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Buying Receivables with "*Cessie*" Related to Guarantee of Liability Rights to Land: Case Study in Indonesia

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Abstract

Banks as financial institutions carry out banking activities, have an intermediary function with debtors and the public who own funds. Banks are given various privileges that are preceded by a debt agreement because of the provision of credit to customers with collateral for mortgages. When creditors experience liquidity problems, they can sell their receivables to other parties in a cessie way. Article 16 Paragraph (1) Mortgage Law requires that receivables guaranteed by mortgage be transferred by means of "cessie" the mortgage rights will also be transferred by law to the new creditor. When faced with the norms of Article 613 Paragraph (2) of the Civil Code, requires that such a surrender for the debtor has no consequences, but after the delivery is notified to him or in writing, he agrees and acknowledges it. It was found that two prepositions with equal hierarchies governing the same thing turned out to have conflicting legal issues. Therefore, cessie institutions need to be studied in depth from the practical and theoretical aspects of legislation.

1. Introduction

Banks in an effort to secure the provision of credit, generally credit agreements are stated in written form. The first function of the credit agreement is the principal agreement, which means that the credit agreement is something that determines whether or not other agreements are cancelled. The second function is as evidence about the rights and obligations of debtors and creditors. The third

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function is to guide banks in planning, implementing, organizing and supervising lending (Sutan Remy Sjahdeini, 2009).

According to the Civil Code, the sale and purchase agreement has not yet resulted in the transfer of ownership of an object from the seller to the buyer. This phase is just an agreement (consensual) and must be followed by an agreement on delivery/material agreement (M. Isnaeni, 2016). Banks as creditors holding receivables during the current credit period have the authority to execute or transfer their receivables using various legal institutions, one of which is Cessie as regulated in the Norms of Article 613 paragraph (1) of the Civil Code: "Submission of receivables in the name of and other intangible objects, is carried out by making an authentic deed or deed under the hand, whereby the rights to the object are delegated to other people".

Article 613 Paragraph (2) of the Civil Code, requires "Such a delivery for the debtor has no consequences, but after the delivery is notified to him or in writing he is approved and acknowledged". The text of the sentence in the norm above has the meaning that the delivery of Receivables by Cessie will not cause any consequences for the Debtor if after that there is no notification or written approval and acknowledgment from the Debtor.

The Bank as a Creditor (Cedent) does not need to first submit to the Debtor (Cessus) notification that the sale of receivables has been carried out to a new Creditor (Cessionaris), the obligation of the cedent Creditor to provide notification or obtain acknowledgment and approval of the transfer of Receivables by Cessie method can be carried out after the transfer of receivables occurs. So it can be interpreted, the transfer of receivables from the old Creditor to the new Creditor by the Cessie method can be carried out, without the need for prior notification to the Cessus Debtor, notification to the Debtor that the transfer of receivables has occurred can be carried out afterward, without a definite time limit being explained by the legislators. has provided space for cedent Creditors not to be required to submit notification or in writing of approval and acknowledgment from the cessus Debtor.

In the Norms of Article 16 paragraph (1) of Law Number 4 of 1996 concerning Mortgage on Land and Objects Related to Land (mortgage law): "if the receivable that is burdened with Mortgage is transferred due to Cessie, subrogation, inheritance or for other reasons, the Mortgage Rights will also be transferred by law to the new Creditor". The norm of this article which regulates the transfer of receivables with Cessie, has the effect of participating in the transfer of Mortgage by law to the new Creditor.

From the two norms that both regulate the same thing, namely regarding Cessie in the same hierarchical hierarchy of legislation, the results of the study show that there are legal issues or legal issues or conflicting norms legis ratios, because in terms of norms, Article 613 paragraph (2) of the Law The Civil Law of the text of the norm explains that the submission of receivables by cessie method as stated in the norm of Article 613 paragraph (1) requires "no consequences for the Debtor", but after it is notified to him or in writing, he acknowledges and approves it.

On the other hand, according to the norm of Article 16 paragraph (1) of the Mortgage Law in written text, if the debt on which the Mortgage is assigned is transferred due to Cessie, subrogation, inheritance or other reasons, the Mortgage shall also be transferred by law to the new Creditor. In these norms, it is written in text that if there is a handover of receivables that are burdened with Mortgage carried out by Cessie's method, it will result in the Mortgage being transferred because the law follows wherever the receivables are located or follows the receivables into the new Creditors.

