks are required to have and implement credit and financing guidelines based on Sharia principles, in accordance with the regulations set by Bank Indonesia..

The bank's confidence is obtained through several credit assessments by accurately analyzing the debtor to prevent problematic credits, based on several factors known as the 5 C's of credit, which are capacity, character, condition of the economy, capital, and collateral.<sup>6</sup> The 5C principles in credit provision serve as a benchmark or guideline that reflects the health of a bank, with the expectation that the loans provided by the bank do not become delinquent or problematic.<sup>7</sup> The assessment of debtors based on the 5C principles is carried out by:<sup>8</sup>

1. Assessment of *capacity* in the case of prospective debtors is conducted by evaluating their abilities, such as the business they own and the management practices employed within their business. This evaluation allows the bank to place trust in its customers to repay loans promptly.
2. Assessment of *character*, or the nature and personality of the prospective debtor, in the context of extending credit is conducted with the aim of determining the good faith or honesty of the prospective debtor.
3. Economic condition assessment is carried out by the bank regarding the business prospects of the prospective debtor to understand the general economic conditions and the sector-specific conditions of the prospective debtor's business, with the goal of minimizing potential risks.

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<sup>6</sup> Gentur Cahyo Setiono, 'Jaminan Kebendaan Dalam Proses Perjanjian Kredit Perbankan (Tinjauan Yuridis Terhadap Jaminan Benda Bergerak Tidak Berwujud)' (2018) 1 *Transparansi Hukum* 1, 11.

<sup>7</sup> Guntara and Griadhi (n 5) 8.

<sup>8</sup> *ibid* 9.

4. The assessment of *capital* is conducted on the capital owned by the credit applicant or prospective debtor. This assessment is based on the distribution of capital as placed by the entrepreneur (prospective debtor), ensuring that the existing resources can be effectively utilized.
5. The assessment of *collateral* or security serves as a risk mitigation tool for banks against potential future risks, such as loan defaults. An item offered as collateral must have a value that is equally high as the amount borrowed by the debtor, and in some cases, even higher.

The existence of *collateral* is a crucial aspect in the provision of credit facilities. This is because the purpose of collateral is to provide certainty and legal protection to both creditors and debtors.<sup>9</sup> Security can be categorized into two (2) types, namely general security and specific security. Furthermore, specific security is further categorized into personal security, the legal basis of which is determined in Article 1820 of the Civil Code, and property security, the legal basis of which is determined in Article 1131 of the Civil Code.<sup>10</sup>

In the Civil Code, the law of property security is regulated, namely mortgages and pledges (*pand*), and the law of property security that is regulated outside the Civil Code, namely the Right of Encumbrance and Fiduciary Security.<sup>11</sup> The existence of agreements outside the primary agreement in credit transactions is an agreement that binds collateral. Therefore, the importance of the institution of security rights is necessary to ensure legal certainty for all parties, one of which is the Right of

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<sup>9</sup> Mulyati and Dwiputri (n 3).

<sup>10</sup> Rodrico Agustino Renee, 'Hipotik Sebagai Jaminan Hak Kebendaan Setelah Berlakunya Undang-Undang Nomor 4 Tahun 1996 Tentang Hak Tanggungan' (2021) 9 LEX ET SOCIETATIS 187.

<sup>11</sup> Triana Dewi Seroja and Winda Fitri, 'Perjanjian Pokok Dan Perjanjian Hak Tanggungan Dikaitkan Dengan Asas Pelengkap' (2019) 4 Journal of Law and Policy Transformation 148, 148.

Encumbrance.<sup>12</sup> In accordance with Article 57 of Law Number 5 of 1960 Concerning the Basic Principles of Agrarian Regulations, hereinafter referred to as UUPA, it asserts that the right to collateral on land is the Right of Encumbrance related to regulations regarding mortgages and credit associations that are temporarily still in effect until the establishment of a law concerning the Right of Encumbrance. Subsequently, Law Number 4 of 1996 concerning Land Mortgage along with Objects Related to Land, abbreviated as UUHT, was enacted as a manifestation of the UUPA's mandate. In Article 5 paragraph 3 of the General Explanation, it is emphasized that the only institution for land security rights is Land Mortgage.<sup>13</sup>

