Figure 2.1 Classification of Rights by the Ownership of Strata Title

The parts that are separated by ownership of individuals are managed by the owner of the strata title units, as for common portion, common goods and common land are managed together by all owners of the flat through Association of Residents and Owners of Strata Title (Indonesian: *Perhimpunan Penghuni dan Pemilik Satuan Rumah Susun* abbreviated PPPSRS). The principle that applies in the law of flats (including condominium, apartment and strata title), are:

1) principle of horizontal separation (*asas pemisahan horizontal*), in separating each strata title unit with another strata title unit next door (on the same level/floor);
2) principle of vertical separation (*asas pemisahan vertikal*), in separating each strata title unit with another strata title unit that is above or below it (different level or floor).[24]

[24]*Ibid.*, pg. 5-6.

When linked with the principles of our national land law which does not use the principle of attachment or *asas perlekatan* in Indonesian (*accessie beginsel*), but instead uses the horizontal separation principle, namely the principle in Indonesian customary law (*hukum adat*), then the notion of flat meets all these requirements, because according to the customary law, ownership of strata title are not required to own the land as well. The house is considered as a standalone object that can be separated from their land rights, thus the same applied to strata title. Ownership of flat unit with the title of strata title is a form of application of the horizontal separation principle.[25]

2) Types of Flats

Flats are divided into several types by its function and usage. According to Act Number 20 of 2011 regarding Flats, the types of flats consists of:

a) Public Housing Flats (*rumah susun umum*)

Public housing flats are organized to meet the needs for houses for the law-income communities. Puvlic housing flats is also known as simple public

[25] *Ibid.*, pg. 6-7.

housing flats, Indonesian terminology: *rumah susun sederhana* (*Rusuna*) given to the people with the rights of lease (known as "*rumah susun sederhana sewa*" or "*Rusunawa*") and with ownership rights/freehold title (*hak milik*) known as "*rumah susun sederhana dengan hak milik*" or "*Rusunami*".[26] Public housing flats are organized to meet the needs for houses for the law-income communities (Article 1 number 7 Act Number 20 of 2011 regarding Flats).[27]

b) Special Flats (*rumah susun khusus*)

Special flats are flats organized to meet the special needs (Article 1 number 8 Act Number 20 of 2011 regarding Flats).[28]

c) State's Flats (*rumah susun negara*)

State's flats are flats owned by the state and serves as a residence or dwelling, fostering families, as well as supporting the implementation of the state's official and/or civil servant duties (Article 1 number 9 Act Number 20 of 2011

[26]Dr. H. Suriansyah Murhaini, S.H., M.H., *op. cit.*, pg. 51.
[27]Dr. Urip Santoso, S.H., M.H., *Hukum Perumahan*, (Jakarta: Kencana Prenadamedia Group, 2014), pg. 409.
[28]*Ibid.*, pg. 409.

regarding Flats).[29] These types of flats were reserved for state's official and/or civil servant who carries out task of state. This kind of flats are not given with rights of lease or property rights, but only given the rights to occupy only.[30]

d) Commercial Flats (*rumah susun komersial*)

Commercial Flats are flats organized to gain benefit out of it (Article 1 number 10 Act Number 20 of 2011 regarding Flats).[31] The term often used by developers are apartment, flat atau condominium. This type of flat are usually a luxury flats built for sale to the middle-upper class and expatriates working in Indonesia.[32]

[29]*Ibid.*, pg. 409.
[30]Dr. H. Suriansyah Murhaini, S.H., M.H., *op. cit.*, pg. 52.
[31]Dr. Urip Santoso, S.H., M.H., *op. cit.*, pg. 409.
[32]Dr. H. Suriansyah Murhaini, S.H., M.H., *op. cit.*, pg. 52.

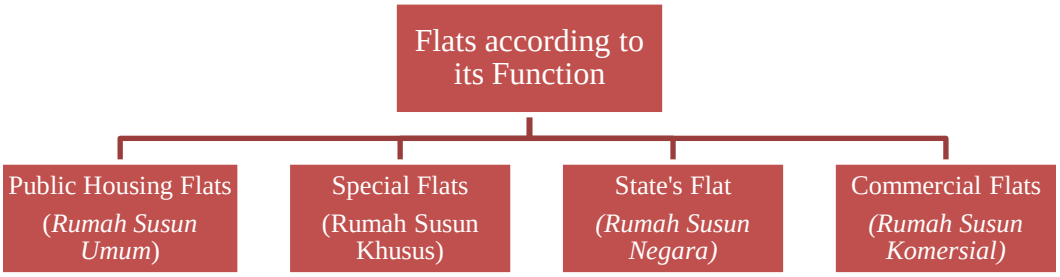

Figure 2.2 Classification of Flats According to its Function

Flats by the usage, are classified into:[33]

a) Residential flats (*rumah susun hunian*), i.e. flats that is entirely serves as a residence purpose.
b) Non-residential flats (*rumah susun bukan hunian*) i.e. flats that is whole fully serves as a place of business.
c) Miscellaneous flats (rumah susun campuran) i.e. flats that is partially serve as shelter/residence and partially functions as a place of business.

[33]Imam Koeswahyono, *Hukum Rumah Susun: Suatu Bekal Pengantar Pemahaman*, (Malang: Bayumedia, 2004), pg. 13-14.

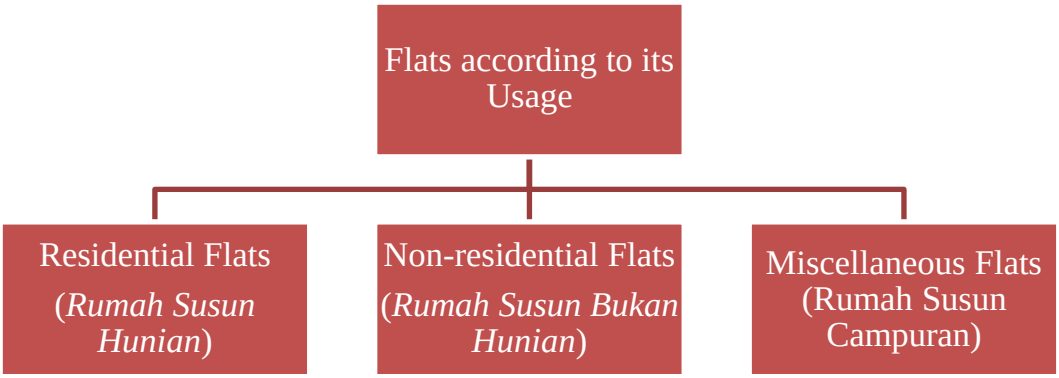

Figure 2.3 Classification of Flats According to its usage

b. Overview on Flats and Strata Title in Singapore

1) Term and the Base of Law on Flats and Strata Title

The term for "*rumah susun*" in Singapore are flat, condominium and apartment. Despite the different terminology in Singapore, only flat that is explicitly interpreted in the laws and regulations of Singapore. Based on Article 3 of Land Titles (Strata) Act (Chapter 158) and Article 2 of Residential Property Act (Chapter 274), a flat is:

"flat means a horizontal stratum of any building or part thereof, whether such stratum is on one or more

levels or is partially or wholly below the surface of the ground, which is used or intended to be used as a complete and seperate unit for the purpose of habitation or business or for any other purposes, and may be comprised in a lot, or in part of any subdivided building not shown in a registered strata title plan"

The laws and regulation that governs about flats, apartment and condominium in Singapore can be seen in several Acts, such as: Residential Property Act (Chapter 274), Land Titles (Strata) Act (Chapter 158), Housing and Development Act (Chapter 129), Housing and Urban Development Company Housing Estates Act (Chapter 131), Urban Redevelopment Authority Act (Chapter 340), Executive Condominium Housing Scheme Act (Chapter 99A) and Housing Developers (Control and Licensing) Act (Chapter 130).

