


Reconstruction of The Pawn Agreement Based on Justice

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Abstract

Introduction: Legally, the clauses in the pawn agreement still contain clauses that conflict with the Consumer Protection Law Nomor 8 of 1999 Article 18 paragraph (1) letter a which states that business actors who offer goods and/or services intended for trading are prohibited from making or including standard clauses in each document and/or agreement if: they state the transfer of responsibility of the business actor. In the pawn agreement there are still missing clauses that should be included in the pawn agreement.

Purposes of the Research: To analyze and find a reconstruction of the mortgage agreement based on justice.

Methods of the Research: The research method used is normative juridical. Descriptive and argumentative techniques must be used in carrying out the analysis.

Results Main Findings of the Research: Exoneration clauses are contrary to the principle of justice, therefore firm action from the authorities must be implemented without discrimination. This is done so that standard agreements made by business actors reflect the principle of justice. The purpose and objective of having a fair agreement is to get a happy ending. If an exoneration clause is found in the agreement, in this case a pawn agreement, then it is necessary to reconstruct the agreement. So that a just and civilized humanitarian agreement and social justice for all Indonesian people are realized.

Keywords: Reconstruction; Pawn Agreement; Justice.

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INTRODUCTION

Every person who is part of society certainly has a purpose in life to survive and also to grow and develop to meet daily needs. The desired needs are physical and spiritual needs. National development and economic development are inseparable from how people live in a country, if people live prosperously and sufficiently, it can be said that the country's economic development is very even. To realize a just and prosperous society, it is necessary to increase economic activities supported by the government sector as an authorized apparatus to determine monetary policy, as well as business activities from economic actors in various sectors, both State-Owned Enterprises, Cooperatives and the private sector.¹

One of the things that can be utilized by humans to meet their needs is one of the pawnshop businesses in Indonesia. The pawnshop business is a pawn by providing loans wrapped in an agreement, of course it must be based on the source of all sources of law, namely Pancasila. The philosophy of the principle of justice must be upheld in business, in

¹ Muhammad Iqbal and . Sukirno, "Reconstruction of Gala Agreement (Customary Pawn) in Acehese Customary Society Based on Sharia," *Law Reform* 13, no. 1 (2017): 98, <https://doi.org/10.14710/lr.v13i1.15954>.

accordance with the basis of Pancasila, the second principle, namely just and civilized humanity which contains the value of an awareness of moral attitudes and human behavior based on the potential of human conscience in relation to norms and culture. This principle applies to oneself, as well as fellow human beings and their environment and the fifth principle is social justice for all Indonesian people.

This principle shows that justice in social life is a dream that must continue to be pursued by all citizens and leaders of the nation.² Theoretically, a pawn is a right obtained by a creditor over a movable item that is handed over by the debtor as collateral for his debt and the item can be sold by the creditor if the debtor cannot pay off his obligation when it falls due.³ According to Subagyo, a pawnshop is a non-bank financial institution that provides credit to the public in a special way, namely through pawn law.⁴ Article 1150 of the Civil Code defines a pledge as a right obtained by a creditor over a movable object, which is handed over to him by a debtor or by another person on behalf of the debtor, and which gives the creditor the power to take payment of the object in priority over other creditors.

Elements and characteristics of a mortgage⁵ namely: a) pawn is given only on movable objects. b) the collateral must be removed from the possession of the Pawner (Debtor), there is a physical handover of the pawned object (levering). c) the pawn gives the creditor the right to obtain payment in advance of the creditor's receivables (*droit de preference*). d) the pawn gives the creditor the authority to take payment in advance. The pawn agreement is the basis between the parties to bind themselves and has legal consequences.

An agreement is a legal relationship between 2 (two) or more parties, where the parties deliberately bind themselves or bind each other, in which there are elements of the rights and obligations of the parties, where one party has rights, while the other party has obligations as in Article 1313 of the Civil Code which states that an agreement is an act in which one or more people bind themselves to one or more other people. In an agreement, each of them has an obligation called performance, which contains: a) giving something (for example: money, goods, etc.). b) do something (for example: making buildings, sending goods, transporting people, etc.). c) not doing anything (for example: not closing the road, etc.).

