



Horizontal legal protection for building owners on the execution of land in a horizontal perspective

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ABSTRACT

Indonesian land law adheres to the principle of horizontal distribution. The principle of flat settlement refers to the principle that the buildings and plants on the land do not belong to the land. Land rights do not necessarily include ownership of buildings and factories. Legal actions against land do not necessarily include legal actions against buildings and plants. The approach used in this study is an active legal approach, namely the act of acting or enforcing normative legal provisions for every legal event that occurs in society. The results of the discussion are: 1) The legal consequences of the principle of horizontal distribution in law. From the transfer of land rights it can be concluded that the principle of horizontal distribution applies to buying and selling land without building a house. The difference between the legal subject of the land owner and the legal subject of the building owner. 2) Legal protection against the application of the principle of equity in transferring land rights to parties who control land and/or buildings in good faith.

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1. INTRODUCTION

The relationship between humans and the land is so close that the correlation between these relationships is rooted in nature. This can be understood and understood because land is a place to live, a place to be born, a place to feed, and a place for humans to be buried in the future. So that land becomes a necessity for every human being both within the scope of a small scale which is only a class to be used as a place to live, as well as on a large scale, namely to meet business and social needs. This development leads to a logical consequence of the demand for land needs which is made the main thing where every individual must have them.

In this case, land is a basic need for every individual. We all know that the development of the population rate in Indonesia is running very rapidly, so it is also likely to cause the availability of land to become scarce and limited. This is because land is also a very vulnerable thing in triggering social crises. Customary Land Law originates from Customary Law, in Customary Law there is a unity or a very close relationship between indigenous peoples and the land they occupy, where the relationship has a religio-magical nature. This religio-magical nature means that natural resources are wealth bestowed by God to indigenous peoples. (Santoso, 2012) The rights of the community over the land are called *Pertuanan* or *Ulayat* (Bushar, 1991). For each individual, the existence of land in his life is very important, so the need for the role of the State to regulate land within its territory so that the objectives in this land can be achieved by the Government.

A deeper look at the purpose of the UUPA is to provide legal certainty for land rights holders. The intended legal certainty can include several things, including: a) Provide certainty over land rights to legal subjects on land both individually and as a body. b) Provide certainty over land location, size, boundaries, and area. c) Providing certainty regarding the status of land rights to the holders of such rights as a form of basis for the relationship between individuals and the land

This is regulated in the UUPA in Article 19 paragraph (1) of the UUPA in conjunction with Article 3 of Government Regulation No. 24 of 1997, which states that in order to ensure legal certainty provided by the Government, registration is held throughout the territory of the Republic of Indonesia which has been regulated in the legislation. One of the most important elements in land law is land law with other objects where both are attached to each other. Thus, the legal certainty of the position of the object is very important because it has a considerable influence on all legal relations concerning the land and the attached object.

Sri Soedewi Mascychun Sofwan, said that the UUPA does not recognize the notions of *aardvast* (stuck) in the ground, *nagelvast* (fixed) in the building, and *carrotvast* (embedded in the ground). (Sofwan, 1980) Law Number 5 of 1960 concerning the Basic Regulation of Agrarian Principles adheres to the principle of horizontal separation (*horizontal scheidng*) as adopted in customary land law. Buildings and plants are not part of the land, so the right to land does not automatically include ownership of buildings and plants on it. (Harsono, 2005) In contrast to Boedi Harsono's opinion, customary law adheres to the principle of horizontal separation. In line with this customary law, the UUPA also recognizes the principle of horizontal separation (Badruzaman, 1983).

The application of the principle of horizontal separation regulated in the Agrarian Law is only land leases, Cultivation Rights, Building Rights, and Use Rights. This means that there is still a legal vacuum regarding the implementation of the practice of buying and selling buildings that are not with the land, or the practice of selling land but not the building. Based on the principle of horizontal separation, land ownership and objects on it are separate things. Land ownership is independent of the objects on it, so the owner of land rights and the owner of building rights are different subjects. The principle of horizontal separation of land rights is the original nature of rights in customary law and is still maintained with adjustments to the needs and conditions of society today. This can include ownership of buildings on the land. Plants, buildings, and other objects located on the land belong to the owner of the building or the owner of the plants and other objects, from both parties previously there has been an agreement on each of their rights. Legal actions concerning land rights do not automatically include plants, buildings, or other objects on a piece of land, this is not expressly regulated in the legislation.