84% of Singapore's population currently resides in high-rise public housing. The remaining 16% of Singapore's population reside in a variety of private

housing comprising of landed and non-landed property.[34]

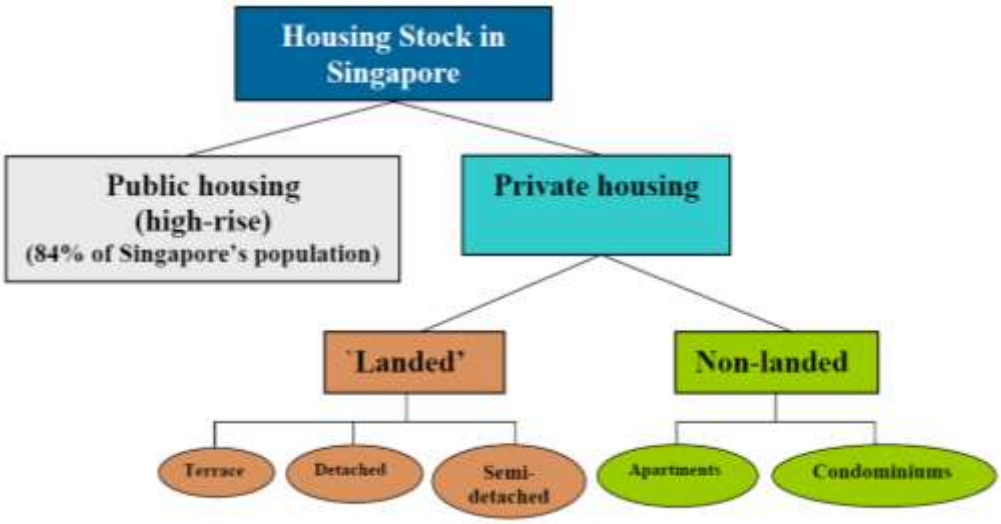

Figure 2.4 Housing Stock in Singapore

As in most countries which practice the common law system, in Singapore, one of the main considerations that determine the value of land is its tenure. The system of landholding as based on the feudal English concept of tenures and estates in land was received into Singapore by the Second Charter of Justice. As a result of this, there exist the estates of freehold and leasehold in Singapore.[35]

[34]Alice Christudason, *Private Sector Housing Redevelopment in Singapore: A Review of the Effectiveness of Radical Strata Title Legislation*, (Singapore: University of Cambridge, 2004), pg. 4.
[35]*Ibid.*, pg. 6.

Public housing in Singapore is managed by the Housing Development Board (HDB). The majority of the residential housing developments in Singapore are publicly governed and developed. These flats are located in housing estates, which are self-contained satellite towns with schools, supermarkets, clinics, hawker centres and sports-recreational facilities.[36]

The year 1964 marked another milestone in Singapore's public housing when the Housing Development Board (HDB) introduced the Home Ownership Scheme to help the people own flats. The scheme not only provides citizens a stake in the country, but also a means of financial security and a hedge against inflation and rising rents.

In the ownership of strata title in Singapore, there's a term called the "Share Value". The share value of a property is a figure that represents the proportionate share entitlement assigned to each strata title unit in the same development. The purpose of a share value is to determine the amount of shares each owner has in relation to the other owners in the development. For example If the share value of a unit in a condominium

[36]Wikipedia, "Public Housing in Singapore", https://en.wikipedia.org/wiki/Lift_Upgrading_Programme, accessed on 23 September 2016.

is represented by the figure 5/350, then 350 represent the share value of all the units in the condominium and 5 is the share value allotted to the unit.[37] The share value shares almost an identical definition on the term of "*Nilai Perbandingan Proporsional* (NPP)" in Indonesian strata title.

The share value determines the amount of contributions for maintenance that an owner has to pay to the management corporation of the estate for maintaining the common areas in the development. Second, the share value of a strata lot determines the voting right of a unit owner. The higher the share value an owner has, the more voting rights he or she has. Third, the share value determines the share an owner has in common property, which is jointly owned by all the owners in a development.

2) Types of Flats

In Singapore, housing is divided into 2 (two) types. Public housing and private housing. As mentioned, flats are also divided into 2 (two) types. Flat that's in the public housing category is HDB Flats. These kind

[37]Building and Construction Authority, *Strata Living in Singapore: A General Guide*, (Singapore: Building and Construction Authority, 2005), pg. 3.

of flat are held under leases from the Housing and Development Board (HDB), including HUDC (Housing and Urban Development Company) flats which the Housing and Development Board takes over the management in 1982. Now, the Housing and Development Board is the only sole provider of public housing in Singapore. Flat that's in the private housing category are condominium, executive condominium and apartment that the development are carried out by private sectors.

Development of the HDB flats as well as private development began to diversify due to the diversity of the needs of Singaporean, such as:

a) Studio Apartment, designed to fulfill the need of senior citizen which is sold with 30 years leasehold, located in a region with a sufficient facilities and good access.
b) 2-Room Flexi, 3-Room, 4-Room, 5-Room, 3Gen Flat and Executive Flat, that is a living are with various floor area, number of bedroom and bathroom, designed for various need and purposes with different price ranges.

c) Executive Condominium (EC) are comparable to private condominium in terms of design and facilities. Build and sold by private developers. They are attractive options for higher-income Singaporean.[38]

d) Condominium or Condo is a term used for housing buildings developed by private companies, such as Far East Organization or Keppel. Condos generally include some special amenities and services such as 24-hour security, gyms, swimming pools, tennis course and spas.[39]

e) Apartment is a term refers to housing that has been built primarily for the purpose of rental, such as service apartment and student dormitories/hostels. This hostels offer highly affordable accommodation prices for students, hence being an attractive option to those here (in Singapore) with student passes.

[38]Housing & Development Board, "Types of Flats", http://www.hdb.gov.sg/cs/infoweb/residential/buying-a-flat/new/types-of-flats, accessed on 25 September 2016.
[39]Nestia, "Types of Property in Singapore", http://www.nestia.com/blog/2015/07/22/types - property-singapore/, accessed on 25 September 2016.

