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Application of the Power of Attorney in the Law of Guarantee Against Fixed Objects in Indonesia

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Abstract--The power of attorney in the Civil Code concerning the granting of power, which is an agreement, so that a binding principle applies to both parties. In addition to the principle of binding consensus also for them the principle of goodwill, that the parties in making agreements must have goodwill. In its development, the power of attorney, especially in business law and the world of a notary, gave birth to the name of absolute power, which then in the field of a notary is known to be contained in the power of attorney imposes dependent rights (SKMHT). This SKMHT arises from the existence of a principal agreement between the debtor and the credit against the material guarantee. SKMHT is a power of attorney that is specific to one legal action only and is an irrevocable power of attorney.

Keywords---absolute power, SKMHT, the power of attorney.

Introduction

The authority plays a very important role, (Satrio et al., 2020), the power of attorney known in Indonesian law is the granting of power (lastgeving) and power (volmacht). Lastgeving is stipulated in the Third Book on The Alliance Article 1793

to 1796 of the Civil Code (hereinafter referred to as the Civil Code). Power of Attorney (*volmacht*) is a unilateral legal action (Sinaga, 2018), that authorizes the beneficiary to take certain legal actions (Budiono, 2007). In contrast to the granting of power (*lastgeving*) which is a unilateral agreement, where the obligation to carry out achievements is only available on one party because usually the granting of power (*lastgeving*) occurs free of charge (Article 1794 civil code) (Sinaga, 2018). It is clear here that *lastgeving* is an agreement, while *volmacht* is a unilateral legal action (Budiono, 2018).

Principles of the Covenant (Richards, 2006), is the freedom of contract, which frees the parties to determine what they wish to pledge as well as determine what is not required to be included in the agreement/ contract, but the principle of freedom to make a contract does not mean free without limits because the state must intervene to protect the weak socially and economically or to protect public order, propriety, and decency (Syarifuddin, 2016). One of the irrevocable power of attorneys on the principle of freedom of contract is absolute power. Absolute power. stated in the Instruction of the Minister of Home Affairs No. 14 of 1982 concerning the Prohibition of the Use of Absolute Power as a Transfer of Land Rights which is then revoked by the Regulation of the Head of the National Land Agency of the Republic of Indonesia Number 10 of 2014 concerning the Repeal of The Law on Land. However, based on Article 39 paragraph (1) of Government Regulation No. 24 of 1997 concerning Land Registration (hereinafter referred to as PP Land Registration 1997), absolute power remains in force. If you look at the element of absolute power which is an irrevocable power and the transfer of land rights that give the recipient the power to control and use his land and do all legal acts that according to the law can only be done by the rights holder. The elements of absolute power as above, it can be concluded that the prohibition of absolute power is only related in the field of land and not in the field of other material law (Budiono, 2018). Objects as one of the collateral objects can be moving and immovable objects, which are included in the guarantee of moving objects including pawns and fiduciaries, while the guarantee of immovable objects includes the right of dependents (Salim, 2016). The right of dependents is a guarantee that is due to be promised in advance between the creditor and the debtor and made in writing (Sidabaria, 2019). The institution guarantees the right of dependents which is used to bind the object of debt guarantee in the form of land along with 'objects related to the land' whose implementation is assisted by the Land Deed Official (PPAT) in making the deed (Setiawan, 2018). Namely in the form of a power of attorney to impose dependent rights (SKMHT) (Salim, 2016), and deed of granting of dependent rights (APHT).

SKMHT is a deed of agreement that is classified as a power of attorney in the form of *lastgeving* (*volmacht*), where SKMHT is a special letter that is only allowed by law to contain certain legal acts that are related to the imposition of dependent rights and is an irrevocable power and will not expire for any reason, therefore, SKMHT can be classified as an absolute power of attorney for material guarantees. If SKMHT has absolute power of attorney relating to material guarantees what about the regulations relating to the period of SKMHT if reviewed from the rules of the power of attorney in the Civil Code (Singh et al., 2021 MacKay, 1992).

Method

This research uses a normative research method that examines the synchronization of the law, (Dewey, 1914; Richards, 2006; Black, 1910), namely regarding the rule of law related to the power of attorney, especially about SKMHT with the legal principles of material guarantee on the rights of dependents. The data used is secondary sourced from primary legal materials and secondary legal materials. Primary legal material consists of legislation, official records, or treatises in the making of legislation and decisions of judges. The secondary legal material is the publication of the law which is official documents. Publications on the law include textbooks, legal dictionaries, and legal journals, as well as comments on court rulings (Marzuki, 2017).