The principle of horizontal separation is not only in the context of the separation between the holder of the land right and the holder of the building right. If this understanding is used as a basis, then we will build a conclusion that the sale and purchase of land that is not accompanied by a building must also apply the principles stipulated in the UUPA. The principle of horizontal separation is not only in the context of the separation of holders of property rights over non-land objects on land belonging to other parties, but the existence of objects on land belonging to other parties has an age that is adjusted in accordance with statutory provisions. This concept can be seen carefully based on legal analogy by not ignoring the legal basis that has been in force.

2. RESEARCH METHOD

In this study the authors used the Normative Juridical approach method or called normative law. Legal research conducted by examining library materials or secondary data as a basis for research by conducting a search for regulations and literature related to the problem under study. (Soekanto, 2009) This method is carried out by examining existing library materials. The stages of research with this normative legal method are research aimed at obtaining objective law, namely by conducting research on existing legal issues. Furthermore, the second stage of normative legal research is research aimed at obtaining subjective law both in obligations and rights.

3. RESULTS AND DISCUSSIONS

Legal Effects of Horizontal Separation

An important aspect of land law is the legal relationship between land and other objects, both living and dead, attached to the land. (Andari, 2019). Legal certainty over the legal position of the attached object is something that really needs to be considered, because this has a very broad influence on the legal relationship between the land and the attached object. In land law, there are 2 (two) principles that contradict each other, namely what is known as the principle of vertical attachment (*verticale accessie beginsel*) which is based on Land Law based on the Civil Code and the principle of horizontal separation (*horizontale scheiding beginsel*) which is based on Customary Law. (Hasan, 1996: 65). Since the enactment of the Civil Code, these two principles have been applied side by side, which is in accordance with the current legal system. And since the enactment of the UUPA, the provisions in Book II of the Civil Code regarding the earth, water, and wealth therein have been revoked, except for the provisions on mortgages.

Prior to the enactment of the UUPA, Indonesia still adhered to two conflicting land laws, namely Colonial Land Law based on BW provisions and Customary Land Law based on adat provisions. (Sukardi, 1997) There are several differences with quite significant characteristics between the two laws. Colonial land law based on BW rules adheres to the principle of attachment as stipulated in Article 500, Article 571, and Article 601 which states that ownership rights to land also contain ownership of everything attached to the land. In other words, ownership of a land right is also ownership of the right to a building that stands on the land. This principle of attachment was adopted in colonial land law, which is in direct conflict with customary land law. In the rules of customary land law, which are based on customary rules, a horizontal separation system is adopted. This horizontal separation system is adopted by the rules of customary law which state that buildings, plants, and everything that exists on land that is economical in nature is the ownership of the party who built the building or object, in contrast to ownership of land rights. In other words, this rule can be interpreted to mean that ownership of land rights does not include ownership of rights to buildings that stand on it.

In order to create a unified law, the regulation on colonial land law decisions was revoked and a unified national land law was formed that had been adapted to the conditions and personality of the Indonesian nation, so that there were no longer rules regarding the classification of colonial land law and customary land law, because these rules had merged into one. However, the unity of the National Land Law was formed based on Customary Land Law, not Colonial Land Law. The unity of the National Land Law was formed because the customary land law has been used by most of the people in the territory of Indonesia.

