

Inconsistency of The Principle of Horizontal Separation in Law Number 4 of 1996 Concerning Mortgage Rights

Ni Luh Ari Andini Adnyana^{1*}, I Wayan Novy Purwanto¹

1. Universitas Udayana, Denpasar-Bali, Indonesia

*Email: ariandiniand5@gmail.com

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Abstract. The objective of this study is to analyze the inconsistency in the application of the horizontal separation principle within Law No. 4 of 1996 on Mortgage Rights over Land and Objects Related to Land, as well as its legal consequences. This research employs a normative legal research method with a statute approach, focusing on the analysis of legal norms, principles, and regulations. The data collection technique involves a literature review of journals, books, and relevant legal provisions. The findings indicate that although the horizontal separation principle is incorporated into the Indonesian agrarian legal system under the Basic Agrarian Law (UUPA), inconsistencies arise from the misalignment between UUPA and the Mortgage Rights Law (UUHT). These inconsistencies result in uncertainties regarding collateral objects, insufficient protection for building owners who do not hold ownership over the land, and potential obstacles in the execution of creditor's rights. It is necessary to harmonize the two legal frameworks to establish clearer and more reliable legal certainty.

Keywords: agrarian law; horizontal separation principle; mortgage rights

1. INTRODUCTION

Land law in Indonesia has a long and complex history due to the legal pluralism that emerged since the Dutch colonial period. (IRIANTORO & UTAMA, 2025). This complexity mainly arises from the population division system outlined in Article 163 of the Indische Staatsregeling (IS), which classifies society into three main groups: the European group (which includes Europeans and equivalents), the Foreign East group (which includes Chinese, Arab, and Indian descendants), and the Indigenous group (native Indonesians). (Khoidin, 2017). The influence of Western legal systems as well as customary law in these regulations has led to a dualism of

law. With the enactment of Law Number 5 of 1960 concerning the Basic Agrarian Law (UUPA), the existence of two land law systems that previously existed in Indonesia was abolished, establishing a national legal system as the basis for land regulation. In addition to aiming to achieve legal unification, the presence of UUPA is also intended to eliminate Indonesia's dependence on land law systems inherited from other countries. (Alyan, 2023).

After the enactment of the UUPA, terms related to land rights according to Western law are no longer recognized and used. Currently, various types of land rights are recognized as regulated by the UUPA. These include ownership rights, the right to cultivate, the right to build, the right of use,

rental rights, as well as several other types of rights. (Nugroho et al., 2017). Although the UUPA has been enacted, several colonial legal provisions, such as mortgages under Book II of the Civil Code, remain in effect because at that time Indonesia did not have specific regulations regarding land collateral. As stated by Boedi Harsono, the collateral rights regulated in the UUPA are mortgage rights, so the conversion from mortgage rights should also become mortgage rights. (Nurjannah, 2018). This indicates an effort towards unification in land guarantee institutions. However, the opinion that mortgage originates from Western land law, while *credietverband* is rooted in customary law, suggests that dualism in the land guarantee system is still being maintained. This condition clearly contradicts the main objective of the UUPA, which seeks to harmonize the agrarian legal system in Indonesia.

Along with its development, the government enacted Law No. 4 of 1996 on Mortgage Rights over Land and Objects Related to Land (UUHT). The emergence of UUHT is a follow-up to the normative mandate in Articles 51 and 57 of the Basic Agrarian Law (UUPA), while also providing a new legal basis related to the imposition of guarantees on land rights. One of the main objectives of the formation of UUHT is to eliminate the dualism in the regulation of land guarantees. Previously, the Indonesian legal system recognized two different guarantee institutions, namely mortgage and *credietverband*. Guarantee agreements have accessory characteristics, meaning that this agreement only functions as a complement and its existence depends on the existence of the main agreement, namely the loan or credit agreement. (Rahmad & Zulhendra, 2022). The granting of collateral rights is a legal effort to ensure protection for creditors against the risk of default by debtors. (Balqis et al., 2023). Although the Land Rights Law is claimed to be a form of unification of security rights over land, conceptually this regulation still falls under civil law which is based on the Civil Code (particularly Property Law).

