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Legal Reconstruction in Indonesia Based on Human Rights

Imam As Syafei Building
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"Legal Reconstruction in Indonesia Based on Human Right"

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PREFACE

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, HilaireTegnan, Ph.D from Sorbone University, Prof. Topo Santoso From Indonesian University, and Dr. Sri Endah Wahyuningsih, S.H., M.H from Sultan Agung Islamic University.

This was our fourth International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner in the concerned field to be discussed as guidelines to exchange and talk about views on the most important recent on Legal Construction and Development focusing on The Role of Indigenous and Global Community in Constructing National Law happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

PROCEEDINGS
The 5th International Conference and Call for Paper Faculty of Law 2019
Legal Reconstruction in Indonesia Based on Human Right

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Reconstruction Legal Rights Associated With A Warranty Not A Bank Debt

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Abstract

Guaranteed law is defined as a legal regulation governing collateral receivables from a creditor to a debtor, or in other words the guarantee law is a law that governs collateral for a person's receivables. Collateral can come from the debtor or the collateral does not belong to the non-debtor. Regarding guarantees not belonging to debtors not yet based on justice.

Keywords:Reconstruction, Mortgage Rights, Guarantees, Debtors, Banks

A.Preliminary

Indonesian nation has a national purpose as stated in the Preamble to the Constitution of 1945 (UUD 1945), which protect all nations and entire homeland of Indonesia, promote the general welfare, educate life of the nation and participate implementing world order based on freedom, lasting peace and social justice. Economic development is one of the efforts embodiment of the Preamble of the 1945 Constitution. Economic development is not solely a task for the government but the private sector is also expected role. The private sector can build with the support of public funding policies through lending by banks. A customer who gets the credit of the bank indeed is a man who won the trust of banks[341] ,

Credit risk in the context of financial institutions is a common occurrence, but it has a negative impact if it can not be resolved will affect the soundness of the financial institution. Nevertheless, this risk can be managed and controlled, by way of precaution in terms of lending. Therefore, in its lending bank must pay attention to the principles of lending right, where one of them is through the appraisal (coleteral) in the form of collateral that can be used as protection for creditors (financial institutions) in the event of default or breach of contract[342] ,

Land is an important asset for human life, because humans live on land and obtain food by way of utilizing land. Historical development and destruction is also determined by the soil, soil problems may cause disputes and wars devastating human, or a nation wants to control land other people or other nations because of the natural resources contained therein , Land as property is a guarantee for debt repayment is most preferred by financial institutions that provide credit facilities. Therefore, the land is generally easier to sell, the price continued to rise has proof of the right, it is difficult darkened and can be burdened with

340 *The writer is an Advocate, is completing the Doctoral Program at the Law Faculty of Law, University Islam Sultan Agung Semarang.*

341 *R. Subekti, Jaminan-jaminan Untuk Pemberian Kredit Menurut Hukum Indonesia, Citra Adita Bakti 1989, Jakarta, hlm. 1.*

342 *Anis Mashdurohatun, Zaenal Arifin, Gunarto, 2016, Rekonstruksi Parate Eksekusi Hak Tanggungan Atas Tanah Yang Berkeadilan, Penerbit: UNISSULA PRESS Universitas Islam Sultan Agung Semarang, Semarang, hlm. 2-3.*

mortgages grant privileges to creditors [343],

The existence of land as collateral in the legal system in Indonesia, has been refined in the Mortgage Law, namely Law No. 4 of 1996 on Mortgage of Land and Their Bodies Relating to Land (UUHT)[344]. Article 29 UUHT stated that with the enactment of this Act, the provisions regarding the Statute 1908-542 Credietverband as jo. Statute Statute 1909-586 and 1909-584 as amended by Gazette 1937-191 and provisions regarding hypotheek as mentioned in Book II Book of the Law of Civil Law of Indonesia during the loading Encumbrance on the right to land and objects relating to the the land is no longer valid.

According to J. Satrio, it is defined as the legal guarantees hukumyang regulations governing the guarantees of a creditor terhadapseorang debtor accounts, or in other words the security law is the law on guarantees of receivables someone who rules[345], In line with this, Salim HS is spesifk provide formulation, where the law guarantees

is the overall legal principles governing the relationship between givers and the insured in relation to imposition of collateralto obtain credit facilities[346] , Collateral consists of an assurance that belongs to the debtor and guarantees not belong to the debtor but are used as collateral for the debtor.