The principle of horizontal land separation is an existing principle in land law which is regulated under customary law. This horizontal separation principle is the original nature of the rights regulated in customary law, and is still maintained in accordance with the needs and conditions of society today. Land rights do not include rights to buildings, plants, or objects attached to the land. Thus, legal actions regarding land and other objects on the land are not expressly stated. However, the application of customary law principles cannot be stated absolutely, but can be adjusted to the development of current community needs. Based on the principle of horizontal separation, ownership of land and objects on the land are separate. Ownership of land is separated from objects on the land, so that the owner of land rights and the owner of the building on it can be different. (Sudiyat, 1981)

Customary land law is something very special, so it has its own separate scope. This specialty is regulated in such a way that in the rules of customary law land, land sale and purchase transactions, and transactions regarding land are regulated separately. What is meant by transactions related to land and customary law rules are land transactions that are carried out indirectly, for example, land leases, profit sharing, land guarantees, and so on. Muhadi berpendapat bahwa

“In accordance with the agrarian law system, national property law is adat law, of course, after being refined and developed. In this case, we take our starting point from the UUPA, which contains a portion of customary law regarding the division of objects. In adat

law, objects are divided into, on the one hand, land and, on the other, other objects.”.(Muhadi, 1983)

Meanwhile, Soenaryati Hartono argues that is

“Land law will essentially consist of land law rules that concern land only. While objects that exist above the ground on the ground are in principle considered independent of the land, so that objects such as trees and plants, buildings as well as excavated materials or valuable objects (archaeology), are regulated by different regulations that are not included in land law.”(Hartono,1994 : 104)

Buildings, plants and other objects located on land belong to the party who builds or the owner of the estate, whether or not the party holds the right to the land itself, unless there is an agreement to the contrary. Then legal acts concerning land do not automatically include buildings, plants and/or other objects located on it, if not stated otherwise and other objects located on it, if not expressly stated (Rubiati, 2015 : 96)

Legal actions regarding land do not automatically include legal actions against buildings and or plants. The principle of horizontal separation in the structure of land rights adopted by the UUPA as stipulated in Article 16 of the UUPA is manifested in the following: (Dwiyatmi, 2020 : 130)

- a. Building rights (Hak guna Bangunan) Article 16 (1) letter C of the UUPA and is specifically regulated in Articles 35 to 40 of the UUPA. The owner of a hak guna bangunan has the authority to construct a building on state land with a hak guna bangunan. The land on which the building is erected is state land, while the building on the land belongs to the owner of the Building rights.
- b. Cultivation Rights Article 16(1) letter b of the UUPA and is specifically regulated in Articles 41 through 43 of the UUPA. This structure is understood to mean that the land to which the hak guna usaha is attached is state land, not the property of the hak guna usaha owner. The owner of the hak guna usaha only has the authority to cultivate something on the hak guna usaha land in accordance with the nature of the right.
- c. Rental Building Rights Article 16 (1) letter e of the UUPA and is specifically regulated in Articles 44 and 45 of the UUPA. The principle of horizontal separation is found in the right to lease a building where a person or legal entity leases land owned by another person for a certain period of time, during which time the landowner grants the right to the lessee to erect a building.
- d. Right to Use Article 16 (1) letter d of the UUPA which is specifically regulated in Articles 41 to 43 of the UUPA. Similar to Hak Guna Usaha and Hak Guna Bangunan, Hak pakai also differs in land ownership, between the legal subject of the land owner and the legal subject using the hak pakai.
- e. Building Rights of Use born from Management rights and Ownership rights This is similar to the right to use a building or the right of use, which can be born from a hak milik. When a hak guna-bangunan or hak pakai is born from a hak milik based on an agreement, the owner of the hak guna-bangunan or hak pakai has the right to construct a building or use the right of use on the other person's hak milik, during the agreed time, with a payment to the owner of the hak milik as well as the cost of obtaining the hak guna-bangunan from the state, and it is no different with the hak guna-bangunan on hak pengelolaan land.
- f. Temporary land rights that also apply the principle of horizontal separation, namely:
 - a) Hitchhiking Rights
The right to occupy another person's land for the purpose of building or occupying a house on another person's land.
 - b) Right to Rent Agricultural Land
The Land Law does not provide a detailed explanation of what is meant by the Right to Lease Agricultural Land, but this can be adjusted with definitions such as a legal act carried out characterized by the transfer of power over agricultural land by the landowner to another party or in this case, the tenant, which occurs within a certain time with a certain amount of money as a contract determined by the two parties on the basis of an agreement between the two parties.

