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Legal Certainty in Qualifying a Mortgage Right Creditor as a Bona Fide Third Party in the Confiscation of Assets Derived from Corruption

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Abstrak

Penelitian ini mengkaji kualifikasi hukum kreditur pemegang Hak Tanggungan sebagai pihak ketiga beriktikad baik dalam perampasan aset yang berkaitan dengan tindak pidana korupsi serta menilai kepastian hukum perlindungannya. Penelitian hukum normatif ini menggunakan pendekatan perundang-undangan dan konseptual dengan menelaah Undang-Undang Hak Tanggungan, Undang-Undang Pemberantasan Tindak Pidana Korupsi, Peraturan Mahkamah Agung Nomor 2 Tahun 2022, UNCAC, serta nilai kepastian hukum, keadilan, dan kemanfaatan. Hasil penelitian menunjukkan bahwa kreditur dapat dikualifikasikan sebagai pihak ketiga karena memiliki hak jaminan terdaftar yang mandiri dan berada di luar pertanggungjawaban pidana pelaku. Iktikad baik tidak cukup dibuktikan dengan Sertifikat Hak Tanggungan, tetapi juga memerlukan transaksi kredit yang nyata, pendaftaran yang sah, pemeriksaan agunan secara hati-hati, waktu dan nilai yang wajar, serta tidak adanya pengetahuan atau keterlibatan dalam tindak pidana. Hukum yang berlaku memberi dasar perlindungan substantif, tetapi masih menyisakan ketidakpastian prosedural karena Peraturan Mahkamah Agung Nomor 2 Tahun 2022 tidak secara tegas memasukkan kreditur pemegang Hak Tanggungan sebagai pemohon. Kepastian hukum memerlukan kedudukan prosedural yang eksplisit, pemberitahuan memadai, beban pembuktian berimbang, dan bentuk pemulihan yang jelas.

Kata kunci: kepastian hukum; Hak Tanggungan; pihak ketiga beriktikad baik; perampasan aset; korupsi.

Abstract

This study examines the legal qualification of mortgage creditors as bona fide third parties in the confiscation of assets related to corruption and evaluates the legal certainty of their protection. It employs normative legal research using statutory and conceptual approaches. The analysis focuses on the Mortgage Law, the Anti-Corruption Law, Supreme Court Regulation Number 2 of 2022, the United Nations Convention against Corruption, and the principles of legal certainty, justice, and utility. The study finds that a mortgage creditor may qualify as a third party because the creditor holds an independent registered security right and stands outside the offender's criminal liability. Good faith requires more than a valid Mortgage Certificate; it also depends on a genuine credit transaction, lawful registration, prudent examination of the collateral, reasonable timing and value, and the absence of knowledge or involvement in the offence. Existing law provides a substantive basis *for protection but remains procedurally uncertain because Supreme Court Regulation Number 2 of 2022 does not expressly include mortgage creditors among eligible applicants. Legal certainty therefore requires explicit procedural standing, adequate notice, balanced evidentiary burdens, and a clear remedy, such as preserving the mortgage, separating the secured amount from sale proceeds, or paying the verified outstanding debt before the remainder is recovered by the state.*

Keywords: *legal certainty; mortgage right; bona fide third party; asset confiscation; corruption.*

INTRODUCTION

Asset recovery is a sequence of tracing, securing, maintaining, confiscating, managing, and returning proceeds of crime to the state, victims, or other entitled parties. This formulation follows Legal Guideline Number 7 of 2025 on Asset Recovery within the Prosecution Service of the Republic of Indonesia, which places all stages within an integrated system. Article 30A of Law Number 11 of 2021 on the Prosecution Service also authorizes prosecutors to trace, confiscate, and return criminal proceeds and other assets to the state, victims, or entitled parties.

In corruption cases, asset recovery seeks to restore state financial losses and recapture economic value derived from crime. Confiscation is therefore part of an anti-corruption strategy that is not confined to punishing offenders. A criminal sentence loses part of its effectiveness if corruption proceeds remain under the offender's control or are transferred to another party.[1]

Asset-recovery figures are useful only when they can be traced to an official, methodologically comparable source. Because the central legal argument does not depend on a particular annual recovery total, this revision removes the unsupported Rp1.531 trillion comparison and confines the discussion to the established policy objective of tracing, securing, confiscating, and recovering criminal proceeds while protecting bona fide third-party rights.

