

Overlapping Authority of Notaries and Land Deed Officials in Making Power of Attorney to Impose the Mortgage Rights

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Abstract: This study aims to examine the imbalances that occur in the implementation of these authorities and evaluate whether the regulations and implementation are in line with the principle of legal certainty. Problems arise when this overlapping authority causes a gap between das sein and das sollen. The granting of authority to Notaries and Land Deed Officials in making Power of Attorney to Impose the Mortgage Rights is a dual authority that opens up room for debate regarding the clarity of the boundaries and legitimacy of each party in making Power of Attorney to Impose the Mortgage Rights, especially in relation to the making of land deeds. This study uses a normative legal approach, namely an approach that focuses on the study of positive legal norms. The results of the discussion are that Power of Attorney to Impose the Mortgage Rights made before Notaries using the format according to letter H (Attachment 23) of Article 96 paragraph (1) of Perkaban Number 8 of 2012 do not meet the requirements as authentic deeds and are contrary to Article 1868 of the Civil Code, Article 1 Number (7) and Article 38 Notary Law. Legal disharmony related to the norms governing Power of Attorney to Impose the Mortgage Rights is a vertical disharmony because it concerns the conflict between statutory regulations with different hierarchies that regulate the same thing, namely between Perkaban Number 8 of 2012 and Notary Law. Legal harmonization must be the heart of legal science in resolving the problem of disharmony between norms governing Power of Attorney to Impose the Mortgage Rights if this is not done then the Power of Attorney to Impose the Mortgage Rights deed made before a Notary will remain a problem all the time and cause chaos at the practical level

Keywords: Power of Attorney to Impose the Mortgage Rights; Notaries; Land Deed Official, Overlapping Authority.



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I. INTRODUCTION

As social beings, humans can't meet all their needs independently. Under certain circumstances, whether due to economic constraints or urgent situations, individuals often require assistance from others in the form of loans, either in cash or goods.¹ Debt itself is a form of agreement in which one person hands over a sum of money or goods to another party, with the condition that the recipient will return the same amount when they are able to do so. Debt has been known since ancient times and continues to evolve with changing times.²

This practice no longer only involves the aspect of trust but also involves legal aspects that require collateral for the debt. The most popular collateral in the community is the collateral of mortgage rights, this is because the object of the mortgage is land which are considered to have an economic value that is always increasing.³ The mortgage itself has the meaning of collateral imposed on the object in the form of land rights, which are specifically given to the creditor. This right gives the creditor the authority to sell the land used as collateral if the debtor defaults, and from the proceeds of the sale the creditor has the right to receive repayment of his debt, either in whole or in part, with a priority position compared to other creditors.⁴

Mortgage rights are regulated in Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land (referred to as Mortgage Law). In the Mortgage Law, it is explained that granting mortgage rights must go through two stages, namely granting mortgage rights and registering mortgage rights. The first stage can only be carried out if there is a credit agreement between the creditor and the debtor.⁵ Based on Article 10 paragraph (2) in conjunction with Article 11 of the Mortgage Law, the Land Deed Official is required to make a Deed of Granting Mortgage Rights. the Deed of Granting Mortgage Rights is important because it contains provisions for debt guarantees, including the identity of the parties, domicile, guaranteed debt, collateral value, and the object of the mortgage right. The second stage is registration of mortgage rights by the Land Office, after the Deed of Granting Mortgage Rights is signed by the parties. The Land Deed Official sends the Deed of Granting Mortgage Rights along with supporting

¹ Tiyas Putri Megawati, Aulia Dwi Ramadhanti, and Faizah Nur Fahmida, "Akibat Hukum Penandatanganan Surat Kuasa Jual Mutlak Sebelum Debtor Mengalami Kredit Macet," *Jurnal Ilmu Kenotariatan* 5, no. 1 (2024): 76–87, <https://doi.org/10.19184/jik.v5i1.47362>.

² Alya Nuzulul Qurniasari and Budi Santoso, "Kekayaan Intelektual Sebagai Aset Bisnis Dan Jaminan Kredit Perbankan Di Era Ekonomi Kreatif," *Notarius* 16, no. 3 (2024): 1376–91, <https://doi.org/10.14710/NTS.V16I3.41408>.

³ Adrian Sutedi, *Hukum Hak Tanggungan* (Jakarta: Sinar Grafika, 2012). P.36.

⁴ Denico Doly, "Aspek Hukum Hak Tanggungan Dalam Pelaksanaan Roya," *Jurnal Negara Hukum* 2, no. 1 (2011): 103–28, <https://doi.org/10.22212/JNH.V2I1.185>.

⁵ Enjang Teguh Brawijaya and I Gusti Ayu Agung Ariani, "Kewajiban Pembuatan Akta Pemberian Hak Tanggungan (APHT) Segera Setelah Ditetapkan Surat Kuasa Membebankan Hak Tanggungan (SKMHT)," *Kertha Semaya: Journal Ilmu Hukum* 3, no. 1 (2015): 123–40, <https://ojs.unud.ac.id/index.php/kerthasemaya/article/view/11899>.

documents, then the Land Office records it in the mortgage land book and on the land rights certificate.

