

The Non-Existence of legal system of social security (Analysis of low no. 4 of 1996)

By Emmi Rahmiwita

THE NON-EXISTENCE OF LEGAL SYSTEM OF SOCIAL SECURITY (ANALYSIS OF LAW NO. 4 OF 1996)

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ABSTRACT

Actually, current Legal System of Social Security has been leading Indonesia's legal system of security to a good direction. However, in its implementation, it has not shown such behavior so that it could lead to problems for users of security especially users of banking security. Relation and synchronization between one regulation to another regulation are essential, especially suitability between one article of law to another article of law in one particular law. This is one of the objectives of legal system of social security. Therefore, if well examined, Article 15 Subsection (4) Law No. 4 of 1996 on Security Rights over Lands and Objects Related to Land states that it is permissible for an unregistered land to be a collateral by terms and conditions, whereas Article 4 Subsection (2) in the same law states that land, as an object of security right, must be registered. Therefore, according to the author, this will emerge a problem such as discrepancy between one regulation and another one, and thus does not reflect arrangement of legal system in line with legal system of social security. The aim of this research is to actualize legal system of social security, synchronization of regulations especially inside their articles is essential. The clarification about Article 15 section (4) and Article 4 Subsection (2) Law No. 4 of 1996 on Security Rights over Lands and Objects Related to Land is a part of actualizing the legal system of social security. The bottom line is: realizing legal system of social security is a certainty and compulsory for all parties particularly lawmakers.

Key Words: System, Legal System of Social Security, Unregistered Lands

Introduction

Law in Indonesia has a high position. This can be recognized in a clear statement in the main content of the constitution of The Unitary State of the Republic of Indonesia¹ which is in Chapter I Constitution of 1945 about Form and Sovereignty, Article 1 Subsection (3) that states that 'Indonesia is a state of law',² which is also stated in Elaboration of Constitution of 1945 that 'government system of state of Indonesia is a state which bases on law (*rechtsstaat*), not merely bases on power (*machtsstaat*)'.³ The implementation of this state of law is that every action taken or decided inside the government system accords with legal regulations or norms. Violation of such rules will be strictly sanctioned.

In relation to the statements above, Law No. 4 of 1996 on Security Rights over Lands and Objects Related to Land or also known as Mortgage Right⁴ is a part of Indonesia's national legal system, referring to subdivisions of law of object. Therefore, this Law

¹Constitution of Republic of Indonesia that has been amended for four times; first amendment on 19 Oktober 1999, second amendment on 18 Agustus 2000, third amendment on 10 Oktober 2001, and fourth amendment on 10 Agustus 2002.

²See Article 1 Subsection (3) 1945 Constitution. The addition in this article occurred in the third amendment on 10 November 2001.

According to Yopi Gunawan and Kristian, in the foreword of the book 'Perkembangan Konsep Negara Hukum & Negara Hukum Pancasila', it is stated that state of law followed and applied in Indonesia is not the same as a concept of state of law *rechtsstaat* in countries following legal system *civil law* or the concept of *the rule of law* in countries following legal system of *common law*, but it follows and applies concept of legal system based on condition and soul of nation of Indonesia which is the concept of State of Law of Pancasila. (see Yopi Gunawan and Kristian, *Perkembangan Konsep Negara Hukum & Negara Hukum Pancasila*, (Bandung: PT Refika Aditama, 2015), p. xi.

³See Explanation of 1945 Constitution.

According to Yopi Gunawan and Kristian, it is stated that 'concept of state of law is basically stemming from an idea where the legal system being implemented should create a system that guarantees legal certainty (*rechtszekerheids*) and keeps giving protection over human rights. (Yopi Gunawan and Kristian, *Perkembangan Konsep Negara Hukum & Negara Hukum Pancasila*, (Bandung: PT Refika Aditama, 2015), p. 21.

⁴According to Budi Harsono in Salim H.S.'s book, Mortgage Right is 'a control over lands, containing a creditor's authorization to do something to lands made as collateral. The lands are not used and controlled physically, but a creditor could sell it if a debtor is in default, and take the money partly or fully as a debtor's repayment.' Salim stated that the essence of the definition of mortgage right is the control over lands. The control over lands is an authorization to control rights over lands. The control of

No. 4 of 1996 cannot be contrary to other regulations in the national legal system, neither can the content of this law; it must not be unstructured, must not damage each other. It will be systematic if regulations in national legal system are not contrary to other regulations, including the contents of the articles.

