**Imposition of Mortgage Rights by the Grantor of the Grant Binding Agreement Object**

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**Abstract**

This paper analyzes the object of the grant binding agreement made in the presence of a notary public who can be liable to a third party by the granter This study uses a normative juridical approach, namely legal writing done by examining data or library materials which are secondary data in the form of primary legal materials, secondary legal materials, and tertiary legal materials. After the legal materials are collected, they are processed and analyzed using qualitative methods. The research results show that basically, the agreements that have been made based on the provisions of Article 1320 *Burgerlijk Wetboek* have binding legal force, meaning that the agreements that have been approved and set forth in the form of a binding agreement are laws for those who make them. Therefore, the grant binding agreement made before a notary public even though there has been no transfer of title to land, the object of the grant binding agreement cannot be borne by the grantee to a third party, given the initial purpose of making the agreement deed of the grant agreement is so that real grants can be made.

**Keywords: *grant, imposition, mortgage, object of agreement.***

**INTRODUCTION**

Legal action, can never be eliminated from social life. One of the legal actions that is often carried out is entering into an agreement. Agreement or in colloquially known as a contract is an important aspect of law, especially civil law. Agreements are an important element in life because the existence of an agreement, both in the unwritten (oral) form and in the written form will give birth to a set of rights and obligations, just like the purpose of law.

The presence of various agreements that grow in society gives birth to an agreement between the parties which makes it a legal relationship for them. The existence of an agreement as one of the sources of the engagement can be found in Article 1233 *Burgerlijk Wetboek* (BW) which states that “Every engagement is born, either because of the agreement, either because of the law”. An agreement stems from the equality of the parties' wills which make it still paying attention to the legal terms of the agreement, including agreement between them who bind themselves, their ability to bind themselves, a certain thing and a lawful cause, as formulated in Article 1320 BW[[1]](#footnote-1) The agreement publishes an engagement between the two people who make it,[[2]](#footnote-2) An agreement is a legal relationship between two people who agree to have legal consequences.[[3]](#footnote-3) In other words, a legal relationship regarding property between two parties, in which a party promises or is deemed to promise to do something or not to do something, while the other party has the right to demand the implementation of the agreement.[[4]](#footnote-4) As for Ahmadi Miru, stated “a contract or agreement is a legal event in which one person promises another person or two people promise to do or not do something”.[[5]](#footnote-5)

At present, there is a new and developing type of covenant in the practice of notary, which is the binding grant agreement. This grant commitment agreement is a form of binding that is born from the agreement and the agreement between the parties that make it. The actual grant binding agreement does not have a significant difference with the agreement in general. This agreement was born as a result of the open nature of book III BW which gives legal subjects the widest freedom possible to enter into an agreement containing anything and in any form, as long as it does not conflict with the prevailing laws and regulations. Although this type of agreement is not yet commonly heard by the public and notary colleagues, a grant binding agreement can be the right solution if there are obstacles for someone who wants to donate his land but cannot grant it directly through a grant deed.

Starting from the explanation above, it can be said that the grant binding agreement becomes a preliminary agreement between the granter and the grantee before the grant agreement is actually implemented, while the grant agreement is an agreement made by someone with another who receives it free of charge, and cannot be withdrawn. In general, the grant binding agreement is carried out if the object to be donated is immovable object (land) and for the transfer of its rights must be based on the deed of the Land Deed Making Official (*Pejabat Pembuat Akta Tanah*/PPAT) in accordance with the provisions of Government Regulation Number 24 Year 2016 concerning Amendments to Government Regulation Number 37 Year 1998 concerning Regulations on the Position of the Land Deed Making Official:

“The PPAT has the main task of carrying out some land registration activities by making deeds as evidence of certain legal actions regarding land rights or property rights over apartment units, which will be used as the basis for registering changes to land registration data as a result of this legal act. One of the legal actions referred to in paragraph (1) is a grant”.