Mortgage rights are considered valid once they are recorded in the land register.⁶ However, in practice, creditors are often unable to directly encumber mortgage rights on the debtor's collateral due to various obstacles, such as the land certificate still being in the developer's name, the collateral not being in the same domicile as the debtor, or the debtor being unable to appear before the Land Deed Official.⁷ Therefore, to provide legal certainty for creditors, a Power of Attorney to Encumber Mortgage Rights is created, which authorizes the creditor to represent the debtor in the Deed of Granting Mortgage Rights signing process.⁸

SKMHT is a deed that can be made by a Notary or the Land Deed Official as per Article 15 paragraph (1) Mortgage Law, so that it is legally binding and can be used as valid and perfect evidence. The format and substance of SKMHT have been standardized using official forms issued by the Ministry of ATR/BPN through Regulation of the Head of the National Land Agency Number 8 of 2012 (referred to as Perkaban Number 8 of 2012). The granting of authority to Notaries and the Land Deed Officials in making SKMHT is a dual authority that opens up room for debate regarding the clarity of the boundaries and validity of each party in making SKMHT, especially in relation to the making of land deeds. Problems arise when this overlapping authority creates a gap between *das sein* and *das sollen*. Conflicts of interest between professions often arise, even leading to doubts about enforcing legal certainty for parties in land security transactions.⁹ This study aims to examine the imbalances that occur in the implementation of these authorities and evaluate whether their regulations and implementation are in line with the principle of legal certainty as mandated by the land and notary law system in Indonesia.

II. METHODS

This research uses a normative legal approach, focusing on the study of positive legal norms as outlined in legislation and legal doctrine. In this context, law is understood as a system of written norms, also known as *law on the books*.¹⁰ The approach that emphasizes the study of applicable legal rules by examining

⁶ Anggi Tamamia Septanti, Muhammad Khoidin, and Mohammad Ali, "Penyimpanan Asli Lembar Kedua Akta Pemberian Hak Tanggungan Setelah Berlakunya Hak Tanggungan Elektronik," *Equivalent: Jurnal Ilmiah Sosial Teknik* 5, no. 2 (2023): 173–86, <https://doi.org/10.59261/JEQUI.V5I2.154>.

⁷ Asuan and Susi Yanuars, "Kontribusi Jabatan Notaris Dalam Perjanjian Kredit Bank," *Solusi* 20, no. 3 (2022): 387–404, <https://doi.org/10.36546/SOLUSI.V20I3.710>.

⁸ Asuan, "Surat Kuasa Membebankan Hak Tanggungan Dalam Perjanjian Kredit," *Solusi* 19, no. 1 (2021): 50–66, <https://doi.org/10.36546/SOLUSI.V19I1.329>.

⁹ Fauziah Suci Ramdhany, Zulkifli Makkawaru, and Abdurrafai Abdurrafai, "Kekuatan Hukum Penggunaan Surat Kuasa Membebankan Hak Tanggungan Terhadap Kredit Pemilikan Rumah Subsidi Yang Wanprestasi," *Clavia* 22, no. 3 (2024): 413–25, <https://doi.org/10.56326/CLAVIA.V22I3.5435>.

¹⁰ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2007).

written legal sources and other relevant legal materials. This research aims to systematically analyze legal regulations to address the legal issues.

III. ANALYSIS AND DISCUSSION

Overlapping Authority of Notaries and Land Deed Officials in Making Power of Attorney to Encumber Mortgage Rights

A guarantee agreement is a special agreement made by a creditor with a debtor or with a third party who makes a promise by pledging certain objects or on the ability of a third party with the aim of providing security and legal certainty of credit repayment or implementation of the guarantee agreement.¹¹ The guarantee agreement consists of material guarantees and individual agreements, but in banking practice, the material guarantee agreement is chosen by the creditor to guarantee the protection and certainty of his rights, to further secure the funds channeled by the creditor to the debtor, the creditor will request a special guarantee, usually in the form of land. This land guarantee institution is called a Mortgage Right guarantee.¹² The Mortgage Right is (*accessoir*) in nature where the birth, transfer, existence, execution and elimination of a mortgage right are determined by the transfer and elimination of the guaranteed receivables.¹³

Mortgage Rights are considered to be the safest bank credit guarantee, and it is easy to identify the collateral object, this is because Mortgage Rights have absolute rights/material rights, namely *droit de suite* and *droit de preference*, namely the right to fulfill receivables in priority and have separatist rights:¹⁴

"Mortgage Rights as a strong collateral institution has droit de preference (having a priority position for the holder) and droit de suite (following the object of the Mortgage Right in whoever the object is in) as its characteristics"

Mortgage Rights are security rights imposed on land rights, including or not including other objects that are part of the land, for the repayment of certain debts, which give a priority position to certain creditors over other creditors. The granting of Mortgage Rights on an object must be preceded by a principal agreement, this is emphasized in Article 10 number (1) of the Mortgage Law.¹⁵

The granting of Mortgage Rights is always followed by a Deed of Granting of Mortgage Rights, the deed is a guarantee of repayment of the debtor's debt to the

¹¹ Sri Endah Cahayani, "Pembuatan Surat Kuasa Membebankan Hak Tanggungan Tanpa Diikuti Akta Pemberian Hak Tanggungan," *Jurnal Hukum Dan Kenotariatan* 3, no. 1 (2019): 29–45, <https://doi.org/10.33474/HUKENO.V3I1.1917>.