The statement above refers to Article 15 Subsection (4) and Article 4 Subsection (2) Law No. 4 of 1996 on Mortgage Right, in which according to the author the contents of the two articles appear to be contrary to each other and biased; although in the explanation of the regulations it is stated that Article 15 Subsection (4) can be done with particular conditions, the content of Article 15 Subsection (4) could bias Article 4 Subsection (2). This may lead to problems.

The word *system* is used to explain many things, but primarily it can be classified into two following categories: *first*, definition of *system* as an entity, which is a form of an object (abstract or concrete, including conceptually) and *second*, definition of *system* as a method or procedure. William A. Shrode and Voich in Tan Kamello's book states something about the definition of system: *The term "system" has two important connotations which are implicit, if not explicit, in almost any discussion of systems. The first is the notion of system as an entity or thing which has a particular order or structural arrangement of its parts. The second is the notion of system as a plan, method, device, or procedure for accomplishing something. As we shall see, these two notions are not markedly different, since order or structure is fundamental to each.*⁵

By that definition, 'system' is an entity, and it is correct that every existing rule has to be synchronous to one another, so the purpose of national legal system can be actualized.

LEGAL SYSTEM OF SOCIAL SECURITY

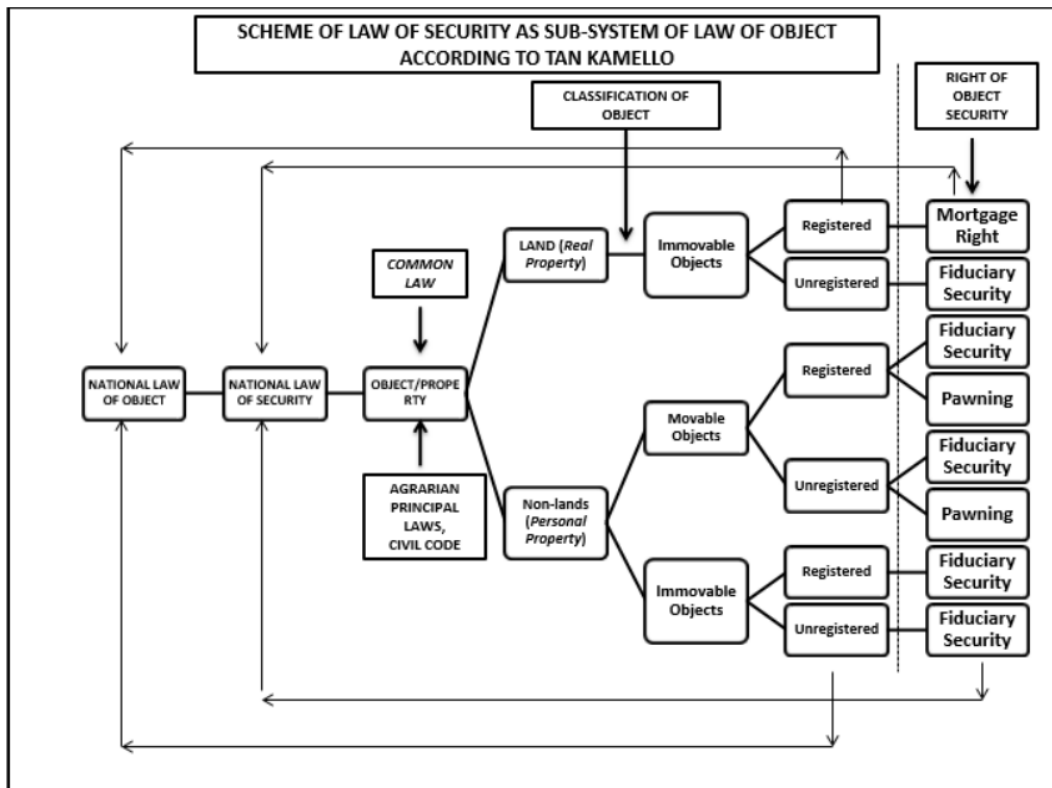
Tan Kamello explains that apart from the fact that legal system acts as an entity, one of the characteristics is that such legal system contains sub-system. In sub-system, legal system is divided into some parts of legal sub-systems. It goes continuously that legal sub-systems will be divided into smaller legal sub-systems, which in its entirety has close connection with one to another wholly and harmoniously, without damaging each other in order to serve the purpose. This makes legal system of security as a sub-system of legal system of object, whereas legal system of object is a sub-system of Indonesia's civil law system. That means that Indonesia's civil law system is a sub-system of national law.⁶