Explained in Article 1 paragraph 1 of the Land Mortgage Law (UUHT), Land Mortgage is a security interest imposed on land rights as referred to in the Basic Agrarian Law (UUPA), whether accompanied by other objects that are integral to the land or not, for the purpose of settling specific debts. It grants a priority position to a particular creditor over other creditors. Land Mortgage arises between the creditor and the debtor and is formalized in the Deed of Land Mortgage Agreement (APHT). Therefore, it can be said that Land Mortgage is a right that arises from a Land Mortgage agreement.<sup>14</sup> The existence of Land Mortgage is determined through a two-stage encumbrance process. The first stage is the granting of Land Mortgage, which is carried out by creating a Deed of Granting Land Mortgage (APHT) by the Land Deed Official (PPAT). A Notary plays a role in verifying whether it matches the original document and in creating the Power of Attorney for Imposing Land Mortgage (SKMHT). According to the Land Mortgage Law (UUHT), PPAT is designated as the official responsible for creating APHT in Land Mortgage. Under the applicable regulations, PPAT is an authorized

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<sup>12</sup> Siti Malikhatus Badriyah and others, 'Implikasi Hukum Penggunaan Surat Kuasa Membebaskan Hak Tanggungan Sebagai Jaminan Dalam Perjanjian Kredit Pemilikan Rumah' (2019) 2 Law, Development and Justice Review 58.

<sup>13</sup> Irman Widi Kurniawan, Ety Mulyati and Betty Rubiati (n 4).

<sup>14</sup> Anak Agung Sagung Karina Prabasari and Sirtha I Nyoman, 'Peralihan Hak Atas Tanah Yang Objeknya Diikat Hak Tanggungan' (2021) 6 Acta Comitatus 127, 128.

official to create deeds for the transfer of land rights and other deeds with predetermined formats. PPAT deeds serve as evidence that a legal act has been performed.<sup>15</sup>

Agreements that create rights and obligations fundamentally result in personal rights that apply only to specific individuals, namely the parties who enter into the agreement, as outlined in the principles found in Article 1315 and 1340 paragraph 2 of the Civil Code (KUH Perdata). This is further emphasized in Article 1338 paragraph 1 of the Civil Code (KUH Perdata).<sup>16</sup> In principle, the debtor still has the authority to take possession actions over the property serving as the collateral object of the Land Mortgage in question. This means that when land is encumbered with a Land Mortgage, it can still grant the debtor the authority to take further actions on the debtor's property that has been pledged to the creditor.<sup>17</sup> The Land Mortgage giver can still make transfers, either by selling or pledging the land that serves as collateral again. If it is assumed that the creditor's rights in the Land Mortgage are personal rights arising from the pledge agreement, and then the debtor binds or pledges the collateral object for sale and/or transfers it to a third party, it can be said that the Land Mortgage giver loses the meaning of the pledge. This is due to the transfer of Land Mortgage objects to third parties. The personal rights of the creditor as the holder of the Land Mortgage cannot extend to the third party who receives the collateral object from the debtor. Furthermore, if the debtor breaches the agreement or defaults, and the banking institution as the creditor intends to execute the Land Mortgage object, the third party in possession of the collateral object can argue that the binding parties are the former owner (debtor/land mortgage giver). This is based on Article 1315 in conjunction with Article 1340 paragraph 2 of the Civil Code (KUHPerdata), which states

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<sup>15</sup> Nur Azizah, Abdul Halim Barkatullah and Noor Hafidah, 'Pendaftaran Hak Tanggungan Secara Elektronik (Studi Di Kantor PPAT Wilayah Banjarmasin Utara)' (2022) 1 Nolak 84, 86.

<sup>16</sup> Hayuning Widiasari, 'Perlindungan Hukum Bagi Para Pihak Dalam Perjanjian Kredit Dengan Jaminan Hak Tanggungan' (2018) 1 Res Judicata 86, 89.

<sup>17</sup> Karina Prabasari and I Nyoman (n 14).

that third parties are not bound by previous agreements between the former owner (Land Mortgage debtor) and the creditor.<sup>18</sup>

The transfer of Land Mortgage objects can fundamentally only be carried out through property rights mechanisms, even if it deviates from the requirements for transferring property rights. However, in practice, the transfer of Land Mortgage objects can occur through personal or informal mechanisms, such as customary land pledge. Under the Basic Agrarian Law (UUPA), there are temporary rights outlined in Article 16 paragraph (1) letter h, including Land Pledge rights as specified in Article 53 paragraph 1 of the UUPA.<sup>19</sup> This is because, in practice, the rights of Customary Land Rights Pledge can last for decades, with the pledge holder enjoying the benefits from the land, sometimes even in amounts greater than what was provided to the land giver. Such practices exhibit exploitative characteristics that run counter to the principles of the Basic Agrarian Law (UUPA).<sup>20</sup> Therefore, efforts to eliminate the practice of Customary Land Rights Pledge in society are further regulated in Article 7 of Government Regulation in Lieu of Law Number 56 of 1960 Concerning the Determination of Agricultural Land Area, hereinafter referred to as Law No. 56 Perpu of 1960. However, up to the present, the practice of customary land rights pledge cannot be completely abolished; at best, its exploitative nature can be reduced.<sup>21</sup>

In reality, besides using land for obtaining funds through banking, where the proof of ownership can be used as collateral for Land Mortgage objects, in rural areas, agricultural land can also be utilized to quickly

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<sup>18</sup> Murylta Nevi Sukmawati, 'Personal Guarante Terhadap Perjanjian Kredit Dengan Jaminan Hak Tanggungan' (2020) 3 Airlangga Development Journal 54, 68–69.