In order for an agreement to be good and correct and binding on the parties, it must be made legally. While the requirements for a valid agreement are determined in Article 1320 of the Civil Code, namely: a) agreed, the parties have agreed, meaning that there is a conformity of the will of the parties. This conformity of will occurs when during the negotiation the offer has been accepted (acceptance). An agreement is considered not to have occurred, even if a contract is signed if there is an element of coercion, fraud, or error and mistake. If an agreement is not reached even though there is an agreement, then this agreement can be canceled, meaning that a certain party can file for cancellation.

If the cancellation is not made, then the agreement continues. b) Competent, the parties are competent in making an agreement, competent means that the parties who make the agreement if individuals must be adults, of sound mind, and not under

² Pancasila Development Agency of the Republic of Indonesia Ideology, "Sukarno to Session Participants," <https://Bpip.Go.Id>, 2024.

³ Sigit Triandaru and Totok Budisantoso, *Banks and Other Financial Institutions* (Jakarta: Salemba Empat, 2000).

⁴ UIN Banten, "Theoretical Study," Repository.Uinbanten.Ac.Id, 2024.

⁵ Tan Henny Tanuwidjaja, *Legal Institutions of Debt Guarantees and the History of Notary Legal Institutions* (Bandung: Refika Aditama, 2012).

guardianship/custody. c) Certain object, the object agreed upon must be certain, the object agreed upon is a certain thing, meaning that the contents of the agreement must have clear specifications, so that the existence of the object is easily identified. If this requirement is not met, then the agreement is null and void, meaning that from the beginning the agreement is considered non-existent, then it cannot be implemented, and if there is a breach of contract, it cannot be sued in court. d) Permissible cause, the permissible cause is that the object agreed upon is not prohibited by laws and regulations, does not conflict with public interest and morality.

If this is not fulfilled, then the status of the agreement is null and void. An agreement that is made legally will apply as a law for those who make it. As in Article 1338 of the Civil Code which states that all agreements made legally apply as a law for those who make it. An agreement cannot be withdrawn except by agreement of the parties, or reasons that are stated by law to be sufficient for that and the agreement must be carried out in good faith. With the existence of the pawn agreement, it is also necessary to have goods as collateral. Collateral is defined as something given to the lender (mortgagor) to create confidence that the borrower (mortgagor) will fulfill obligations that can be valued in money arising from an agreement.

The Civil Code regulates in general about collateral, namely Article 1131 and Article 1132, the provisions in Article 1131 which states that all movable and immovable goods owned by the debtor, both existing and future, become collateral for the debtor's individual obligations, according to this article, all of a person's assets will automatically become collateral for debts that have been made, both existing and non-existent objects. The provisions in Article 1132 of the Civil Code which states that the goods become joint collateral for all creditors against them, the proceeds from the sale of the goods are divided according to the ratio of each debt unless there are legitimate reasons among the creditors to be prioritized. The collateral used in pawning is all movable goods, consisting of: a) tangible movable objects, such as objects that can be moved, for example televisions, gold, diamonds, cars, motorbikes and others. This is currently being implemented. b) intangible objects, such as securities such as stocks, bonds, promissory notes, checks and promissory notes.

Legally, the clauses in the pawn agreement still contain clauses that conflict with the Consumer Protection Law Number 8 of 1999 Article 18 paragraph (1) letter a which states that business actors who offer goods and/or services intended for trading are prohibited from making or including standard clauses in each document and/or agreement if: they state the transfer of responsibility of the business actor.⁶ In the pawn agreement there are still blank clauses that should be included in the pawn agreement. For example, clauses related to the maintenance of collateral for car, motorcycle, bicycle warehouses. In reality, the collateral for the warehouse is not well maintained so that it can be detrimental to the pawnbroker. Because the basis of the pawn transaction is a pawn agreement, then when there is no clause related to the maintenance of collateral for car, motorcycle, bicycle warehouses, if the pawnbroker sees that the collateral is not as expected, he cannot file an objection because it has not been regulated in the pawn agreement, it can be said that the pawnbroker is disadvantaged.