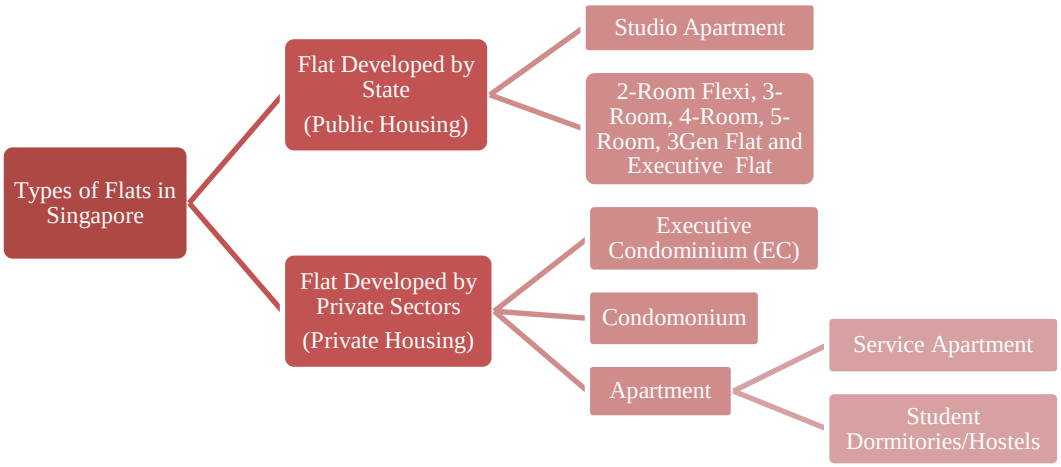

Figure 2.5 Types of Flats in Singapore

2. Overview on Foreign Nationals

a. Overview on Foreign Nationals in Indonesia

1) Definition on Foreign Nationals

The term Nationality in Indonesian is "*Warga Negara*" which according to *Kamus Besar Bahasa Indonesia* is "*penduduk sebuah negara atau bangsa berdasarkan keturunan, tempat kelahiran dan sebagainya yang mempunyai kewajiban dan hak penuh sebagai seorang warga dari negara itu*"[40] which in English means "population of a certain country or nation based on ancestry, birth place and so on which

[40]Tim Penyusun Kamus Pembinaan dan Pengembangan Bahasa, *op. cit.*, pg. 706.

have obligation and right as a citizen of the said country"

While foreigner or foreign national in Indonesian is "*Orang Asing*" which according to *Kamus Besar Bahasa Indonesia* is "*orang lain, orang dari negara lain, orang yang tidak dikenal*"[41] which in English means "other person, person from another country, unknown person (foreign)"

According to Act Number 12 of 2006 regarding Indonesian Nationality, Article 1 number 1, a Nationality is a citizen of a country as appointed by the law. In Article 7 of Act Number 12 of 2006 regarding Indonesian Nationality, the term foreigner (*orang asing*), is "every person which is not an Indonesian Nationality is treated as foreigner". Thus, in Article 4 of Act Number 12 of 2006 regarding Indonesian Nationality, have been detailed that an Indonesian Nationality are (the Writer translate literally from the original Indonesian text):

a) everyone as based on the law and/or agreement between Indonesian government and another

[41] *Ibid.*, pg. 1125.

country before this Law is valid, has already became an Indonesian;

b) a child born from legitimate marriage of a Indonesian father and mother;
c) a child born from legitimate marriage of an Indonesian father and mother with another nationality;
d) a child born from legitimate marriage of a father with another nationality and an Indonesian mother;
e) a child born from legitimate marriage of an Indonesian mother and a father with no nationality or the law of the father's country of origin didn't give a nationality to that said child;
f) a child born in within 300 (three hundred) days after the father pass away and from a legitimate marriage and the father is an Indonesian nationality;
g) a child born not from a legitimate marriage and the mother is an Indonesian nationality;
h) a child born not from a legitimate marriage of a mother with another nationality that is recognized by the Indonesian father as his child and the

recognition is done before the child reaches 18 (eighteen) years old or not yet married;

i) a child born in the territory of the Indonesia which at the time of birth, it's not clear the nationality of the father nor the mother;

j) a child which is born and found in the territory of Indonesia as long as the father nor the mother is unknown;

k) a child which is born in the territory of Indonesia if the father nor the mother didn't have a nationality or its whereabouts is unknown;

l) a child born outside the territory of Indonesia from an Indonesian father and mother which because of the regulation of the country where the child was born gives nationality to the child;

m) a child from a father or mother which is approved with an Indonesian nationality, then the father and mother passed away before the saying of the oath or declaration of allegiance.

2) Types of Foreign Nationals

According to the Circulars Letter of the State Minister of Agrarian Number 110-2871 of 1996, from

the presence in Indonesia, a foreigner or foreign national can be categorized in into 2 (two) category/types, namely:

a) foreigner that stay in Indonesia permanently (resident/*penduduk Indonesia*), and
b) foreigner that do not stay in Indonesia permanently, hence just temporarily staying in Indonesia.

From the Circulars Letter of the State Minister of Agrarian Number 110-2871 of 1996, then distinct the difference between the 2 (two) types of foreigner above with the documentation it needs to purchase or acquire a property (house) in Indonesia, namely:

a) for foreigner that stay in Indonesia permanently: *Izin Tinggal Tetap* (Permanent Residence Permit), and
b) for other foreigner: *Izin Kunjungan* (Visit Permit) or other immigration permit in the form of a sign applied in passport or other immigration documentation that the foreigner possess.

b. Overview on Foreign Nationals in Singapore

1) Definition on Foreign Nationals

Singaporean nationality law is derived from the Constitution of Singapore and is based on *jus sanguinis* and a modified form of *jus soli*. There are three ways of acquiring Singaporean citizenship, such as citizenship by birth, citizenship by descent and citizenship by registration. Citizenship by naturalization is no longer granted.[42] Foreigner in Singapore referred to as a non-Singaporean and non-Singapore Permanent Resident.[43]

2) Types of Foreign Nationals

According to the Section 2 of the Residential Property Act (Chapter 274), a foreigner means any person who is not any of the following:

a) a citizen of Singapore;
b) a Singapore company;
c) a Singapore limited liability partnership;
d) a Singapore society.

3. Publicity Principle (*Asas Publicited*)

[42]Wikipedia, "Singaporean Nationality Law", htpps://en.m.wikipedia.org/wiki/Singaporean-nationality_law, accessed on 25 September 2016.
[43]Inland Revenue Authority of Singapore "Individuals (Foreigners)", htpps://www.iras.gov.sg/irashome/page01.aspx?id=88, accessed on 25 September 2016.