<sup>19</sup> Laola Subair, 'Hakikat Hak Pengelolaan Dalam Undang-Undang Tentang Peraturan Dasar Pokok-Pokok Agraria' (2021) 3 Jurnal Hukum Ekonomi Syariah 241, 241.

<sup>20</sup> Renee (n 10).

<sup>21</sup> M Teguh Pulungan and Muazzul Muazzul, 'Tinjauan Hukum Tentang Peralihan Hak Atas Tanah Melalui Perjanjian Gadai Di Bawah Tangan' (2019) 4 Jurnal Ilmiah Penegakan Hukum 60, 63.

acquire money to meet urgent community needs by pledging the land.<sup>22</sup> Wherein the transfer of land to the holder of the land pledge is not for debt security but rather for their management, and the proceeds from the land are collected, thereby transferring control of the land to the holder of Customary Land Rights Pledge. In the execution of agricultural land pledge agreements, various patterns exist within the community, and these agreements are typically not in writing due to the simple nature of customary law systems.<sup>23</sup> Due to the simple nature of the pawn agreement made by the parties involved, issues may arise when there is an encumbrance of the Customary Land Rights Pledge that is done informally. This situation can potentially occur in the practice of re-encumbering collateral objects with Customary Land Rights Pledge when the object was previously encumbered with a Land Mortgage.

Based on a literature review, no prior research specifically focusing on the Binding Force of the *Droit De Suite* Principle in Land Pledges on Land Mortgage Objects has been found up to this point. However, there are several related and overlapping studies with this research, including:

The thesis authored by Serly Nurnaningsih from Sultan Agung Islamic University Semarang in 2019 focused on the Analysis of Protection for Third Parties Regarding the Principle of *Droit De Suite* in the Execution of Land Mortgage. This research is descriptive and employs a socio-legal juridical approach. The research outcomes indicate that the protection for third parties in the execution of Land Mortgage based on the principle of *droit de suite* includes the registration of the Land Mortgage to fulfill the principle of publicity, public announcements of auction sales during the execution of Land Mortgage, and the prohibition of auctioning third-party property, providing protection to third parties. The difference from the

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<sup>22</sup> Annisa Reski Syamsuri, Sohrah Sohrah and Nurjannah Nurjannah, 'Gadai Tanah Pertanian Menurut Pasal 7 Undang-Undang Nomor 56 Prp Tahun 1960 Dan Implementasinya Di Desa Dongi Kecamatan Pitu Riawa Kabupaten Sidrap' (2020) 2 *Iqtishaduna: Jurnal Ilmiah Mahasiswa Hukum Ekonomi Syari'ah* 19, 159.

<sup>23</sup> Syamsuri, Sohrah and Nurjannah (n 22).



aforementioned research lies in the fact that the previous research analyzed the legal protection related to the principle of *droit de suite* for third parties, while in this research, the analysis focuses on the legal protection derived from the principle of *droit de suite* for Land Mortgage holders through re-encumbrance with Customary Land Rights Pledge.

The journal authored by Dian Pertiwi titled "Legal Protection for Land Mortgage Holders Whose Objects are Controlled by Third Parties Based on Lease Agreements" employs a *statute approach*. The research results are as follows: Firstly, for Land Mortgage holders, legal protection regarding the transfer through Lease Rights is based on the promises made in the Deed of Land Mortgage (APHT) as well as the property nature of the Land Mortgage object, which strengthens the Land Mortgage holder's position against the lessee. Secondly, based on Article 1576 of the Civil Code (BW), legal protection can only be given to the lessee, who cannot maintain their rights but can only claim compensation. The difference from previous research lies in the fact that in previous research, the transfer of the object to a third party was based on lease agreements, while in this research, the form of transfer is based on Customary Land Rights Pledge, which is commonly found in rural communities.