"Where the Debtor has agreed to give a security interest in specific collateral to creditors,.." (Lee Mei Pheng and Detta Samen, 2002). If the debtor is unable to fulfill the obligations as agreed, the debtor's guarantee can be executed through a public sale. The debtor has the right to get recognition and privacy or legal rights are protected based on the individual principle, the principle of consensuality, the principle of facta sun servanda. Debtors have the privacy to choose with whom to contract, the choice is based on the assessment of creditors who have good quality, good character,

good reputation (godwill) so that the Debtor feels confident that he feels safe for his Receivables and for the material guarantees provided are in the hands of trusted Creditors. From the description of the background of the problem, a philosophical problem can be drawn: What is the meaning of cessie in the regulation of Article 16 paragraph (1) of the Mortgage Law which results in the guarantee that the mortgage burdened with the Mortgage is also transferred by law to the new Creditor.

2. Literature Review

Law has the character of a prescriptive and applied science. As a prescriptive science, jurisprudence studies the purpose of law, legal concepts and legal norms. As an applied science, legal science establishes standard procedures, provisions, and signs in implementing the rule of law. To answer the problems posed and formulated in this study, the following legal research methods were used: Thus this research can be classified into normative juridical research, namely research on the rule of law itself (regulations of legislation), jurisprudence, customary law or or other unwritten laws and legal principles (Peter Mahmud Marzuki, 2008).

Legal issues that arise because of a causal relationship contains the proposition that one is thought of as the cause of the other. The identification of these legal relationships is necessary within the framework for which the research is conducted. In this case, legal research becomes meaningful (Peter Mahmud Marzuki, 2008).

Except for research within the scope of customary law, legal research at the dogmatic level of law or research for purposes in legal practice cannot be separated from the statutory approach. In the statutory approach method, researchers need to understand the hierarchy and principles in statutory regulations. According to Article 1 number 2 of Law Number 15 of 2019 concerning Amendments to Law Number 12 of 2011 concerning the Establishment of Legislations, Legislation is a written regulation that contains legally binding norms in general and is formed or stipulated by an institution. state or authorized official through the procedures stipulated in the Legislation. So the form of the statute is in the form of legislation and regulations. The observation will be carried out from a comprehensive, all-inclusive, and systematic aspect (Peter Mahmud Marzuki, 2008).

Sources of Legal Materials for solving legal issues as well as providing prescriptions, sources of legal research in the form of primary legal materials on legislation and secondary legal materials for books and journals.

Legal Principles & Theory

The principle of preference (Lex Superioi derougate Legi Imperior) was proposed by M.T Cicero and the theory of norm alignment (Stufentheory) proposed by Hans Kelsen. Whereas the occurrence of a conflict of norms between two interrelated propositions, it is necessary to obtain a philosophical study to find the true nature behind the two norms through a value study based on the nation's cultural values that breathe Pancasila and the 1945 constitution. The urgency of the study of legal philosophy to avoid the possibility of negative impacts From the inconsistency of values with the nation's culture, the legal ideals of achieving justice, legal certainty, and legal benefits are difficult to achieve. For this purpose, it is necessary to analyze legal issues against two conflicting legal propositions, so we use the principle of preference and Stufenbow theory, so that it is in accordance with the mandate of the 1945 proclamation of independence and is in line with the Outline of State Policy (GBHN), namely relying on the philosophical values of the two norms that govern the State Policy. cessie so that it is in accordance with the Indonesian Nation Culture and legislation that breathes Pancasila and the 1945 constitution.

According to P.W. Brouwer, the problem of conflict norms is resolved based on a study of the principle of preference (P.W. Brouwer, 1991), in the legal system known as a hierarchy, there are higher regulations and lower regulations, however, legislation is a system that does not require any norm conflict.

Lex Superioi derougate Legi Imperior, has the meaning that the law domiciled above will override the validity of the law domiciled below. This principle was put forward by M.T Cicero that, "higher law supersedes the lower law" which means that higher-level laws override lower-level laws (M.T. Cicero, 1991).