Publicity principle is the principle which states that all charges, weather encumbrance right, fiduciary guarantee and mortgages have to be registered. Registration is intended for the third party to know that the object afore mentioned are being charged as collateral. Registration of encumbrance rights in the city/district Land Office (*Badan Pertanahan Nasional kabupaten/kota*), registration of fiduciary guarantee is done in Fiduciary Registration Office (*Kantor Pendaftaran Fidusia*) of the office of the Ministry of Law and Human Rights, while the registration of ship mortgages is made in front of the registrant and registrar official i.e. harbor master (Indonesian: *Syahbandar*).[44]

4. Specialties Principle (*Asas Specialited*)

Specialties principle is the principle which provides that a charge, such as encumbrance rights, fiduciary guarantee and mortgage can only be charged on a plot or on certain goods that have been registered in the name of particular person.[45]

5. Undivided Principle (*Asas Tidak Dapat Dibagi-bagi*)

Undivided principle is the principle that states that although a certain debt can be divided cannot cause to the division of encumbrance rights, fiduciary rights, mortgages or pledge even

[44]H. Salim HS, S.H., M.S., *op. cit.*, pg. 9.
[45]H. Salim HS, S.H., M.S., *op. cit.*, pg. 9.

though there is already a partial payments on the debt and the object used as collateral must be an integral part in ensuring a debt.[46]

6. Livery Principle (*Asas Inbezitstelling*)

Livery principle (*inbezitstelling*) is a principle which stipulates that the collateral (pledge) should be on the receiving party (pledgee).[47]

7. Principle of Horizontal Separation (*Asas Pemisahan Horizontal* or *Horizontale van Scheiding Beginsel*)

The principle of horizontal separation is the principle that states that the building and land is not a single unity. This can be seen in use of the rights to use (*hak pakai*), either on state land (*tanah negara*) or land ownership rights/freehold title (*hak milik*). The building belong to the concerned or the giver of encumbrance right, but the land belongs to someone else, based on the right of use can be used as collateral.[48]

8. Nationality Principle (*Asas Nasionalitas*)

The main principle in the Act Number 5 of 1960 is the nationality principle. The nationality principle only gives the rights of land to Indonesian citizen (*Warga Negara Indonesia*) in terms of owning the rights of land, which has closes the possibility for foreign nationals to own the rights of land. The implementation of Act Number 5 of 1960

[46]H. Salim HS, S.H., M.S., *op. cit.*, pg. 9.
[47]H. Salim HS, S.H., M.S., *op. cit.*, pg. 10.
[48]H. Salim HS, S.H., M.S., *op. cit.*, pg. 10.

has the consequence of the difference in treatment for Indonesian citizen and foreign nationals. This difference in treatment is fair, primarily associated with the position of land for Indonesian which has an important position.[49]

The nationality principle in Act Number 5 of 1960 does not completely prohibit foreigners to own rights of land. But restricts foreigners to own only the rights of use (*Hak Pakai*). Thus the difference in the treatment between foreigners and Indonesian citizen as a consequence of the nationality principle is not rigidly applied. This means that the law makers view that the foreign control over the land is possible, but in the framework of national development.[50]

C. Legal Framework

1. Overview on the Law of Security

a. Overview on the Law of Security in Indonesia

1) Definition on the Law of Security

The term security, assurance or guarantee in Indonesian is "*Jaminan*" which from the root word of "*Jamin*" that according to *Kamus Besar Bahasa Indonesia* is "*menanggung (tentang keselamatan, ketulenan, kebenaran dari orang, barang, harta benda dan sebagainya)*" which is "to bear (about safety,

[49]Martin Roestamy, *Konsep-konsep Hukum Kepemilikan Properti Bagi Asing Dihubungkan dengan Hukum Pertanahan*, (Bandung: Alumni, 2011), pg. 52.
[50]*Ibid.*

genuineness, the truth of people, goods, property and so on)" while "*jaminan*" according to *Kamus Besar Bahasa Indonesia* is "tanggungan atas pinjaman yang diterima"[51] which in English means dependent on the loans received. One vocabulary for guarantee in Dutch-Indonesian Law Dictionary is *Onderpand* which means the pawned goods, guarantee.[52]

A guarantee (collateral) according to Thain is something that has a value of the debtor that are included in the agreement, in order to guarantee it's debt. Without the collateral, the agreement is merely a contract for loan and for receivables or just an obligation to fulfill.[53]

The collateral as a sort of security for loan in banks in essence serves to ensure the certainty of the settlement of that loan if the debtor do not obey its obligation or declared bankrupt.[54] Collateral is the ultimate source for the prepayment of loans granted by banks to debtor, if it turns out that the primary source of repayment is from the debtor's company's earnings are

[51]Tim Penyusun Kamus Pembinaan dan Pengembangan Bahasa, *Kamus Besar Bahasa Indonesia*, ed. 2, cet. 9, (Jakarta: Balai Pustaka, 1997), pg. 399.
[52]Yan Pramadya Puspa, *Kamus Hukum*, (Semarang: CV Aneka, 1977), pg. 637.
[53]Ivida Dewi Amrih Suci dan Herawati Poesoko, *Hak Kreditor Separatis dalam Mengeksekusi Benda Jaminan Debitor Pailit*, (Yogyakarta: Laksbang Pressindo, 2011), pg. 20.
[54]Djoni S. Gazali, *Hukum Perbankan*, (Jakarta: Sinar Grafika, 2010), pg. 270.

no longer sufficient to pay the existing loan. Often though the debtor has been tied with a loan agreement in such legal force that is still applicable and already been carried out with an analysis toward the debtor, giving out loan to debtor still contains risk of failure in repayment so in practice, banks are often faced with the problem of bad loans and this causes the performance of banks do not always runs smoothly.[55]

Law of security is the legal regulations governing the security (collateral) especially regarding security for the debt of a debtor to creditor. According to J. Satrio, law of security is the law governing a collateral on someone's credit.[56] According to Hemat Salim, law of security is the entirety of legal rules governing the relationship between the giver and the recipient of the security in relation to the encumbrance of collateral to obtain credit facilities.[57]

From the opinion on the 2 (two) experts above, it can be concluded that the law of security is a device in the form of rules or laws that are set, in this case more

[55]Dr. J. Andy Hartanto, S.H., M.H., Ir., M.M.T., *Hukum Jaminan dan Kepailitan: Hak Kreditor Separatis dalam Pembagian Hasil Penjualan Benda Jaminan Debitor Pailit*, (Surabaya: Laksbang Justitia Surabaya, 2015), pg. 21-22.
[56]J. Satrio, *Hukum Jaminan Hak Jaminan Kebendaan Fidusia*, (Bandung: Citra Aditya Bakti, 2002), pg. 3.
[57]H. Salim HS, S.H., M.S., *Perkembangan Hukum Jaminan di Indonesia*, (Jakarta: PT Raja Grafindo Persada, 2004), pg. 6.

specifically governing about the legal relationship between the guarantor or debtor with the insured or the creditor, in order to guarantee a particular debt, whether it be material as well as individual guarantee (*borgtoch*).

At this time, there has been created various of legislation regarding security, collateral and security institution (*lembaga penjaminan*). Based on the understanding above, the elements contained in the formulation of the law of security are as follows:[58]

1) The Existence of Rule of Law (*Adanya kaidah hukum*)

   Rule of law in the field of law on security can be divided into 2 (two) types, namely the unwritten rule of law on security and the written rule of law on security. Written rule of law on security is a legal principle contained in the legislation, treaties and jurisprudence. While the unwritten rule of law on security are the rule of law that grow, live and thrive in the society.

[58] *Ibid.*, pg. 7.

