

Problems in the Implementation of Mortgage Rights Based on Law No. 4 of 1996 Concerning Mortgage Rights



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ABSTRACT: After the enactment of Law No. 4 of 1996 on Mortgage Rights (hereinafter referred to as UUHT), the provisions for the execution of Mortgage Rights are regulated under Article 20 of UUHT, which provides three alternative methods that creditors can use to execute the collateral object of the mortgage in the event of a debtor's default. These methods are: 1) parate executie, 2) execution based on the executorial title contained in the Mortgage Certificate, and 3) sale by private treaty. These steps can be taken if the debtor is in breach of contract. However, in practice, these mechanisms need to be reviewed in greater depth to determine whether they can be implemented, as Article 26 stipulates that 'as long as no regulations are enacted, the execution shall refer to the provisions regarding the execution of hypothec existing at the time of the enactment of this Law.' The term 'regulations to be enacted' should refer to 'Government Regulations' (as implementing regulations of the law), and the 'provisions regarding the execution of hypothec existing at the time of the enactment of this Law' as explained in Article 26 of UUHT refers to Article 224 of the HIR, which stipulates that bodily coercion can only be carried out after being authorized by a court decision. This creates practical problems, leading some to argue that even though the execution of Mortgage Rights is regulated under Article 20 of UUHT, in the absence of 'Government Regulations' (as further implementing regulations concerning the execution of mortgage rights under the Mortgage Law), any public sale (auction) of the object of mortgage rights must still go through the fiat of the Chief Judge of the Court as stipulated in Article 224 of the HIR. On the other hand, some believe that the fiat of the Chief Judge of the Court as stipulated in Article 224 of the HIR is unnecessary, as Article 20 of UUHT already provides for parate executie, which can serve as an alternative in the execution of Mortgage Rights, allowing the creditor to directly apply for auction without a court fiat.

KEYWORDS: Mortgage; Default; Execution.

I. INTRODUCTION

Mortgage Rights are a security institution arising from a credit agreement with immovable property as the collateral, where the mortgage rights are imposed on the immovable property based on the Deed of Granting Mortgage Rights (APHT), which will then be registered at the land office to obtain a Certificate of Mortgage Rights (SHT) that carries executorial power equivalent to a court decision because it contains the clause "For the Sake of Justice Based on the Almighty God."

The legal basis and the reasons for the execution of mortgage right auctions in Indonesia are regulated by Law No. 4 of 1996 on Mortgage Rights (UUHT). Article 1, point 1 of Law No. 4 of 1996 defines mortgage rights as security rights imposed on land rights as referred to in Law No. 5 of 1960 concerning Basic Agrarian Principles, with or without other objects that form a single unit with the land, for the repayment of certain debts, giving priority to certain creditors over others. From this definition provided by Law No. 4 of 1996, it can be understood that mortgage rights are not solely focused on the land but also include other objects related to or forming a unit with the land (Soetijoprodjo, 1996).

Article 6 of UUHT states: "If the debtor is in default, the first mortgage holder has the right to sell the object of the mortgage right on their own authority through a public auction and to receive payment of their debt from the proceeds of the sale."

The execution process is outlined in Article 20, which regulates the execution of Mortgage Rights if the debtor is in default. The execution can be carried out in three (3) ways: a. Based on Article 20 paragraph (1) letter (a): This refers to the right of the first mortgage holder to sell the object of the Mortgage Right on their own authority through a public auction as mentioned in Article 6 of UUHT. b. Based on Article 20 paragraph (1) letter (b): This refers to the execution based on the executorial title contained in the Certificate of Mortgage Rights, as referred to in Article 14 paragraph (2) of UUHT. In this case, it is based on the clause contained in the Certificate of Mortgage Rights which includes the words "FOR THE SAKE OF JUSTICE BASED ON THE ALMIGHTY GOD." c. Based on Article 20 paragraph (2): This refers to an underhanded sale, which is the sale of the object of the Mortgage Right conducted by the Mortgage Grantor based on an agreement with the Mortgage Holder if this method will yield the highest price.

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Article 20 of UUHT provides three alternative methods that creditors can use to execute the collateral object of the mortgage if the debtor defaults: 1) parate executie, 2) execution based on the executorial title contained in the Certificate of Mortgage Rights, and 3) underhanded sale.