⁶ Grace Sharon, "Compensation for Misleading Promotion Methods Based on Law Number 8 of 1999 Concerning Consumer Protection," *Binamulia Hukum* 7, no. 1 (2018): 50–70, <https://doi.org/10.37893/jbh.v7i1.14>.

In the pawn agreement there are still exoneration clauses that can be categorized as biased, including: a) clause number 12 which states that the customer is obliged to pay the costs required for the maintenance of the collateral in the event that the collateral has not been sold within 20 (twenty) days from the due date as referred to in number 11 which states "if it is agreed by PT Pegadaian upon the customer's request to sell the collateral that has matured, a maximum of 20 (twenty) days from the due date is given..." even though the collateral is still in the possession of the pawn recipient. b) clause number 15 which states that the customer agrees that the cost of notifying the customer of the excess money can be calculated as a deduction from the excess money. c) clause number 16 which states "... If the proceeds from the auction sale of the collateral are not sufficient to pay off the customer's obligations in the form of loan money, capital lease, other costs (if any) auction fees, then the customer is obliged to pay the shortfall and states that he still owes PT Pegadaian".

Clauses 12, 15 and 16 are in conflict with Article 18 paragraph (1) letter a of Law No. 8 of 1999. The exoneration clause is a clause that is often used by parties who have a stronger position in making an agreement, namely a clause that exempts or limits the responsibility of the creditor/person in the agreement.⁷In the pawn agreement There is still a lack of clarity regarding legal protection for the mortgagee in the mortgage agreement.⁸ The pawn agreement still does not reflect justice, both from the clauses of the pawn agreement and the concept of legal protection for the pawnbroker, so this existing problem is a challenge for jurists to be able to provide a solution so that a mutually beneficial agreement for the parties (win-win solution contract) is realized, also providing legal certainty and providing justice. Therefore, if the pawn agreement contains elements of exoneration, it is necessary to reconstruct the pawn agreement based on justice. For this reason, more in-depth research needs to be carried out in order to reconstruct a pawn agreement based on justice.

METHODS OF THE RESEARCH

The type of research used in this study is normative juridical. This type of research is a type of research that uses library sources as a basis for research by tracing the rules and books that are relevant to the problems being studied. The legal materials used in this study are secondary legal materials, which come from theories obtained through library research, by reading, researching, and citing various ideas, concepts, and rules that are related to the problems being studied. Descriptive and argumentative techniques must be used in conducting the analysis. The problems that arise in this study are overcome by analyzing existing materials. Normative legal research can also be done using authentic, grammatical, and systematic interpretations.

RESULTS AND DISCUSSION

The business at Pegadaian is certainly related to the national economy, which is oriented towards pawn-based businesses with the slogan of solving problems without problems.⁹For that, with the principle of mutual benefit, the principle of family needs to be applied both in terms of transaction agreements and the contents of clauses in the agreement. As explained in Article 33 paragraph (1) of the 1945 Constitution, it states that the Indonesian

⁷Airlangga University, "Exoneration Clause in Business Contracts," <https://Repository.Unair.Ac.Id>, 2024.

⁸ Mochammad Dja'is et al., "Electronic Goods Pawn Agreements in Central Java," *Legal Issues* 48, no. 2 (2019): 186, <https://doi.org/10.14710/mmh.48.2.2019.186-193>.

⁹ Djaman Saerika Anggriani, "Application of Standard Clauses in Pawn Agreements" I, no. 1 (2013): 31.

economy is structured as a joint venture based on the principle of family. In Article 33 paragraph (1) there is a principle of family, this principle is the basis for making agreements, if this principle is applied, the agreement made will lead to justice.