2) The Collateral Giver and Collateral Recipient (*Adanya pemberian jaminan dan penerima jaminan*)

Collateral giver is a person or legal entity that delivers the collateral and gave it to the collateral recipient. The collateral giver can also be the person or legal entity which needs credit/loan. The person or legal entity which needs credit/loan is referred to as debtor. The collateral recipient is a person or legal entity that receives collateral from the collateral giver or the debtor. Collateral recipient is generally a legal entity that provides credit facilities/loan. The said legal entity can either be a non-banking institution or a banking institution.

3) Security (*Adanya jaminan*)

Basically collateral given to the creditor is a material collateral which is in the form of moveable or immoveable properties.

4) Giving of Credit Facilities (*Adanya pemberian fasilitas kredit*)

The charge of collateral that is done by the debtor is to aim for obtaining the credit facilities

from banking institution or non-banking institution. Giving out credit is essentially giving money based on trust. The meaning of trust here is that the banking institution or non-banking institution belief the debtor is able to repay the loan given including the principal loan and interest as well as the cost incurred to maintain the collateral object. Likewise, the debtor believes that the banking institution or non-banking institution will provide credit to him/her.

According to Rachmadi Usman, the elements contained in the formulation of the law on security are as follows:[59]

1) A series of legal provisions, both of which is sourced from the provisions of the written and unwritten laws. The written legal provision is a legal provision derived from the legislation, while the unwritten legal provisions are legal provision that is from the society.
2) The provision on the law of security is governing the legal relationship between the guarantor (debtor) and the creditor. Guarantor is referred to

[59]Rachmadi Usman, *Hukum Jaminan Keperdataan*, (Jakarta: Sinar Grafika, 2008), pg. 2.

as debtor, that is the party which owe certain sum in a relationship of debt and receivables, which hand over a specific object as a security to the lender (creditor). In this case, the one acting as a guarantor is a person or legal entity that will acquire a specific amount of credit facility or the owner of the object of security for a particular debt. As for the lender referred to as creditor, namely those who being indebted in a specific debt in a relationship of debt and receivables, that receives a specific object as a security. In this case, acting as object recipient can be an individual (person) or legal entity. Similarly, legal entity referred here is either a banking institution or non-banking institution.

3) There is collateral submitted by the debtor to the creditor. Because of the secured debt is in the form of money then the collateral herein shall be able to be valued in money too.
4) The handover of an object is made by collateral giver as a collateral which is intended as a security for a repayment of a certain debt, which means the handover of collateral is done for the purpose of

> obtaining a certain debt, the debt or loan granted by a person or legal entity to an individual or legal entity based on trust. The imposition of a collateral is intended to ensure the repayment of a certain debt obligation to the creditor if the debtor experiencing default.

The scope of legal study on the law of security covers security into 2 (two), namely general securities and special securities. Special securities are divided into 2 (two) types, namely material security (collateral) and personal guarantees. Collaterals are also divided into moveable collaterals (chattels) and immoveable collaterals. Collaterals on moving objects include liens (*gadai*) and fiduciary (*fidusia*) whereas collateral in immoveable objects includes encumbrance right (*hak tanggungan*) and mortgage (*hipotik*). While an individual (personal) guarantee consist of *borg*, corporate guarantee and a bank guarantee.

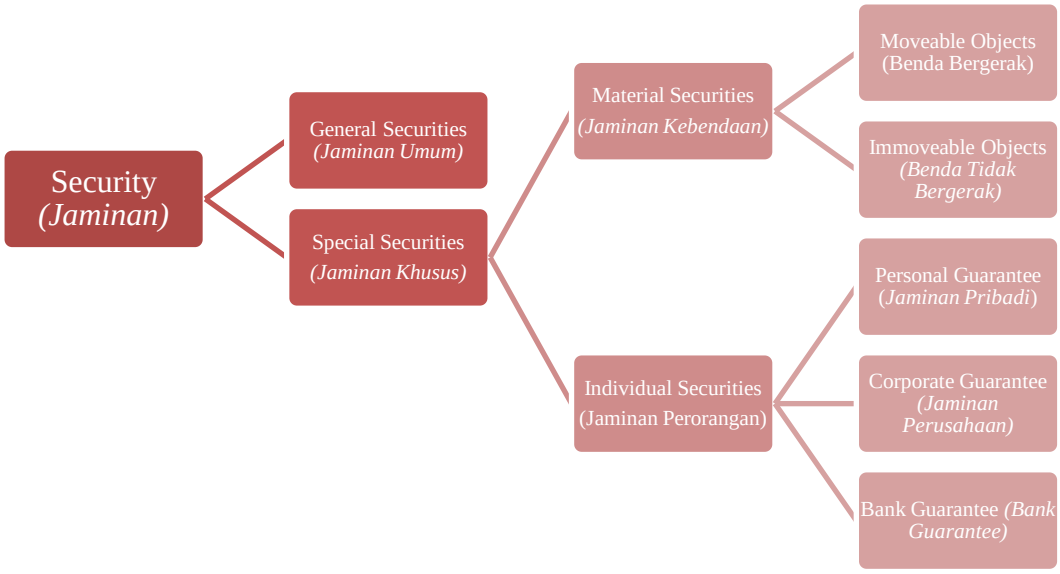

Figure 2.6 Classification of Securities in Indonesian Law System

Act Number 10 of 1998 regarding the Amendment of Act Number 7 of 1992 regarding Banking in Article 1 number 23 reads:

"*Agunan adalah jaminan tambahan yang diserahkan Nasabah Debitur kepada Bank dalam rangka pemberian fasilitas kredit atau pembiayaan berdasarkan Prinsip Syariah*".

Which the Writer translates literally from the Indonesian into English, the provision above will said:

> "Collateral is an additional security that the Debtor submitted to the Bank in the provision of giving credit facilities or financing based on Sharia Principles".

Collateral in its construction is an additional security in order to get credit facilities from banks and other non-banking institutions. Collateral have several elements, that's an additional security, and submitted by the debtor to the bank in order to get credit facilities or financing.

The convenience in terms of loan collateral is a realization of the banking with the principle of economic democracy with its main function as a gatherer and distributor of public funds, having a strategic role to support the implementation of national development in order to improve the distribution of development and its results, economic growth and national stability toward improving the standards of living for the people. Despite the ease thus, the collateral must remain ideal for the collateral has an important task of carrying out and securing the credit given, namely by providing the right and power to the

bank to obtain repayment from the collateral if the debtor defaults.[60]

In the case of giving out credit facility in practice the collateral is evens more dominant and preferred, so the actual collateral is more important than security or just a form of confidence in the debtor's ability to repay their debts. It thus is very founded because security is an abstract thing, where assessment toward security is highly subjective, different from collateral which is clearly more objective and economically if in case the debtor defaults or the loan is in state of bad loan/credit, the bank can immediately convert them to a more liquid money.[61]

In the perspective of banking law, the collateral can be divided into 2 (two) types, namely principal collateral (*agunan pokok*) and additional collateral (*agunan tambahan*). This is confirmed in the explanation of Article 8 paragraph (1) of Act Number 10 of 1998 regarding Amendment of Act Number 7 of 1992 regarding Banking, principal collateral is goods, securities or warranty relating directly to the object financed by credit in question, such as items purchased

[60]Drs. Muhamad Djumhana, S.H., *Hukum Perbankan di Indonesia*, (Bandung: PT Citra Aditya Bakti, 2000), pg. 397.
[61]*Ibid.*, pg. 397.

with the credit concerned, project financed with the loan concerned, while additional collateral is goods, securities or guarantees that are not directly related to the objects that is financed with loans in question that were added as an additional collateral. Banks are not required to request additional collateral that is not directly related to the objects that is financed by the credit facilities in question.