These three methods of executing mortgage rights differ in their procedures:

- Parate executie: When the debtor is in default, the creditor can execute the collateral object without needing a fiat from the court chairman, without following the procedures stated in civil procedural law, without the need for prior seizure, and without involving a court bailiff, making the procedure simpler and less costly.
- Execution using the executorial title based on the Certificate of Mortgage Rights (formerly using *grosse acte hypothec*): The execution of the collateral sale is subject to and must comply with civil procedural law as regulated in Article 224 H.I.R. and Article 258 R.Bg.
- Underhanded execution: This must meet several requirements, including an agreement between the mortgage grantor and the mortgage holder.

Since the enactment of UUHT, the mechanisms offered by Article 20 of UUHT have not always been easy to implement in practice. The process of parate executie has experienced a shift in meaning because some believe that although the execution of Mortgage Rights is regulated in Article 20 of UUHT, any public sale (auction) of the object of Mortgage Rights must still go through the fiat of the Court Chairman as per Article 224 of the HIR. On the other hand, others argue that the fiat of the Court Chairman as per Article 224 of the HIR is unnecessary because Article 20 of UUHT already regulates parate executie, which can be an alternative in the execution of Mortgage Rights, allowing the creditor to directly apply for auction without a court fiat.

Based on the explanation above, the author attempts to normatively examine the implementation of Mortgage Rights Execution under Law No. 4 of 1996 concerning Mortgage Rights.

II. RESEARCH QUESTION

How is the Execution of Mortgage Rights carried out under Law No. 4 of 1996 on Mortgage Rights, and what are its developments?

III. RESEARCH METHOD

This study employs normative juridical research (legal research), which involves the use of written regulations or other normative legal materials. This type of research is also known as library research because it focuses on collecting documents and library data (Soekanto, 2006). Normative juridical legal research examines legal doctrines that are socially constructed and the principles contained within literature and legal science (Ali, 2016). This study utilizes a statute approach and a conceptual approach.

In this research, the author uses legal materials derived from documents. The secondary data used consists of materials sourced from documents rather than from informants, in line with the nature of normative research (Suteki, 2020). The sources of legal materials employed include both primary and secondary legal materials. The primary legal material used in this study is Law No. 4 of 1996 on Mortgage Rights, Article 224 of the *Het Herziene Indonesisch Reglement (HIR)*, and the Minister of Finance Regulation of the Republic of Indonesia No. 122 of 2023 on Guidelines for Auction Implementation. Meanwhile, secondary legal materials include draft laws, books, journals, and opinions of legal experts (Muhaimin, 2020). The collection of legal materials is conducted through a literature study. Data analysis adopts a qualitative descriptive-analytical method using a deductive logical approach.

IV. RESULT AND DISCUSSION

The Execution of Mortgage Rights under Law No. 4 of 1996 on Mortgage Rights

Law No. 4 of 1996 on Mortgage Rights over Land and Objects Related to Land (hereinafter referred to as UUHT) provides creditors (holders of mortgage rights) the opportunity to settle their claims through a public auction, as stipulated in Article 6 of UUHT:

"If the debtor defaults, the first holder of the mortgage right has the right to sell the object of the mortgage by their own power through a public auction and to settle their claim from the proceeds of the sale."

This method is carried out through the mechanism of Mortgage Rights Execution, based on the "heading" in the Mortgage Rights Certificate, as regulated in Article 14, paragraphs 2 and 3 of UUHT, which states:

(2) The Mortgage Rights Certificate as referred to in paragraph (1) contains a heading with the words "FOR JUSTICE BASED ON THE ALMIGHTY GOD." (3) The Mortgage Rights Certificate as referred to in paragraph (2) has executorial power equivalent to a court decision that has obtained permanent legal force and serves as a replacement for the *grosse acte* of Hypotheek as far as it concerns land rights.

Furthermore, the classification of Mortgage Rights Execution is regulated in Article 20 of UUHT, which states:

(1) If the debtor defaults, then based on: a. The right of the first holder of the Mortgage Rights to sell the object of the Mortgage as referred to in Article 6 (Parate Execution); b. The executorial title contained in the Mortgage Rights Certificate as referred to in Article 14, paragraph (2), the object of the Mortgage is sold through a public auction in accordance with the procedures stipulated

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in the legislation for the settlement of the creditor's claim, with priority over other creditors (Judicial Assistance Execution); (2) With the agreement of the mortgagor and the mortgagee, the object of the Mortgage can be sold privately if this will result in the highest price that benefits all parties.