However, in such a case, the making of the grant binding agreement deed is not under the authority of PPAT even though the land is the object to be bound through the agreement. The authority to draw up the grant binding agreement deed is given to the notary public. This authority is given because the contents of the grant agreement deed contain the preliminary agreement and the binding agreement between the granter and the grantee, not regarding the transfer of the object of a right. It is different if the land can be immediately granted to the recipient, then the PPAT will be the authorized party to make a deed of transfer of rights to the land in accordance with the provisions mentioned above.

Transfer of objects of ownership rights to land through a grant, a legal action is needed which can prove that the transfer has occurred and is legal in the eyes of the law. This can be done by registering the deed that has been drawn up before the PPAT to the local land office, as stated in the provisions of Government Regulation Number 24 Year 1997 concerning Land Registration in Article 37 Paragraph (1) which states:

“Transfer of rights to land and ownership rights to apartment units through sale and purchase, exchange, grants, income in companies and other legal actions of transfer of rights, except the transfer of rights through auction can only be registered if it can be proven by deeds made by the authorized PPAT according to the provisions of the applicable laws and regulations”.

From the provisions of this regulation, it can be said that the transfer of ownership rights to land through a grant must be made with a PPAT deed. However, on the other hand, there are several factors that have become obstacles so that the grantees and recipients of the grants have not been able to carry out the transfer of land rights through a grant deed made by PPAT. The factors in question are if the subject of the grant, both the donor and recipient of the grant is outside the area of ​​residence, the object of the grant is still guaranteed to a third party, the land granted is only part of the master certificate, the land to be granted is still in the process of being certified at the land office local, or the grantee has not been able to pay the Tax on Acquisition of Land and Building Rights (*Bea Perolehan Hak Atas Tanah dan Bangunan*/BPHTB) on grants, and other factors.

Specifically, the grant binding agreement does not yet have separate regulations, either in the form of legislation or in the form of other regulations. However, what should not be overlooked is the openness nature of book III BW which gives legal subjects the widest freedom possible to create new types of agreements that were previously unknown in a named agreement. The provisions regarding the form of the grant binding agreement do not require that the agreement be written in the form of an authentic deed, because the form of the agreement is considered valid if the provisions of article 1320 BW have been fulfilled so that the grant binding agreement made before a notary (authentic deed) is only an option.

A grant binding agreement made in a notary has advantages over an agreement made orally or in writing (unofficial). This is because the agreement made in a notary has perfect evidentiary power. Perfect proof is that if there is denial of the truth of the deed, then the deed is still considered true so that the person who makes the denial can provide evidence to the contrary. Therefore, with the notarized grant binding agreement it can provide protection and legal certainty to the parties involved, so that this grant binding agreement needs to be made as early as possible so that the real grant can be implemented immediately because basically the giver really meant to grant his land. to the recipient.

However, there are important things to consider in binding a grant agreement for land. This is because, apart from being the object of grants, land is also often used as an object of collateral to third parties (creditors). Collateral for this land is known as a mortgage. The assignment of land with mortgage rights is specifically regulated through Law No. 4 Year 1996 concerning Land Rights and Objects related to Land. In this regulation, it is explained that, land rights that can be borne by mortgage rights, namely, ownership rights, land use rights, building use rights and certain land use rights must be registered and are transferable according to their nature. Basically the imposition of land with mortgage rights is motivated by economic development which requires a large amount of funds. Because land is a high-value asset, to charge land with mortgage rights is arranged in such a way as to provide legal certainty for creditors and debtors who have borrowed and borrowed money.

However, as mentioned above, besides being granted, land can also be used as an object of collateral to a third party. This is where the main problem that becomes the starting point for this research is carried out when the land to be granted and an agreement made through a grant binding agreement, is at the same time used as an object of collateral to a third party (debtor) without the involvement and knowledge of the grantee. This paper analyzes the object of the grant binding agreement made in the presence of a notary public that can be liable to a third party by the grantor of the grant.