2) Source and System of the Law of Security

The source of law is where the rule of law is found. In this regard, the source of law on security and guarantee derived from the Indonesian Code of Civil Law (*Burgerlijk Wetboek voor Indonesie*) which is the result of an adjustment between the law and situation in Indonesia and the Netherlands. The Netherland's *Burgerlijk Wetboek* ensouls the spirit of the Indonesian Code of Civil Law which is the result of codification on the material civil code that is announced on the 30 April 1847 and entered into force in January 1848 and

still being used until now based on the principle of concordance (*asas konkordansi*).[62]

Provisions on the law of security can be found in the second book (*Buku II*) of the Indonesian Code of Civil Law, which governing about object/thing (*kebendaan*). Judging from the systematic of the Indonesian Code of Civil Law, the law on security is part of the law on object/thing, as the setting of the second book (*Buku II*) of the Indonesian Code of Civil Law that is governing about the definition, procedures for distinguishing objects and rights on objects, be it in giving pleasure to the holder/bearer or even the right to apply charge to the object (as a security/guarantee).

Articles governing the law of guarantee and security including the security institution (*lembaga penjaminan*) starting from Article 1131 to Article 1232, second book of the Indonesian Code of Civil Law. Such articles governing about the privileged receivables (*piutang-piutang yang diistimewakan*), pledge (*gadai*) and mortgages(*hipotik*).

In connection with the issuance of Act Number 4 of 1996 on the Encumbrance Right over Land and Land-

[62]Yulies Tiena Masriani, S.H., M.Hum., *Pengantar Hukum Indonesia*, (Jakarta: Sinar Grafika, 2004), pg. 72-73.

Related Objects, the charge over land and land-related objects is no longer charged using the mortgage instruments as provided in Article 1162 to Article 1232 of the Indonesian Code of Civil Law.

In additional to regulating about the object as a security, the Indonesian Code of Civil Law also regulates about the individual guarantees, namely debt coverage (*borgtoch*) and engagement-engagement about the joint liability (*tanggung-menanggung*). Individual guarantees or the personal guarantees is regulated under Article 1820 until Article 1850 of the Indonesian Code of Civil Law. In those articles mainly regulates about the definition and nature of individual guarantees, the effects of the individual guarantee toward a debt between a debtor and the guarantor as well as the abolition of a legal relationship of debt guarantee.

According to Soebekti, personal guarantee is an agreement between an indebted (lender) with a third party that ensures the compliance of the obligation of the indebt (debtor). This agreement of the third party can even be held outside (without) the indebt. The purpose of this guarantee is for the fulfillment of the

obligations of the debtor that is guaranteed entirely or to a specific part, the property of the guarantor can be seized and auctioned according to the provision concerning the execution by court's decision.[63]

Security is very closely related to law of objects. Under Article 499 of the Indonesian Code of Civil Law, objects are any goods and rights that can be the object of rights. Objects can which sometimes become an integral part of the rights due to the principle of attachment (*recht van natrekking*), either obtained naturally (*natuurlijke vruchten*) because its generated by soil or by animals, or form craftsmanship (*vruchten van nijverheid*) by the way of human intervention.[64]

Types of guarantee or security according to H. Salim HS, S.H., M.S., can be divided into 2 (two) kinds, namely:[65]

1) Material Security (*Jaminan materiil/kebendaan*)

   Material security has a characteristics of "materials" in the sense of giving the rights or title to precede over certain objects and inherent the nature to follow the objects in question.

[63]*https://kuliahade.wordpress.com/2010/06/25/hukum-jaminan-jaminan-perorangan/*, accessed on 12 September 2016.
[64]Tan Thong Kie, *Studi Notariat dan Serba-Serbi Praktek Notaris*, (Jakarta: PT Ichtiar Baru Van Hoeve, 2013), pg. 151.
[65]H. Salim HS, S.H., M.S., *op. cit.*, pg. 23-24.

2) Immaterial Security/Individual Guarantee (*Jaminan imateriil/perorangan*)

Individual guarantees does not entitle a right to precede over certain objects, but only secured by the assets of a person through people who guarantee the fulfillment of the obligation of the debtor.

Material security can be classified into 5 (five) types, namely:

1) Pledge (Indonesian: *gadai*; Dutch: *pand*) as stipulated in Chapter 20 of the Second Book of the Indonesian Code of Civil Law;
2) Mortgage (Indonesian: *hipotik*) as stipulated in Chapter 21 of the Second Book of the Indonesian Code of Civil Law;
3) *Credietverband* (particularly for unregistered land) as stipulated in Law Gazette (*Staatsblaad*) *Stb*. 1908 Number 542 as amended by *Stb*. 1937 Number 190;
4) Encumbrance Rights (Indonesian: *Hak tanggungan*) as stipulated in Act Number 4 or 1996 regarding Encumbrance Right over Land and Land-Related Objects;

5) Fiduciary Guarantee (Indonesian: *Jaminan fidusia*) as stipulated in Act Number 42 of 1999 regarding Fiduciary Guarantee.

Whilst the security that is considered as individual guarantees are:

1) Guarantor (*borg*) are other who may be charged;
2) Joint liability (*tanggung-menanggung*); and
3) Guarantee agreement (*perjanjian garansi*).

Individual guarantee (*personal guarantee*) is an agreement between an indebted (lender) with a third party that ensures the compliance of the obligation of the indebt (debtor). This agreement of the third party can even be held outside (without) the indebt. According to Prof. Soebekti, because of the demand of creditors against a guarantor is not given a privilege position against all other creditors, the individual guarantee is not widely practiced in the world of banking.[66]

Out of the 8 (eight) types of guaranty or security mentioned above, the security that is still being used until now are:

1) Pledge (*Gadai*);

[66]Drs. Muhamad Djumhana, S.H., *op. cit.*, pg. 398.

2) Encumbrance Right (*Hak Tanggungan*);
3) Fiduciary Guarantee (*Jaminan Fidusia*);
4) Mortgage over Ships and Air Planes (*Hipotek atas kapal laut dan pesawat udara*);
5) Individual Guarantees (*borg*);
6) Joint Liability (*tanggung-menanggung*); and
7) Guarantee Agreement (*Perjanjian Garansi*).