The journal authored by Achmad Rifa'i and Sapto Mulyono, titled "The Legal Power of Land Mortgage Holders in Re-Encumbering Collateral Objects with Customary Land Rights Pledge," is a normative juridical research conducted using qualitative research methods. The results of the discussion indicate that Fiduciary, Pledge, Hypothec, and Land Mortgage as property security rights possess both *droit de suite and droit de preference* due to the full legal protection they receive. On the other hand, Customary Land Rights Pledge is of a personal nature, and therefore, in the process of settlement, it does not bind the collateral object. The difference from previous research lies in the discussion section where the author not only focuses on Land Mortgage as a property right but also discusses Pledge, Fiduciary, Ship Hypothec, and Land Mortgage. Furthermore, the focus is

not solely on the implications of *droit de suite* but also on *droit de preference* as a characteristic of property rights.

The specific aim of this research is to contribute to expanding the perspective on the legality of the practice of re-encumbering Land Mortgage collateral objects with Customary Land Rights Pledge, which continues to be a customary practice in rural communities up to the present time. It is hoped that rural communities engaging in Customary Land Rights Pledge transactions will first examine the land certificate to determine whether a Land Mortgage has been previously encumbered on it or not. This is to ensure the establishment of sound legal relationships and to prevent potential conflicts in the future. Thus, legal protection can be provided to both Land Mortgage creditors and Customary Land Rights Pledge creditors.

## **Method**

This research employs a normative legal research method with a statutory approach that examines legal provisions related to legal issues. The statutory approach method is associated with an understanding of principles and hierarchy within legal regulations. The primary legal materials used include: Law Number 23 of 1847 Concerning Burgerlijk wetboek voor Indonesian (Civil Code), Law Number 5 of 1960 Concerning Basic Agrarian Regulations, Government Regulation in Lieu of Law Number 56 of 1960 Concerning the Determination of Agricultural Land Area, Law Number 4 of 1996 Concerning Land Mortgage on Land and Related Objects, and Law Number 10 of 1998 Concerning Banking. Secondary legal materials include journals related to the research.

## Result and Discussions

### *Transfer of the Collateral Object of a Land Mortgage via Customary Land Rights Pledge to a Third Party*

#### *Binding the Collateral Object with a Land Mortgage*

The existence of the banking sector in today's society is inseparable, especially in terms of banking services related to credit disbursement.<sup>24</sup> The banking institution is obligated to go through several stages to process a credit application, beginning with the application request, followed by analysis, approval, the credit agreement, and finally, the disbursement of credit between the debtor and the creditor. The credit agreement stage is a crucial aspect of the credit granting process; if there is no agreement marked by a signature in the credit agreement, then no credit will be granted.<sup>25</sup> The credit agreement, as the principal agreement, determines the terms of the security agreement.<sup>26</sup>

The existence of a security agreement is intended to provide strong protection for the creditor.<sup>27</sup> The juridical requirements for a security include having proof of ownership in the name of the prospective debtor, ensuring that the security is indeed owned by the prospective debtor, not in dispute with third parties, and not leased. Furthermore, the ownership certificate must meet the requirements for binding as stipulated in the provisions of the Land Mortgage, and the collateral object must not have been previously encumbered by another security.<sup>28</sup> There are four types of property security, namely, fiduciary, pledge, Land Mortgage, and mortgage.<sup>29</sup> For land, the form of collateralization is tied to the Land

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<sup>24</sup> Adi Widjaja, A Rachman Budiono and Bambang Winarno, 'Pelaksanaan Eksekusi Jaminan Hak Tanggungan Dalam Penyelesaian Kredit Macet Di Lembaga Perbankan' (2018) 3 Jurnal Ilmiah Pendidikan Pancasila dan Kewarganegaraan 2.

<sup>25</sup> Anak Agung Ayu Diah Oktarini and Anak Agung Gede Agung Dharma Kusuma, 'Peran Dan Fungsi Covernote Dalam Pelaksanaan Pencairan Kredit Oleh Bank' (2020) 9 Jurnal Magister Hukum Udayana (Udayana Master Law Journal) 811, 813.

<sup>26</sup> Irman Widi Kurniawan, Ety Mulyati and Betty Rubiati (n 4).

<sup>27</sup> Mulyati and Dwiputri (n 3) 112.

<sup>28</sup> *ibid.*

<sup>29</sup> Irman Widi Kurniawan, Ety Mulyati and Betty Rubiati (n 4).