Legislation at a lower level may not conflict with legislation at a higher level which regulates the same normative material. If there is a conflict, then the legislation at a higher level will override the legislation at a lower level, and because of the hierarchy in the legislation, in this case the Lex Superior derougate Legi Imperor principle applies.

The principle of preference, the principle of Lex Superior derougate Legi Imperior can be used to resolve the norms of conflict between the norms of Article 16 Paragraph (1) of the Mortgage Law and the norms of Article 613 Paragraph (2) of the Civil Code. The two norms (concrete norms) are then confronted with the above norms, grandnorm (abstract) Article 28D Paragraph (1), 28G Paragraph (1), 28H Paragraph (4), 28I Paragraph (2)(4), 28J Paragraph (1) of the law the 1945 Constitution. the norm of Article 613 Paragraph (2) of the Civil Code Norm of Article 613 Paragraph (2) of the Civil Code adopts and respects the values of human rights as the philosophical values of the Indonesian nation as regulated in the context of Article 28D Paragraph (1), 28G Paragraph (1), 28H Paragraph (4), 28I Paragraph (2)(4), 28J Paragraph (1) of the 1945 Constitution concerning the value of human rights, the two norms are in agreement. The norm of Article 16 Paragraph (1) of the mortgage law as a concritnorm, if analyzed and examined, turns out to ignore or ignore the philosophical values of the Indonesian nation as mandated by the Proclamation of Independence of the Indonesian Nation in 1945 and the outline of the State Policy, namely, must be in line with the philosophical values of the abstract norm. 28D Paragraph (1), 28G Paragraph (1), 28H Paragraph (4), 28I Paragraph (2)(4), 28J Paragraph (1) the 1945 Constitution as the highest law (grandnorm).

P.W. Brouwer stated, in dealing with conflicts between legal norms, practical steps can be taken to resolve the conflict, namely, First, denial (disavowal), if there is a conflict of norms in two different jurisdictions, by maintaining that there are no conflicting norms, the application of the jurisdiction of the two norms must be separate. , although there are conflicting norms between the two legal norms. Second, reinterpretation, if there is a conflict, then by following the principle of preference, then reinterpretation of the main norm is carried out in a more flexible way. Third, cancellation (anvalidation), is carried out by canceling abstract norms by the authorized institution, while the cancellation of practical norms by not applying these norms in concrete practice is known as overriding. Fourth, by remedial, in the event that one norm excels in overrulednorm, by canceling the losing norm by compensating (P.W. Brouwer, 1991). Based on the study and analysis of concrete norms (dogmas), practical norms and abstract norms (the 1945 Constitution) due to the existence of the principle of preference, the abstract norm as an overrulenorm is won and cancels a losing norm by reinterpretation in a more comprehensive way flexible.

Hans Kelsen is the originator of the Norm Hierarchy Theory or the Norm Stranding Theory (Stufenbau Theory/Stufentheory), which states that the legal system in the form of legislation is a system shaped like a rung with tiered rules where the lowest legal norms will adhere to legal norms. higher law, and the highest legal norms such as the constitution must adhere to the most basic legal norms (grundnorm).

According to Hans Kelsen the most basic legal norms (grundnorm) are not concrete (abstract). Hans Kelsen states that a legal norm always originates and is based on the norms above it, but below the legal norms it also becomes the source and becomes the basis for norms that are lower than it and

in terms of the structure/hierarchy of the norm system, the highest norm, namely the basic norm, becomes the norm. on which the norms under it depend (Hans Kelsen, 2005).

Stufenbau Theory can be used to examine conflict norms, if faced with two conflicting prepositions, between the norms of Article 16 Paragraph (1) of the Mortgage Law and the norms of 613 Paragraph (2) of the Civil Code, the two norms are concrete which Conflicts in the hierarchical structure of the legislation or Indonesian legal system are positive laws that exist in the layer of formal law. Formal laws (Formell Gesets) which are applied in concrete life to regulate order in society must be valid, sourced and based on a norm that is above it, which is sourced again from the highest norm called the basic norm (basic norm) whose form is not concrete. abstract), which had previously been formed by the Indonesian people.