**METHOD**

This study uses a normative juridical approach, which is legal writing done by examining data or library materials which are secondary data in the form of primary legal materials, secondary legal materials, and tertiary legal materials.[[6]](#footnote-6) After the legal materials are collected then they are processed and analyzed qualitatively.[[7]](#footnote-7)

**RESULTS AND DISCUSSION**

**Imposition of Mortgage Rights by the Grantor of the Grant Binding Agreement Object Made Before a Notary Public**

Today's agreement is one of the most important things in carrying out a legal relationship between legal subjects. The existence of an agreement that has been agreed upon in advance, will provide certainty and limits for legal subjects to do or not do something. In addition to providing certainty and limitations, the agreement also has other roles, one of which is the agreement to provide a solution in terms of achieving an initial agreement for the transfer of title to land, whether the transfer of property rights is based on sale, purchase, exchange, or grant transferring rights. said, cannot be stated in the form of authentic deed, deed of official land deed maker. There is also an agreement in question is a sale and purchase agreement agreement and a grant binding agreement.

Basically, the agreement can be divided into several types. These types are determined by what type of agreement will be made and agreed upon. Article 1314 BW regulates the existence of two agreements when viewed from the burdens and benefits obtained by the parties, namely free agreements and agreements on burdens. A free agreement is an agreement that only imposes an obligation on one party, while the other party does not have the right to sue the other party (does not get benefit), while an agreement on expense is an agreement that obliges each party to perform (submit something or not giving up something).[[8]](#footnote-8)

A grant is one type of agreement that is often carried out by legal subjects, Article 1666 BW stipulates that “A grant is an agreement whereby the grantee, in his life free of charge and irrevocably, surrenders something for the benefit of the grantee. who accepted the surrender”. This award is classified in the so-called free agreement, where the word free of charge is shown only on the achievement of one party only, while the other party does not have to provide counter-achievement as a reward,[[9]](#footnote-9) Such an agreement is also called a unilateral agreement as opposed to a reciprocal agreement (bilateral).

Based on BW, there are two types of grants, namely grants and will grants. However, apart from grants and will grants, there is a new type of agreement related to grants, namely the “grant binding agreement”. In general, the meaning of grants, testament grants, and hiibah binding agreements can be described as follows:

1. Grant;

Based on Article 1666 BW, a grant of this type is a grant made while the grantee is still alive, given free of charge without the need for any achievement which is first carried out by the grantee. This grant is an agreement, so automatically this grant may not be withdrawn unilaterally by the donor of the grant. Transfer of title to a grant occurs after the handover between the grantor of the grant and the grantee.

1. Will grant;

This type of gift is a gift that is contained in a testament (will) in BW called a relief or will which is regulated in inheritance law, this will will have power and will take effect after the giver dies and at any time as long as the donor is still alive. changed and withdrawn by it; and

1. Grant Bind Agreement

A grant binding agreement is a form of engagement that is born from an agreement and there is an agreement between the parties who make it. This grant binding agreement is a preliminary agreement between the giver and recipient before the actual grant is made.

This Grant Agreement and testament grant is clearly regulated in book III BW. Arrangements regarding grants and testament grants can be found in the provisions of Article 1666 to Article 1693 BW. Although both grants and wills have different legal arrangements, because the grant is part of the law of the agreement, while the will is part of the law of inheritance, so the grant deed requires the signature of the recipient of the grant, while the will not required the signature of the recipient.[[10]](#footnote-10) Unlike the case with the grant binding agreement, the arrangement of the grant binding agreement cannot be found in book III BW. This happens because at the time of writing, the agreement was not yet known, so if you want to classify the agreement, the agreement is referred to as an anonymous type of agreement.

Generally, the grant binding agreement is carried out if the object to be donated is an immovable object which for the transfer of its rights must be based on a PPAT deed in accordance with the provisions of Government Regulation Number 24 Year 2016 concerning Amendments to Government Regulation Number 37 Year 1998 concerning Regulation of Land Deed Making Officials.