Confiscation does not always affect only the interests of an accused or convicted person. Before seizure in criminal proceedings, an asset may already be the object of a legal relationship with another party. Land owned by an accused, a convicted person, or an associated party may have been pledged to a bank or finance institution as security for debt. The same land then stands in two legal relationships: as an asset pursued to restore state losses and as collateral securing repayment to a creditor.[2]

Article 1(1) of Law Number 4 of 1996 on Mortgage Rights over Land and Land-Related Objects defines a Mortgage Right as a security right imposed on land to secure a specified debt and to give a particular creditor priority over other creditors. It confers priority of payment (droit de préférence), follows the object into whosoever's possession it passes (droit de suite), and permits execution upon the

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[1] Sugeng Wahyudi, "Penal Policy on Assets Recovery on Corruption Cases in Indonesia," *Journal of Indonesian Legal Studies* 4, no. 1 (2019): 45–72, https://doi.org/10.15294/jils.v4i01.28224.

[2] Juangga Saputra Dalimunthe, "Penegakan Hukum Pidana Pengembalian Kerugian Keuangan Negara Melalui Perampasan Aset Hasil Tindak Pidana Korupsi yang Dikuasai Pihak Ketiga," *Jurnal Indonesia Sosial Sains* 1, no. 2 (2020): 64–81, https://doi.org/10.59141/jiss.v1i02.15.

debtor's default. The right arises through registration at the land office, enabling third parties to know of it under the publicity principle.[3]

A Mortgage Right creditor does not own the collateralised land. Ownership remains with the grantor, while the creditor holds a proprietary security interest in the asset's economic value to secure payment. This distinguishes the creditor from an unsecured creditor who has only a general claim against the debtor's property. The secured right is attached to a specific asset by a Deed Granting Mortgage Right and registration at the land office.

Confiscation of mortgaged land for the state can deprive the creditor of the ability to execute the collateral and receive priority payment. A creditor who previously held a preferred position risks losing the source of repayment and being left with a personal claim against a debtor whose assets have been diminished by criminal proceedings. This may occur even where the financing was lawful and the creditor had no involvement in the underlying corruption.[4]

Article 31(9) of the United Nations Convention against Corruption recognises protection for third-party rights by providing that freezing, seizure, and confiscation must not prejudice the rights of bona fide third parties. Indonesia ratified the Convention through Law Number 7 of 2006. This protection limits state power so that recovery of criminal proceeds does not extinguish rights lawfully acquired by others.[5]

Article 19 of the Anti-Corruption Law protects the 'rights of a bona fide third party' affected by confiscation. A Mortgage Right creditor is not the owner of the land, but it holds a registered proprietary security right with priority and droit de suite characteristics. The standing argument therefore does not depend on treating the creditor as owner; it asks whether 'rights of a third party' should include an independently registered security right whose economic and executorial content would be prejudiced by confiscation. That broader statutory formulation must be reconciled with the more specific applicant categories in Supreme Court Regulation Number 2 of 2022.[6]

Supreme Court Regulation Number 2 of 2022 is procedural regulation issued by the Supreme Court; it should not be treated as narrowing a statutory substantive right without analysis of hierarchy and purpose. At the same time, its express definition of applicants creates a real procedural-standing problem for a Mortgage Right creditor who is not an owner, custodian, guardian, or curator. The article therefore distinguishes (1) substantive third-party protection under Article 19 and

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[3] Siti Malikhatun Badriyah, "Problematika Pembebanan Hak Tanggungan dengan Objek Tanah yang Belum Bersertipikat," *Masalah-Masalah Hukum* 45, no. 3 (2016): 173–180, https://doi.org/10.14710/mmh.45.3.2016.173-180.

[4] Dimas Nur Arif Putra Suwandi, "Perlindungan Hukum bagi Bank Pemegang Hak Tanggungan Peringkat Kedua dalam Eksekusi Objek Hak Tanggungan," *Media Iuris* 1, no. 3 (2018): 420–438, https://doi.org/10.20473/mi.v1i3.10183.

[5] Widyanti Wibowo, "Perlindungan Hukum Pihak Ketiga yang Beritikad Baik dalam Tindak Pidana Pencucian Uang," *Jurist-Diction* 2, no. 5 (2019): 1871–1886, https://doi.org/10.20473/jd.v2i5.15248.

[6] Evander, "Keberatan Pihak Ketiga yang Beritikad Baik terhadap Perampasan Aset dalam Tindak Pidana Korupsi," *Jurist-Diction* 7, no. 1 (2024): 21–38, https://doi.org/10.20473/jd.v7i1.54674.