¹² Oktaviantin Intansari and Edith Ratna, "Keotentikan Akta Pejabat Pembuat Akta Tanah Elektronik," *Notarius* 16, no. 2 (2023): 916–22, <https://doi.org/10.14710/NTS.V16I2.41540>.

¹³ Meralda Amala Istighfarin, "Perlindungan Hukum Kreditur Dan Pemilik Jaminan Dalam Pelaksanaan Perjanjian Kredit Dengan Jaminan Tanah Milik Orang Lain," *Acten Journal Law Review* 1, no. 1 (August 31, 2024): 64–84, <https://doi.org/10.71087/AJLR.V1I1.3>.

¹⁴ Sutedi, *Hukum Hak Tanggungan*.

¹⁵ Risky Puspita Sari and Djoni S Gozali, "Implikasi Hukum Akibat Kelalaian Dalam Pembuatan Surat Kuasa Membebankan Hak Tanggungan Dalam Perjanjian Kredit Perbankan," *Notary Law Journal* 1, no. 2 (2022): 145–56, <https://doi.org/10.32801/NOLAJ.V1I2.20>.

creditor in connection with the loan/credit agreement made by the creditor. In banking practice, the debtor usually does not yet legally own the collateral object that will be burdened by the Mortgage Right, this is because the certificate of the mortgage right object is still in the name of the developer, the mortgage right object is not in the same domicile as the debtor, which makes the debtor unable to appear before the Land Deed Official, in practice the creditor in this case the bank will make a SKMHT where the bank or creditor can represent the guarantor to carry out the burden of mortgage rights by signing the Deed of Granting Mortgage Rights.¹⁶

SKMHT based on Article 15 paragraph (1) Mortgage Law must be made with a Notary deed or the Land Deed Official deed. SKMHT as one of the processes in granting Mortgage Rights, the authority to make the SKMHT is given to Notaries and the Land Deed Official, by following the applicable regulations according to their positions. The existence of SKMHT must be in accordance with procedures and meet the requirements so as to be able to provide protection for creditors as credit loan distributors.¹⁷ This is because credit is one of the bank's businesses that is very important for the continuity of banking business activities. Therefore, in general, in credit agreements there is also a guarantee agreement. The existence of this guarantee is one of the bank's efforts to prevent bad debts that can cause losses for the bank. Supported by the prolonged economic crisis, banking institutions are more careful in distributing credit to the community.¹⁸

Basically, SKMHT is a form of written agreement from the party granting the mortgage to the recipient of the mortgage to encumber the mortgage. The SKMHT must be made directly by the mortgagee, fulfilling two aspects, namely those related to the limitations on the contents of the SKMHT and limitations on the time period. Regarding the time period as stated in Article 15 paragraphs (3) and (4) of the Mortgage Law, in reality, the time period is too short so that it can be detrimental to the creditor.¹⁹ This is because if the time period has expired, the SKMHT is legally void even though the Deed of Granting Mortgage Rights has not been made. SKMHT that is not followed up with the making of the Deed of Granting Mortgage Rights has consequences for legal protection for creditors, considering that the mortgage has not yet been born so that the creditor does not

¹⁶ Stefanie Waringga and Sudarwanto. Albertus Sentot, "Tanggung Jawab Notaris Yang Memiliki Kewenangan PPAT Dalam Pembuatan Surat Kuasa Membebankan Hak Tanggungan," *Jurnal Privat Law* 8, no. 2 (2020): 310–15, <https://doi.org/10.20961/PRIVAT.V8I2.48425>.

¹⁷ Miranadia Djati and Edith Ratna MS, "Perlindungan Hukum Bagi Koperasi Dalam Pembuatan Surat Kuasa Membebankan Hak Tanggungan," *Notarius* 12, no. 2 (2019): 900–908, <https://doi.org/10.14710/NTS.V12I2.29134>.

¹⁸ Gilang Wisudha, "Keabsahan Surat Kuasa Membebankan Hak Tanggungan Yang Dibuat Terhadap Agunan Yang Masih Terikat Hak Tanggungan Untuk Kreditor Lain," *Jurnal Legal Reasoning* 1, no. 1 (2018): 14–35, <https://doi.org/10.35814/JLR.V1I1.39>.

¹⁹ Shinta Andriyani, "Kajian Yuridis Surat Kuasa Membebankan Hak Tanggungan Menurut Undang-Undang No 2 Tahun 2014 Tentang Jabatan Notaris," *Jurnal Jatiswara* 30, no. 2 (2015): 334–56, <https://doi.org/10.29303/JTSW.V30I2.106>.

have preferential rights.²⁰ Regarding the making of SKMHT, according to Article 15 Paragraph (1) of the Mortgage Law, it is mandatory that the SKMHT be made with a notarial deed or a the Land Deed Official deed. However, the provisions related to the granting of SKMHT through a Notary or the Land Deed Official actually create dualism of authority.²¹