In the transfer of objects of ownership rights to land through a grant, a legal action is required which can prove that the transfer has taken place and is legal in the eyes of the law. This can be done by registering the deed that has been drawn up before the PPAT at the local land office, as stated in the provisions of Government Regulation Number 24 Year 1997 concerning Land Registration in Article 37 Paragraph (1).

From the provisions of these regulations, it can be concluded that the transfer of title to land through a grant must be made with a PPAT deed, but on the other hand, there are several factors that become obstacles so that the grantor and recipient of the grant have not been able to carry out the transfer of rights to the land through the grant deed made by PPAT. The factors that are meant are that if the object of the grant is outside the area of ​​residence of both the donor and the recipient of the grant, the object of the grant is still guaranteed to a third party, the land granted is only part of the master certificate, the land to be granted is still in the process of being certified at the land office. local, or the grantee has not been able to pay the Tax on Acquisition of Land and Building Rights on grants, and other factors. Moving on from several factors that become obstacles, so that the giver and the recipient cannot transfer the rights to the land through a grant deed made by PPAT, this grant binding agreement was born as an initial solution that can facilitate later for the transfer of land rights that want Granted if the problem factor has been resolved.

In general, a grant binding agreement can be interpreted as a preliminary agreement between the grantor and the grantee before the actual grant is made. In addition, the definition of a grant binding agreement can be seen by separating the word from the grant binding agreement into a grant binding agreement and agreement. The meaning of the agreement has been described in the earlier part, while the agreement of a grant means an agreement between the prospective donor and the recipient of the grant before the implementation of the grant or before the grant deed is drawn up. The grant binding agreement serves to prepare or even strengthen the main/principal agreement to be carried out, because the grant binding agreement is the beginning for the birth of the main agreement. The same thing was expressed by Herlien Budiono, which stated that the aid agreement functions and has the aim of preparing, confirming, strengthening, regulating, changing or completing a legal relationship. Thus, it is clear that the grant binding agreement functions as a preliminary or preliminary agreement that provides confirmation to carry out the main agreement, and completes a legal relationship if the things that have been agreed in the grant binding agreement have been fully implemented.[[11]](#footnote-11) In the grant binding agreement that has been made by the parties, it must be underlined here that, in the agreement there has been no transfer of land rights[[12]](#footnote-12) So that the recipient of the grant binding agreement does not yet have absolute power in terms of utilization of the land.

This grant binding agreement was born due to the need to obtain protection and legal certainty for parties who wish to enter into an agreement, but there are no regulatory provisions either in book III BW, or in other laws and regulations. This agreement was also born because of the open nature of book III BW which gives the widest possible freedom to legal subjects to enter into an agreement, whether it is a written or unwritten agreement as long as it does not conflict with the prevailing laws and regulations. In addition, the grant binding agreement is also based on the principle of freedom of contract. The principle of freedom of contract is one of the most important principles in contract law.[[13]](#footnote-13) This principle is the embodiment of the free will of everyone to make a contract. [[14]](#footnote-14)

The principle of freedom of contract (*partij* autonomy, freedom of contract, *contractvrijheid*) followed by Indonesian law has a close relationship with the open system, followed by book III BW, which is a complementary law that can be overridden by both parties in making an agreement.[[15]](#footnote-15) The principle of freedom of contract is that both parties are free to make or not make an agreement, as well as their freedom to self-regulate the contents of the agreement.[[16]](#footnote-16) In addition, the principle of freedom of contract also guarantees a person the freedom to be free in several matters relating to the agreement, among others:[[17]](#footnote-17)

1. Freedom to make or not make agreements;
2. Freedom to choose with whom he wants to make an agreement;
3. Freedom to choose the cause of the agreement that will be made;
4. Freedom to determine the object of the agreement;
5. Freedom to determine the form of the agreement; and
6. Freedom to accept or override statutory provisions that are optional.

It should be understood that the principle of freedom of contract is universal which refers to the free will of everyone who makes the contract.[[18]](#footnote-18) Thus, the principle of freedom of contract provides an opportunity for the parties to create new types of agreements that were not previously known in a named agreement or nominaate agreement.