Scheme 1: Law of Security as Sub-System of Law of Object

rights over lands by a creditor is not a physical control, but to sell them if a debtor is in default. (Salim, H.S., *Perkembangan Hukum Jaminan Di Indonesia*, (Jakarta: PT Raja Grafindo Persada, 2014), p. 97.

⁵ Tan Kamello, *Hukum Jaminan Fidusia Suatu Kebutuhan Yang Didambakan*, (Bandung: PT. Alumni, 2004), p. 145-146.

⁶ Tan Kamello, *Hukum Jaminan Fidusia Suatu Kebutuhan Yang Didambakan*, (Bandung: PT. Alumni, 2004), p. 155.



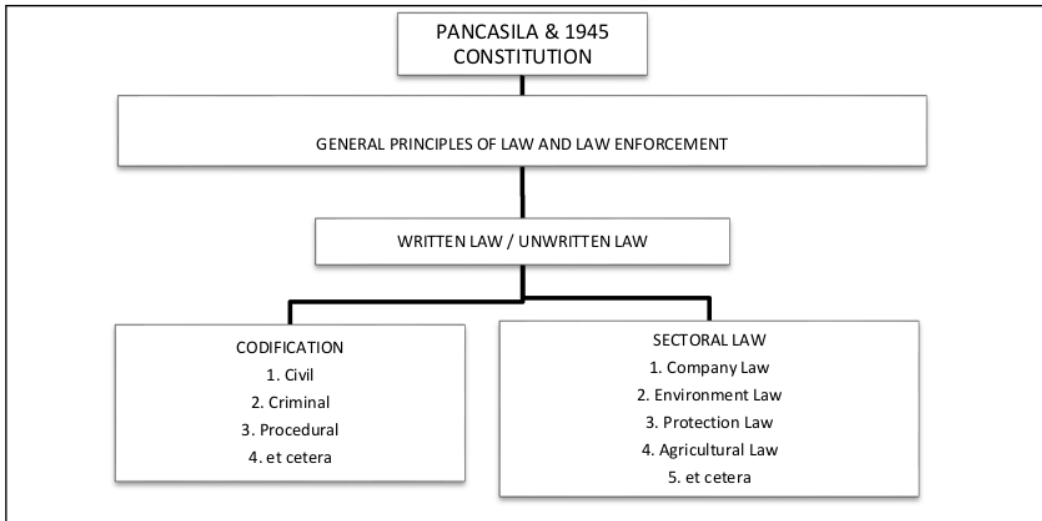
The above scheme specifies the position of law of security in the national legal system of object, and it also specifies types of rights of object security that can be used in a civil agreement.

To give a more distinct description about the framework of the national legal system, in which we can see the position of written law and especially civil law, which is the mother of regulations of security of object, the following is specified in Sunaryati Hartono's scheme in *Liber Amicorum*:⁷

5

⁷ *Liber Amicorum* for Prof. Dr. CFG. Sunaryati Harton Editor Elly Erawaty, Bayu Seto Hardjowahono, and Ida Susanti, *Beberapa Pemikiran Tentang Pembangunan Sistem Hukum Nasional Indonesia*, (Bandung: PT Citra Aditya Bakti, 2011), p. 30.

Scheme 2: Framework of National Legal System



In the scheme above, it is specified that Pancasila and 1945 Constitution, which are the basic or origin of all laws below them, are placed in the highest position, above all other laws, so that all regulations under cannot be against all regulations above them. Pancasila has the highest position, so that Pancasila is the first fundamental of the appearance of next regulations. Implementation of values of Pancasila is the one that will be contained in existing regulations because Pancasila is the philosophy of Indonesia.