The Land Deed Official based on Article 1 number 1 of Government Regulation Number 24 of 2016 concerning amendments to Government Regulation Number 37 of 1998 concerning the Regulation of the Positions of Land Deed Official is a public official who is authorized to make authentic deeds regarding certain legal acts regarding Land Rights or Ownership Rights for Apartment Units. Types of the Land Deed Official are divided into two, namely Temporary the Land Deed Official and Special the Land Deed Official.²² Temporary the Land Deed Official is a government official appointed due to his position to carry out the duties of the Land Deed Official by making the Land Deed Official deeds in areas where there are not enough the Land Deed Officials. Special the Land Deed Official is an official of the National Land Agency appointed due to his position to carry out the duties of the Land Deed Official by making certain the Land Deed Official deeds specifically in the context of implementing certain government programs or tasks.²³

The Land Deed Official is qualified as a public official and is given the authority to make certain deeds in the field of transfer and encumbrance of land rights.²⁴ The authority of the Land Deed Official is based on Article 3 of the Regulation of the Positions of the Land Deed Official which stipulates that:

- (1) the Land Deed Official has the authority to make authentic deeds regarding all legal acts as referred to in Article 2 paragraph (2) regarding land rights and ownership rights to apartment units located in his area.
- (2) A Special the Land Deed Official is only authorized to make deeds regarding legal acts specifically mentioned in his/her appointment.

²⁰ Ahmad Zulfikar, “Kekuatan Hukum Jangka Waktu Surat Kuasa Membebankan Hak Tanggungan Kredit Mikro Pada Peraturan Menteri Agraria Dan Tata Ruang/Kepala Badan Pertanahan Nasional Nomor 22 Tahun 2017,” *Wajah Hukum* 3, no. 2 (2019): 110–20, <https://doi.org/10.33087/WJH.V3I2.73>.

²¹ Lingga CItra Herawan, “Pengaturan Kewenangan Pembuatan Surat Kuasa Membebankan Hak Tanggungan (SKMHT),” *Jurnal Calyptra* 2, no. 2 (2014): 1–10, <https://journal.ubaya.ac.id/index.php/jimus/article/view/735>.

²² Husna Handayani, Aminuddin Ilmar, and Muhammad Aswan, “Pengaturan Honorarium Pejabat Pembuat Akta Tanah,” *Amanna Gappa* 31, no. 2 (2023): 82–93, <https://journal.unhas.ac.id/index.php/agjl/article/view/28286>.

²³ Baeti Sakinah and Denny Suwondo, “Tanggung Jawab Pejabat Pembuat Akta Tanah (Ppat) Dalam Pembuatan Akta Jual Beli Tanah Beserta Akibat Hukumnya,” *Jurnal Ilmiah Sultan Agung* 2, no. 1 (2023): 998–1008, <https://jurnal.unissula.ac.id/index.php/JIMU/article/view/31439>.

²⁴ Muhammad Rafiq Utama, “Kewenangan PPAT Dalam Pembuatan Akta Peralihan Hak Atas Tanah Melalui Jual Beli,” *Grondwet* 3, no. 2 (2024): 72–83, <https://doi.org/10.61863/GR.V3I2.43>.

Furthermore, in Article 4 paragraph (1) of the Regulation of the Positions of the Land Deed Official, the Land Deed Official is only authorized to make deeds regarding land rights or ownership rights for apartment units located within his/her work area. the Land Deed Official based on Article 2 paragraph (1) of the Regulation of the Positions of the Land Deed Official has the main duty to carry out some land registration activities by making deeds as evidence that certain legal acts have been carried out regarding land rights or ownership rights for apartment units, which will be used as the basis for registering changes to land registration data resulting from these legal acts.²⁵ These legal acts based on Article 2 paragraph (2) of the Regulation of the Positions of the Land Deed Official are as follows:

- a. Buy and sell;
- b. Exchange;
- c. Grant;
- d. Intake into the company (inbreng);
- e. Distribution of joint rights;
- f. Granting of Building Use Rights/Use Rights on Freehold Land;
- g. Granting of Mortgage Rights;
- h. Granting power of attorney imposes mortgage rights

Based on the explanation of Article 2 paragraph (2) of the Regulation of the Positions of the Land Deed Official above, in carrying out his main duties, a the Land Deed Official has the authority to make authentic deeds regarding all legal acts as referred to in Article 2 paragraph (2) regarding rights to land. In accordance with the Land Deed Official's position as a public official, the deeds he makes are given the status of authentic deeds.²⁶

Article 2 paragraph (2) of Regulation of the Positions of the Land Deed Official letters g and h, one of the authorities of the Land Deed Official is to make SKMHT and the Deed of Granting Mortgage Rights, the SKMHT and the Deed of Granting Mortgage Rights are made by following the provisions in accordance with Perkaban Number 8 of 2012, the form/format of which is provided by the ministry of ATR/BPN. The procedure for filling it out must also follow the provisions of Perkaban Number 8 of 2012. The SKMHT has been provided in the form of a form/format by the Ministry of ATR/BPN, so the Land Deed Official only needs to fill it in according to the instructions for filling out the form/format of the relevant SKMHT.²⁷

²⁵ Emha Ainun Rizal, "Tanggung Jawab PPAT Atas Pembatalan Akta Yang Dibuat Dihadapannya," *Officium Notarium* 2, no. 2 (2022): 354–62, <https://doi.org/10.20885/JON.VOL2.ISS2.ART17>.