This situation triggers ambiguity in the practice of applying principles in property law and guarantees, particularly concerning the principle of *accessie* (vertical attachment) and the principle of horizontal separation. The principle of *accessie*, also

known as the principle of vertical attachment, determines that ownership of land automatically includes all objects attached to the land as a unity and cannot be separated. (Andari, 2019). On the other hand, the principle of horizontal separation states that land ownership does not directly include buildings, crops, or other objects that stand and are attached to it. (Hasan, 1998). The principle of horizontal separation serves as the philosophical foundation in the customary land law system, which is then integrated into the provisions of the UUPA (Article 5). Meanwhile, the principle of vertical attachment becomes the philosophical basis adopted by Western land law as regulated in Article 571 of the Civil Code. The principle of horizontal separation is a key distinguishing feature between national agrarian law and civil law (BW). Civil law, as regulated in Articles 571 and 1165 BW, adheres to the principle of attachment by stating that buildings or plants present on the surface of the land automatically become part of the land. In contrast, national land law based on customary law applies the horizontal principle, so that objects physically attached to land burdened with collateral rights do not automatically become subject to those collateral rights.

The preparation of the Land Rights Law aims to provide a legal basis for the guarantee over immovable property, thereby facilitating the practice of bank credit agreements and protecting the interests of creditors and debtors. (Sijabat, 2023). The presence of a mortgage means providing assurance for creditors in obtaining repayment of the debt that has been granted to the debtor. (Aptaningsih et al., 2025). According to M. Isnaeni, it cannot be denied that the birth of the Land Acquisition Law has brought significant positive impacts, especially for economic activity players.

Nevertheless, it should be noted that the Land Title Law regulates a strategic aspect that also has its own complexities, namely regarding land rights. This raises questions about the principles that form its basis, whether the Land Title Law should be consistent with the customary law principles that have long been applied in society, or if it is more appropriate to follow the principles derived from the Western legal system. (Khoidin, 2017).

Based on the background that has been outlined, a number of previous studies can be found whose contents have a similar topic to this research, especially those that discuss similar issues from different perspectives. One of them is a study by Made Wiwin Dharma Lestari and Made Gde Subha Karma Resen entitled 'Regulation of the Principle of Attachment and the Principle of Horizontal Separation in Relation to Apartments in Indonesia'. (Lestari & Resen, 2022). This research highlights the conflict between the application of the principle of attachment and horizontal separation in the context of apartment buildings, particularly concerning the differences in regulations between the Apartment Law and the Basic Agrarian Law. The main focus of their research is on land and building ownership within apartment complexes, where there are fundamental differences in Indonesia's land law system that cause disharmony in its implementation.

Another research by Sri Harini Dwiyatmi titled "The Principle of Horizontal Separation (Horizontale Scheiding Beginsel) and the Principle of Attachment (Verticale Accesie) in National Agrarian Law" (Dwiyatmi, 2020). The research discusses the principle of horizontal separation conceptually and philosophically, without relating it to collateral rights or the Land Mortgage Law (UUHT). In its examination, the research focuses more on the differences in the principle of horizontal separation in customary law and Western law. However, this study aims to practically examine how the inconsistency in the application of the principle of horizontal separation in UUHT can affect legal certainty in the banking world and the provision of credit based on land collateral.

Referring to the presentation of the background issues above, the author formulates 2 (two) problem statements, namely:

What is the nature of the inconsistency of norms between Law Number 4 of 1996 concerning Mortgage on Land and Objects Related to Land?

What are the legal consequences of the inconsistency of the principle of horizontal separation in Law Number 4 of 1996 concerning Mortgage Rights over Land and Objects related to Land?

The purpose of writing here is to analyze the forms of inconsistency in the application of the principle of horizontal separation in Law No. 4 of 1996 concerning Land Rights and Objects Related to Land, as well as to examine the legal consequences of the inconsistency of the horizontal separation principle in that law.

2. METHOD

The research applies normative legal research methods, which focus on the process of analyzing norms, principles, and legal rules as outlined in legislation, jurisprudence, and legal doctrines, thus being able to address the legal issues under study. (Marzuki, 2007).

Here, the approach used is the statute approach. The aim is to conduct a study on various legal regulations such as the 'Civil Code, Law No. 5 of 1960 on the Basic Regulations of Agrarian Principles (UUPA), Law No. 4 of 1996 on Encumbrances on Land and Related Objects, as well as other legal regulations.' The way legal materials are gathered is by reviewing journals, books, and relevant internet sites related to the research topic. Furthermore, a qualitative descriptive analysis is conducted on the collected legal materials.