3. Discussion

The principle of preference, the principle of Lex Superior derougate Legi Imperior can be used to resolve the norms of conflict between the norms of Article 16 Paragraph (1) of the Mortgage Law and the norms of Article 613 Paragraph (2) of the Civil Code. The two norms (concrete norms) are then confronted with the above norms, grandnorm (abstract) Article 28D Paragraph (1), 28G Paragraph (1), 28H Paragraph (4), 28I Paragraph (2)(4), 28J Paragraph (1) of the law the 1945 Constitution. the norm of Article 613 Paragraph (2) of the Civil Code Norm of Article 613 Paragraph (2) of the Civil Code adopts and respects the values of human rights as the philosophical values of the Indonesian nation as regulated in the context of Article 28D Paragraph (1), 28G Paragraph (1), 28H Paragraph (4), 28I Paragraph (2)(4), 28J Paragraph (1) of the 1945 Constitution concerning the value of human rights, the two norms are in agreement. The norm of Article 16 Paragraph (1) of the mortgage law as a concritnorm, if analyzed and examined, turns out to ignore or ignore the philosophical values of the Indonesian nation as mandated by the Proclamation of Independence of the Indonesian Nation in 1945 and the outline of the State Policy, namely, must be in line with the philosophical values of the abstract norm. 28D Paragraph (1), 28G Paragraph (1), 28H Paragraph (4), 28I Paragraph (2)(4), 28J Paragraph (1) the 1945 Constitution as the highest law (grandnorm).

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The two norms of Article 16 Paragraph (1) of the Mortgage Law and the norms of Article 613 Paragraph (2) of the Civil Code must breathe the philosophical values contained in the 1945 Constitution, namely Article 28D Paragraph (1), 28G Paragraph (1), 28H Paragraph (4), 28I Paragraph (2)(4), 28J Paragraph (1) regarding the recognition of Human Rights. The norm of Article 16 Paragraph (1) of the Mortgage Law in the study of the conflict between the two norms apparently does not heed the philosophical values of Article 28D Paragraph (1), 28G Paragraph (1), 28H Paragraph (4), 28I Paragraph (2)(4), 28J Paragraph (1) of the 1945 Constitution, which must be heeded.

4. Conclusion

Based on the discussion of normative research using the Preference Principle (Lex Superioi derougate Legi Imperior) put forward by M.T Cicero and the Norm Alignment Theory (Stufentheory) initiated by Hans Kelsen, essentially philosophical values that exist in the context of the Norms Article 16 Paragraph (1) of the mortgage law and the context of the norm of Article 613 Paragraph (2) of the Civil Code, both of which regulate Cessie, are in conflict with each other. The two norms when confronted with the grandnorm of the 1945 Constitution of the Republic of Indonesia as the highest source of law for the Indonesian Nation turned out to be the norm of Article 16 Paragraph (1) of the Mortgage Law which ignores the values contained in Article 28D Paragraph (1), 28G Paragraph (1), 28H Paragraph (4), 28I Paragraph (2)(4), 28J Paragraph (1) of the 1945 Constitution concerning Human Rights as a Philosophical Culture of the Indonesian Nation. This context is not in accordance with the ideals of the Proclamation of Independence of the Indonesian Nation in 1945 and the mandate of the Outline of State Policy.

The meaning of buying and selling receivables with a cessie is related to the guarantee of mortgage over land, when examining Article 16 Paragraph (1) of the mortgage law which requires, if the receivable guaranteed by mortgage is transferred by means of "cessie" the mortgage will also be transferred by law to the New creditors, if tested on the principles of preference and stufenbau theory, do not heed the philosophical values of Article 28D Paragraph (1), 28G Paragraph (1), 28H Paragraph (4), 28I Paragraph (2)(4), 28J Paragraph (1) the 1945 Constitution concerning Human Rights, then this context is contrary to the ideals of the Proclamation of Independence of the Indonesian Nation in 1945 and the mandate of the Outline of State Policy. Therefore, the norms of Article 16 Paragraph (1) of the Mortgage Law will be overridden by the norms above, namely Article 28D Paragraph (1), 28G Paragraph (1), 28H Paragraph (4), 28I Paragraph (2)(4), 28J Paragraph (1) the 1945 Constitution concerning Human Rights. So the sale and purchase of receivables with cessie is to require the values of one of the principles of material guarantee of droit de suite without heeding the values of the principle of contracting (private law) and have the same role in buying and selling receivables.

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