The charge over land and land-related objects using mortgages (*hipotik*) and *credietverband* is no longer done because it has been repealed by the Act Number 4 or 1996 regarding Encumbrance Right over Land and Land-Related Objects, whereas the charge over ships and aircrafts are still using the mortgage.[67]

In principle, not all objects can be charged as a collateral in banking institutions and non-banking institutions, but the objects that can be charges as collateral must fulfill certain terms and requirements. The terms and requirements for a good collateral are:

1) can be easily used to obtain credit facilities by the parties who need it;
2) do not weaken the potency (strength) of the loan seekers to undertake or continue its business;

[67]H. Salim HS, S.H., M.S., *op. cit.*, pg. 25.

3) provide assurance to the creditors in the sense that the collateral given is available to be executed at any time, if necessary, can be easily be cashed to pay off debts of the recipient (taker) of credit facilities (Subekti, 1996:73)[68]

Basically the agreement of loan can be divided into 2 (two) types, namely principal agreement (*perjanjian pokok*) and the additional agreement (*perjanjian accesoir*). Principal agreement is an agreement to obtain credit facilities from banking institutions or non-banking institutions. Rutten view that the principal agreement is an agreement to have a basis independent existence (*welke zelftanding een reden van bestaan recht*). Examples of principal agreement is a bank credit agreement (*Perjanjian Kredit*).[69]

Additional agreement (*Perjanjian accesoir*) is an agreement that is associated and added to the principal agreement. Examples of this agreement is an agreement to charge a collateral, such as pledge agreement, encumbrance right agreement or fiduciary agreement.

[68]H. Salim HS, S.H., M.S., *op. cit.*, pg. 27-28.
[69]H. Salim HS, S.H., M.S., *op. cit.*, pg. 29.

So, the nature of security agreement is an additional agreement, which follows the principal agreement.[70]

The written agreement to charge an object as collateral is usually done in the banking institution, non-banking institution or even pledge institution. This kind of agreement can be done in the form of deed made by both parties (*akta di bawah tangan*) or authentic deed (*akta autentik*). Usually the charge of collateral using the deed made by both parties is used on pledges. The form, content and terms have been determined unilaterally by pawnshops (In Indonesia is known as *PT Pegadaian (Persero),* which has a monopoly on pledge and fiduciary service), while the debtor only has to agree on the content of the agreement. the empty spaces in the agreement (*Surat Bukti Kredit (SBK*)) comprises of name, address, collateral, estimated amount appraised, loan amount, the loan date and loan maturity date.

The charge over collateral is done in the presence of authorized official who's competent for that reason. The competent official that is authorized to make that kind of deed is a Land Deed Official (Indonesian:

[70]H. Salim HS, S.H., M.S., *op. cit.*, pg. 30.

Pejabat Pembuat Akta Tanah) appointed by the Minister of Agrarian. Usually agreement for charge over collateral can be done to encumbrance right, fiduciary guarantee and mortgage on ships and airplanes.[71]

In the context of loan, the term guarantee/security often exchanged with the terms of collateral. If the term security is as mentioned in Article 2 paragraph (1) Decree of the Board of Directors of Bank Indonesia Number 23/69/KEP/DIR dated 28 February 1991 regarding Security on Credit, then the security in that term means that it's a bank's confidence on the ability of the debtor to repay the loan in accordance with the agreed terms.[72]

b. Overview on the Law of Security in Singapore

1) Definition on the Law of Security

The term "Collateral" in English according to Longman Business English Dictionary means "finance assets promised by borrower to a lender if the borrower cannot repay a loan"[73] which in Indonesian means:

[71]H. Salim HS, S.H., M.S., *op. cit.*, pg. 31.
[72]Drs. Muhamad Djumhana, S.H., *op. cit.*, pg. 398.
[73]Pearson Education Limited, *Longman Business English Dictionary*, (Suffolk, Inggris: Pearson Education Limited, 2000), pg. 81-82.

"*aset keuangan yang dijanjikan oleh peminjam kepada pemberi pinjaman jika peminjam tidak dapat membayar pinjaman*".

Obtaining credit or financing and giving some security or collateral in return is an important aspect of any business. Perhaps the most common form of financing is the loan or the overdraft that is extended by banks and finance companies to their customers. Bank and finance companies may not be the only ones providing such facilities. Others such as moneylenders may do the same. However, it may be noted that, like banks and finance companies, any person who carries on the business of moneylending would have to be registered, pursuant to the Moneylenders Act, failing which he would be guilty of an offence and the loan would be irrecoverable. Loan and overdraft however are not identical.[74]

When a loan is granted, the amount lent is debited to a loan account opened in the name of the customer. Interest is generally charged whether or not the customer makes use of the proceeds. Interest is normally calculated on a monthly or yearly basis and

[74]Ravi Chandran, *Introduction to Business Law in Singapore*, (Singapore: McGraw-Hill Education, 2006), pg. 317.

paid periodically (usually monthly). Interest rates cannot be increased unless the contract has an express or implied provision to this effect. However, usually the contract of loan would have an express clause allowing the bank to vary the interest rate. In Singapore, there is no limit on the maximum rate that can be charged.[75]

The overdraft represents current account financing. Under an overdraft, the customer is issued with a cheque book and is given a ceiling, which defines the maximum amount he is allowed to overdraw on his account. Unlike in the case of loan, interest is normally calculated on a daily basis and paid periodically (usually monthly). The interest rates cannot be increased unless the contract has an express or implied provision to this effect. Further, an overdraft can be created informally, unlike a loan that usually created formally. For instance, if a cheque is presented and there are insufficient funds in the account of a customer, the bank may decide, at its discretion, to grant a temporary overdraft for that amount so that the cheque can be honored.[76]

[75] *Ibid.*, pg. 317-318.
[76] *Ibid.*, pg. 318-319.

When a loan or overdraft is advanced and the debtor is able to repay, it may not really matter whether the creditor has taken any security in return. However, in situations where the debtor is not in a position to repay and bankruptcy or liquidation is imminent, the issue of whether the creditor or the person to whom monies are owed has taken some security that will give him priority over unsecured creditors, becomes very crucial. Thus, often, when loans or overdrafts are gained, banks will demand some security or collateral in return.[77]

2) Source and System of the Law of Security

Since Singapore was formerly a British colony, the roots of Singapore law lie within English law. Even today, English law still plays a significant role in Singapore. In recent years, however, this influence has decreased, especially as the Singapore legislature, judiciary and legal profession mature.[78] There are 2 (two) major sources of law in Singapore. They are legislation and case law, or common law. Legislation refers to statutes made by parliament and subsidiary legislation made by various administrative bodies

[77]*Ibid.*, pg. 319.
[78]Benny S. Tabalujan dan Valerie Du Toit-Low, *Singapore Business Law*, (Singapore: CommAsia Resources Pte Ltd, 2012), pg. 41.

pursuant to powers given by the statutes. In contrast, the judge has more discretion when it comes to case law or common law. This is because it is the judge who writes the case. When two people litigate and the court delivers its judgement, that judgement becomes a case. Once a case has been decided, future cases that are the same will be bounded by the earlier decision, future provided the earlier decision was made by a higher court in the same hierarchy. This is known as the doctrine of precedent. This ability of judges to make law is unique to countries that follow the "common law" system (Anglo Saxon). Countries in the Commonwealth, as well as others such as America and the Philippines, follow such a system.[79]

The source of credit security law in Singapore is governed in Chapter 11 of the Singapore Commercial Law. There are many different security devices that may be created to suit the varying needs of both the debtor and the creditor. These security devices may differ in the type of asset over which the security interest may be created. The types of credit security that is implemented in Singapore are as follows:

[79]Ravi Chandran, *op. cit.*, pg. 3.

a) Mortgages or Charges Over Land

One common form of security given in Singapore towards land or building unit is a mortgage or charge over land. This kind of security is governed by the Land Titles Act. With registered land, it is possible to create a legal mortgages or charges by using the prescribed forms under the Land Titles Act. Registration is compulsory in order for the mortgage or charge to be recognized as legal interests (section 45 (1)).