ANALYSIS OF ARTICLE 4 SUBSECTION (2) AND ARTICLE 15 SUBSECTION (4) LAW NO. 4 OF 1996

According to A.P. Parlindungan, the purposes of legislating Law of Mortgage Right are:

- a. To overcome a problem that has been going on all this time, about where the point of 'For the sake of justice based on the belief in the one and only God', whether in land certificates or in certificates of Land Titles Registrar, concerning especially debt collateral with land as the collateral; and to check if it is sufficient in the cover of certificate of Mortgage Right or in the head (crown) of the certificate of Mortgage Right.
- b. To execute a strict order from Article 51 Law of Agrarian Affairs to create Law of Mortgage Right, in order to nullify erroneous interpretation towards this social system of security and to perform unification developed by Law of Agrarian Affairs in which social system of Mortgage Right acts as social system of debt collateral with land as the collateral.
- c. To state the term for land security or collateral as 'Mortgage Right', and note either 'lien' (as created by Law of Apartment and Article 57 Law of Agrarian Affairs) or *credietverband* (Article 57 Law of Agrarian Affairs) or 'fiduciary' stated in Article 15 Law No. 4 of 1992 on Housing and Residence.
By this, therefore, all terms 'lien' or *credietverband* stipulated in Law No. 16 of 1985 or regulated by Law No. 4 of 1992 must be read as Mortgage Right.
- d. To give a precise solution. There is still an assumption in society that Usage Right (*privaat*) cannot be an object of Mortgage Right, in which the development of fiduciary will turn Usage Right into a registered collateral. Also as in banking practice, Usage Right is accepted as a bank collateral in many versions.
Because of practical reasons, Usage Right can be made debt collateral by the Mortgage Right (the new one) even though it is not mentioned in Article 15 Law of Agrarian Affairs.
- e. To give a precise solution so that jurisprudence will also support both the Mortgage Right and the statement that the point of 'For the sake of justice based on the belief in the one and only God' is on the certificate of Mortgage Right, not on the deed of Mortgage Right. It is different from existing stipulation such as regulated in Article 224 HIR and Article 285 RBG.
- f. To keep performing principle of nationality, and the authority of the process of making certificate of Mortgage Right is on the Land Titles Registrar located in the district where the lands are located.

Apart from the purposes shared by the expert above, it is specified in Law No. 4 of 1996 – concerning the purpose of the release of this law – it is, inter alia, to actualize the unification of Law of National Land, to assure legal certainty, and to give protection to interested parties.⁹

¹³ A.P. Parlindungan, *Komentar Undang-Undang Tentang Hak Tanggungan Atas Tanah Beserta Benda-Benda Yang Berkaitan Dengan Tanah (U.U. Nomor 4 Tahun 1996/9 April 1996/LN Nomor 42) Dan Sejarah Terbentuknya*, (Bandung: Mandar Maju, 1996), p. 31-32

¹² See Explanation of Law No. 4 of 1996 about Mortgage Right.

In addition to legal certainty, in this case the author also interprets it as legal resoluteness, according to Article 4 Subsection (1) and Subsection (2) and Article 15 Subsection (4) Law of Mortgage Right, it is specified in Article 4 Subsection (1) that rights or titles, which can be imposed by Mortgage Right, over land are Free hold Titles, Cultivation Titles, and Building Titles. Besides such rights over lands, Usage Right over state lands, which – based on existing regulations – must be registered and – based on its nature – can be handed over, can also be imposed with Mortgage Right. This Article 3 has been in line with the purpose of the making of this law. However, Article 15 Subsection (4) Law of Mortgage Right states that the making of Power of Attorney of Imposing Mortgage Right over registered lands is allowed and can be an object of credit agreement; although under certain terms at least in three months, Power of Attorney of Imposing Mortgage Right must be changed into Certificate of Imposing Mortgage Right.¹⁰ These two articles are contrary to each other, reflecting irresolution.