A pawn agreement is a standard agreement, which has been made by the party receiving the pawn.¹⁰ This is allowed, but it is the contents of the agreement that need to be considered.¹¹ The clauses listed in the pawn agreement apparently still contain exoneration clauses. This raises a sense of injustice for the pawnbroker, therefore it is necessary to conduct an in-depth analysis of the pawn agreement, especially the exoneration clauses. The clauses listed in the pawn agreement need to be analyzed in depth because there are empty clauses and unclear legal protection for the pawnbroker.

The following are the results of the analysis of several of these clauses: a) clause number 12 which states that the customer is obliged to pay the costs required for the maintenance of the collateral in the event that the collateral has not been sold within 20 (twenty) days from the due date as referred to in number 11 which states "if it is agreed by PT Pegadaian upon the customer's request to sell the collateral that has matured themselves, a maximum of 20 (twenty) days from the due date is given..." even though the collateral is still in the possession of the pawnbroker.. If oriented with clause number 12 in the pawn agreement, then clause number 12 can be categorized as being in conflict with Article 33 paragraph (1) of the 1945 Constitution. In addition, clause number 12 also conflicts with the Copy of the Circular Letter of the Financial Services Authority Number 52/SEOJK.05/2017¹² regarding the Implementation of Pawnshop Business Activities that Organize Conventional Business Activities in letter B number 2 states "In maintaining the security and safety of collateral, the company must maintain cleanliness and carry out regular maintenance on the collateral in accordance with the characteristics of the collateral."

The provisions in the Financial Services Authority Circular Letter focused on Conventional Pawnshops, and in letter B number 2 there is a sentence "must", in this provision it is clear that Conventional Pawnshops are fully responsible for the maintenance of collateral, so that clause number 12 in the pawn agreement is contrary to the provisions of the OJK. Based on the provisions of the regulation, it is the obligation of the pawn recipient to maintain the collateral, but in reality, it turns out that the maintenance of the collateral has not been fully implemented and the provisions of numbers 11 and 12 also need to be changed. The reconstruction is as follows: "PT Pegadaian will guard and maintain collateral that has not been sold either by agreement of the customer to sell it themselves by bringing the prospective buyer to PT Pegadaian with an agreed time limit of 20 (twenty) days from the due date". b) Clause number 15 states that the customer agrees that the cost of notifying the customer of the excess money can be calculated as a reduction in the excess money.. In clause number 15, it is burdensome for customers, the customer's collateral used as collateral is auctioned by PT Pegadaian to cover its debt. When it has been sold and there is a surplus, then it is the absolute right of the pawnbroker. Meanwhile, PT Pegadaian as a BUMN company is obliged to notify the excess money to the customer. The provisions in

¹⁰ Yurida Zakky Umami and Anto Kustanto, "Legal Consequences of Default in Pawn Agreements," *Qistie* 14, no. 2 (2022): 13, <https://doi.org/10.31942/jqi.v14i2.5597>.

¹¹ Al Khairat Islamic Institute Pamekasan et al., "Ngejhá Community Service Journal Implementation Of Gold Pawn With Shariah System," *Community Service Journal* 1, no. 2 (2022): 99.

¹² Financial Services Authorization, "Copy of Circular Letter of Financial Services Authorization Number 52/SEOJK.05/2017 Concerning the Implementation of Pawnshop Business Activities Conducting Business Activities Conventionally" (2017).

clause number 15 are exoneration clauses which are unilateral decisions made by PT Pegadaian.

Customers are burdened again with the cost of notification of excess money, on the one hand excess money is an absolute right for customers that must be returned in full. On the other hand, it is the obligation of the company to inform customers about the excess money. While in clause number 15, the company tries to shift the responsibility for the cost of notification of excess money to customers and with costs that are not yet transparent in the agreement. This is clearly not in accordance with the elements of humanity, justice, and civilization, as stated in the second principle of Pancasila, namely just and civilized humanity.