Horizontal separation also has legal consequences in the enforcement of collateral in Indonesia. Security is a translation of the Dutch *zekerheid* or *cautie*. *Zekerheid* or *cautie* covers in general the ways in which creditors guarantee the fulfillment of their bills, in addition to the general responsibility of debtors for their goods. (Poesoko, 2008: 31) Rachmadi Usman defines collateral as a means of protecting the creditor's security, namely the certainty of repayment of the debtor's debt for the performance of a performance by the debtor or by the debtor's guarantor. (Usman, 2001 : 61).

Land as an object encumbered with mortgage rights as regulated in Law Number 4 of 1996 concerning Mortgage Rights. Mortgage Rights recognize the principle of attachment as stated in Article 4 paragraph 4 of the UUHT.

The use of land as collateral is quite popular. This is based on the ease of identification of the object of mortgage rights, clear and certain execution and prioritizes the payment of the proceeds from the land auction to the creditor. (Sutantio, 1999 : 8). However, with the enactment of horizontal separation, a building on the land can be charged with a fiduciary guarantee. In Law No. 42/1999 on Fiduciary Guarantee (Fiduciary Guarantee Law), there is no explicit mention of what objects become objects of fiduciary guarantee, this law only provides a legal framework regarding objects that can be used as debt collateral with fiduciary encumbrance. Fiduciary guarantees arise due to a credit agreement or debt acknowledgment (*accessoir*). Conventionally, debts and receivables arise because of a loan of money or goods (*credit*). Therefore, different collateral can be applied to land and buildings that stand on the land. Like Mortgage Rights, fiduciary security institutions have characteristics (Patrik, 2001), including: a) Gives precedence to the fiduciary creditor against other creditors; b) Always follows the pledged object in whomever's hands it is in (*droit de suite*) Fulfills the principles of specialty and publicity so that it binds third parties and; c) provides legal certainty to interested parties Easy and certain execution.

In the event that the owner of the building is not the owner of the land, the transfer of ownership rights of the building must be approved by the owner of the land. (Siahaan, 2001) However, it must be understood that fiduciary encumbrance of a building must consider: There must be consent from the owner or holder of the land rights; Must be equipped with a building construction permit which has now changed to Building Approval (PBG)

Protection for Building Owners on the Application of Horizontal Separation in the Execution of Land Rights

One of the most important aspects in the implementation of land law is the relationship between land and objects attached to it such as buildings, plants, and other objects. Legal certainty for the right owner will of course provide an inherent legal position on the land so that it is very important for the right owner to have a broad influence on the land. In Indonesia itself, residents are classified into three criteria that illustrate the pluralism of regulations.

This horizontal separation principle is the principle currently applied in the National Land Law, overriding the attachment principle described earlier (Ganindra, 2017). In this principle, buildings and plants as well as objects that exist on land rights are not the rights of the owner of the land rights. the principle that explains that the legal subject of the holder of the property right over the object on the land, is different from the legal subject of the holder of the property right over the land, where the existence of objects on land rights belonging to others has a clear period of time in accordance with the provisions of laws and regulations or agreements. (Nasrullah, 2018). Legal actions regarding the land cannot necessarily fall on the landowner. So that the holder of land rights only controls the surface of the land, while the buildings, plants, or objects attached to the surface of the land have different property rights. It is possible that the holder of the rights to objects attached to the land has different ownership from the one who holds the land rights.