Mortgage, as based on the provisions of Number 5 Paragraph 3 of the General Explanation of the Land Mortgage Law (UUHT). This means that the form of collateralization for land as the collateral object in debt agreements, which serves as the principal agreement between the debtor and creditor, is bound by the Land Mortgage.<sup>30</sup>

In the Land Mortgage encumbrance process, there are two stages. The first stage involves the granting of the Land Mortgage, where the Deed of Land Mortgage (APHT) is created by the Land Deed Official (PPAT). This stage follows the prior agreement, which is the credit agreement. The second stage is the registration of the Land Mortgage at the Land Office, which results in the birth of the Land Mortgage.<sup>31</sup> Before the encumbrance is carried out, if the Land Mortgage grantor is unable to be present, they can be represented by another party with a Conditional Power of Attorney (SKMHT) to act as their proxy in executing the Land Mortgage encumbrance before the Land Deed Official (PPAT). Subsequently, the first stage of granting the Land Mortgage by the PPAT, through the creation of the Deed of Land Mortgage (APHT), is based on Article 10 paragraph (2) of the Land Mortgage Law (UUHT).<sup>32</sup> Within the Deed of Land Mortgage (APHT), there must be provisions in accordance with Article 11 paragraph (1) of the Land Mortgage Law (UUHT). The creation of the deed serves as the legal basis for determining the status of property, rights, and obligations of individuals.<sup>33</sup> The second stage involves the obligation for registration at the Land Office, as based on Article 13 paragraph (1) of the Land Mortgage Law (UUHT). The systematic mechanism for registering the Land Mortgage is outlined in Articles 13 through 14 of the UUHT. The registration of the Land Mortgage at the Land Office in the land book is done in accordance with the principle of publicity. The Land Mortgage does not come into

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<sup>30</sup> Karina Prabasari and I Nyoman (n 14).

<sup>31</sup> Irman Widi Kurniawan, Etty Mulyati and Betty Rubiati (n 4).

<sup>32</sup> *ibid.*

<sup>33</sup> Risky Puspita Sari and Djoni S Gozali, 'Implikasi Hukum Akibat Kelalaian Dalam Pembuatan Surat Kuasa Membebaskan Hak Tanggungan Dalam Perjanjian Kredit Perbankan' (2022) 1 Notary Law Journal 145, 146.

existence when the Deed of Land Mortgage (APHT) is signed; rather, it comes into existence upon registration in the land book at the Land Office. This registration binds the Land Mortgage to third parties.<sup>34</sup>

From the explanation provided, it can be understood how crucial recording and publication are in property law. The examination of publicly available records becomes necessary when other parties wish to ascertain whether specific legal actions have been taken by certain individuals regarding a particular property. This serves the purpose of safeguarding the interests of third parties.<sup>35</sup> Initially, the agreements made only give rise to individual rights. The presence of recording and publication serves as the moment of birth for property rights stemming from the agreement. Consequently, the rights acquired from property rights have absolute validity, in contrast to situations where there is no recording and publication, which results in these rights having only relative validity. The obligations related to recording and publication regarding the existence of property rights can be observed in the granting of Land Mortgage, as stipulated in the provisions of the Land Mortgage Law (UUHT).

#### *Binding an object with a Land Mortgage right to Customary Land Rights Pledge*

Under Customary Land Rights Pledge, landowners transfer their land to the moneylender to allow for its management and the collection of its yields. In practice, for various reasons, the use of customary law is more prevalent than national positive law.<sup>36</sup> From a formal legal perspective, Article 7 paragraph (1) of Law No. 56 Perpu of 1960 abolishes the practice of the customary land pledge system in rural areas due to perceived extortion and its inconsistency with the spirit of the Agrarian Law. However, in reality, customary land rights pledges continue to be in effect up to the

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<sup>34</sup> Badriyah and others (n 12).

<sup>35</sup> Karina Prabasari and I Nyoman (n 14).

<sup>36</sup> Syamsuri, Sohrah and Nutjannah (n 22).

present day.<sup>37</sup> Various patterns and procedures exist in the implementation of land pledges within society, depending on the parties involved, namely the pledge holder and the pledge grantor, in the process of land collateralization. These practices are typically informal and not in writing. Article 5 paragraph (1) of the Land Mortgage Law (UUHT) affirms the use of a single collateral object to secure multiple debts arising from different agreements/legal events. This means that aside from the debts originating from the same creditor, it is also possible for debts secured by the same collateral object to stem from two different creditors.