The question then arises as to whether these three types of execution can already serve as alternatives for creditors in carrying out the execution of Mortgage Rights. However, in Article 26 of UUHT, it turns out that the execution of Mortgage Rights based on Article 20 of UUHT cannot yet be implemented as long as there is no legislation regulating it. This is as regulated in Article 26, which states:

"As long as there is no legislation regulating it, taking into account the provisions in Article 14, the regulations regarding the execution of hypotheek that existed at the time this law came into effect shall apply to the execution of Mortgage Rights."

Based on this, it is concluded that 'as long as there is no legislation regulating it, the execution must refer to the regulations regarding the execution of hypotheek that existed at the time this law came into effect' (There is a phrase: "as long as there is no legislation regulating it").

What kind of 'legislation' is meant by UUHT"? This issue needs to be examined because UUHT does not provide a clear description of the 'legislation' referred to.

The author argues that if UUHT is a 'law,' then the regulation that is one level below the 'law' must be identified, as it is intended to serve as an implementing regulation of that 'law' concerning its contents.

To explore this, the author refers to the hierarchy of legislation according to Chapter III, Article 7, paragraph 1 of Law No. 12 of 2012 on the Formation of Legislation, which states:

Chapter III

TYPES, HIERARCHY, AND CONTENTS OF LEGISLATION

Article 7

(1) Types and hierarchy of Legislation consist of:

- a. The 1945 Constitution of the Republic of Indonesia;
- b. Decrees of the People's Consultative Assembly;
- c. Laws / Government Regulations in Lieu of Laws;
- d. Government Regulations;
- e. Presidential Regulations;
- f. Provincial Regulations; and
- g. Regency/City Regulations.

(2) The legal force of Legislation corresponds to the hierarchy as referred to in paragraph (1).

This hierarchy indicates that the form of implementing regulation of a 'Law' (in this case, UUHT No. 4 of 1996) is a Government Regulation (PP).

Based on this, all provisions of UUHT (concerning execution as stated in Article 20) and the meaning of the phrase: 'legislation' as an implementing regulation (as referred to in Article 26 of UUHT) should be further regulated in the form of a 'Government Regulation' (PP), but until now, none has been issued. As a result, the execution of mortgage rights still has to be carried out by referring to the regulations regarding the execution of hypotheek that existed at the time this law came into effect (see Article 26).

Since the 'legislation' as an implementing regulation (as referred to in Article 26 of UUHT), which should be further regulated in the form of a 'Government Regulation' (PP), has not yet been issued, the execution of mortgage rights must adhere to the regulations regarding 'execution of hypotheek that existed at the time this law came into effect.'

The question then arises, what is meant by 'execution of hypotheek that existed at the time this law came into effect'?

The answer can be found in General Explanation No. 9 of UUHT, which states:

"One of the strong features of Mortgage Rights is that their execution is easy and certain if the debtor defaults. Although the general provisions regarding execution have been regulated in the prevailing Civil Procedure Law, it is deemed necessary to specifically include the provisions on the execution of Mortgage Rights in this law, which regulates the institution of parate executie as referred to in Article 224 of the Reglemen Indonesia yang Diperbaharui (Het Herziene Indonesisch Reglement) ... etc."

Furthermore, it can be observed that the explanation regarding 'execution of hypotheek that existed at the time this law came into effect' is as explained in the Explanation of Article 26 of UUHT, which states:

Article 26 (Explanation)

"What is meant by the regulations regarding the execution of hypotheek in this article are the provisions regulated in Article 224 of the Reglemen Indonesia yang Diperbaharui (Het Herziene Indonesisch Reglement, Staatsblad 1941-44) and Article 258 of the Reglement tot Regeling van het Rechtswezen in de Gewesten Buiten Java en Madura (Staatsblad 1927-227)." If

what is meant is Article 224 of HIR, then we need to review its provisions as follows:

"... In the execution of such a document, if it is not fulfilled amicably, the regulations in this section may apply, but with the understanding that body force can only be applied after being permitted by a Judge's decision. etc."

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Furthermore, referring to the Supreme Court Decision of the Republic of Indonesia No. 3210 K/Pdt/1084 dated January 30, 1986, which states:

"The auction sale based on parate execution conducted without going through the Chairman of the Court is an unlawful act, and the auction concerned is null and void." Review:

Based on 'General Explanation No. 9' and 'Explanation of Article 26,' it is certain that UUHT mandates that regarding its execution (as long as there is no legislation - in this case, Government Regulation), the execution must comply with Article 224 of HIR. Article 224 of HIR requires that execution (body force) can only be carried out after being authorized by a Judge's Decision, so in this case, the court plays a very vital role in executing Mortgage Rights, beginning with the pre-execution mechanism, namely Annmaning and Execution Seizure.

