

Agricultural Land-pawning in Indonesian Traditional Law Perspective

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Abstract: Land transactions can be divided into real land transactions and transactions related to land. On the real land transaction, the object is the land. In land-related transactions, the land is only a complementary. Forms of land transactions can be divided into: (1) Pawn (*gade-grondverpanding*), (2) Sale (*menjuallepas - grondverkoop*), (3) Renting the land with rental payments in advance (*jualtahunan - grondverhuur meet vooruitbetaaldehuur - schat*). Land Pawning is the delivery of a piece of land belonging to someone for another person for a certain period of time, also followed by the payment by the landowner to take the land back.

1 INTRODUCTION

The existence of indigenous peoples cannot be separated with the land. There are two things that cause the land to have a very important position in customary law, that is because of the "nature" and "factor" of the soil itself (Wulansari, 2016). The relationship between indigenous peoples with their land creates a right that gives the community a legal capability, the right to use the land for the benefit of society (Hutagalung, 2005). This is the original and main right in customary land law and covers all the land within the customary law community which is also regarded as the source of other land rights within the community of customary law and may be owned by all members of the customary law community. Land has an important position because:

- The nature of the land where the soil is the only thing of wealth which, though under any circumstances, remains in its state, even more profitable.
- The fact that the land is a reality of land is a means of dwelling for legal partnership and all its members as well as giving livelihood to its owner.
- The Religious Magical Aspect of Land where the soil is a unity wherein later owners will be buried after death as well as the ancestral site of fellowship for several generations before (Wiranata, 2005).

The closeness of the community to the land in various tribes in Indonesia can be seen in the Minangkabau ethnic where it arises the perception that land is one of the factors that unites the Minangkabau people (Aliasman, 2005).

2 AGRICULTURAL LAND-PAWNING

Land transactions are distinguished from land transactions and land-related transactions. On land transactions the object is land, while other agreements that follow are complementary. On transactions related to the land exactly the opposite, namely the principal agreement is another agreement, while the land is only a complementary agreement. Basic forms of land transactions can be divided into: (1) Pawn (*gade - grondverpanding*), (2) Sales (sell off - *grondverkoop*), (3) Rents of land with advance rental payments (annual selling - *grondverhuur met vooruitbetaaldehuur - schat*) (Ridwan, 1982).

In land-pawning, the time of redemption is up to the landowner without any time limit or expiration and even the right to redeem can be transferred to the heirs of the landowner.

Apart from that, land-pawning also have the nature of extortion in its implementation. Because as long as the landowner has not been able to redeem his land, the lien holder still controls the land. Many

land-pawning last for years, even tens of years because landowners have not been able to make redemption. This means that the lien holder can benefit and get the results of the land that could be greater than the amount of money given to landowners at the time of the sale of land.

Land-pawning is one of the products derived from customary law then the arrangement also according to customary law. Customary law is the original law of the indigenous people, which is a law that lives in an unwritten form and contains the original national elements that is the social and familial nature which is based on balance and is covered by the religious atmosphere (Panggabean, 2011). According to Ter HaarBzn., Pledge is a transaction which in the transaction the land is handed over to another party against a payment in cash, with the promise that the person who submits will have the right to order the return of the land through equal payments.

There is a tendency to distinguish between ordinary mortgages and mortgages over time, where the latter tends to provide some sort of benchmark to the temporary nature of the transfer of rights to the land (Soekanto, 2009).

The lien and lease rights in this connection arise because of a contractual agreement between the two parties on the land. As long as it has not been redeemed by the landowner, so long as the right to land becomes the property of the lender, as well as the lease rights, that property rights continue until the lease agreement is broken on the land.

On a regular pledge, then the land can be redeemed by the mortgage at any time. The restriction is one year of harvest, or if on the ground there are vegetation that has not been picked up. In this case, the receiver of the pledge shall not be entitled to claim, so that the pawner shall redeem his land at a certain time. In order to protect the interests of the mortgagee, he can at least perform two actions: (1) applying the mortgage ("onderverpanden"), in which the mortgagee pawns the land to a third party. (2) transferring ("doorverpanden") is an act whereby the mortgagee pawns the land to a third party and then the third party replaces the position of the receiver of the pledge to further deal directly with the pawnshop.