²⁶ Arsiendy Aulia, "Prinsip Kehati-Hatian PPAT Dalam Proses Pengikatan Jual Beli Tanah Sebagai Perwujudan Kepastian Hukum," *Recital Review* 4, no. 1 (2022): 244–78, <https://doi.org/10.22437/RR.V4I1.13364>.

²⁷ Mira Novana Ardani, "Fungsi Surat Kuasa Membebankan Hak Tanggungan Ditinjau Dari Ketentuan Pasal 15 Undang-Undang Nomor 4 Tahun 1996," *Diponegoro Private Law Review* 1, no. 1 (2025): 140–56, <https://ejournal2.undip.ac.id/index.php/dplr/article/view/1945>.

SKMHT made by the Land Deed Official, the form of the deed must be in accordance with that determined by the Ministry of ATR/BPN in the form of a blank/format SKMHT and must be remembered the area of authority of the Land Deed Official concerned. SKMHT in the form of a written authentic deed is a must and must be implemented, the Land Deed Official only fills in according to the data on the blank/format SKMHT. Previously, the obligation to follow and fill in the blank/format SKMHT for the Land Deed Official and Notary in making SKMHT was also explained in the Circular Letter of the Minister of State for Agrarian Affairs/Head of the National Land Agency Number 110-1039 dated April 18, 1996. From the circular letter, it can be seen that there is only one form of SKMHT, both made by the Land Deed Official. This means that the form of SKMHT must follow the form stipulated as in Perkaban Number 8 of 2012.

Notaries based on Article 1 number 1 of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary (referred to as Notary Law) are public officials who are authorized to make authentic deeds and have other authorities as referred to in this Law or based on other Laws. Notaries as public officials according to Article 15 paragraph (1) of Notary Law state a notary has the authority to make authentic Deeds regarding all acts, agreements and stipulations which are required by statutory regulations and/or which are desired by interested parties to be stated in authentic Deeds, guarantee certainty of the date of making the Deed, all of this as long as the making of the Deed is not also assigned or excluded to another official or other person as determined by law.

Based on Article 15 paragraph (2) Notary Law, in addition to the authority as referred to in paragraph (1), a Notary also has the authority to:

- a. Validate signatures and determine the certainty of the date of private letters by registering them in a special book;
- b. Recording letters under hand by registering them in a special book;
- c. Make a copy of the original private letter in the form of a copy containing the description as written and described in the letter in question;
- d. Carry out validation of the suitability of the photocopy with the original letter;
- e. Providing legal advice regarding the preparation of deeds;
- f. Making deeds related to land; or
- g. Making a deed of auction minutes

Article 15 paragraph (2) letter f Notary Law states that a Notary has the right to make deeds related to land, which deeds related to land are known as Notarial's SKMHT. The SKMHT made by a Notary must be made based on Notary Law and not follow the provisions of Perkaban Number 8 of 2012. Based on Article 38 Notary Law, in making a deed, the Notarial SKMHT should include the Beginning

of the Deed or the Head of the Deed; the Body of the Deed; and the End or closing of the Deed.²⁸

1. The beginning of the Deed or head of the Deed contains:
 - a. Title of Deed;
 - b. Deed Number;
 - c. Hour, day, date, month, and year; and
 - d. Full name and domicile of the Notary.
2. The body of the deed contains:
 - a. Full name, place and date of birth, nationality, occupation, title, position, place of residence of the presenters and/or the person they represent;
 - b. Information regarding the acting position of the facing person;
 - c. Contents of the Deed which constitute the wishes and desires of the interested parties; And
 - d. Full name, place and date of birth, as well as occupation, position, status and residence of each identifying witness.
3. The end or closing of the Deed contains:
 - a. Description of the reading of the Deed as referred to in Article 16 paragraph (1) letter m or Article 16 paragraph (7);
 - b. Description of the signing and place of signing or translation of the Deed, if any;
 - c. Full name, place and date of birth, occupation, position, status and residence of each witness to the Deed;
 - d. A description of the absence of changes that occurred in the making of the Deed or a description of the existence of changes which may be in the form of additions, deletions or replacements and the number of changes.

Notaries with their position in making SKMHT as one of the processes of granting Mortgage Rights must be based on the rules stated in Notary Law. Notary Law has regulated the Authority of Notaries in Article 15 paragraph (2) which states that Notaries have the right to make deeds related to land, in which case the deeds related to land include SKMHT, carried out by issuing their own notarial deed that has been typed or prepared by the notary.²⁹ Regarding the filling of the SKMHT

²⁸ Dian Cahayani, "Kewenangan Notaris Dalam Pembuatan Akta Otentik Berdasarkan Undang-Undang Nomor 2 Tahun 2014 Tentang Jabatan Notaris," *Jurnal Pendidikan Dasar Dan Sosial Humaniora* 3, no. 10 (2024): 853–60, <https://bajangjournal.com/index.php/JPDSH/article/view/8447>.