3. Results and Discussion

The form of inconsistency in the application of the principle of horizontal separation between Law Number 4 of 1996 concerning rights of mortgage on land and objects related to land.

One of the main purposes of the enactment of the UUPA is to build a strong foundation in ensuring legal certainty regarding land rights in Indonesia. This guarantee includes three important aspects, namely:

Certainty regarding the legal subjects entitled to the land, whether individuals or legal entities;

Certainty regarding the object of the right, which includes the location, its boundaries, as well as the size or area of the land plot;

Certainty regarding the status of land rights, this serves as the legal basis in the legal relationship between the land and the

parties who own or hold the rights. (Sinaga & Sembiring, 2024).

The basis for the formation of the national land law system is rooted in the values and principles that have developed within customary law. This is clearly reflected in the provisions found in Article 3 and 5, namely:

Article 3 of the UUPA states, "Considering the provisions in articles 1 and 2, the implementation of customary land rights and similar rights of indigenous communities, as long as they still exist, must be carried out in a manner that aligns with national interests and the state, which is based on national unity and must not be contrary to laws and other higher regulations."

Article 5 of the UUPA stipulates that "The agrarian law applicable to the land, water, and airspace is customary law, as long as it does not conflict with national interests and the State, which is based on national unity, Indonesian socialism, as well as the regulations stipulated in this law and other legislation, all taking into account elements grounded in religious law."

Customary Law is used as the main foundation for the Agrarian Law system in Indonesia. (IRIANTORO & UTAMA, 2025). It contains the principle of horizontal separation, which reflects respect for the land as an object that has magical value for indigenous communities (Jiwandono et al., 2022). In customary law, the principle of horizontal separation is applied based on the habit of separating land ownership from the buildings standing on it. Therefore, the buildings can be sold separately from the land. For example, in the region of Java, there is a tradition of selling houses without including the land underneath, known as 'adol bedol', thus the ownership of land and buildings is considered a separate entity (Khoidin, 2017). The provisions in that article result in the application of customary law concepts in the national land or agrarian legal system. This ultimately leads national agrarian law to integrate principles and tenets derived from customary law (Dwiyatmi, 2020). According to the customary legal system, objects are categorized into only two categories, namely land and non-land. Based on this classification, customary law recognizes the

principle of horizontal separation as its main principle.

Meanwhile, in Western civil law, objects are classified based on their characteristics, namely movable and immovable, which is the basis for the emergence of the principle of accessory or vertical attachment. In Western civil law (BW), legal objects not only encompass physical and tangible objects that can be seen and felt through the senses, but also include intangible objects, such as rights that are attached to those tangible objects (Kheista et al., 2024). Western civil law limits the recognition of types and property rights only to those explicitly regulated in legislation. The difference in the classification system of objects between Western law and customary law has an impact on the differentiation of security rights, which in turn affects the nature and character of those rights. However, Western law prohibits the creation of new types and property rights other than those listed in the law. The difference in the way objects are grouped between Western law and customary law has significant implications in distinguishing security rights, which ultimately affects the characteristics of those security rights (Khoidin, 2017).

The existence of the UUHT is an implementing regulation of Article 51 of the UUPA. This article stipulates that "The mortgage rights that can be imposed on ownership rights, use rights, and building use rights as specified in Articles 25, 33, and 39 are regulated by law." Therefore, the UUHT is enacted as a special regulation governing mortgage rights as a form of real assurance specifically related to land objects. Nevertheless, the UUHT does not fully align with the principle of horizontal separation, which is the basic principle of the UUPA.

One of the early indications of the inconsistency between the Land Rights Law (UUHT) and the principle of horizontal separation in the Basic Agrarian Law (UUPA) can be seen from the title of UUHT, namely: "On the Right of Mortgage on Land and Objects Related to the Land." The phrase "and objects related to the land" terminologically indicates a vertical approach that unites the land and the objects above it into a single object of guarantee. This inconsistency is not only

reflected in the title but is also substantially evident in several provisions of UUHT that treat the land and the objects above it as a single object of guarantee. This can be found in the following articles:

Article 1 number 1 UUHT

Determining that "The Mortgage on the land along with the objects related to the land, hereinafter referred to as the Mortgage, is a security right imposed on the land rights as referred to in Law Number 5 of 1960 concerning the Basic Agrarian Principles, with or without other objects that are a unity with the land, for the settlement of certain debts, which grants a preferred position to certain creditors over other creditors."

