

TRANSFER OF MORTGAGE RIGHTS DUE TO SUBROGATION

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Abstract: *Mortgage rights are security rights over land to guarantee repayment of debts by debtors to creditors. In the practice of debt agreements, there can be a transfer of receivables from the old creditor to a third party through a subrogation mechanism. Problems arise when the transferred receivables are guaranteed by mortgage rights, thus raising questions regarding the process of transferring mortgage rights to new creditors. This study aims to analyze the mechanism of transfer of mortgage rights due to subrogation according to positive law in Indonesia, the legal consequences for the parties after subrogation, and the obstacles and solutions in its implementation practice. This study uses a normative legal method with a statutory approach. The results of the study indicate that the transfer of mortgage rights through subrogation is in principle possible, but has not been explicitly regulated in Law Number 4 of 1996 or the Civil Code. Therefore, the transfer requires administrative action in the form of recording and renewing mortgage certificates to ensure legal certainty for new creditors and prevent potential disputes. It is necessary to reformulate norms and improve procedures so that the subrogation mechanism for mortgage rights can be implemented effectively and transparently.*

Keywords: *Mortgage, Subrogation, debt, collateral.*

Introduction

Mortgage rights are a security institution that provides a preferential position for creditors to execute land and related objects. (Ginting, 2022) Since the enactment of Law Number 4 of 1996 concerning Mortgage Rights on Land and Land-Related Objects (UUHT), the mortgage system in Indonesia has gained stronger legal certainty, both in terms of encumbrances, registration, and execution.

In modern financing practices, credit relationships do not always end with the original creditor. There is an economic need for third-party debt repayment or the transfer of receivables from the original creditor to a new creditor. This mechanism is known legally as subrogation, as regulated in Articles 1400–1403 of the Civil Code. (Naki, 2019) Subrogation results in the legal transfer of the position of the old creditor to the new creditor, including the privileges and guarantees attached to the receivables.

However, when the receivable is secured by a Mortgage, a question arises: can the Mortgage be transferred automatically to the new creditor, or must certain administrative actions be taken? The UUHT does not explicitly regulate the mechanism for transferring Mortgage Rights through subrogation. The absence of this regulation creates a legal gap and has the potential to give rise to disputes, particularly regarding the status of the new creditor and the certainty of ownership of the Mortgage Rights.

Literature Review

This research aims to analyze the mechanism for transferring mortgage rights due to subrogation according to positive law in Indonesia, the obstacles that arise in transferring mortgage rights due to subrogation.

Method

This is a normative legal study sourced from legislation (statute approach). The statutory approach inventories and uses laws and regulations related to the research topic to conduct analysis and be used as research supplementary materials. (Medaline & Moertiono, 2023) This study tends to use secondary data in the form of primary and secondary legal sources. The main source of law is the laws and regulations relating to Mortgage dan subrogation. Secondary legal sources are the opinions of legal experts from the literature that support the system of thought and analysis related to Mortgage dan subrogation. Secondary legal materials related to this research such as journals, essays, research reports, and others that are relevant to the subject matter of this research.

Result and Discussion

1. Mechanism for Transfer of Mortgage Rights Due to Subrogation in Indonesian Positive Law

Subrogation, as defined in Article 1400 of the Civil Code (KUHPdata), is a mechanism that places a third party as a new creditor after paying the debtor's debt. (Naja, 2019) From this definition, the elements of subrogation are derived, namely:

- a. The transfer of creditor rights
- b. The existence of a third party (new creditor) who replaces the old creditor, and
- c. Payment by the third party (new creditor) to the old creditor.

There are two forms of subrogation recognized in Indonesian civil law:

- a. Based on Article 1401 of the KUHP, subrogation based on an agreement, namely subrogation resulting from:
 - 1) The old creditor receives payment from a third party and expressly states in the deed that their rights are transferred to that party.
 - 2) The debtor borrows money from a third party to pay the old creditor, and the written deed states that the new creditor replaces the old creditor.
- b. Under Article 1402, subrogation can occur without an agreement, if regulated by law, such as in the following circumstances:
 - 1) A creditor pays the debt of another creditor with a higher priority.
 - 2) A buyer of goods pays the debts of the seller to the creditor.
 - 3) A person who is obligated to pay another person's debt for their own benefit.