Discussion

The power of attorney is regulated in Book III starting from Article 1792 to Article 1819 of the Civil Code, where the power of attorney (Article 1792 of the Civil Code) is a treaty, by which one gives power to another person, who receives it, to on his behalf conduct an affair. Power (Black, 1910), in the Civil Code, can be done specifically and generally. That can be done in writing and orally. While the expiration of power based on Article 1813 of the Civil Code states that:

The granting of power ends with the withdrawal of the power of power; with the death, the fulness, or the bankruptcy of the power of attorney or the power of attorney; with the mating of the woman who gives or receives power of attorney.

In essence, the granting of power is aimed at managing the interests of the beneficiary for his/her affairs to be realized (Husni & Salim, 2021). In other words, give the right to act on behalf of the (Satrio et al., 2020). Since power is an agreement, it does not essentially set aside general provisions on the expiration of an agreement, based on the expiration of the specified time, or after the fulfilling of the void or completed conditions of the given task (Satrio et al., 2020).

One of the powers arising from the first time because of the habits in business law (lex mercatoria) and the need for the law that is then recognized, and developed in the world of a notary public is absolute power (Reed et al., 2016; Macdonald & Lefang, 1998). The absolute power of attorney is not found in the Civil Code but the Civil Code recognizes the existence of "irrevocable power", which is contained in Article 1178 paragraph (2) of the Civil Code. In other words, it cannot be revoked by waiving the provisions of Article 1813 juncto Article 1914 of the Civil Code concerning the expiration of power. Absolute power is contained in the Instruction of the Minister of Home Affairs No. 14 of 1982 concerning the Prohibition of the Use of Absolute Power as a Transfer of Land Rights containing 2 dictums, namely:

- First dictum
Prohibiting the Sub-District and Village Head or Officials at the same level, to make/strengthen the creation of an Absolute Power of Attorney which is essentially a transfer of land rights.
- Second Dictum

Absolute Power referred to in the First Dictum is a power in which it contains irrevocable elements by the authorizer; b. Absolute Power which is essentially the transfer of land rights is the Absolute Power that gives authority to the recipient to control and use his land and perform all legal acts that according to the law can be done by the rights holder.

The emergence of the Instruction of the Minister of Home Affairs aims to effectively control the use, control, and ownership of land so that it is completely following the principle of fair and equitable. Based on the second dictum, the irrevocable power of attorney according to Herlien Budiono must meet several conditions: (Budiono, 2018); 1) The Agreement shall be based on a valid right; 2) The interest is not for the authorized, but the use of the interests of the beneficiary even if legal action is taken in the name of the authority; 3) Legal obligations that still have to be performed by the authorizer to be granted irrevocable/withdrawn power of attorney; 4) Bedding power cannot be revoked /withdrawn must be firmly promised; 5) Irrevocable/revoked power is inseparable from the agreement between the giving party and the assignee (Sfikas, 1997; Kokhanovska et al., 2021).

According to J. satrio the basis of this absolute power of attorney is that the authorizer has no interest in the object on which it is given absolute power, and on the contrary, the beneficiary is very concerned over the possession of absolute authority over the object (Satrio et al., 2020). If seen the principle in the application of notarial deed, absolute power can be done toward trade binding agreement where the seller's money has received full sale money (paid off) which in practice is also called a deed of binding of the sale and power agreement.

Based on the hereinafter referred to as PP Land Registration 1997, Article 39 paragraph (1) letter d, which reads "either party or the parties act based on an absolute power of attorney which contains the legal act of transfer of rights", causing the prohibition of absolute power remains in force but only in the field of material law. In the law of material guarantee of immovable objects in the form of dependent rights, a credit agreement is a principal agreement that is then followed by a deed of granting dependent rights (APHT), where the APHT must be made by and before the authorized official, in this case, Notary And/or PPAT by signing the Deed of Granting of Dependent Rights (APHT) by the giver and the recipient of the dependent rights, if the dependent rights giver cannot face or future at before the Notary and/or PPAT there is a power of attorney in lieu, namely the Power of Attorney Charging dependent Rights (SKMHT) (Purwoko, 2015). Similar to the deed of binding of sale and power agreements, SKMHT is also an absolute power of attorney against the agreement, namely credit agreement (Budiono, 2018). The arrangements related to SKMHT contained in the Civil Code are: 1) Article 1795 that the granting of power of attorney can be done specifically, namely concerning only one particular interest; 2) Article 79 of the Civil Code, that a representative may be appointed using authentic power; 3) Article 334 of the Civil Code, that the power is allowed to act on behalf of only one person.