In Tapanuli also known other kinds of pawn which is commonly called dondon shrink. On mortgage shrinkage, the redemption of the land is done by installment with the yield of the land concerned. Therefore, at each harvest, the price of the mortgage will shrink so that at any given time the land will return to the pawns without redeeming it. On mortgage shrinkage, the redemption of the land is done by installment with the yield of the land concerned. Therefore, then at each harvest, the price

of the pledge will shrink, so that at a certain time the land will return to the pawns without redeeming it.

Based on the customary law of land pledge is a justified way in the transfer of land rights so that until now still live like in Karo Regency. The terms of transfer of ownership of land in customary law apply also in the matter of pledge, considering the pledge as one of the transfers of property rights. The conditions are: cash and light, ie the participation of the village head to know the existence and in the legal framework and the protection of the parties involved in the transaction.

3 AGRICULTURAL LAND-PAWNING IN TRADITIONAL LAW PERSPECTIVE

Land liens in Indonesian legislation system have been regulated in Law Number 5 Year 1960 on Basic Regulation of Agrarian System especially in Article 16 paragraph (1) letter h. Where the land lien belongs to one of the temporary land rights. However, in the law known as BAL, these liens are not given a clear understanding. In order to obtain more explanation, below will be raised some opinions about the understanding of this land lien. According BoediHarsono, Pawn is a legal relationship between a person with the land belonging to another person, who has received uanggadai from him. As long as the pawn money has not been returned, the land is controlled by a "pawnbroker". During that time the whole land became the right of the pawnbroker. The refund of lien or so-called "redemption", depends on the will and ability of the mortgaged landowner.

According to Effendi Perangin, Pawn Land contains an exploitative element, since the proceeds received by the pawn holders of the land in question are generally much larger than what is a proper interest from the mortgage received by the landowner.

According to A.P. Parlindungan, after mastering the rice fields for 7 years that the receiver of pledge (pawn holders) is enough to taste the rice fields that have been to get back the lien that has been issued. From the above explanation it can be seen, that in the implementation of these liens on the other hand has the element of help-help, but on the other hand contains the nature of extortion that could harm the landowner.

Redemption is done by returning the pawn money that was received by the giver of the pawn. If the mortgage of agricultural land, the ransom is not as much as a pawn money, but as big as according to the formula contained in Article 7 paragraph (2) of Law Number 56 Prp. Year 1960 (Ruchiyat, E., 2006).

4 CONCLUSIONS

The position of customary law in national land law is customary law as a source of development of national land law as contained in the consideration and Article 5 of the BAL, meaning that conception, *asa*, and legal institution derived from customary law are used as the main ingredient for formulating norms of national land law as set out in the LoGA. In addition to its function as a primary source, customary law also serves as a complement when norms contained in national land law have not regulated certain matters. Since the legislator assumes that the pledge of land contains an element of extortion, the rule of article 7 IJU no. 56 / Prp / 1960 which aims to eliminate land pledge transactions based on Indonesian customary law, but the judiciary institution in its application is still inconsistent resulting in dualism, namely land pledge based on national agrarian and customary law. Because the boundary between the two is unclear, it raises the uncertainty of legal protection and the legal relationship between the two.

The Customary Law System is a largely unwritten legal system (non-statutoir) so that its implementation in one area with another is not always the same. Another case with the system of Civil Law West and BAL, which is very concerned with the implementation of certain activities in written form. Djaja S. Meliala explains, Customary Law recognize pawn agreement is different from mortgage in KUH. The Civil Code, the pledge under Customary Law is not an *accessoir* agreement, but a stand-alone agreement (Djaja, 2008).

Regarding the pledge of agricultural land, there is an understanding given the legislation. Pawn of agricultural land, in the explanation of Perppu No. 56 of 1960 on Stipulation of Land Area of Agriculture, which then passed into law, mentioned that the mortgage is the relationship between a person with the land belonging to someone else, who have money debt to him. As long as the debt is not paid in full, the land remains in the lender's lending power.