In practice, the method often used by creditors to request the execution of Mortgage Rights Auctions is through the State Wealth and Auction Service Office (KPKNL) without first involving the role (fiat) of the District Court. This is certainly not in line with the mandate of UUHT, especially Article 26 jo Article 224 HIR, so in practice, creditors often face resistance ('Verzet') or resistance from third parties ('Derden Verzet') when they have submitted an auction request to KPKNL.

The legal basis used by creditors and KPKNL is the Auction Implementation Guidelines issued by the Ministry of Finance (see: Minister of Finance Regulation of the Republic of Indonesia No. 122 of 2023 on Guidelines for Auction Implementation). In these rules, there is no obligation for auction requests to be accompanied by a Fiat from the District Court (except in the case of thirdparty claims and under certain conditions). This regulatory disharmony naturally becomes its own problem in the execution of mortgage right.

Development of Mortgage Rights Execution After the Issuance of Regulation of the Minister of Finance of the Republic of Indonesia Number 122 of 2023 Concerning Auction Implementation Guidelines (Latest Auction Rules)

The recent enactment of the Minister of Finance Regulation of the Republic of Indonesia Number 122 of 2023 on Auction Implementation Guidelines (commonly referred to as Juklak Lelang) serves as a legal basis for creditors and the State Asset Management and Auction Service Office (KPKNL) to conduct auctions of mortgages. This regulation does not require an auction application to include a Fiat from the District Court, except under specific circumstances, such as when there is a third-party claim.

1. Analysis Based on the 'Considering' and 'Considering' Sections

If we analyze the 'Considering' section, which provides the rationale for the formation of this regulation, it states:

Considering: a. That to improve auction services, create a more efficient, effective, transparent, accountable, simple, modern auction system, and ensure legal certainty, and respond to developments in electronic transaction models, the Minister of Finance Regulation Number 213/PMK.06/2020 on Auction Implementation Guidelines needs to be replaced;

b. That based on the considerations mentioned in letter a, it is necessary to establish a Minister of Finance Regulation on Auction Implementation Guidelines.

Similarly, if we look at the 'Considering' section:

Considering:

- a. Article 17 paragraph (3) of the 1945 Constitution of the Republic of Indonesia;
- b. Auction Law (Vendu Reglement, Ordinance of February 28, 1908, Staatsblad 1908: 189 as amended several times, last with Staatsblad 1941:3);
- c. Law Number 39 of 2008 concerning State Ministries (State Gazette of the Republic of Indonesia of 2008 Number 166, Supplement to the State Gazette of the Republic of Indonesia Number 4916);
- d. Auction Instruction (Vendu Instructie, Staatsblad 1908: 190 as amended several times, last with Staatsblad 1930:85);
- e. Presidential Regulation Number 57 of 2020 on the Ministry of Finance (State Gazette of the Republic of Indonesia of 2020 Number 98);
- f. Minister of Finance Regulation Number 118/PMK.01/2021 on the Organization and Work Procedures of the Ministry of Finance (State Gazette of the Republic of Indonesia of 2021 Number 1031) as amended by Minister of Finance Regulation Number 141/PMK.01/2022 on the Amendment to Minister of Finance Regulation Number 118/PMK.01/2021 on the Organization and Work Procedures of the Ministry of Finance (State Gazette of the Republic of Indonesia of 2022 Number 954).

Discussion:

If we refer to the 'Considering' and 'Considering' sections, it can be observed that in the 'Considering' section, there is no phrase mentioning that the issuance of Juklak Lelang is due to the mandate of the Mortgage Law (UUHT), particularly Article 26, which mandates the formation of 'legislation' as the basis for executing Mortgage Rights, as stated in Article 26 UUHT:

Article 26 UUHT states: *"Until there is legislation regulating it, taking into account the provisions of Article 14, the regulations concerning the execution of mortgages existing at the commencement of this Law apply to the execution of Mortgage Rights."* Furthermore, in the 'Considering' section, there is also no mention of the UUHT as a basis for the issuance of Juklak Lelang. This indicates that the UUHT was not a consideration in the formation of Juklak Lelang, even though the substance of the regulation governs the auction of Mortgage Rights.