Land law in Indonesia does adhere to the principle of horizontal separation. With the separation that allows land and buildings that stand on it to be owned by different legal subjects (Utomo, 2019), it is possible for building and land owners to carry out two different legal actions. This condition can complicate the creditor's position to carry out execution if the debtor as the owner of the land or as the owner of the building on the land defaults. As we know, apart from Indonesia as a country that adheres to the principle of horizontal separation, Japan the principle of horizontal separation, Japan also uses the same principle. the same principle. In Japan, in the

process of registering fixed objects, registration of land rights is not included. Land rights does not include the registration of objects attached to the land.

attached to it. Land, buildings and even plants are registered separately from each other so that the legal status of land as a fixed object each other so that the legal status of land as a registered fixed object and the objects attached to it have separate legal status from each other. Therefore, both objects can be used as objects of separate legal actions. separate legal acts. In the sense that the pledge of land does not will necessarily bind the objects that are on it. In the event that the land has the status of ordinary primary rights, such as Hak

Ownership Rights, Building Use Rights, and so on, it is possible that the land is pledged to different creditors by the landowner concerned. Thus, in the event of the execution of the land, there may be an overlap between the execution of the land and the execution of the building. The position of the creditor holding the fiduciary security over the building at the time of execution will be weaker than the position of the creditor holding the mortgage. This is because, although both have the concept of preference rights, ownership of a building is not yet strong, and is weaker than ownership of a land title certificate.

In addition, because the land and building are owned by different subjects, it causes the creditor as the fiduciary beneficiary to think twice about providing a loan. A different subject, it causes the creditor as a fiduciary recipient to think twice about providing a loan. This is because the building has a time limit and the value of the building is not comparable to the value of the land. In addition, the transfer of ownership rights of the fiduciary object is not accompanied by physical transfer (*constitutum possessorium*) or physical control of the fiduciary object is still under the power of the fiduciary grantor who has the status of a borrower.

The legal protection that can be provided as a landowner, in granting permission for the construction of a building on it would be better if it is preceded by a statement letter stating that the building owner will not pledge the building that stands on the land, If this happens, the collateral agreement is carried out with cross collateral between a credit facility secured by building fiduciary and a credit facility secured by a mortgage on the land underneath.

4. CONCLUSION

The principle of horizontal separation in the UUPA is a principle that separates property rights to land from property rights to objects on the land or attached to the land where the existence of objects attached to the land has a time limit either based on agreement or based on the provisions of laws and regulations.

The legal protection that can be given as a landowner, in granting permission for the construction of a building on it would be better if it is preceded by a statement stating that the building owner will not pledge the building that stands on the land, If this happens, the guarantee agreement is carried out with cross collateral between a credit facility secured by building fiduciary and a credit facility secured by a mortgage on the land underneath. It is necessary to make a regulation that specifically regulates the procedure for pledging buildings whose ownership is separate from the land in order to provide legal certainty.

REFERENCES

- Badruzaman, Mariam Darus. (1983). *Mencari Sistem Hukum Benda Nasional*. Bandung : Alumni.
- Dwiyatmi, Sri Harini. (2020). Asas Pemisahan Horizontal (Horizontale Scheiding Beginsel) Dan Asas Perlekatan (Verticale Accessie) Dalam Hukum Agraria Nasional. *Jurnal Ilmu Hukum*. Vol. 5. No. 1.
- Ganindra, Dyah Devina Maya. Faizal Kurniawan. (2017). Kriteria Asas Pemisahan Horizontal Terhadap Penguasaan Tanah Dan Bangunan. *Jurnal Yuridika*. Vol. 32. No 2.
- Harsono, (2005). *Hukum Agraria Indonesia (Sejarah Pembentukan Undang-Undang Pokok Agraria, Isi dan Pelaksanaannya)*. Jilid I Hukum Tanah Nasional. Jakarta: Djambatan.
- Hartono, Soenaryati. (1994). *Penelitian Hukum di Indonesia Pada Akhir Abad ke-20*. Bandung: Alumni.
- Hasan, Djuhaendah. (1996). *Lembaga Jaminan Kebendaan Bagi Tanah Dan Benda Lain yang Melekat Pada Tanah Dalam Konsepsi Penerapan Asas Pemisahan Horizontal*. Bandung: Citra Aditya Bakti
- Nasrullah. (2018). *Analisis Hukum Secara Analogi Penerapan Asas Pemisahan Horizontal Pada Praktek Jual Beli Tanah Tidak Beserta Dengan Pohon Kelapa Di Atasnya Di Kec. Patilanggio Kab. Pohuwato*. *Jurnal Hukum Volkgeist*. Vol. 2. No. 2.
- Muhadi. (1983). *Hukum Benda dalam Sistem Hukum Perdata Nasional*. Bandung: Binacipta.