UNCAC; (2) proprietary status under the Mortgage Law; and (3) procedural access under Supreme Court Regulation Number 2 of 2022.[7]

The differing scopes leave creditors in an uncertain position. Article 19 protects 'rights of a third party,' while Supreme Court Regulation Number 2 of 2022 focuses standing on ownership or representation of an owner. A creditor is not an owner, custodian, guardian, or curator, yet holds a registered proprietary right that can lose its economic value and executorial force upon confiscation.

A valid Mortgage Right Certificate is also insufficient by itself to establish that a creditor is bona fide. The certificate proves formal creation of the security right, whereas good faith concerns the process by which it was acquired. Relevant considerations include the timing of the loan and mortgage, document validity, examination of the land's status and history, reasonableness of collateral value, observance of prudential principles, and the creditor's knowledge of any relationship between the collateral and corruption. Good faith includes both formal validity and the material propriety of the creditor's conduct.[8]

Radbruch's values are operationalised rather than invoked abstractly. Legal certainty is assessed through clarity of standing, predictable evidentiary requirements, notice, objection deadlines, and specified consequences after a successful objection. Justice is assessed through allocation of the asset's value between the state and a creditor uninvolved in the offence, while preventing sham security arrangements from shielding criminal proceeds. Utility is assessed through whether the solution preserves effective asset recovery without unnecessarily destabilising legitimate secured credit. The three values guide interpretation but do not override positive law.

Justice concerns the proper allocation of rights and burdens. The state may confiscate assets derived from or connected with corruption, but a creditor who lawfully acquired a Mortgage Right should not bear losses caused by a crime it did not commit. A just assessment should consider when the right arose, the creditor's relationship to the offence, and compliance with prudential principles when accepting the collateral.

Legal protection has substantive and procedural dimensions. Substantive protection recognises priority, the right to follow the object, and execution of the Mortgage Right. Procedural protection gives the creditor an opportunity to object, prove the right's validity, and explain good faith before a court. Recognition of a proprietary right is incomplete when its holder lacks access to defend it during confiscation proceedings.

A tension therefore exists between the broad protection of 'rights of a third party' under Article 19 and the limited categories in Supreme Court Regulation Number 2 of 2022. The position of a secured creditor is not expressly regulated, and the existence of a Mortgage Right Certificate does not by itself resolve whether the creditor acted in good faith.

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[7] Melkianus Ndaomanu, "Claims for the Rights of Third Parties in Good Faith Against Confiscation of Goods in Corruption Criminal Decisions," *Unnes Law Journal* 9, no. 2 (2023): 357–376, https://doi.org/10.15294/ulj.v9i2.75565.

[8] Fadhila Restyana Larasati dan Mochammad Bakri, "Implementasi Surat Edaran Mahkamah Agung Nomor 4 Tahun 2016 pada Putusan Hakim dalam Pemberian Perlindungan Hukum bagi Pembeli Beritikad Baik," *Jurnal Konstitusi* 15, no. 4 (2018): 881–902, https://doi.org/10.31078/jk15410.

The discussion addresses two questions. First, how should a Mortgage Right creditor be qualified as a bona fide third party in the confiscation of assets linked to corruption? Second, to what extent is the creditor's protection legally certain under the Mortgage Law, the Anti-Corruption Law, Supreme Court Regulation Number 2 of 2022, and the third-party protections in UNCAC?

RESEARCH METHOD

This normative legal study uses statutory, conceptual, and limited case-material approaches. The statutory approach examines the Mortgage Law, Anti-Corruption Law, Law Number 7 of 2006 ratifying UNCAC, Supreme Court Regulation Number 2 of 2022, and related asset-recovery rules. The conceptual approach addresses proprietary security, bona fide third parties, publicity, legal certainty, and procedural protection. To avoid presenting hypothetical concerns as adjudicated facts, any judicial decision used is identified by number and analysed for the specific issue of third-party objection or security rights; where no verified decision squarely resolves Mortgage Right creditor standing, the article states that the proposed solution is de lege interpretanda or de lege ferenda rather than existing settled jurisprudence.[9]

Primary materials consist of legislation, while secondary materials include books, journal articles, and earlier studies. Materials were collected through library research and analysed qualitatively using grammatical, systematic, and hierarchical interpretation to assess the creditor's qualification as a bona fide third party and the legal certainty of protection in corruption-related asset confiscation.