The formulation here explicitly indicates that the land and the objects on it are treated as a single unit of collateral.

Article 4 (1) and (2) UUHT

Article 4 (1) of the Land Rights Law (UUHT) states that 'The land rights that can be encumbered by a Mortgage are: a. Ownership Rights; b. Right to Cultivate; c. Right to Build.' Article 4 (2) of UUHT states that 'In addition to the land rights referred to in paragraph (1), the Use Rights over state land that must be registered according to applicable regulations and can be transferred may also be encumbered by a Mortgage.'

This provision emphasizes that the mortgage rights can be imposed not only on the land but also on everything that is permanently attached to it. This approach disregards the possibility of ownership differences between the land and the building.

Article 6 of the UUHT

To determine that "If the debtor breaches the promise, the first Mortgage Holder has the right to sell the object of the Mortgage at their own discretion through a public auction and to collect the repayment of their receivables from the proceeds of the sale."

The provision grants authority to the holder of the mortgage (creditor) to execute the collateral object through a public auction without explicitly distinguishing between land and buildings. The creditor as the holder of the Mortgage has the authority to sell the collateral object directly (parate

executie), that is, to auction certain assets belonging to the debtor without having to obtain prior permission or determination from the court (Salsabila & Dintara Lubis, 2024). This provision also strengthens the assumption that both are a single unit of collateral, which deviates from the principle of horizontal separation as regulated in the UUPA. If the land and building are owned by different parties, such as in the case where the building is owned by a tenant or another third party, the execution that covers the entire object may disregard the rights of the tenant or third party.

This inconsistency creates problems in land practice and collateral encumbrance, especially when the land and building objects are owned by different parties.

The legal consequences of the inconsistency of the principle of horizontal separation in Law Number 4 of 1996 concerning Mortgage Rights over Land and Objects Related to Land

The incompatibility between the UUHT and the principle of horizontal separation adhered to in the UUPA not only leads to conflicts of norms but also affects the clarity in land practices. When the UUHT treats land and the objects above it as a single unit of collateral, this certainly has the potential to create its own issues when land and buildings are owned by different parties. The previous discussion mentioned Articles 4 (1) and (2) which reflect the inconsistency of the principle of horizontal separation. Accordingly, Article 4 (4) of the UUHT states that the collateral is not limited to land, but can also include buildings, plants, or any created objects above it, whether existing or planned, as long as they are owned by the rights holder and are firmly recorded in the Deed of Granting Security Rights. The creation of the Deed of Granting Security Rights (APHT) The Land Deed Official (PPAT) plays an important role in the process of registering mortgage rights, as the APHT is the main document used to encumber land rights and provides legal assurance to both creditors and debtors (Anli et al., 2023).

The encumbrance of mortgage rights on land automatically includes objects located on it, such as buildings, plants, and works of art, as long as all these objects have the same owner and are clearly stated in the Deed of Grant of Mortgage Rights.

According to Sutan Remi Sjahdeni, the mortgage rights consist of several main components, namely:

Mortgage functions as a guarantee in the payment of obligations;

The Object of the Mortgage Right is the right to land in accordance with the provisions of the UUPA;

A mortgage can be imposed on the rights to land as well as other objects that are part of the whole together with the land owned;

The secured debt must be a specific and clear debt;

Mortgage offers priority or a higher position for certain creditors compared to other creditors.

Article 4 paragraph (5) of the UUPA regulates the possibility of ownership differences between land and buildings. The article states that if the buildings, plants, and creations mentioned in point (4) are not owned by the entity that holds ownership of the land, then a Mortgage on these objects can be imposed if their APHT is signed by the owner of the objects or authorized representative through an authentic deed.

Based on the author's understanding, if the land rights holder is not the owner of the building or other objects on it, then the mortgage imposed on the land does not automatically include the building, unless there is a specific agreement between the parties involved.

Legally, guarantees on land and the buildings on it are regulated through their respective institutions. For land rights, the guarantee takes the form of a Mortgage as stated in the regulation 'Law No. 4 of 1996 concerning Mortgages on Land and the related objects (UUHT).' Meanwhile, guarantees for buildings can be provided through a Fiduciary mechanism in accordance with the provisions of Law No. 42 of 1999 regarding Fiduciary Guarantees (UUJF) (Pujiono et al., 2025).