The Civil Code guarantees that in subrogation, the new creditor obtains the same rights as the existing creditor. This means that the new creditor has the right to demand payment from the debtor, including exercising the security rights previously granted to the existing creditor. Therefore, the process of transferring creditors through subrogation does not eliminate existing rights but merely replaces the party authorized to collect the debt. This legal certainty provides protection for the new creditor, allowing them to exercise their rights without fear of claims from other parties claiming the same rights. Not only does the new creditor gain legal certainty, but the debtor also gains certainty regarding the party entitled to receive payment of their debt. (Yunus & Raharto, 2022)

If subrogation is not clearly executed or accompanied by written evidence, the debtor may be confused about who they are supposed to pay. In such situations, there is a possibility that the

debtor will make payments to the wrong creditor, which could lead to double payment obligations or legal disputes. Therefore, subrogation carried out using the correct mechanism will protect the debtor's rights by ensuring that they are only obligated to pay the legitimate creditor. Subrogation begins when a debtor receives a credit facility guaranteed by a guarantee institution defaults. Subrogation occurs when there is a collection of bad debts or write-offs due to the debtor's default. Write-offs are one way to improve the credit system within a bank by transferring problematic or non-performing loans that are difficult to handle from the bank's balance sheet to extra-computable, thus eliminating the burden on the bank's performance. (Supriyatna, 2019)

Subrogation must also not harm other parties, especially other creditors who have higher rights in the debt repayment priority order. Subrogation must be carried out by considering the entire structure of existing debt obligations, so as not to cause injustice to other parties who have interests. The existence of a written deed, equal rights of new creditors with old creditors, and protection of debtor rights are the main factors in ensuring legal certainty in subrogation. Apart from that, subrogation must also be carried out taking into account the rights of other creditors and the principles of justice so as not to harm parties who have higher rights in the order of payment. In practice, subrogation is widely used in banking, insurance and business transactions, so a good understanding of this mechanism is very important for all parties involved in financial transactions. Therefore, implementing appropriate subrogation in accordance with the Civil Code can help create legal certainty and protection for creditors, debtors and third parties involved in debt-receivable relationships.

Legal certainty in subrogation can be realized through clarity regarding the rights and obligations of each party, whether new creditors who receive collection rights, old creditors who have received payment, or debtors who are obliged to pay off their debts to the correct party. (Yustisia, Permadi, & Andrijani, 2021). With formal and well-documented procedures, legal certainty in subrogation can be maintained, so that all parties involved receive legal protection in accordance with applicable regulations. (Afrita & Arifalina, 2021)

The transfer of receivables to a third party through subrogation, against credit collateral secured by a mortgage, occurs when the third party has made payment or settled the debtor's debt and the creditor has received payment from the third party, then the collateral is also transferred to the new creditor. (Adistie & Anwar, 2021) Conceptually, subrogation has the legal effect of transferring all the rights of the old creditor, including property rights in the form of a mortgage. This aligns with the principle of *accessoir volgt hoofdzaak*, which states that the collateral follows the receivable. (Satrio, 2015)

Law Number 4 of 1996 concerning Mortgage Rights on Land and Land-Related Objects (UUHT) does not regulate subrogation. However, Article 16 of the UUHT stipulates that Mortgage Rights are transferred through the transfer of receivables. Therefore, subrogation, as a form of receivable transfer, is actually covered by this provision. (Rahardjo, 2021) Article 16 of the UUHT stipulates that Mortgage Rights can be transferred through inheritance and the transfer of receivables.

Subrogation is a mechanism for transferring receivables, so the Mortgage Rights are legally transferred to the new creditor. However, the UUHT does not explicitly regulate specific procedures for subrogation, creating a normative gap. The UUHT does not provide specific regulations regarding subrogation as a means of transferring collateral rights, so practice in the field relies heavily on land administration interpretations. (Tamrin, 2022) The absence of explicit language regarding subrogation does not mean the mechanism is invalid, but rather makes the administrative process dependent on general principles of land registration.

The transfer of mortgage rights due to subrogation must be proven through registration in the land register. This provision is based on:

- a. Articles 13–14 of the Land Title Law (registration is a prerequisite for the issuance of a Mortgage Right),
- b. Article 19 of Government Regulation No. 24 of 1997 (changes in legal data must be recorded),
- c. Regulation of the Minister of Agrarian Affairs and Spatial Planning/National Land Agency No. 5 of 2020 concerning Electronic Mortgage Services (updating Mortgage Holder Data).