RESULTS AND DISCUSSION

Qualification of a Mortgage Right Creditor as a Bona Fide Third Party

A Mortgage Right is a proprietary security interest that gives a creditor a special position in land designated as collateral. Article 1(1) of Law Number 4 of 1996 confirms that it gives a particular creditor priority over others. The position arises when the grant is documented in a Deed Granting Mortgage Right and registered at the land office. Registration satisfies the publicity principle and binds third parties to respect the interest attached to the collateral.[10]

The creditor's position does not arise solely from the loan agreement. The agreement creates a personal relationship between creditor and debtor, while registration creates a proprietary right in a specified asset. That right allows priority payment from sale proceeds when the debtor defaults. A Mortgage Right creditor therefore differs from an unsecured creditor, who can claim only against the debtor's property generally.

The proprietary character of the right appears in droit de préférence and droit de suite. The former gives the creditor priority of payment; the latter causes the security to follow the object into whosoever's possession it passes. Transfer of land ownership does not automatically extinguish a registered Mortgage Right. The state

[9] Peter Mahmud Marzuki, *Penelitian Hukum*, edisi revisi, cetakan ke-15 (Jakarta: Kencana, 2021).
[10] H. M. Arba dan Diman Ade Mulada, *Hukum Hak Tanggungan: Hak Tanggungan atas Tanah dan Benda-Benda di Atasnya* (Jakarta: Sinar Grafika, 2020).

that receives land by confiscation consequently encounters a juridical status already recorded against the asset.[11]

Article 18 of the Mortgage Law lists extinction of the secured debt, release by the creditor, cleansing under a priority determination by the district-court chair, and extinction of the underlying land right as events terminating the Mortgage Right. Criminal seizure and confiscation are not expressly included. Their omission supports the proposition that confiscation does not automatically extinguish a lawfully created proprietary security right, although the final result still depends on the asset's origin, the time of the grant, the judgment, and the creditor's good faith.[12]

Asset confiscation in a corruption case is a court-ordered taking of property connected with the offence. It seeks to deprive the offender of economic gain, restore state losses, and prevent criminal proceeds from remaining with those who benefit from the crime. This is a public-law power, whereas a Mortgage Right arises from a private-law relationship. The regimes intersect where the confiscated property became collateral before seizure.[13]

The state's position upon confiscation is not necessarily equivalent to acquiring property free of every encumbrance. One asset may carry several legal interests: the grantor owns the land, the creditor holds a security interest in its economic value, and the state claims the part proved to derive from or relate to crime. Separating these interests determines the scope of protection available to the creditor.

Although the creditor does not own or possess the land while the debtor performs, its right lies in the asset's economic value as security for repayment. Lack of ownership does not remove the right's proprietary quality. Proprietary rights encompass not only ownership, which grants the broadest powers, but also limited rights conferring particular authority over an object.[14]

This position supports treating the creditor as a third party: a legal subject outside the criminal-responsibility relationship between the state and offender whose rights are affected by seizure or confiscation. The creditor is not an accused, convicted person, or participant in the crime. Its relationship with the land arises from financing, the grant of security, and registration rather than from the offence underlying confiscation.

Article 19(1) of Law Number 31 of 1999 provides that property not owned by the accused may not be confiscated when doing so would prejudice the rights of a bona fide third party. The following paragraph allows the third party to object before the court. The rule contains three central elements: another party's right or interest, good faith, and prejudice caused by the confiscation order. Article 19

[11] Hirsanuddin dan Sudiarto, "Perlindungan Hukum bagi Para Pihak (Kreditur dan Debitur) melalui Parate Executie Obyek Hak Tanggungan," *Jurnal IUS Kajian Hukum dan Keadilan* 9, no. 1 (2021): 253–267, https://doi.org/10.29303/ius.v9i1.890.

[12] Bambang Wahyuono dan Wahyu Tris Haryadi, "Kepastian Hukum bagi Kreditur Pemegang Hak Tanggungan atas Jaminan Hak Guna Bangunan yang Sudah Berakhir Jangka Waktunya," *Jurnal Hukum dan Keadilan* 12, no. 2 (2023): 14–31, https://doi.org/10.55499/judiciary.v12i2.177.

[13] Supardi, *Perampasan Harta Hasil Korupsi: Perspektif Hukum Pidana yang Berkeadilan* (Jakarta: Prenadamedia Group, 2018).