However, such an event can only occur if the initial Land Mortgage holder is willing to transfer their land certificate to the Land Mortgage grantor for it to be used as collateral for another creditor. The transfer of Land Mortgage without the consent of the initial Land Mortgage holder actually demonstrates the principle of property rights. In practice, even though the creditor holds the certificate for the Land Mortgage collateral object, the debtor can still use the Land Mortgage collateral object again with a Customary Land Rights Pledge, which is done informally and does not require a land certificate in the Customary Land Rights Pledge encumbrance process. Therefore, legal facts related to the collateral object in the form of land when it comes to the binding of collateral institutions in obtaining loan funds, in addition to being regulated in the Land Mortgage Law (UUHT), are also governed by Law No. 56 Perpu of 1960. Consequently, in Article 5 paragraph (1) of the UUHT, there is no prohibition on using the same piece of land as collateral for debt more than once. Rebinding the collateral object under a customary land right to another party by the debtor with a Customary Land Rights Pledge is permissible. As a result, there are two types of collateral institution bindings on the same land: the initial binding with the Land Mortgage institution and the second binding with the Customary Land Rights Pledge institution. Therefore, with regards to the

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<sup>37</sup> *ibid.*

re-binding of the collateral object, there are two creditors: the holder of the Land Mortgage and the holder of the Customary Land Rights Pledge.

In the field of contract law, it is a fundamental principle that publication is not a requirement. This means that an agreement between the grantor of Land Rights and the recipient of Land Rights only creates individual rights that are binding solely upon the parties involved, and therefore, it cannot bind third parties. The formation of the agreement cannot result in losses or benefits for third parties outside of the agreement. Therefore, third parties are not bound absolutely by such legal acts. The recording and publication in contractual law do not apply in this case because they would not have an impact on third parties and cannot be used by third parties to harm the parties involved in the agreement. In the case of a customary land pledge agreement, the rights that arise are only valid relative to the parties involved (Article 1315 jo. Article 1340 of the Civil Code). So, the process of encumbering land in a pledge agreement made by the parties only gives rise to rights that are valid relative to the parties in the land pledge agreement, which only results in individual claims (*actions in personam*).<sup>38</sup>

### ***Legal Protection for Mortgage Right Holders regarding the Encumbrance of Collateral Objects with Customary Land Pledge Rights***

#### ***The Definition and Comparison of Property Rights and Personal Rights***

In Book II of the Civil Code, property rights are differentiated based on property rights that provide security (*zakelijk zekerheidsrecht*) and property rights that provide enjoyment (*zakelijk genotsrecht*).<sup>39</sup> In the context of providing credit facilities between a debtor and a creditor, it is necessary for the creditor to request collateral from the debtor. When the debtor is unable to repay their debt at the agreed-upon time, as the function

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<sup>38</sup> Renee (n 10).

<sup>39</sup> Rose Panjaitan, 'Pengaturan Dan Pelaksanaan Parate Eksekusi Diluar Hukum Acara Perdata' (2018) 1 Notaire 133, 137.

of collateral in property rights, the creditor's role is to sell the collateral to recover the funds.<sup>40</sup> Property rights and individual rights constitute the allocation of human rights within legal science. In property rights, a guarantee will confer authority.<sup>41</sup> In contrast, individual rights only provide for a claim against a specific individual.<sup>42</sup>

Property rights and individual rights have the following differences.<sup>43</sup>

1. Property rights are absolute rights that can be asserted against anyone. In contrast, individual rights are relative rights that can only be asserted against the parties involved in an agreement.
2. In Property Rights, there is *droit de suite*, meaning that a Mortgage Right will continue to follow its collateral object regardless of whoever possesses it. In individual rights, it can be asserted against an individual, and thus, the right will cease if there is a transfer of the rights to the object in question.
3. Property rights within a system typically hold a higher rank when established earlier and vice versa. In contrast, individual rights do not recognize ranks, so whether they are established earlier or later, their status remains the same.
4. Property rights entail a priority right, known as *droit de preference*. In contrast, individual rights, in the event of a debtor's bankruptcy, entail the distribution of assets based on the balance of their respective interests.
5. Lawsuits related to property rights are referred to as property-related lawsuits and can be filed against anyone who violates those rights. In

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<sup>40</sup> Irman Widi Kurniawan, Etty Mulyati and Betty Rubiati (n 4).

<sup>41</sup> Dwi Dasa Suryantoro, 'Eksistensi Hak Kebendaan Dalam Perspektif Hukum Perdata BW' (2023) 3 Legal Studies Journal 19, 20.

<sup>42</sup> Bambang Sudiarto, 'Subyek Hak Milik Atas Tanah Menurut UUPA' (2021) 5 (1) Al-Qisth Law Review 1, 10.

<sup>43</sup> Ahmad Fauzi, 'Karakter Hukum Bangunan Gedung Sebagai Jaminan Utang' (2019) 2 Doktrina: Journal of Law 13, 27.



the case of individual rights, the lawsuit is termed an individual lawsuit and is directed only against the opposing party (*wederpartijk*).

When a property rights holder intends to transfer their rights, they can do so without limitations. However, the transfer of rights in the case of individual rights is restricted.