Thus, the actual procedures in practice are:

- a. Notarized Subrogation Deed: Subrogation, according to Article 1401 of the Civil Code, must be expressly stated by the existing creditor. In practice, this statement is made in a Subrogation Deed or a Notary's Deed of Acknowledgment of Subrogation.
- b. Application for Change of Mortgage Holder: The new creditor submits an application for change of Mortgage Holder to the Land Office. The attached documents include:
 - 1) Subrogation Deed,
 - 2) Old Mortgage Certificate,
 - 3) Identity of the new creditor,
 - 4) Notification letter to the debtor.
- c. Recording of Renvoi on the HT Certificate: The Land Office records the change of Mortgage Holder in the land register and HT certificate (renvoi).
- d. Output: HT Certificate with New Creditor: After registration is complete, the updated HT certificate is given to the new creditor as authentic proof of legal standing.

This process aligns with the universally applicable public registry system in international collateral law, which asserts that without publicity, collateral rights lack prioritized enforceability. (Susanto & Haiti, 2025) The transfer of Mortgage Rights through subrogation cannot be considered administratively valid if it is not registered at the Land Office. Registration is a requirement for new creditors to obtain legal protection and to be able to execute collateral in the event of default. Without registration, new creditors do not have a defensible legal standing against third parties. (Sutedi, 2018) Registration is a requirement for new creditors to be able to execute if the debtor defaults.

2. Obstacles to the Transfer of Mortgage Rights Due to Subrogation

Obstacles to the transfer of Mortgage Rights due to subrogation can be categorized into three groups: normative, administrative, and substantive.

Normative obstacles arise from deficiencies or gaps in regulations within laws and regulations. These obstacles include:

- a. Normative Gaps in the Mortgage Law

The Mortgage Law does not mention the subrogation mechanism as a method for transferring Mortgage Rights, although subrogation is essentially a form of receivable transfer. Article 16 of the Mortgage Law only details transfers due to inheritance and cession, leading to

inconsistent interpretations. This creates what some call a normative vacuum, which is prone to creating legal uncertainty in financing transactions. (Rahardjo, 2021)

b. Absence of Standard SOPs from the ATR/BPN

Although Ministerial Regulation No. 5 of 2020 contains provisions regarding electronic Mortgage Rights (HT), the regulation does not explain the specific mechanism for changing Mortgage Rights holders due to subrogation. Land offices then developed their own SOPs, resulting in variations in procedures across regions. The lack of a uniform SOP is a major factor in the inefficiency of the Mortgage Rights renewal process in Indonesia. (Arsyad & Putra, 2023) In addition to normative barriers, administrative obstacles also play a significant role in the ineffectiveness of the Mortgage Rights subrogation mechanism.

a. HT Certificates Not Submitted by Existing Creditors

In practice, existing creditors often delay or refuse to submit HT certificates even though the receivables have been transferred through subrogation. This hampers recording and prevents new creditors from renewing their rights.

b. Unpreparedness of Land Officials

Lack of understanding that subrogation is a form of receivable transfer that results in the transfer of Mortgage Rights, resulting in frequent rejections of applications.

c. Suboptimal HT-EL System

The digitalization of HT-el services has not been fully synchronized with the legacy database, so recording creditor changes often requires manual verification. This has the potential to slow down the process and open up room for administrative conflicts.

In substance, several issues affecting the transfer of Mortgage Rights through subrogation include:

a. Lack of a Clear Deed of Subrogation

If the deed of subrogation does not contain an explicit statement from the previous creditor, the subrogation is deemed not to meet the requirements of Article 1401 of the Civil Code. In such cases, the new creditor cannot register as the replacement Mortgage Right holder. This is confirmed in Supreme Court Decision No. 2744 K/Pdt/2019, which states that subrogation must be clear and unequivocal to transfer collateral rights.

b. Lack of Notification to the Debtor

The debtor must be notified of the transfer of collection rights. Without notification, the debtor may continue to pay the previous creditor, which could give rise to disputes. Notification to the debtor is a crucial element in ensuring the effectiveness of subrogation. (Katarina, 2020)

Conclusion

1. The mechanism for transferring Mortgage Rights due to subrogation can be implemented based on Articles 1400–1403 of the Civil Code and the *accessoir* principle in property collateral. However, legal certainty is only achieved if the change in Mortgage Rights holder is recorded at the Land Office to fulfill the principle of publicity.
2. Obstacles to the transfer of Mortgage Rights due to subrogation include a lack of norms in the Mortgage Law, the absence of administrative SOPs from the ATR/BPN, obstacles to certificate delivery, lack of understanding by officials, and weaknesses in the

subrogation deed. These obstacles result in the lack of protection for new creditors and the potential for disputes over collateral execution.

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