The arrangement regarding the grant binding agreement, specifically has not been regulated in statutory regulations or other regulations, however, it does not mean that the grant binding agreement is not recognized by law, the agreement is still considered valid and still has legal protection such as the agreements in In general, the terms of the agreement must comply with the provisions of Article 1320 BW, because the article is a determining article for the validity or invalidity of an agreement.

In the current legal theory, it is generally recognized that legal principles in addition to legislation, customs and court decisions are also considered a source of law.[[19]](#footnote-19) We can find the validity of the grant binding agreement in the making of the agreement, the agreement is considered valid if the parties in making the agreement have met the provisions of Article 1320 BW, namely:

1. Their agreement that binds him;
2. The ability to make an engagement;
3. A certain thing;
4. Because that is lawful.

The description of Article 1320 BW according to Ahmadu Miru, namely:[[20]](#footnote-20)

1. The agreement referred to in this article is an adjustment of the will between the parties, namely the meeting between an offer and an acceptance. This agreement can be reached in various ways, both written and unwritten. It is said that it is not written, not spoken, because an agreement can occur in an unwritten or non-verbal way, but even only in symbols or in other ways that are not verbal.
2. Proficiency is the ability according to law to take legal action (agreement). This skill is indicated by having reached the age of 21 years or having been married, even though he is not yet 21 years old. So, a widow or widower is still considered capable even though he is not yet 21 years old. Even though the proficiency measure is based on the age of 21 years or is married, not all people who have reached the age of 21 years and have been married are automatically said to be legally competent because there is a possibility that people who have reached the age of 21 years or are married but are still considered inadequate because they are in the under interdiction, for example because of insanity, or even because of wastefulness.
3. Regarding certain matters, as a third condition for the validity of this agreement, it explains that there must be a clear object of the agreement. So, an agreement cannot be made without a certain object. So, someone cannot sell “something” (not certain) at a price of one thousand rupiah, for example, because the word something does not indicate a certain thing, but something that is not certain.
4. The fourth condition regarding a lawful cause, this is also a condition regarding the contents of the agreement. The word halal here is not intended to contradict the word haram in Islamic law, but what is meant here is that the contents of the agreement cannot contradict the law of decency and public order.

The four conditions that the author describes above are absolute conditions that must be present in every agreement. If the agreement is made without fulfilling any of the four conditions mentioned, then the agreement can be called for cancellation or cancellation of the agreement.

The provisions regarding the form of the grant binding agreement do not require that the agreement must be written in the form of an authentic deed, the form of the agreement is considered valid if the provisions of Article 1320 BW have been fulfilled among the parties making it. However, an agreement made in the form of an authentic deed has advantages when compared to a deed made under hand.

The definition of authentic deed can clearly be seen in article 1868 BW which states “An authentic deed is one of the deeds which in the form prescribed by law is made by or in front of public officials who have the power to do so at the place where the deed made”.

Based on Article 1868 BW above, it can be seen that the form of the deed is determined by law and must be made by, or in the presence of an authorized employee. The authority of making the grant binding agreement deed is not under the authority of PPAT, even though the object to be bound in the agreement is land. The authority to draw up the grant binding agreement deed is given to the notary public. This authority is given because the contents in the agreement deed of the grant agreement contain the preliminary agreement and the binding agreement between the granter and the grantee only, not regarding the object of transfer of a right.[[21]](#footnote-21) In addition, the authority of a notary in making deeds can be based on the provisions of Article 1 Number 1 of Law Number 2 Year 2014 concerning Amendments to Law Number 30 Year 2004 concerning Notary Position (hereinafter referred to as UUJN) which states “Notary is an official who is authorized to make authentic and authorized deeds and other authorities as referred to in this law”.