### *The Implications of the Droit De Suite Principle on Creditors (Mortgage Right Holders)*

In Dutch, the word "asas" is referred to as "*beginsel*," which means a beginning or inception. Therefore, principles (*beginselen*) are structures that originate from human feelings, while understandings (*begrippen*) stem from human intellect.<sup>44</sup> Legal principles are the foundation in the source of a community's worldview, consciousness, and legal aspirations. They are termed abstract norms because legal principles remain abstract, serving as the basis for the emergence of a legal regulation.<sup>45</sup> The legal principles in legislation cannot be used as formulations for the articles contained within it; rather, they serve as the foundation and/or the underlying rationale for the formulation of these articles.<sup>46</sup> In a positive legal system, legal principles function both in front of and behind positive law. This is because legal principles serve as normative standards that contain values.<sup>47</sup> The principle of law binds fundamentally on a moral level, and its binding nature is not contingent on being explicitly stated in legislation. Instead, it binds because moral boundaries apply to the self, serving as limits for ethical conduct towards achieving a just order in the process of organizing society, not merely due to being encompassed by legal regulations.<sup>48</sup>

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<sup>44</sup> Rokilah Rokilah and Sulasno Sulasno, 'Penerapan Asas Hukum Dalam Pembentukan Peraturan Perundang-Undangan' (2021) 5 Ajudikasi : Jurnal Ilmu Hukum 18, 180.

<sup>45</sup> Niru Anita Sinaga, 'Peranan Asas-Asas Hukum Perjanjian Dalam Mewujudkan Tujuan Perjanjian' (2018) 7 Binamulia Hukum 107, 115.

<sup>46</sup> Dewa Gede Atmadja, 'Asas - Asas Hukum Dalam Sistem Hukum' (2018) 12 145, 147.

<sup>47</sup> Atmadja (n 46).

<sup>48</sup> *ibid*.

The main characteristic of Article 7 of the Land and Building Tax Law (UUHT) states that regarding the inherent nature of the *droit de suite* principle in the Mortgage Right, it follows wherever the collateral object is located, regardless of who possesses it. In other words, the right continues to adhere to the property itself even if it is transferred or conveyed by the Mortgage Right provider.<sup>49</sup> Furthermore, the general explanation of Article 7 of the Land and Building Tax Law (UUHT) states that the existence of *droit de suite* is intended to protect the interests of the Mortgage Right holder. In the event of a transfer, the creditor can still enforce their rights through execution if the debtor breaches their commitments.<sup>50</sup>

Based on the explanation provided, the presence of the *droit de suite* principle in the Mortgage Right as a property right is aimed at protecting creditors. Thus, if the collateral object of the Mortgage Right has been transferred through the Customary Land Pledge Right or has potentially become the property of a third party, the creditor's receivables remain secured for repayment when the debtor defaults on their obligations, and the creditor can still enforce their rights. It is this property right nature within the Mortgage Right that allows for the possibility of the debtor transferring the property to a third party in principle.<sup>51</sup> Therefore, with the presence of property rights, even if the collateral is transferred, creditors need not worry because the right will continue to follow the collateral object regardless of whoever possesses it. Thus, concerning the binding of two collateral institutions carried out by the Mortgage Right provider, namely the first binding with the Mortgage Right that creates an absolute property right applicable to third parties and the second binding with the Customary Land Pledge Right, which only generates personal rights applicable relatively to the parties involved, the legal protection granted to the property

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<sup>49</sup> Karina Prabasari and I Nyoman (n 14).

<sup>50</sup> Bayu Setiawan Hendri Putra and Arief Suryono, 'Kedudukan Sertifikat Hak Atas Tanah Sebagai Jaminan Kebendaan Berdasarkan Undang-Undang Hak Tanggungan Atas Tanah Beserta Benda-Benda Yang Berkaitan Dengan Tanah' (2020) 8 Jurnal Privat Law 57, 60.

<sup>51</sup> Karina Prabasari and I Nyoman (n 14).

right holder is legally bound to the collateral institution. This results in the impossibility of transferring the collateral object before the Mortgage Right provider fulfills their debt repayment obligations.

*The Implications of The Droit De Suite Principle on Third Parties (Holders of Customary Land Pledge Rights)*

Within the Civil Code (KUH Perdata), there are several articles that provide regulations concerning the relationship between debtors, creditors, and third parties. In contrast, the Land and Building Tax Law (UUHT) does not contain many provisions governing the relationship between creditors, debtors, and third parties. Although the term "third party" is mentioned, it does not specify who is meant by the term "third party." In general, the term "third party" means anyone outside the involved parties. Article 1199 of the Civil Code provides guidance that can potentially be used as a reference for determining who qualifies as a third party in Article 16 paragraph 5 of the UUHT. Article 1199 of the Civil Code discusses third parties who possess the pledged object, which, when connected to our discussion regarding the Mortgage Right, refers to those who control the collateral object of the Mortgage Right owned by the debtor, in other words, those not under the debtor's personal control. In conclusion, the first category of third parties consists of those who physically possess the collateral object owned by the provider of the Mortgage Right (debtor), which is pledged by its owner (the debtor) to the creditor.