²⁹ Ni Made Seri Wahyuni Dewi, I Nyoman Putu Budiartha, and Ni Made Puspasutari Ujianti, "Perjanjian Kredit Bank Dalam Hal Surat Kuasa Membebankan Hak Tanggungan Tidak Diikuti Dengan Akta Pemberian Hak Tanggungan," *Jurnal Interpretasi Hukum* 3, no. 1 (2022): 188–92, <https://doi.org/10.22225/JUINHUM.3.1.4742.188-192>.

form/format, Notaries are required based on the rules in Notary Law, to make deeds in accordance with the provisions of Article 38 Notary Law. In practice, several Notaries in making SKMHT use the form of deed based on Perkaban Number 8 of 2012, and this is very wrong because it causes the authenticity of the SKMHT they made to be lost if the person filling in the SKMHT form/format is based on Perkaban Number 8 of 2012.

Simply put, this provision would create the consequence that the SKMHT falls within the scope of contract law. On the other hand, granting a SKMHT with a the Land Deed Official deed would result in the SKMHT falling within the scope of land law. Even though the SKMHT was drawn up by two different parties, the SKMHT deed is actually standardized in accordance with the provisions stipulated by the land office. Therefore, considering its standardized form, it essentially indicates a restriction on the parties' freedom to determine the content of the agreement.³⁰ Therefore, this is certainly a form of violation of the contract principle as reflected in Article 1338 of the Civil Code, which indirectly eliminates the principle of freedom of contract itself.

In relation to the authenticity of the SKMHT deed made before a Notary as described previously, it is clear that there are several formal requirements related to the form of the deed that cannot be fulfilled by the SKMHT deed format regulated in Perkaban Number 8 of 2012, especially those related to the beginning of the deed and the end/closing of the deed, if related to the form of the deed regulated in Article 38 Notary Law.³¹ By not fulfilling the formal requirements related to the form of the deed, the SKMHT deed made before a Notary using the deed format of Perkaban Number 8 of 2012 does not meet the requirements as an authentic deed.

According to the provisions of Article 1869 of the Civil Code, it states that: A deed which due to the inability or incompetence of the employee referred to above, or due to a defect in its form, cannot be treated as an authentic deed, however, has the force of a private writing if it is signed by the parties. Likewise with Article 41 of the Notary Law which states that: Violation of the provisions as referred to in Article 38, Article 39 and Article 40 of the Notary Law results in the deed only having the force of proof as a private deed.³² If these two provisions are linked to Article 1 point 7 of the Notary Law which states that A Notarial Deed hereinafter referred to as a deed is an authentic deed made by or before a Notary

³⁰ Ketut Nurcahya Gita and I Made Udiana, "Kepastian Hukum Dalam Pembuatan Surat Kuasa Membebankan Hak Tanggungan," *Acta Comitas : Jurnal Hukum Kenotariatan* 6, no. 02 (2021): 275-287–275 – 287, <https://doi.org/10.24843/AC.2021.V06.I02.P05>.

³¹ Ni Putu Selviana Putri Pratamikha, "Bentuk Surat Kuasa Membebankan Hak Tanggungan Setelah Dikeluarkannya Peraturan Kepala Badan Pertanahan Nasional Nomor 8 Tahun 2012 Tentang Ketentuan Pelaksana Peraturan Pemerintah Nomor 24 Tahun 1997 Tentang Pendaftaran Tanah," *Acta Comitas : Jurnal Hukum Kenotariatan* 1, no. 1 (2016), <https://doi.org/10.24843/AC.2016.V01.I01.P05>.

³² Made Oka Cahyadi Wiguna, "Surat Kuasa Membebankan Hak Tanggungan Dan Pengaruhnya Terhadap Pemenuhan Asas Publisitas Dalam Proses Pemberian Hak Tanggungan," *Jurnal Legislasi Indonesia* 14, no. 4 (2018): 439–46, <https://doi.org/10.54629/JLI.V14I4.122>.

according to the form and procedures stipulated in this Law, then it can be concluded that a Notarial Deed that does not comply with the form stipulated in the Notary Law, because there is a defect in its form, then the Notarial Deed cannot be used as an authentic deed. The legal consequence is that the deed only has the power of proof as a private deed, if the deed is signed by the parties.

Authentic deeds have the power of birth evidence in accordance with the principle of *acta publica probant seseipsa*, while private deeds do not have the power of birth. This means that a private deed is only valid if the signer acknowledges the truth of his signature, meaning that if the signature has been acknowledged as true by the person concerned, then the deed is valid as perfect evidence for the parties concerned. If the authenticity requirements of the deed are not met, the SKMHT prepared by the Notary cannot be used as a basis for making an the Deed of Granting Mortgage Rights. As is known, when the SKMHT cannot be used as a basis for making an the Deed of Granting Mortgage Rights, the creditor will be threatened with not having the rights as a concurrent creditor with executorial power over the collateralized object because the general guarantee provisions will apply, thus the SKMHT will also be null and void by law. This certainly has a very vital legal impact for the banking sector.

Banking institutions are capable of providing funding for the development of infrastructure within the community. Both the government and the private sector can apply for loans or capital to complete development projects. These factors make banks play a strategic and crucial role in the advancement of national economic development, requiring their operations to remain stable and sound. Bank health can be defined as the bank's ability to carry out all operational activities properly and normally.³³ Furthermore, a bank is considered healthy if it is able to fulfill all its obligations in accordance with applicable banking regulations. The concept of bank health is broadly defined, based on the fact that bank health encompasses all banking business activities.³⁴ The bank's health is ultimately used by these parties to assess and evaluate its performance. Evaluations relate to the bank's compliance with applicable policies, adherence to Sharia principles, risk management, and the application of prudential principles.