The second principle of Pancasila shows that the Indonesian state respects humans and treats them fairly and civilized. The reconstruction is as follows: The customer agrees that the cost of notifying the customer of the excess money is the responsibility of the pawn recipient. As in the Circular Letter of the Financial Services Authority Number 52 of 2017 in Roman numeral VI concerning Procedures for Refund of Excess Money, number 1 states that companies are required to return excess money from the sale of collateral by auction or based on the power of attorney to sell to customers. However, in the Circular Letter of the Financial Services Authority Number 52 of 2017 in Roman numeral VI number 7 states that the cost of notification and sending excess money to customers can be calculated as a deduction from the excess money returned to customers. Furthermore, number 8 states that the imposition of notification and sending excess money by the company as referred to in number 7 must be included in the proof of pledge.

The provisions contained in the agreement in the pawn certificate and the provisions in the Circular Letter of the Financial Services Authority Number 52 of 2017, Roman numerals VI, 7 and 8 are exoneration clauses and must be reconstructed as: "This OJK regulation is part of the exoneration, because the excess auction money is the full right of the customer, so the notification and remittance costs of the excess money that reduce the excess money need to be revised because: a) there is no transparency in the amount of money remittance, b) the excess money is the full right of the customer, c) notification from the pawn recipient is an obligation that must be fulfilled without reducing the customer's rights"; c) Clause number 16 reads "...If the proceeds from the auction sale of collateral are insufficient to pay off the customer's obligations in the form of loan money, capital lease, other costs (if any) and auction fees, then the customer is obliged to pay the shortfall and declare that he still owes PT Pegadaian. The statement in clause number 16 is contrary to the second principle of Pancasila, namely just and civilized humanity. Customers who have goods when their collateral is auctioned, there are two perceptions: a) Indeed, the customer really does not have the money to settle. b) The customer has money but the money is used for the interests of his life. c) The customer has money but the collateral is indeed to be auctioned.

In pawn business activities that are oriented towards collateral, there are elements of rights and obligations for both the pawnbroker and the pawn recipient.¹³ Regarding the collateral that is pawned, it is the customer's right whether the collateral is to be redeemed, extended, or auctioned. When the collateral is entered, there is already an appraisal team that assesses the collateral. When the company has internally decided that the collateral is

¹³ Asuan Asuan, "Settlement Against Defaulting Debtors in Pawn Agreements," *Solutions* 18, no. 1 (2020): 121-38, <https://doi.org/10.36546/solusi.v18i1.254>.

accepted and assessed according to the provisions, then the company's obligation to provide the loan money is the customer's right.

When it is due, if the customer does not complete it, the collateral will be auctioned. When the auction is carried out, the customer's obligation is terminated, the customer will get his rights if the auction after deducting the obligation has excess money. However, if the auction that is carried out turns out to be a loss, it is a risk for the company. The customer has no obligation to complete it. So in clause number 16 it needs to be reconstructed into: "...If the proceeds from the auction sale of collateral are insufficient to pay off the customer's obligations in the form of loan money, capital lease, other costs (if any) and auction fees, then the customer is not required to pay the shortfall and is not declared to still be in debt to PT Pegadaian." This pawn agreement still contains a blank clause that should be included regarding the warehouse collateral maintenance clause. The clause should be included as follows: "PT Pegadaian is fully responsible for the collateral that is pledged at PT Pegadaian, including in terms of security, maintenance, care, confidentiality, damage and loss.

CONCLUSION

Exoneration clauses are contrary to the principle of justice, therefore firm action from the authorities must be implemented without discrimination. This is done so that standard agreements made by business actors reflect the principle of justice. The purpose and objective of having a fair agreement is to get a happy ending. If an exoneration clause is found in the agreement, in this case a pawn agreement, then it is necessary to reconstruct the agreement. So that a just and civilized humanitarian agreement and social justice for all Indonesian people are realized.

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