Furthermore, the use of the term "third party" in a general sense does not restrict broad interpretation, thus also encompassing those who are in the position of creditors because they had previously offered themselves as Mortgage Right providers to guarantee the debtor's debt. In this context, third parties can also refer to those who are in possession of the collateral object, which is currently under a Mortgage Right (without any discharge), and based on Article 7 of the Land and Building Tax Law (UUHT), they are now considered as the transferor of the guaranteed parcel, being in the

position of a third party Mortgage Right provider. More broadly, the term "third party" can be interpreted to include all creditors beyond the new creditor and the related debtor. We can observe that the rights of the new creditor against third parties are equivalent to the rights of the original creditor against third parties. Article 16 paragraph 5 of the UUHT seems to provide assurance that the rights of the new creditor are the same as those of the old creditor, even if they have never co-signed the deed of transfer of land rights (APHT).

The grant of property right characteristics to a Mortgage Right aims to provide a stronger position to the creditor, with one of its features being *droit de suite*. Therefore, even in the event of a transfer of this right, it will continue to follow the collateral object in the hands of whomever possesses it. Due to its nature as a property right, objections cannot be made by third parties based on Articles 1315 and 1340 paragraph 2 of the Civil Code (KUH Perdata) because such objections are intended to deviate from the principles contained in those provisions. One might ask, does this right not harm third parties (holders of the Customary Land Pledge Right) with good intentions? Isn't it true that, from the perspective of the holder of the Customary Land Pledge Right, they are defeated in terms of property rights by a third party based on a previously concluded agreement? To answer this question, it can be related to the obligation of registration in property rights. Registration at the Land Office and recording in the land book and land certificate determine the Mortgage Right as a property right, as stipulated in Article 13 of the Land and Building Tax Law (UUHT). Therefore, based on the principle of publicity, parties involved can examine the land book, which, based on the principle of specificity, contains detailed records of whether the relevant land has been encumbered, who the creditor is, and the amount of the encumbrance.

If the holder of the Customary Land Pledge Right, as a third party, fails to exercise due diligence in binding the collateral object in the form of land when seizing such an opportunity and it is subsequently discovered

that the land serving as collateral for the Customary Land Pledge Right bears the burden of a Mortgage Right, it cannot be said that the buyer (holder of the Customary Land Pledge Right) acted in good faith. This is because the buyer (holder of the Customary Land Pledge Right) cannot be considered to have incurred a loss, but rather, the holder of the Customary Land Pledge Right suffers a loss due to their own negligence. The act of encumbering the land with the Customary Land Pledge Right, which only results in personal security rights for the parties involved, thus means that legal protection for the holder of the Customary Land Pledge Right regarding debt repayment depends solely on the debtor's ability to settle the amount of the pledged money, which is not tied to the land used as collateral.

## Conclusion

In the context of land as a collateral for debt, apart from being encumbered by a Mortgage Right, which is the sole institution of collateral rights based on Article 5 Paragraph 3 of the General Explanation of the Land and Building Tax Law (UUHT), in practice in rural areas, land is also used as collateral to obtain a certain amount of loan with a Customary Land Pledge Right based on Law No. 56 Prp of 1960. Consequently, there is a possibility of re-encumbering the land as the subject of a Mortgage Right with a Customary Land Pledge Right, where there is no prohibition on doing so more than once with regard to the land as specified in Article 5 Paragraph (2) of the UUHT. As a property right, the Mortgage Right has *droit de suite*, meaning that the right will continue to follow the collateral object possessed by the holder of the right. Therefore, if the collateral object of the Mortgage Right is transferred through a Customary Land Pledge Right to another party, the holder of the Mortgage Right remains the strongest right holder. The difference between these two rights lies in their attachment to the collateral object, where the Mortgage Right, as a property right, is attached to the collateral object, while the Customary Land Pledge Right, as a personal right, is not attached to the collateral object. Hence, the property right nature provides legal protection to the Mortgage Right holder in the event of a transfer/encumbrance of the object serving as collateral for the Mortgage Right with a Customary Land Pledge Right.

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#### **DECLARATION OF CONFLICTING INTERESTS**

The authors declare that the data published in this journal has no conflict of interest to any parties. If in the future it is found that there is such a thing, the author will be fully responsible.

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