- Muhammad, Bushar. (1991). *Asas – Asas Hukum Adat : Suatu Pengantar*. Jakarta : Pradnya Paramita.
- Patrik, Purwahid. Kashadi. 2001. *Hukum Jaminan, Revisi dengan UU Hak Tanggungan*, Semarang: Fakultas Hukum UNDIP.
- Putri, Cicilia. Djumadi Purwoatmodjo. (2019). Akibat Hukum Asas Pemisahan Horizontal Dalam Peralihan Hak Atas Tanah. *Jurnal Notarius*. Vol. 12. No.2.
- Poesoko, Herowati. (2008). *Parate executie Obyek Hak Tanggungan (inkonsistensi, Konflik Norma dan Kesesatan Penalaran dalam UUHT)*. Yogyakarta: LaksBang PRESSind.
- Rubiati, Betty. Yani Pujiwati, Mulyani Djakaria. (2017). Asas Pemisahan Horizontal Dalam Kepemilikan Hak Atas Tanah Dan Bangunan Satuan Rumah Susun Bagi Masyarakat Berpenghasilan Rendah (MBR). *Jurnal Sosiohumaniora*. Vol. 17. No. 2.
- Santoso, Urip. (2012). *Hukum Agrarian Kajian Komprehensif*. Jakarta: Kencana.
- Siahaan, Marihot Pahala. (1998). *Hukum Bangunan Gedung Di Indonesia*. Jakarta : Rajawali Press.
- Sudiyat, Iman. (1981), *Hukum Adat Sketsa Asas*. Yogyakarta : Liberty.
- Sukardi. (1997). *Politik Hukum Terhadap Penggunaan Hak Atas Tanah Dan Bangunan Bagi Orang Asing Di Indonesia*. XII Yuridika.
- Sutantio, Retnowulan. (1999). *Penelitian Tentang Perlindungan Hukum Eksekusi Jaminan Kredit*. Jakarta: Badan Pembinaan Hukum Nasional (BPHN).
- Soekanto, Soerjono, dan Sri Mamuji. (2009). *Penelitian Hukum Normatif Suatu Tinjauan Singkat*. Jakarta: PT Raja Grafindo Persada.
- Sofwan, Sri Soedewi Masychun. (1980). *Hukum Jaminan di Indonesia, Pokok-pokok Hukum Jaminan Dan Jaminan Perorangan*. Jakarta : BPHN.
- Usman, Rachmadi. (2001). *Aspek-aspek Hukum Perbankan di Indonesia*, Jakarta: Gramedia Pustaka Utama.
- Utomo, Hatta Isnaini Wahyu. (2019). Perlindungan Hukum Bagi Kreditur Atas Obyek Jaminan Berupa Bangunan Tanpa Tanah Dalam Perspektif Asas Pemisahan Horizontal. *Jurnal Selat*. Vol. 7. No. 1.
- Undang-Undang Republik Indonesia Nomor 5 Tahun 1960 Tentang Peraturan Dasar Pokok-Pokok Agraria (Lembaran Negara Republik Indonesia Tahun 1960 Nomor 104, Tambahan Lembaran Negara Republik Indonesia Nomor 2043).
- Undang-Undang Republik Indonesia Nomor 4 Tahun 1996 Tentang Hak Tanggungan Atas Tanah Beserta Benda-benda yang Berkaitan dengan Tanah (Lembaran Negara Republik Indonesia Tahun 1996 Nomor 42, Tambahan Lembaran Negara Republik Indonesia Nomor 3632).
- Kitab Undang-undang Hukum Perdata (Burgerlijk Wetboek voor Indonesie) tahun 1947.