[14] Edoardo Biyakto Putro dan Siti Malikhatun Badriyah, "Perlindungan Hukum Kreditur Separatis Pemegang Hak Tanggungan dalam Perkara Kepailitan," *Notarius* 17, no. 3 (2024): 2207–2222, https://doi.org/10.14710/nts.v17i3.44840.

remains part of the Anti-Corruption Law notwithstanding amendments or partial repeals affecting other provisions.

The phrase 'rights of a third party' is broader than 'third-party ownership' and can include limited proprietary rights such as a Mortgage Right. Confiscation does not transfer the creditor's ownership because it was never the owner. The creditor is harmed by loss of its right to priority payment from the collateral. Non-ownership alone is therefore insufficient to exclude the creditor from third-party status.[15]

This scope is consistent with Article 31(9) of UNCAC, which states that freezing, seizure, and confiscation provisions may not be interpreted to prejudice the rights of bona fide third parties. UNCAC likewise speaks of third-party rights, not merely third-party ownership. Protection extends to lawfully acquired legal interests that were not created to conceal criminal proceeds.

Difficulty arises from Supreme Court Regulation Number 2 of 2022, which links bona fide third-party status to proof that the applicant is the lawful owner, custodian, guardian of the owner, or bankruptcy curator. A Mortgage Right creditor is not expressly included.

The creditor cannot simply be categorized as owner, custodian, or guardian. Nor is it a curator, who administers and realizes a bankruptcy estate, whereas a Mortgage Right creditor enforces its own interest. The wording may leave the creditor only as an interested party whose evidence can be heard if the court considers it necessary, rather than an applicant independently entitled to object.

Restricting third parties to owners risks narrowing the protection established by Article 19. The statute protects third-party rights, while the procedural regulation centers standing on owners and their representatives. A procedural regulation should provide a means of implementing the statutory right, not reduce its scope.

A systematic reading of the Mortgage Law, Article 19, Supreme Court Regulation Number 2 of 2022, and UNCAC supports inclusion of the creditor as a third party. The Mortgage Law recognises its proprietary right; the Anti-Corruption Law protects bona fide third-party rights; and UNCAC prohibits confiscation that prejudices lawful third-party interests. The Supreme Court Regulation should therefore be read as procedural guidance that does not foreclose holders of proprietary rights other than ownership.

Third-party status does not automatically establish good faith. The former describes the creditor's position relative to the criminal case, while the latter concerns the quality of the acquisition and exercise of the right. A creditor may stand outside the offence yet hold a Mortgage Right created through a sham transaction, a fictitious encumbrance, or collusion to conceal the offender's assets. Protection is appropriate only where the right arose from a genuine transaction and the creditor acted properly in extending credit.

Good faith has subjective and objective dimensions. Subjective good faith concerns the creditor's knowledge of the asset's connection to crime: the creditor did not know that it derived from corruption, was purchased with corrupt funds, or

[15] Galih Kurnia Sakti dan Ana Silviana, "Perlindungan Hukum Pihak Ketiga dari Asas Droit de Suite dalam Eksekusi Hak Tanggungan," *Notarius* 17, no. 1 (2024): 189–202, https://doi.org/10.14710/nts.v17i1.46950.

was being used to conceal the offender's wealth. Objective good faith concerns the actions a prudent creditor should take before accepting land as collateral.[16]

A creditor's assertion of ignorance is insufficient. Knowledge can be inferred from surrounding circumstances, such as creation of the right after an investigation began, a loan value disproportionate to the asset, problematic ownership documents, a special relationship between bank management and the debtor, or untraceable use of loan proceeds. Such facts may indicate that the creditor knew or ought to have known of legal risk.

Objective good faith is reflected in prudential review. A creditor should examine the debtor's identity and capacity, title validity, transfer history, consistency of physical and juridical data, existing blocks or seizures, and reasonable collateral value. Banks and financial institutions should also perform customer due diligence, identify beneficial owners, verify sources of funds, examine transaction profiles, and assess debtor risk.[17]

Registration is a strong formal indicator because it demonstrates compliance with land procedures and public notice of the creditor's right. A certificate nevertheless cannot be the sole measure of good faith. A formally valid right may arise from a materially unreasonable transaction deliberately constructed to shield assets from enforcement.[18]

Timing also affects the assessment. A right created before the offence receives the strongest protection because it could not have been designed to conceal proceeds not yet in existence. A right created after the offence but before it became known to the public or authorities may remain protected if the creditor conducted proper review. A right created after investigation, blocking, or seizure is subject to a heavier evidentiary standard.