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This suggests that *Juklak Lelang* is not the 'legislation' referred to in Article 26 of the UUHT, and thus, it should not serve as the legal basis for the execution of Mortgage Rights. However, in practice, *Juklak Lelang* is often used by creditors to apply for the execution of Mortgage Rights auctions through the KPKNL without involving the District Court's Fiat.

2. Deep Analysis:

Examining Article 9 of *Juklak Lelang*:

Article 9:

(1) Auction organizers consist of:

- a. KPKNL;
- b. Auction Hall; and
- c. Class II Auction Officer's Office.

From this provision, it is evident that the courts (District Court or Religious Court) are not granted the authority to conduct auctions, except in cases where there is a lawsuit from a third party other than the debtor/owner of the collateral and/or the spouse of the debtor/owner of the collateral concerning the ownership of the object to be auctioned. This is elaborated in Article 34 of *Juklak Lelang*:

Article 34:

(1) In the event of a lawsuit before the auction of a mortgage object by a party other than the debtor/owner of the collateral and/or the spouse of the debtor/owner of the collateral related to the ownership of the object to be auctioned, the execution auction of the mortgage object as per Article 6 of the Mortgage Law cannot be carried out.

(2) The parties other than the debtor/owner of the collateral and/or the spouse of the debtor/owner of the collateral as referred to in paragraph (1) consist of: a. lawful heirs, whose lawsuit is based on the fact that the mortgage was created after the inheritor as the owner of the collateral passed away, accompanied by valid evidence; b. other parties with ownership documents other than those tied to the mortgage; c. parties who entered into a notarial sale and purchase agreement before the mortgage was granted.

(3) For the mortgage object referred to in paragraph (1), the auction execution is conducted based on the executorial title of the mortgage certificate, which requires a fiat of execution.

(4) The application for the execution auction as referred to in paragraph (3) is submitted by: a. The District Court; or b. The Religious Court, in cases where the mortgage was created under a debt agreement using Islamic principles.

3. Review:

The *Juklak Lelang* stipulates that the fiat execution as per Article 224 HIR is only pursued if there is a lawsuit as mentioned above. This differs from the intent of the UUHT, which mandates that until legislation is issued (in this case, a Government Regulation), the execution must adhere to Article 224 HIR. Article 224 HIR requires execution (forced seizure) to be authorized by a court decision, meaning the court plays a vital role in executing Mortgage Rights, typically beginning with pre-execution procedures such as *Anmaning* (warning) and Execution Seizure.

The current practice, where creditors apply for the execution of Mortgage Rights auctions through KPKNL without the involvement of the court, is inconsistent with the mandate of the UUHT, especially Article 26, in conjunction with Article 224 HIR

CONCLUSIONS

The execution of objects under a Security Right (*Hak Tanggungan*) based on Article 6 of Law No. 4 of 1996 concerning Security Rights (UUHT) cannot yet be carried out. This is because the UUHT does not yet have implementing regulations regarding its execution, which should be regulated in the form of a 'Government Regulation' (PP). Consequently, the regulations regarding the execution of mortgages that were in effect at the time this law came into force should be referred to (as mentioned in General Explanation Number 9 of the UUHT in conjunction with the Explanation of Article 26 of the UUHT, which refers to Article 224 of the HIR, stating that forced execution can only be carried out after being authorized by a court ruling).

The current development in the execution of Security Rights refers to the Regulation of the Minister of Finance of the Republic of Indonesia Number 122 of 2023 concerning the Implementation Guidelines for Auctions (the Latest Auction Regulation, also known as *Juklak Lelang*). However, according to the author, this *Juklak* does not constitute 'legislation' as referred to in Article 26 of the UUHT. First, it is not regulated in the form of a 'Government Regulation' (PP) as stipulated in Chapter III, Article 7, paragraph 1 of Law No. 12 of 2012 concerning the Formation of Legislation. Second, in the considerations of 'recalling' and 'considering,' there is no mention of the applicability of Law No. 4 of 1996 concerning Security Rights (and therefore cannot serve as a legal basis for the execution of Security Rights). However, upon closer examination, its substance regulates the auction of Security Rights. In practice, this *Juklak Lelang* is often used by creditors to request the execution of Security Rights auctions through the State Finance and Auction Service Office (KPKNL).

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