Under the Act, all mortgages act only as security and do not involve the transfer of title from the debtor to the creditor (section 68 (3)). However if there is a default, there is a similar right to sell the property or appoint a receiver to receive income arising out of it. Once the monies due have been paid, the mortgagor has the right to request discharge of the mortgage.

It is also possible to create an equitable mortgage. An equitable mortgage would be created, for instance, if the mortgagor has already created a legal mortgage over the

property and then subsequently tries to create further mortgage out of the same property. An equitable mortgage can be protected by means of a *caveat*. The contract between the mortgagor and mortgagee is likely to confer a right of sale or right to appoint a receiver in the event of default.[80] In a mortgage, possession of the asset by the mortgagee is not required. In the event of default in repayment of the loan by the mortgagor, the mortgagee has a right to sell the asset, the subject of the security and apply the proceeds to satisfy the debt.

b) Mortgages or Charges Over Chattels

Just as with mortgages or charges over land, mortgages or charges may be created over any form of chattel or moveable property. However, if there is a written agreement to grant a mortgage or charge over chattels or moveable property, that will be governed by the Bills of Sale Act. Under the Act, such mortgages or charges have to be registered within 3 (three) days and have to meet certain other formalities.

[80]Ravi Chandran, *op. cit.*, pg. 319.

In addition, there is formality that the agreement must be attested before certain persons, such as a Commissioner of Oaths.

Despite all the formalities and many other restrictions, the registration is valid only for 12 (twelve) months and will lapse unless renewed for another 12 (twelve) months. The upshot of these limitations is that mortgages or charges over chattels on moveable property are rarely created in practice. However, the Bills of Sale Act does not apply to companies and so it is common for companies to create such security interests.[81] If a company is creating a mortgage or charge over chattels, as stated earlier that the Bills of Sale Act does not apply to companies. Thus a mortgage of chattels by the company need not be registered under the Bills of Sale Act and only has to be registered as a charge under the Companies Act.[82]

c) Pledges

The pledge is another form of security and it is usually granted in relation to chattels or

[81]Ravi Chandran, *op. cit.*, pg. 320.
[82]Ravi Chandran, *op. cit.*, pg. 321.

moveable property. There is no transfer of title from the debtor to the creditor. Instead, the essence of a pledge is possession. The debtor transfers possession of the chattel to the creditor as security for the repayment of the debt. However, possession does not have to be actual possession; it would suffice if there was constructive possession. There could be constructive possession by the bank holding the document of the title relating to the goods. Perhaps the most common document of title is the bill of lading.

The pledgee has the right to retain the chattel as security until the debt is repaid and also has the power of sale should the debtor default on repayment. However, upon repayment, the debtor is entitled to get back the goods pledged. Generally the pledge does not have to be registered under the Bills of Sale Act and is thus relatively simple to create.

Pledges are commonly used in certain types of transactions. For instance, in case of pawn shops, when a debtor pawns a valuable at the

pawn shop to raise money, that is essentially a pledge. Pledges are also very commonly used in connection with the importation of goods. The buyer of the goods will have to pay the seller and for this reason, he might have obtained credit from a bank. The bank will want to have security and the security often would be the goods themselves. However, since the goods might be on board a ship at the time of credit was extended, actual possession would not be possible. Instead the buyer transfers the documents of title to the bank. By getting hold of the document of title, the bank would have constructive possession of the goods. When the goods arrive, the bank will release the document of title to the buyer, enabling him to collect the goods and sell them, but in the condition that the goods or proceeds of sale must be held on the trust or on behalf of the bank. The reason for this constructive possession so that the pledge continues until repayment.[83]

d) Liens

[83]Ravi Chandran, *op. cit.*, pg. 324-326.

A lien is another form of security. Like a pledge, there is no transfer of title of the property concerned from the debtor to the creditor. Similarly, the Bills of Sale Act is generally not applicable and so there is no formalities involved. However, liens and pledges are not identical. Pledges usually arise by prior agreement between the parties, whereas liens can arise without such prior arrangement. In the case of a pledge, possession of the asset is transferred by the debtor to the creditor for the specific purpose of creating the security. In the case of a lien, the creditor obtains possession of the asset for purposes other than security. Further, while pledges carry with them the power of sale, not all liens do. He is merely entitled to retain possession of the asset until he is paid.

When a person has done work for another but yet to be paid, he would, in certain circumstances, have the right to retain goods belonging to the other which are in his possession until that person has paid for the

work done. This is in essence a common law or possessory lien and as the name suggest, its validity depends on possession. Such lien may be "general" or "particular". It is general when the right attaches to any property in the lienee's possession, whether or not any work was done in respect to that property. Thus for instance, solicitors, bankers and stockbrokers have a right of general lien. So, if they have done some work and have not been paid and they have in their possession some property, such as shares, belonging to their clients, they may retain these until they are repaid. In contrast, particular lien arises when a person is entrusted with maintaining, storing, carrying or repairing goods and he has not been paid in respect of those services. However, they do not have a right of sale, unless the contract expressly states so. Nonetheless, it may be possible to obtain a court order to sell the goods in certain circumstances, such as when the goods are perishable.[84]

e) Guarantees

[84]Ravi Chandran, *op. cit.*, pg. 326-327.

Another form of security that is relatively common is the guarantee. It need not be registered and it is comparatively a simple agreement. However, the value of the guarantee depends on the credit-worthiness of the guarantor. If the guarantor were of weak financially standing, it would not be of much value to the creditor. A guarantee can be defined as a promise to answer the debt, default or miscarriage of another. By virtue of section 6 of the Singapore Civil Law Act, a guarantee must be in writing and signed by the guarantor. Thus, if the guarantee is only to orally, it will not be enforceable. A guarantor is only liable only if the principal debtor is liable.[85]

Table 2.1 below provides a comparison of the basic types of security interests and the rights conferred on the holder of the security interest in each case.

Security	Title	Possession	Sale
Mortgage over Land	√	×	√
Mortgage over Chattels	√	×	√
Pledge	×	√	√
Lien	×	√	×
Guarantees	×	×	×

[85]Ravi Chandran, *op. cit.*, pg. 328.

Table 2.1 Types of Real Security Interests and Rights Conferred