The land's origin must likewise be distinguished. Land lawfully owned before the offence differs from land purchased directly with corruption proceeds. Confiscation of land in lieu of substitute-money payment also differs from confiscation of direct proceeds. Where an asset did not derive from crime, an earlier creditor right has a stronger basis for protection.

The proposed good-faith criteria are a normative reconstruction rather than a statutory checklist already contained in Supreme Court Regulation Number 2 of 2022. They combine positive-law indicators—valid credit agreement, actual disbursement, valid Mortgage Right deed and registration, and a legally existing outstanding debt—with prudential indicators such as reasonable due diligence, consistency between credit amount and collateral, absence of collusion, and the creditor's lack of knowledge or participation in the offence. Each criterion should be

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[16] Widodo Dwi Putro, Ahmad Zuhairi, Syukron Salam, dan Elizabeth Lestari T. Lubis, *Penjelasan Hukum: Pembeli Beritikad Baik—Perlindungan Hukum bagi Pembeli Beritikad Baik dalam Sengketa Perdata Berobyek Tanah* (Jakarta: LeIP, 2016).

[17] Arina Ratna Paramita dan Djumadi Purwoatmodjo, "Analisis Legalitas Akta Surat Kuasa Membebankan Hak Tanggungan (SKMHT) yang Dibuat di Hadapan Notaris dan Pengaruhnya terhadap Perlindungan bagi Kreditor," *Notarius* 15, no. 2 (2022): 803–817, https://doi.org/10.14710/nts.v15i2.42672.

[18] Pradesti Elva Rachmayanti dan Ngadino, "Peran dan Tanggung Jawab PPAT dalam Penerbitan Sertifikat Hak Tanggungan Elektronik," *Notarius* 15, no. 1 (2022): 230–240, https://doi.org/10.14710/nts.v15i1.46037.

linked to the legal source that justifies it and to the evidence reasonably available to a professional creditor.[19]

Table 1. Reconstructed Good-Faith Criteria for a Mortgage Right Creditor

Good-faith indicator	Positive-law or normative basis	Evidence	Legal effect
Valid loan + actual disbursement	Contract/credit law; genuineness of transaction	Agreement, bank transfer, repayment history	Shows real secured credit rather than sham transaction
Valid Mortgage Right + registration	Mortgage Law/publicity principle	APHT, certificate, land-register data	Establishes registered proprietary security interest
Reasonable due diligence	Prudential/good-faith reconstruction	KYC, land status, valuation, beneficial-owner/conflict checks	Supports bona fides; scope depends on risk and information available
No knowledge/collusion	Third-party good faith; anti-concealment purpose	Communications, relationship evidence, investigation facts	Protection denied if security is used to conceal criminal assets
Timing	Circumstantial indicator only	Loan/mortgage/offence/seizure chronology	Earlier timing strengthens but does not conclusively prove good faith
Verified outstanding debt	Limit of creditor economic interest	Account statement, payments, secured cap	Protection should not exceed genuine secured balance

These elements must be assessed substantively. An administrative deficiency unrelated to the asset's origin does not always negate good faith, while complete documents cannot conceal a fictitious loan or sham encumbrance. The inquiry centers on transactional honesty, proper diligence, and the absence of a connection between creditor and offence.[20]

A Mortgage Right creditor can accordingly qualify as a third party because it holds an independent proprietary right and stands outside the offender's criminal liability. Good faith is established when the right derives from a genuine transaction,

[19] Erna dan Edith Ratna M.S., "Kealpaan Pembuatan Akta Pemberian Hak Tanggungan Berdasarkan Surat Kuasa Membebankan Hak Tanggungan," *Notarius* 15, no. 2 (2022): 992–1001, https://doi.org/10.14710/nts.v15i2.37680.

[20] Widodo Dwi Putro dan Ahmad Zuhairi, "Menimbang Prinsip Duty of Care: 'Pembeli' Melawan 'Pembeli' dalam Sengketa Jual Beli Tanah," *Jurnal Yudisial* 10, no. 1 (2017): 99–114, https://doi.org/10.29123/jy.v10i1.133.

is lawfully created and registered, is supported by proper review, and involves no creditor knowledge or participation in crime. Bank status or a certificate is relevant evidence but not automatic proof.