Banking performance evaluations and assessments are conducted annually. If a bank is categorized as sound and its health continues to improve, the supervisory body expects the bank's health to be maintained. However, if a bank is categorized as sick or unhealthy, Bank Indonesia, as the bank supervisor and

³³ Brawijaya and Ariani, "Kewajiban Pembuatan Akta Pemberian Hak Tanggungan (APHT) Segera Setelah Ditetapkan Surat Kuasa Membebankan Hak Tanggungan (SKMHT)."

³⁴ Rifandika Naufal Afif, Andi Muh Ihsan, and Dita Elvia Kusuma Putri, "Akibat Hukum Bagi Notaris Terhadap Penyalahgunaan Keadaan Dalam Pembuatan Akta Autentik," *Jurnal Ilmu Kenotariatan* 5, no. 1 (2024): 45–61, <https://doi.org/10.19184/jik.v5i1.47761>.

supervisor, will provide guidance and sanctions.³⁵ This guidance from Bank Indonesia includes recommendations for management changes, consolidation, mergers, acquisitions, and even the bank's liquidation. Liquidation of a bank signifies that the bank's condition is deemed truly serious and extremely unhealthy.

Harmonization of Regulations for Making Power of Attorney to Assign Mortgage Rights

Mortgage Rights as collateral for land cannot be an agreement that can stand alone, but in the agreement there must be a clause regarding the granting of mortgage rights as collateral for debt. This clause is based on Article 10 paragraph (2) of the Mortgage Law stated in the Deed of Granting Mortgage Rights made by the Land Deed Official, in the presence of the grantor of the Mortgage Rights (debtor) in person before a Notary or Land Deed Official. The granting of the Mortgage Rights must meet the special requirements (Article 11 paragraph (1) of the Mortgage Law) which include the Name and identity of the holder and grantor of the mortgage rights, Domicile of the parties, holder and grantor of the mortgage rights, Clear designation of the debt or debts whose repayment is guaranteed.³⁶

Paul Schoultzen stated that law demands obedience. Society and legal entities, as legal subjects, must only obey what is not contradictory to the law itself, and therefore, the law must embody unity. Paul Schoultzen's statement above serves to remind us of the importance of harmonization and synchronization in laws and regulations so that they can be complied with by all legal subjects. Legal harmonization should be incorporated in legal science and used to demonstrate the existence of legal diversity that can lead to disharmony between norms.³⁷

SKMHT as regulated in Article 15 paragraph (1) Mortgage Law and Article 96 paragraph (1) Perkaban Number 8 of 2012, which provides space for Notaries and the Land Deed Official to make SKMHT, has caused problems in the practice of the notary world as explained previously, even with the division of authority that SKMHT for land rights located in the Land Deed Official work area is made with a the Land Deed Official deed while SKMHT for Land Rights located outside the Land Deed Official work area is made with a Notary deed. This condition becomes more complicated when the government through the Ministry of ATR/BPN stipulates 1 (one) SKMHT deed format with the same procedures and filling methods for the Land Deed Official and Notaries.

This condition has created legal disharmony because there is a lack of harmony between one legal norm and another. In contrast to a Notary, a the Land

³⁵ Agus Widiantoro and Dita Elvia Kusuma Putri, "Akibat Hukum Bagi Nasabah Terhadap Pelaksanaan Merger Badan Usaha Perbankan Di Indonesia," *Acten Journal Law Review* 2, no. 1 (2025): 17–31, <https://doi.org/10.71087/AJLR.V2I1.24>.

³⁶ Gusriadi and Taufiq El Rahman, "Perlindungan Hukum Terhadap Kreditur Akibat Surat Kuasa Membebangkan Hak Tanggungan Yang Terdegradasi Sebagai Akta Di Bawah Tangan," *Jurnal Hukum* 37, no. 2 (2021): 134–54, <https://doi.org/10.26532/JH.V37I2.16325>.

³⁷ Yovita A. Mangesti and Bernard L. Tanya, *Moralitas Hukum* (Yogyakarta: Genta Publishing, 2014).

Deed Official is subject to the provisions stipulated in the Regulation of the Positions of the Land Deed Official and its Implementing Regulations regulated by Ministerial Regulations including Perkaban Number 8 of 2012, complete with forms and procedures for filling out the deed forms that are available in full according to the filling instructions. While for a Notary, they are bound by the form of the deed as stipulated in Article 38 Notary Law which is the main guideline for a Notary in carrying out his/her duties so that the SKMHT made by a Notary meets the requirements to be declared a Notarial deed that has the power as an authentic deed. To overcome this disharmony of norms, it is necessary to harmonize legal norms regarding SKMHT. The intended harmonization of legal norms for SKMHT is an effort to harmonize the laws and regulations that are used as a basis for making SKMHT deeds before a Notary so that the deed can meet the requirements as an authentic deed.³⁸

Referring to the 2 (two) concepts of harmonization and synchronization offered by experts, in relation to this research problem, the harmonization and synchronization needed is vertical harmonization and synchronization of the SKMHT deed. Vertical harmonization and synchronization is the harmonization and synchronization of laws and regulations with other laws and regulations in a different hierarchy. Vertical synchronization is carried out by seeing whether a law and regulation that applies in a certain field does not contradict each other, in addition to having to pay attention to the hierarchy of the laws and regulations, in Vertical synchronization requires attention to the chronology of the year and the number of the relevant legislation. Vertical synchronization aims to determine whether the legislation applicable to a particular area of life does not contradict one another when viewed from a vertical perspective or the hierarchy of existing legislation.