Supreme Court Circular No. 7 of 2012 on the formulation of the Law of the Supreme Court Plenary Meeting Room as Task Implementation Guidelines for the Court (SEMA 7/2012), the number of Sub Room XIII General Civil, declare that: "Mortgage auction conducted by the creditor itself through the Office of the auction, if terlelang not want to vacate the object being auctioned, it can not be done emptying under Article 200 paragraph (11) HIR but must be filed lawsuit. Because of the aforesaid auction is not an auction but the auction execution voluntary "

SEMA 7/2012 especially XIII Sub figure the General Civil Rooms, considered by legal experts Inconsistency form of the substance of the UUHT. However, not questioned how the legal protection of collateral that does not belong on the debtor. Based on this background, then formulated the problem:

1. Is the legal construction of encumbrance related to collateral that does not belong to the debtor's own justice?
2. Is the construction weakness of mortgage law relating to guarantees which do not belong to the debtor?
3. How legal reconstruction of mortgage-related collateral is not the object belonging to the debtor based on values of justice?

This study is a qualitative research approach that departs sociolegal of constructivism[347] , Also through Empirical juridical approach is a method or procedure used to solve the problem by first examining the ex-

343 *G.Kartasapoetra dkk, 1991, Hukum Tanah Jaminan Bagi Keberhasilan Pendayagunaan Tanah, PT Rineka Cipta, Jakarta, hlm. 1. Lihat juga Sudikno Mertokusumo, 1996, Mengenal Hukum, Edisi ke-4, Liberty, Yogyakarta, hlm. 3.*

344 *Effendi Parangin, Praktik Penggunaan Tanah sebagai Jaminan Kredit, Rajawali Pers, Jakarta, hlm. ix. Bandingkan Maria Stephannie Halim, Perlindungan Hukum terhadap Pemilik Jaminan dalam Lelang Eksekusi Hak Tanggungan, Jurnal Hukum Bisnis Bonum Commune, Vol. I, No. 1 Agustus 2018, hlm. 96-109.*

345 *J. Satrio, 1996. Hukum Jaminan Hak-Hak Kebendaan. PT. Citra Aditya Bakti, Bandung, hlm. 3. Dalam Anis Mashdurohatun, Zaenal Arifin, Gunarto, 2016, Rekonstruksi Parate Eksekusi Hak Tanggungan Atas Tanah Yang Berkeadilan, hlm. 12.*

346 *Lihat Salim. HS, Perkembangan Hukum Jaminan di Indonesia, PT. RajaGrafndo Persada, 2008, hlm. 6, dalam ibid.*

347 *Lihat Sudarwan Danim, 2002. Menjadi Peneliti Kualitatif, Pustaka Setia, Bandung. Lihat juga dalam Lexy J. Maleong, 2005, Metodologi Penelitian Kualitatif, Rosda Karya, Edisi Revisi, Bandung, hlm. 165. Juga dalam Anas Saidi, 2005 " Metode Penelitian Kualitatif", Makalah Workshop Penyusunan Proposal Penelitian, LIPI, Jakarta. hlm. 6. Dan Juga dalam S. Nasution, Metode Penelitian Naturalistk Kualitatif, Transito, Bandung, hlm.12. lihat juga Esmi Warassih, 2006, "Penelitian Socio-Legal: Dinamika Sejarah Dan Perkembangannya", Makalah Workshop, Forum Kajian Dinamika Hukum dan Majalah Ombudsman, Bandung, hlm. 5. Juga dalam Bambang Sunggono, 2003, Metode Penelitian Hukum, Raja Grafindo Persada, Jakarta, hlm. 103.*

isting secondary data and then proceed with research on primary data in the field[348] , This approach aims to understand that the law is not solely as a statutory set of rules that are normative, but legal as mengejala community behavior in public life, interact and relate to aspects of society, socio-cultural aspects.