Legal Certainty of Protection for Mortgage Right Creditors

Legal certainty requires clear and consistent rules that produce foreseeable consequences. For a Mortgage Right creditor, it includes clarity concerning third-party status, good-faith requirements, standing to object, continuation of the security after confiscation, and resolution of the debt when the asset passes to the state.

The first issue is procedural standing. Article 19 grants a bona fide third party a right to object, and Supreme Court Regulation Number 2 of 2022 governs the procedure, yet it does not expressly identify Mortgage Right creditors as applicants. The difference creates uncertainty as to whether a creditor's objection will be accepted.

Without express inclusion, protection depends on judicial interpretation. One judge may read Article 19 broadly and accept a creditor as holder of a proprietary right; another may adhere strictly to the Supreme Court Regulation and reject standing. Such inconsistency conflicts with the need for legal consequences that can be anticipated before an objection is filed.

The second issue concerns the effect of confiscation on the security. The Mortgage Law does not list criminal confiscation as a ground of termination, and the Anti-Corruption Law does not specify whether the state receives an asset free of encumbrance, subject to the Mortgage Right, or only after the creditor's interest is satisfied. This gap permits several possible solutions.

First, the Mortgage Right may continue to attach after confiscation, consistent with droit de suite. Difficulty arises when the creditor seeks execution against an asset held by the state. Execution of a criminal judgment and enforcement of the security may then concern the same asset, requiring rules on who conducts the sale and how proceeds are distributed.[21]

Payment from sale proceeds is presented as a reform option, not as a consequence already expressly mandated by current Indonesian confiscation law. Under this model, the state would retain control of confiscation and sale, the court would verify the creditor's bona fide registered security and outstanding secured amount, and only the offender's residual economic interest would be transferred to asset recovery. Implementing this option would require a clear legal mechanism governing valuation, sale authority, priority, payment, challenges, and the treatment of interest and costs.

Third, the security may be treated as unenforceable after confiscation, leaving the creditor with only a personal claim against the debtor. That would deprive the creditor of priority because of a crime it did not commit. The approach is justified only where the creditor lacked good faith or the security was created to conceal assets; automatic extinction would conflict with Article 19 and Article 31(9) of UNCAC.

[21] Rifki Khrisna Mahendra dan Bambang Eko Turisno, "Pelaksanaan Eksekusi Hak Tanggungan Elektronik," *Notarius* 17, no. 2 (2024): 1179–1198, https://doi.org/10.14710/nts.v17i2.45258.

Protection must begin before judgment, during tracing and seizure. A registered Mortgage Right appears in land records, and the publicity principle enables the state to discover that the land is encumbered. Examination of juridical status should therefore form part of asset tracing before prosecutors seek confiscation.[22]

Seizure secures property for evidence and execution of judgment; it does not immediately cancel the loan agreement or extinguish the security. The creditor retains the debt and security, although execution may be delayed. Delay can protect the integrity of criminal proceedings, but it should not become extinction without an opportunity for the creditor to be heard.

At prosecution, the Mortgage Right should be described as part of the property's legal status. The identity of the holder, registration date, secured limit, outstanding debt, and time of the offence may affect the confiscation request and help the court separate the offender's economic interest from that of the third party.

Procedural protection also requires notice. A creditor may lose the opportunity to object if it learns of confiscation only after the deadline. A publicly registered right should trigger notice to its holder when the asset is included in a confiscation request or order. Without notice, access to objection exists only formally.

Substantive protection recognises priority, the right to follow the object, and enforcement; procedural protection permits objection, presentation of evidence, explanation of good faith, and a decision on the effect of confiscation. Both are necessary.

Recognition of the Mortgage Right is meaningless without access to defend it, while access to object offers no real protection if the resulting decision merely declares good faith without resolving the debt. The decision should determine concrete consequences for the asset, sale proceeds, or the amount belonging to the creditor.

Protecting the creditor does not require excluding the entire asset from confiscation. The creditor is not the owner, and its interest is limited to the secured outstanding debt. Where asset value exceeds that amount, the remainder can be recovered by the state if its connection to the offence is proved. This preserves asset-recovery objectives.

The creditor's entitlement must be verified. The amount stated in the certificate may not equal the remaining debt. The court should examine principal, payments received, interest, costs, and the secured limit in the deed, preventing overpayment while preserving recoverable value for the state.

Justice between state and creditor also depends on the asset's relationship to the offence. Direct corruption proceeds are more strongly connected to confiscation than lawfully acquired property confiscated to satisfy substitute-money payment. In the latter category, an earlier creditor interest warrants greater weight because the asset did not itself derive from the offence.