Article 15 Subsection (4) gives the meaning that lands that are not registered can be made credit collateral by the authority of Power of Attorney of Imposing Mortgage Right/ *Surat Kuasa Membebaskan Hak Tanggungan* (SKMHT for short), which in three months a head must become Certificate of Imposing Mortgage Right. According to the author, the contents of these two articles have become a problem because of the non-synchronization between them. Article 4 explains the obligation of registration for object of Mortgage Right, while Article 15 Subsection(4) allows unregistered lands to become object of Mortgage Right and become a collateral to banks by using Power of Attorney of Imposing Mortgage Right (SKMHT).

Based on the existing definition of system, those articles should not be opposing each other, should be fitting, however, that is not what is happening. The two articles do not correspond. Hence, according to the author, Law No. 4 of 1996 has become in conflict with the definition of system explained earlier, reflecting irresolution.

Furthermore, the author is also of the same opinion as Tan Kamello states that Power of Attorney of Making Lien / *Surat Kuasa Memasang Hipotik* (often called as SKMH), which is now known as Power of Attorney of Imposing Mortgage Right (often called as SKMHT), is not a security right, so it is not preferential and does not give strong position to creditors.¹¹ This Power of Attorney of Imposing Mortgage Right (SKMHT) is mentioned in Article 15 Subsection (4) Law No. 4 of 1996 which is there known that Power of Attorney of Imposing Mortgage Right is not an object of collateral that can be equated with existing collateral of Mortgage Right, therefore, this cannot give guarantee of legal certainty to users of this law.

It is recognized that Indonesia's civil law acknowledges collateral securities in the nature of object or matter right and individual right. Collaterals in the nature of object are collaterals in the form of an absolute right over an object, having the characteristics: having a direct connection with debtors' certain objects, can be defended against anyone, always following the objects (*droit de suite*) and can be handed over (for examples: lien, pawn, et cetera). Collaterals in the nature of individual are collaterals that bring about direct connection to certain individuals, can only be defended towards certain debtors, towards debtors' possessions in general (for instance: *borgtocht*).

Apart from such characteristics, things that differentiate object right from individual right are principle of *priorite it* for object right and principle of equality for individual right. In object right, it is known that an older (earlier) object right is preferable than a later one. In individual right, there is principle of equality (Article 113 and Article 1132 Indonesia's Code of Civil Law) which means that it does not differentiate an earlier credit from a later one. Both have equal position, not depending on timeline; both have equal position towards debtors' possessions. If then bankruptcy happens, outcome of auction will be divided based on the two rights '*ponds-ponds gelijk*', proportionate to the amount of respective credit, unless terms in agreement say differently, then principle of equality can be breached (for examples: *privilege*, lien, pawn).

If there is a collision between object right and individual right, basically, object right is stronger than individual right. If the collision happens due to the same object or thing, object right will be won from individual right, without concerning whether the object right takes place before or after the individual right. There is an exception when the party having the object right is tied to the individual right that the party creates.

According to Sri Soedewi Masjchoen Sofwan, cited from Kartini Muljadi and Gunawan Widjaja, there are at least ten characteristics that distinguish object security and individual right, inter alia:¹²

- 1) Law of object is a compelling law (*dwingend recht*) which cannot be waived by parties.
- 2) Object right is transferable, in the sense that freehold right over objects can be handed over from its original owner to other parties, with all its legal consequences, unless it is opposing regulations, ethics and public order.
- 3) *Individualiteit*, which means that something that can be owned as an object is something that can be legally separated (*individueel bepalde*).
- 4) *Totaliteit*. This principle states that an ownership by an individual over an object means that it is a complete ownership over every part of the object. In this context, for example, a person could not have a part or some parts of an object if he himself does not have full free hold title over the object.
- 5) The principle of inseparability (*onsplitsbaarheid*). This principle constitutes a legal consequence from the principle of *totaliteit* where it is said that a person may not discharge some part of his free hold title over a complete object. Even though an owner is given the authority to impose his freehold title with other limited object rights (*jura in re aliena*), such imposition

¹⁰Article 15 (4) Law of Mortgage Right is Power of Attorney of Imposing Mortgage Right concerning rights over unregistered lands that must be followed by creation of Certificate of Imposing Mortgage Right at least three months after being given.