In Law No. 5 of 1960 on the Basic Agrarian Law, the explanatory section states that the use of land on a lease basis, profit-sharing agreement, pledge and so on shall not be submitted to the agreement of the parties concerned on the basis of "freefight", but the ruler will give provisions on the manner and conditions, in order to meet the considerations of justice and prevented ways of extortion.

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Therefore, Law Number 56 Prp 1960 came into existence. In Article 7 the regulation states that the land that has been pawned for 7 years is returned to the owner, without the obligation to pay the copy money.

Pawn of agricultural land, in the explanation of Law Number 56 Prp Year 1960 on Stipulation of Land Area of Agriculture, stated that what is meant by the mortgage is the relationship between a person with the land belonging to someone else, who have money debt to him. As long as the debt has not been paid off, the land remains in possession of the money lender ("pawn-holder"). During that time the entire land proceeds into the right of the mortgage holder, which is thus the interest of the debt. In Law Number 56 Prp Year 1960 Article 7 states that: Whoever controls agricultural land with liens which at the time of entry into force of this Regulation has lasted 7 years or more shall return the land to its owner within a month after the existing crops are harvested, with no right to demand payment of ransom. Regarding the liens which have not been in force for 7 years, the landowner has the right to request it back at any time after the crops are harvested, paying a ransom of magnitude calculated according to the formula: provided that at any time

the liens have lasts 7 years then the pawn holders are obliged to return the land of the mortgage without payment of ransom, within a month after the existing plant is harvested. The provisions of paragraph 2 of this article shall also apply to liens held after the entry into force of this Regulation. The provision that the land pledged for 7 years must be returned without paying the ransom, in most cases, the Supreme Court has disconnected. This can be seen in the Supreme Court's decision. 38 K / Sip / 1961 dated 17-5-1976, where the legal rule can be taken, namely that although in this case the claimed land is the yard with the house on it according to the Supreme Court article 7 No. 5o / 1960 can be treated anoloog so that the yard and house must be returned to the owner without giving the loss. Similarly, the Supreme Court decision No. 903 K / Sip / 1972 dated 10-10-1974. It is found that the terms of liens contained in Law Number 56 Prp Year 1960 Article 7 are the same as buying and selling of the land, therefore the land must be returned without ransom. Or also on the Supreme Court's decision. 1272 K / Sip / 1973 dated 01-04-1975, with the rule of law that is Law Number 56 Prp Year 1960 Article 7 is forcing the pawn of agricultural land that has lasted 7 years or more, must be returned to the owner without payment of ransom and this cannot be attenuated because it has been agreed by both parties, because it is against the principle of the pawning institution.

According to customary law, the mortgage-pawning of the land is only done among indigenous Indonesians. However, due to the principle set forth in Article 9 paragraph (2), which excludes the distinction of indigenous citizens and foreign descendants in obtaining a right to land, it is presumed that liens after the coming into effect of the Basic Agrarian Law may also be owned by citizens Indonesian foreign descent.

The liens both on agricultural land and the original building land are regulated by customary (agrarian) law. Later in the Basic Agrarian Law the liens mentioned in Article 53 are linked to Article 52 paragraph 2 of the Basic Agrarian Law, which provides that as a temporary right the right shall be regulated to limit its properties contrary to the Basic Agrarian Law. In fact, it must be cultivated in a short time because the liens contain elements that are extortion. As the implementer of Article 53 of the Basic Law on Agrarian Law, the Rule 7 of Law No. 7/1999 is passed. 56 Prp Year 1960 on Stipulation of Agricultural Land Size regulating the return and redemption of pawned agricultural land (criminal sanction set out in Article 10). This article

also aims to eliminate land pledge transactions based on Indonesian customary law, but the judiciary in its application is still inconsistent resulting in dualism, namely land pledge under national agrarian law and customary law. Because the boundary between the two is unclear, it creates the uncertainty of legal protection and the attractive legal relationship between the two. Therefore, it is necessary to study the effect of land lien regulation on the implementation of land pledge in customary law.

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