The problem related to the disharmony of the SKMHT deed norms as the focus of this study is a vertical inconsistency because there are 2 (two) regulations that are different in hierarchy, namely regulations with a lower hierarchy that conflict with a higher hierarchy of regulations, namely between Perkaban Number 8 of 2012 and Notary Law.³⁹ The harmonization that will be analyzed is specifically the formulation of provisions concerning the Format / form of the SKMHT Notarial deed so that the deed still meets the requirements as an authentic deed and does not

³⁸ Piters Djajakustio, "Surat Kuasa Membebankan Hak Tanggungan (SKMHT) Batal Demi Hukum: Urgensi Dan Alternatif Membangun Konsep Baru Perlindungan Hukum Bagi Kreditor," *Jurnal Ilmu Kenotariatan* 4, no. 1 (2023): 25–44, <https://doi.org/10.19184/jik.v4i1.38539>.

³⁹ Asyri Febriana, M. Arba, and Aris Munandar, "Implikasi Hukum Pembuatan Surat Kuasa Membebankan Hak Tanggungan (SKMHT) Yang Dibuat Oleh Pejabat Yang Sudah Tidak Berwenang," *Jurnal IUS Kajian Hukum Dan Keadilan* 9, no. 3 (2021): 607–20, <https://doi.org/10.29303/IUS.V9I3.921>.

cause other consequences that can be detrimental to the parties involved in the deed.⁴⁰

By carefully observing the provisions in Perkaban Number 8 of 2012, the regulation is actually intended for the Land Deed Official in making SKMHT deeds and not intended for Notaries. However, in letter h (attachment 23) of Article 96 paragraph (1) of Perkaban Number 8 of 2012, which regulates the format of deeds and procedures for filling out SKMHT deeds, the regulation is not only intended for the Land Deed Official but also intended for Notaries in making SKMHT deeds, because there is only 1 (one) deed format for both Notaries and the Land Deed Officials.⁴¹ From the description of theory and concept regarding the potential for legal disharmony, it is reasonable to suspect that this disharmony is caused by overlapping authority and conflict of interest between agencies in the government bureaucracy. In addition, the lack of coordination in the process of making laws and regulations involving various agencies and legal disciplines also plays a role in the presence of this legal disharmony. Therefore, there must also be a technical guideline that serves as a reference for officers, in this case the Land Office, that Notaries and the Land Deed Officials are 2 (two) different positions, and have their own guidelines for making deeds, so that they cannot be mixed up, which will have an impact on the authenticity of the deeds of each official, both Notaries and the Land Deed Officials.

VI. CONCLUSION

SKMHT made before a Notary using the format according to letter H (Attachment 23) of Article 96 paragraph (1) of Perkaban Number 8 of 2012 does not fulfill the requirements as an authentic deed and is in conflict with Article 1868 of the Civil Code, Article 1 Number (7) and Article 38 of the Notary Law. In this case, the Notary has denied his existence as a public official who is given the authority to make authentic deeds in accordance with what is regulated in the Notary Law and is considered to have violated the Notary Law and is open to being sued in civil court by parties who feel aggrieved by the deed. The possibility of being sued in civil court by parties who are harmed in the SKMHT deed has a negative impact on decreasing public trust in the profession of a Notary.

Legal disharmony related to the norms governing SKMHT is a Vertical disharmony because it concerns the conflict between Legislation with different hierarchies that regulate the same thing, namely between Perkaban Number 8 of 2012 and Notary Law, for that vertical harmonization is needed in order to create harmony in the regulation of SKMHT in accordance with the scope of authority of

⁴⁰ Daffa Mulyo Saputro and Ana Silviana, "Akibat Hukum Penggunaan Surat Kuasa Membebankan Hak Tanggungan Dengan Kreditur Pemegang Hak Tanggungan," *USM Law Review* 7, no. 3 (2024): 1705–18, <https://doi.org/10.26623/JULR.V7I3.9708>.

⁴¹ Metta Tjia and David Tan, "Keabsahan Dari Akta Surat Kuasa Membebankan Hak Tanggungan Yang Dibuat Oleh Notaris," *Repertorium: Jurnal Ilmiah Hukum Kenotariatan* 11, no. 1 (2022): 12–23, <https://doi.org/10.28946/RPT.V11I1.1714>.

each Notary and the Land Deed Official. Legal harmonization must be the heart of legal science in resolving the problem of disharmony between norms governing SKMHT if this is not done then the SKMHT deed made before a Notary will remain a problem all the time and cause chaos at the practical level.

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