¹¹Kamello, *Hukum Jaminan Fidusia Suatu Kebutuhan Yang Didambakan*, (Bandung: PT. Alumni, 2004), p. 97.

¹²Kartini Muljadi dan Gunawan Widjaja, *Hak Istimewa, Gadai, Dan Hipotek*, (Jakarta: Kencana, 2005), p. 67-69.

can only be applied to the whole object owned. Therefore, *jurain re aliena* cannot be applied to some part of an object, but the complete object as a whole.

- 6) The principle of *prioriteit*. In the explanation of principle of *onsplitsbaarheid*, it is mentioned that an object is likely to be given *jurain re aliena* which gives limited object right over the object. This limited object right, by law, is given a position based on priority between one right and other rights. Remember, there is an object right that is limited. It is possible to impose result-usage right on freehold right where it is also possible to impose lien on the result-usage right.
- 7) The principle of mixing (*vermenging*). This principle is the continuous principle of *jura in re aliena* where it is stated that the holder of freehold title over object even limited object right (*jurain re aliena*) is not likely to be the holder of such limited object right (*jurain re aliena*). If the limited object right falls into the hand of the holder of the object freehold title, the limited object right will be eliminated by law.
- 8) The principle of *publiciteit*. This principle applies for immovable objects which are given object right.
- 9) The principle of different treatment towards movable and immovable objects.
- 10) The existence of agreement nature in every provisioning or establishing of object right. This principle reminds us of the fact that, basically, there is principle of object in every legal agreement and there is a nature of agreement law in every object right. The nature of this agreement is getting important because of the limited object right (*jurain re aliena*), as allowed by laws. Besides, as a form of security, object security gives preceding right to the creditor or the holder of right of object security over selling of object which is guaranteed by the object right, in the case that debtors are in default on their obligation towards creditors.

Therefore, the author believes that legal certainty is an inseparable characteristic from law, especially for written norms. Laws, without value of certainty, will lose their significance because they cannot be the code of conduct for everyone. In Latin, *Ubi jus incertum, ibi jus nulum* means that where there is no legal certainty, there is no law.

Thus, it is an absolute for a regulation, which is a part of a legal system, to be harmonious, so that it gives legal certainty its written norms and does not evoke confusion in its interpreting and implementation; in this case, the regulation intended is Law No. 4 of 1996 on Security Rights over Lands and Objects Related to Land.

Conclusion

Indonesia's System of Social Security has given correct direction to implementation of security in Indonesia. However, in this implementation of social security system, there exists in appropriate things for purposes of legal system of social security, so that law makers will have a duty to fix or revise all weaknesses and blunders existing in the regulations. In this case, the author focusing on Article 4 Subsection (2) and Article 15 Subsection (4) Law of Mortgage Right. The existence of discrepancy the contents of Article 4 Subsection (2) and Article 15 Subsection (4) Law No. 4 of 1996 on Mortgage Right, is a proof the unrealized legal system of social security which shows the non-synchronization creating unclear in the law that might lead to legal uncertainty. The potential of legal uncertainty is described in Article 15 Subsection (4) Law No. 4 of 1996 stating that Power of Attorney of Imposing Mortgage Right (SKMHT) can be a collateral at banks, in spite of the fact that based on legal form of object security – as seen in the scheme of security as sub-system of object law by Tan Kamello – some of the things that can be made as banking collateral is the assurance of mortgage right, not a power of attorney such as Power of Attorney of Imposing Mortgage Right. This is because Power of Attorney of Imposing Mortgage Right is an ordinary power of attorney, not an object security.

Recommendation

In making a legal regulation, it is correct to base it on the theory of system, so the regulation will be systematic, meaning that it is synchronous, well-arranged, orderly, and not against each other, and being clear and determined. In relation to object security as a part of legal system of social security, in this case Law No. 4 of 1996, it is essential to revise Article 15 Subsection (4) Law No. 4 of 1996 on Mortgage Right, so that synchronization and harmonization are achieved in regulations of legal system of social security. The author believes that the existence of legal system containing synchronization and harmonization in the existing laws in the form of regulations in a country, shows that such country is developed, orderly and has a high level of civilization. State management, particularly in law, reflects the level of prosperity of the state.

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