A notarized grant binding agreement has advantages over agreements made orally or in writing. This is because the agreement is made in a notary manner, has the power of perfect proof, perfect proof here means that, if someone denies the truth of the deed, then the deed is still considered true until the one who denies the validity of the deed can prove otherwise. However, to make an authentic deed that has perfect evidentiary power, it must meet certain conditions, not only the deed is made before a notary, because deeds made before a notary can also be degraded if they do not meet the requirements in the provisions based on the Law. Law Number 2 Year 2014 concerning Amendments to Law Number 30 Year 2004 concerning the Position of Notary Public. The provisions referred to are based on the provisions of Article 38, Article 39 and Article 40 of the UUJN.

These three articles are the determining articles in making an authentic deed, if the deed made before a notary does not pay attention to the provisions in Article 38, Article 39 and Article 40 UUJN, then the deed made even though it is made before a notary, will be degraded into a deed in under the hand. This provision has also been regulated in Article 41 UUJN which states that “Violation of the provisions referred to in Article 38, Article 39, and Article 40 results in the Deed only having the power of proof as an underhand deed”.

A deed made before a notary that has fulfilled the requirements as written above imposes three evidentiary powers of a deed, we can classify this proof as follows:

1. The Power of Outward Proof *(uitvendige bewijkskracth)[[22]](#footnote-22)*

That the deed itself has the ability to prove itself to be an authentic deed, as regulated in Article 1875 BW. That capability cannot be given to under-handed deeds, because under-handed deeds only become valid if all the signatories acknowledge the truth of the signature, or by lawful means can be deemed as having been recognized by the person concerned.

If a deed appears to be an authentic deed, indicating itself from the outside, from words derived from a public official, then the deed is considered an authentic deed, until it can be proven that the deed is not authentic at all.

1. The Power of Formal Evidence

Formal in the sense that the deed proves the truth of what was witnessed, namely seen, heard and done by the Notary/PPAT as a general official in carrying out his / her position.

In a formal sense, guaranteed:

1. The correctness of the date of the deed;
2. The truth of the signature contained in the deed;
3. The correctness of the identities of the people present; and
4. The truth of where the deed was made.

So in a formal sense, the correctness of the certainty of the date of the deed is guaranteed, the validity of the signatures contained in the deed, the identity of the people present, as well as the place where the deed was drawn up and as long as it is regarding the party deed, that the parties explain what described in this deed, while the truth of the statements itself is only certain among the parties themselves.

1. The Power of Proving Materiel *(materiele bewijkskracht)*

Everyone considers the contents of the deed to be correct. This proof of proof is what is meant in Article 1870, Article 1871 and Article 1875 BW.

After it is known that the imposition of the power of proof that is imposed on the deed mentioned earlier, it can be described the three evidentiary powers of the authentic deed, namely:[[23]](#footnote-23)

1. The power of formal proof

It proves between the parties that they have explained what is written in the deed;

1. The power of material proof

Proving between the parties, that the events mentioned in the deed actually happened;

1. Binding strength

It proves between the party and the third party that on the date stated in the deed concerned, they have appeared before a public employee and explained what was written in the deed.

Authentic deeds as evidence that are the most accurate and of high value in proof have an important role in every legal relationship in people's lives. In various business relations, activities in banking, land affairs, and social activities.[[24]](#footnote-24) The need for written evidence in the form of authentic deeds is increasing, in line with the growing public demands for legal certainty in various economic and social relationships. Through authentic deeds that clearly define rights and obligations, guarantee legal certainty, and at the same time hopefully avoid future disputes.[[25]](#footnote-25)

An authentic deed is a perfect tool of proof for both parties and their heirs as well as all those who get rights from him about what is made in the deed. Authentic deed is binding evidence which means that the truth of the things written in the deed is considered to be true as long as there is no other party proving otherwise.[[26]](#footnote-26) In addition, what is meant by an authentic deed is also a deed made in the form determined by law made by and or in the presence of public officials who have the power to do so, at the place where the deed was drawn up. This is in accordance with what is stated in Article 1868 BW.[[27]](#footnote-27) Of course, by making a notarill grant binding agreement, there will be protection and legal certainty for the parties in the agreement.