Timing is an indicator of good faith, not a conclusive presumption. A Mortgage Right created before the offence or before the asset became criminally connected

[22] Sounda Daniawijaya dan Budi Ispriyarso, "Tanggung Jawab Kreditor dan PPAT dalam Pelaksanaan Pendaftaran Hak Tanggungan Secara Elektronik," *Notarius* 17, no. 1 (2024): 565–577, https://doi.org/10.14710/nts.v17i1.44883.

may support an inference that the transaction was independent, but the creditor must still establish a genuine loan, actual disbursement, valid registration, due diligence, and absence of collusion or knowledge. A later right may justify more intensive scrutiny without automatically proving bad faith.

Allocation of proof should be framed as a procedural recommendation unless a specific rule supplies it. The creditor is ordinarily best placed to produce the loan agreement, disbursement record, deed, certificate, outstanding balance, valuation, and due-diligence documents. Prosecutors are better placed to present evidence of the asset's criminal connection and facts from the criminal investigation suggesting creditor knowledge or involvement. Supreme Court guidance or an amendment to the objection procedure could make this allocation explicit while preserving the court's authority to assess all evidence.

Good faith should not require a creditor to know the entire origin of a debtor's wealth. The inquiry should focus on information available when credit was extended and steps reasonably required by the risk profile. Facts discoverable only through special criminal investigation cannot always be treated as matters the creditor ought to have known.

Radbruch's values provide a framework. Utility lies in recovering corruption proceeds and restoring state losses; justice prevents a lawful right holder from bearing all consequences of another's crime; and legal certainty requires clear boundaries among state rights, creditor rights, good-faith standards, and allocation of asset value.

Absolute state priority may extinguish lawfully acquired proprietary interests and weaken confidence in secured transactions. Absolute creditor priority may permit sham loans and mortgages to shield corruption proceeds. Resolution must turn on validity, good faith, timing, the asset's criminal connection, and the genuine outstanding debt.

Certainty can be assessed through three elements: express recognition that a Mortgage Right creditor has standing as a third party; a good-faith standard combining formal validity and material propriety; and clear consequences after a successful objection, whether continuation of the security, payment from sale proceeds, or separation of the creditor's verified amount.

The positive-law foundation is therefore substantial but procedurally incomplete: the Mortgage Law establishes the creditor's proprietary security, Article 19 protects bona fide third-party rights, and Article 31(9) UNCAC supports protection of bona fide third parties. Supreme Court Regulation Number 2 of 2022, however, does not expressly list a registered security-right holder among applicants. The primary recommendation is to amend or formally clarify that procedural instrument so that a creditor holding a registered Mortgage Right may file an objection to protect the security interest, without being treated as the owner of the asset.

Pending such clarification, a hierarchy-consistent interpretation can support standing where confiscation directly prejudices a genuine registered third-party security right, but the article does not claim that this interpretation is already uniform judicial practice. The creditor must still prove the right, the debt, and good faith; protection extends only to the legitimate proprietary interest and does not immunise criminal proceeds or sham transactions from confiscation.

Legal certainty ultimately lies not in exempting the whole asset but in measured recognition and settlement of the creditor's right. The creditor is protected only up to the secured outstanding debt, while the state recovers the offender's economic interest or the portion connected to crime. This allocation permits asset recovery without extinguishing a lawfully acquired third-party proprietary right.

CONCLUSION

A Mortgage Right creditor can normatively qualify for third-party protection because it holds an independent registered proprietary security interest even though it does not own the collateral. Good faith is not established by the certificate alone: the court should examine the genuine loan, actual disbursement, valid deed and registration, outstanding debt, reasonable due diligence, collateral proportionality, absence of collusion, and the creditor's knowledge at the relevant time. Timing is one indicator rather than an automatic presumption.

Legal certainty remains incomplete because substantive third-party protection under Article 19 and UNCAC is broader than the express applicant categories in Supreme Court Regulation Number 2 of 2022. The principal reform should be an amendment or authoritative Supreme Court clarification expressly recognising registered security-right holders, coupled with notice, a clear evidentiary structure, and specified consequences after a successful objection. Among the remedial options, payment of the verified secured amount from sale proceeds offers a balanced model but requires an express legal mechanism and is therefore presented de lege ferenda. This study is normative and does not establish a nationwide pattern of inconsistent judicial outcomes where verified cases are unavailable.

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