Based on the article above, the Civil Code has set several articles related and become a reference of the SKMHT itself. The function of SKMHT is so that in the

future under the time determined by the bank/creditor can represent the guarantee to carry out the imposition of dependent rights by signing the APHT (Husni & Salim, 2021). SKMHT is generally used in credit agreements, which are used as a continuation of credit agreements with land and building rights guarantees as collateral for debt repayment (Nurhayati & Gueci, 2019). The philosophy of SKMHT is that SKMHT cannot be withdrawn and cannot end for any reason, it is an effort to provide legal protection for dependent rights holders as preferred holders also called preferential creditors (Purwoko, 2015).

Article 15 paragraphs (3), (4), (5), and (6) of Law No. 4 of 1996 concerning The Right of Dependents on Land along with Objects Related to The Land (hereinafter referred to as the Law on The Rights of Dependents), namely: 1) Power of Attorney imposes dependent rights on land rights that have been registered must be followed by the creation of the Deed of Granting of Dependent Rights no later than 1 (one) month after it is granted; 2) Power of Attorney imposes dependent rights on unregistered land rights must be followed by the creation of a Deed of Granting of Dependent Rights no later than 3 (three) months after it is granted; 3) The provisions as referred to in paragraphs (3) and (4) shall not apply if a Power of Attorney to Impose the Right of Dependents is granted to guarantee certain credits stipulated in the prevailing laws and regulations; 4) Power of Attorney imposes dependent rights that are not followed by the creation of the Deed of Granting of Dependent Rights within the specified time as referred to in paragraph (3) or paragraph (4), or the time specified according to the provisions as referred to in paragraph (5) null and void (Silvern, 1999; Isra et al., 2017).

Based on Article 15 paragraphs (3), (4), (5), and (6) above it is clear that SKMHT has a period to be followed up on the signing of APHT, for land that has been certified SKMHT only valid for 1 month, while for land that does not agree SKMHT applies 3 months. For certain credit periods, SKMHT refers to the Regulation of the Minister of Agrarian and Spatial Head of the National Land Agency of the Republic of Indonesia Number 22 of 2017 concerning the Determination of The Deadline for the Use of Power of Attorney To Charge The Right of Dependents to Guarantee The Repayment of Certain Credit (hereinafter referred to as Permen ATR / BPN Number 22 the year 2017). Permen ATR/BPN No. 22 of 2017 regulates SKMHT that is valid until the expiration of the principal agreement for credit/financing/small business loans, for housing breeding (simple houses/flats), and loans/financing/other productive loans with a ceiling of up to IDR 200,000,000.00 (two hundred million rupiahs). While SKMHT applies up to 3 months to the rights to land that is essentially under management, with criteria for credit/financing / productive loans for small businesses with a credit ceiling of IDR 50.000.000 to IDR 250.000.000 and loans/financing/loans intended for the procurement of shophouses by small businesses with a credit ceiling/financing/loans not exceeding IDR 250,000,000 guaranteed with land rights financed by procurement with credit/financing/loans (Wechsler et al., 2015; Kahan, 2015).

If we compare with the Civil Code regarding the period of power in Article 470 states that the required power grace period is 10 years. Therefore, it is much different from the period of the Law on Dependent Rights and Candy ATR / BPN Number 22 the year 2017. So it can be called that the non-compliance of the

rules regarding the period against the power of attorney. According to Redi (2018), the principle of conformity lies between types and hierarchies between laws and regulations with each other.

Article 1338 of the Civil Code states that the agreement must be implemented in such good faith. If this principle is used in the use of SKMHT then according to the frugal author of the period in SKMHT is not required, good intentions become the basis of the SKMHT agreement. The pattern of SKMHT is paired indefinitely by holding the principle of agreement (goodwill), if the debtor begins to appear bad in the payment of credit installments then the creditor (bank) can give a reprimand (warning letter), this reprimand can be done in stages (strike 1, strike 2 and reprimand 3) and/or can be done by doing addendum of the basic agreement that is credit agreement (Markovic & Plickert, 2019; Mohamed & Rosman, 2021). Reprimand and addendum (additional agreement) if it can not change the intention then just paired the dependent rights as a last resort. It is also the forerunner of SKMHT following Sharia banking when followed by payment of obligations for debt payments only limited to the guarantee value of the guaranteed object. If you look at the opinion of Saidi (2015), mortgages and credits are never done in a commercial calculation, let alone for profit. Thus, mortgages and credit were not initially businesses, but rather a form of social services to help someone who was experiencing financial difficulties.

Conclusion

Power as one of the agreements is a good faith agreement between the sesame parties acting in the power of attorney. Power of Attorney Imposes The Right of Dependents (SKMHT) which is a special power of attorney, regulates only one legal action and cannot be withdrawn, is a feature of absolute power. The principle of *lex superior derogate legi inferior* should apply to the period of installation of SKMHT, so that there are no deviations in the rules, at least under the rules of the power of attorney in the Civil Code.

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