In the grant binding agreement, it contains provisions for the parties that bind themselves to make a grant. The contents of the agreement state that the giver agrees to later give a plot of land to the recipient. As explained in the initial section, that there are reasons that cause the donor of not being able to carry out the grant whose act is made by the PPAT, so that if the aforementioned constraints have been resolved, the grant binding agreement can be followed up with a real grant.

In general, the grant binding agreement in practice is usually followed by a deed of grant power. The purpose of making the deed of power grant is so that there is efficiency, both in terms of time and in terms of material so that, if there are no more obstacles, then the recipient can make the deed of the agreement of the grant and the deed of power of the grant as a basis for the right to transfer ownership of property rights. over land through a grant before PPAT, provided that the party receiving the power of attorney is also the same person as the party receiving the grant binding agreement.

Nowadays, it is realized that the main factor that becomes the reason for someone to do a tie-up agreement before committing a hiibah, namely if the object of the grant commitment is outside the area of ​​residence of the grantee or the object for which the grant is still subject to guarantees of security by the donor. grants to third parties. Specifically for the agreement for binding a grant with the object of the grant which is still charged with a guarantee of mortgage, a grant binding agreement is usually carried out with the condition that the loan and borrowing agreement will be resolved immediately (in full). on this occasion will describe a little about guarantees of mortgage rights. In general, guarantees are divided into two, namely general guarantees and special guarantees. General guarantee is regulated in Article 1131 BW. According to Article 1131 BW general guarantee is defined as “All objects of the debtor, both movable and immovable, both existing and new in the future, will be borne by all individual engagements”. Based on the formulation of the article, general guarantee is defined as all assets owned by the debtor, both existing and future ones, or in other words, the debtor's entire assets are general guarantees of the agreement made by the debtor. Special guarantees are guarantees that have been determined by the debtor as collateral for the engagement he has done. Special guarantees are contractual in nature, namely those issued from certain agreements which are specifically aimed at certain objects. Special guarantees are divided into two types, namely individual guarantees and material guarantees.[[28]](#footnote-28)

Material security for land is known as "Mortgage Rights." Mortgage is a security right to land for the settlement of certain debts, which gives priority to certain creditors over other creditors. In this sense, that if the debtor defaults on, the creditor holding the Mortgage has the right to sell, through a public auction of land which is used as collateral according to the provisions of the relevant laws and regulations, with the right to precede other creditors. This preferred position should not reduce the preference for state receivables according to applicable legal provisions. The imposition of land rights with mortgage rights is regulated in Law Number 4 Year 1996 concerning Mortgage Rights on Land and Objects Related to Land.[[29]](#footnote-29)

In the Law of the Republic of Indonesia Number 4 of 1996 concerning Mortgage Rights and Objects related to Land, it also regulates the object of the mortgage. As for land rights that can be encumbered with mortgage rights, namely:

1. Property rights;
2. Right to cultivate
3. Right to build; and
4. Usufructuary rights over state land which according to the applicable provisions must be registered and according to its nature can be transferred.

From the description above, it can be concluded that the guarantee of mortgage rights is collateral for land for the settlement of certain debts, which is the preferred position.

As described above, the main factor that becomes the reason for someone to make a grant agreement before making a hiibah, namely if the object of the grant commitment is outside the area of ​​residence of the grantee or the object that wants the grant is still subject to guarantee. guarantee rights by the donor of the grant to a third party. However, if the grant commitment agreement is made before a notary public, with the background of making a grant binding agreement because the object to be donated is outside the area of ​​the granter's residence, the land is borne by the grant giver to a third party, without notification and approval from the recipient of the agreement.

The reason for the imposition of mortgage rights on the object of the grant binding agreement to a third party is that the giver assumes that there has been no transfer of property rights through the grant and the land is still registered under its own name, so he is still authorized to use it in fulfilling capital development for his business.