Although it may seem at first glance that the UUHT provides a space for the separation of collateral objects, in practice, this provision still results in legal uncertainty if the building is not owned by the land rights holder and there is no binding agreement in the APHT. The building owner risks losing legal protection in the event of

execution by creditors. This is due to the absence of practical norms regarding a clear mechanism in positive law concerning the separation of the execution process between land and buildings with different ownership. The UUHT also does not explicitly regulate legal protection for building owners who are unaware of a lien being imposed on the land beneath their building.

Especially when information regarding the legal status of land and buildings is not included in land certificates or other registration documents, building owners become unable to access the original land certificates that are pledged to creditors. As a result, building owners cannot effectively ensure their legal position in case of disputes or execution. This condition creates an information asymmetry that can potentially harm third parties acting in good faith, as the principle of publicity in land registration should ensure adequate information transparency to protect all parties involved. Additionally, there is a lack of sanctions for violations of Article 4 Paragraph (5) of the Land Law by landowners or certificate holders. Although Article 4 paragraph (5) of the Land Right Law requires the approval of the building owner in the imposition of rights, this law does not regulate:

The legal sanctions that apply if the debtor and/or creditor intentionally do not include the ownership of third parties in the APHT;

The legal consequences of the validity of APHT made without involving the building owner, despite the fact that the landowner is aware of the separate ownership.

The vacancy of this norm also has the potential to complicate the execution process by creditors if the building and land are owned by different parties. When only the land is made the object of guarantee and the building is not owned by the debtor, the execution process becomes hindered because the object of guarantee cannot be practically separated without involving the approval of the building owner. This situation places creditors as lien holders in a less advantageous position, even though they should obtain preferential rights over the object of guarantee.

In the current construction of positive law in Indonesia, it can be concluded that

there is yet to be comprehensive legal protection for building owners who are classified as third parties in the mortgage scheme. The normative conflict between the principle of horizontal separation in the UUPA and the principle of accession in the UUHT has created a legal vacuum that systematically disadvantages the position of building owners. The application of the principle of *lex specialis derogat legi generali*, which means that specific law overrides general law, is one of the principles of preference in the study of legal science (Agustina, 2015). *The application of this principle prioritizes the UUHT as special law which can be justified technically and legally, but substantively it actually ignores the principles of justice and protection for third parties acting in good faith.*

This condition creates a legal paradox where, on the one hand, the Land and Building Tax Law acknowledges the possibility of separating ownership of land and buildings, but on the other hand, does not provide adequate legal instruments to protect the rights of building owners. As a result, the position of building owners becomes very vulnerable legally, especially when facing mortgage execution, where their buildings can be unilaterally considered as part of the collateral object without any opportunity to defend their rights through a fair legal process. Building owners may get caught in a legal case they are unaware of, involved in an execution they are unprepared for, and at risk of losing their rights without adequate protection in the existing legal system.

4. CONCLUSION

The application of the horizontal separation principle in Indonesia's agrarian legal system, adopted from customary law, as reflected in the UUPA, indicates a recognition of the separation of ownership between land and the buildings on it. However, the existence of Law No. 4 of 1996 concerning Mortgage Rights over Land and Related Objects (UUHT) demonstrates a form of normative and conceptual inconsistency with the horizontal separation principle embraced in the UUPA. This is reflected in the phrase 'and related objects' in the title of the UUHT and several articles that explicitly do not recognize the horizontal separation principle. This indicates a normative and conceptual

inconsistency between the UUHT and the UUPA.

This inconsistency leads to various legal consequences, such as the ambiguity of the guarantee object, the lack of protection for building owners who are not landowners, and potential obstacles to execution for creditors. The UUPA also does not provide clear sanctions or mechanisms in the event of ownership discrepancies between land and buildings, creating information asymmetry and legal uncertainty. There is a conflict of norms between the principle of horizontal separation in the UUPA and the principle of legal attachment in western civil law in the UUHT, which has not been systematically bridged. Overall, this situation creates a legal paradox, where the protection of third parties' rights, particularly building owners, remains weak, and creditors may also face obstacles to their execution rights due to inadequate legal certainty. Based on this, a normative harmonization between the Land Rights Act (UUHT) and the Agricultural Land Law (UUPA) is necessary, especially in addressing the reality that land and building ownership often resides with different parties.

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