B. Results and Discussion

Satjipto Raharjo defines the legal protection is to give shelter to human rights (HAM) that harmed others and the protection given to the public with the aim that they can enjoy all the rights conferred by law[349] , Construction related lawsUUHT to provide a guarantee of ownership rights[350] that do not belong debtor's dependents. Legal protection according to Setiono, is the act or an attempt to protect the public from arbitrary actions by the authorities are not in accordance with the rule of law, to bring order and peace so as to enable people to enjoy dignity as human beings [351],

Legal protection will relate to justice, Gustav Radbruch conceptualized one legal purpose or goal of the law is "justice" in addition to expediency and certainty[352] , Aristotle argued that the purpose of the law is solely to bring about justice. Justice here is ius suum Quique tribuere, which means giving to each person what is to be a part or right , Including security rights law.

The legal system according to Lawrence M. Friedman is composed of three elements, , Achmad Ali, said that the problems faced by Indonesia today is the third element[353] of the downturn in the legal system, and that is very sad is the fact that all three elements of the Indonesian legal system is still not in harmony with one another [354], Including in UUHT either of the legal structure, the substance of law and legal culture.

The basic assumption of progressive law is the view of the relationship between law and human. There affirmation principle that "the law is for man" and not vice versa[355]. In connection with that that law does not exist for itself, but for something larger and larger. Whenever there is a problem with the law, is the law that is reviewed and improved and not the man who pushed for inclusion in the legal scheme[356]. Likewise with UUHT associated with not justice, especially related to the owner who is not the debtor's collateral, then that should be reviewed is UUHT, thus UUHT be reconstructed, by providing legal protection for the owner of the guarantee is not the debtor.

C. Conclusions and suggestions

1.knot

a. Construction law relating to guarantees of mortgage that is not the object belongs to the debtor is not justice against the owner of the guarantee is not the debtor, because there are clear arrangements in case the execution.

b. The weakness of the legal construction of the security rights associated with the guarantee that do not belong

348 Soerjono Soekanto, 1986, Pengantar Penelitian Hukum, UI Press, Jakarta, hlm, 52.

349

350 Dudu Duswara Machmudin, 2000. Pengantar Ilmu Hukum Sebuah Sketsa, Refika Aditama, Bandung, hlm. 23

351 Setiono. 2004. Rule of Law (Supremasi Hukum). Surakarta. Magister Ilmu Hukum Program Pascasarjana Universitas Sebelas Maret.Salatiga. hlm. 3.

352 Ahmad Ali, 2002. Menguak Tabir Hukum Suatu Kajian Filosofis Sosiologis, Gunung Agung, Jakarta, hlm. 72

353 Lawrence M. Friedman, 1977, Law and Society, an introduction, Prentice Hall, New Jersey, p.7. (Selanjutnya disebut Lawrence M. Friedman I) Pada prinsipnya menurut Friedman bahwa sistem hukum terdiri dari struktur hukum, substansi hukum dan budaya hukum. Struktur hukum menyangkut lembaga-lembaganya, substansi hukum mencakup semua peraturan hukum, sementara itu budaya hukum mencakup gambaran sikap dan perilaku terhadap hukum, dan faktor-faktor yang menentukan diterimanya sistem hukum tertentu dalam suatu masyarakat.

354 Achmad Ali, 2008, Menguak Realitas Hukum, Kencana Prenada Media Group, Jakarta, hlm. 9 – 11.

355 Satjipto Rahardjo, Hukum Progresif, Hukum Yang Membebaskan, Jurnal Hukum Progresif, PDIH Semarang, Volume I Nomor 1, April, 2005, hal. 5.

356 Endang Sutrisno, 2013, Anthology of Law and Globalization, In Media, Jakarta., P. 67 to the debtor, whether the owners will guarantee his sukarena pledged caused debtor defaults.

c. Reconstruction of mortgage-related legal guarantees not belong debtor objects based on values of justice is to provide balanced protection to all parties ie between creditors and debtors, in particular providing protection against the owner guarantees in good faith.

2.Suggestion

a. MA should immediately overhaul-SEMA SEMA 7/2012 with more legal protection balanced and fair, and not in tune with theSEMA No. 3 of 1963,

b. In line with the SEMA No. 3 of 1963 states thatBurgelijk Wetboek by the Dutch colonialists deliberately arranged completely artificial of Burgelijk Wetboek in the Netherlands and again for the first treated for the Dutch in Indonesia, there is the question whether the atmosphere in independent Indonesia escape the shackles of colonial Dutch, still in place to look at this Wetboek Burgelijk parallel to a law which came into effect in Indonesia, should BW or the Civil Code should be immediatelypembarui comprehensively.

c. UUHT should immediately reconstructed.

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