Although the reasons put forward by the granting party in terms of the imposition of security rights against the object of the grant binding agreement prior to the transfer of title to land through the grant and land certificate are still in his name. However, what must be underlined here is that the object that is used as a mortgage has been made a previous grant binding agreement and he as the party giving it has agreed, then it is stated in the form of a binding agreement deed. The occurrence of an agreement between the two parties will give birth to an agreement (consensualism principle). In this principle of consensualism, it is adopted the understanding that the source of contractual obligations is the convergence of wills or the consensus of the two parties who make the agreement.[[30]](#footnote-30) Meeting of wills or conformity of will is the essence of covenant law.[[31]](#footnote-31) This principle is the "essence" of a covenant. This is reflected in the agreement between the two sides.[[32]](#footnote-32) When an agreement has been reached between the two parties, there will be rights and obligations for them or it is also common to say that the contract is obligatory, namely the birth of an obligation for the parties to fulfill the contract.[[33]](#footnote-33)

In addition, as it is known that in the grant binding agreement made based on the provisions of Article 1320 BW, the agreement is considered valid and has binding legal force (the principle of binding the contract). In Article 1338 BW states that “All agreements that are legally made apply as laws for those who make them. The agreements cannot be withdrawn other than by the agreement of the two parties, or for reasons which are stated by law to be sufficient for this. Agreement agreements must be carried out in good faith”.

This article is the most popular article because it is where the principle of freedom of contract is based, although there are also scholars who rely on article 1320 BW or both.[[34]](#footnote-34) Every person who makes a contract is bound to fulfill the contract because the contract contains promises that must be fulfilled and the promise is binding on the parties as it is legally binding.[[35]](#footnote-35)

Based on this, if it is reviewed and analyzed based on the agreement theory which states that conditions related to, or related or ties related to law, which in turn give rise to legal consequences, the emergence of rights and obligations of legal subjects, will become supporters of rights and obligations. The right is conceptualized as the authority or power of the recipient to do something, do something or not do something because it has been determined in the agreement. Meanwhile, the obligation is conceptualized as something that must be carried out by the giver.[[36]](#footnote-36) Thus it can be concluded that the land which is the object of the grant binding agreement may not be subject to any more rights, including the imposition of mortgage rights by the granter to a third party, even though the ownership of the land has not been transferred through a grant deed, but what needs to be considered here is the existence of a promise and the agreement set forth in the form of a grant binding agreement deed, so that from such legal action, the recipient party can request the cancellation of the imposition of the mortgage rights against the object of the grant binding agreement, as part of the legal effect carried out by the giver party. The imposition of the mortgage rights to the object of the grant binding agreement will have an impact on the implementation of the agreement as soon as possible, so that the agreement made does not have any meaning. This is because, the imposition of mortgage rights is usually carried out for a long period of time so that such actions give uncertainty to the recipient of the binding agreement, because basically the main purpose of making a grant binding agreement between the parties is so that the grant can actually be implemented as soon as possible. In addition, this agreement was made because basically, the giver was serious about donating his land to the recipient.

In making an agreement, it is not only focused on what is written, but also on the behavior of the parties involved. The parties must not ignore things that are obligatory according to appropriateness and appropriateness in society, so that everything that has become a promise from the giver will have a legal effect on the party who entered into the agreement with him. Therefore, it is appropriate for the grant binding agreement to be implemented and continued as best as possible based on the principle of appropriateness in the agreement regulated in Article 1339 BW. The agreement not only binds things that are expressly stated in the contents of the agreement, but also binds everything that according to the nature of the agreement is required or required by propriety, custom, and law. The commitment of the parties to an agreement, is not only limited to the words in the agreement, but the parties are also bound by the principles contained in the agreement. The principle of appropriateness or appropriateness is also a principle that becomes the benchmark in implementing the agreement.

**CONCLUSION**

Basically, the agreements that have been made based on the provisions of Article 1320 *Burgerlijk Wetboek* have binding legal force, meaning that the agreements that have been approved and set forth in the form of a binding agreement are laws for those who make them. Therefore, the grant binding agreement made before a notary public even though there has been no transfer of title to land, the object of the grant binding agreement cannot be borne by the grantee to a third party, given the initial purpose of making the agreement deed of the grant agreement is so that real grants can be made.

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