# Implementation of the Principle of Horizontal Separation in Providing Legal Certainty of Building as an Object of Fiduciary Guarantee

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***Abstract***
*The principle of horizontal separation is a principle that separates land rights from building rights, both above and below the surface. In Indonesia, the implementation of the horizontal separation principle is realized through the issuance of building ownership certificates (SBKBG) by the government, which serves as proof of ownership and facilitates the use of buildings as collateral through fiduciary agreements, in accordance with applicable laws and regulations. This study aims to analyze the implementation of horizontal separation to provide legal certainty for buildings used as fiduciary collateral. This is a normative legal research. The research results indicate that the execution of building binding as collateral must always be accompanied by written approval from the landowner to prevent obstacles during the execution of fiduciary collateral.*

## I. Introduction

Land and building ownership are two important elements in property law, which are

often regulated separately. In Indonesia, there is a legal principle known as the principle of horizontal separation, which separates land and other objects attached to the land both above and below the surface of the land, such as buildings.[1] Thus, in principle, the right to the building is both separate and apart from the right to the land on which it is built.[2]

The principle of horizontal separation is actually not only adopted by Indonesia, Japan also adheres to the same principle. According to real property registration law in Japan, land and buildings are two separate objects so that the registration process can be carried out separately. Therefore, land and building rights will each have a separate legal status and can be used as collateral objects separately as well. This provision as mention in The Immovables Registration Law, Law Number 24 February 1899 dan Law Relating to Standing Timbers, Law Number 22 1909: *"the most significant practical result of this distinction between land and structures there on is that building may be owned separately disposed of. In addition, the land and buildings may separately used as collateral securing obligations of the owner".* [3]

The implementation of the horizontal separation principle contains two aspects, namely the legal aspect and the aspect of building ownership. The legal aspect is that the principle of horizontal separation divides the applied law between land and buildings. In relation to land, land law applies and in relation to buildings, land law applies. Whereas in terms of property ownership is that the principle of horizontal separation divides the land owner and the owner of the building.[4]

The realization of the principle of horizontal separation is contained in Law Number 28 of 2002 on Building (hereinafter referred to as UUBG) which has been amended by Law Number 11 of 2020 on Job Creation (hereinafter referred to as UUCK). According to this law, a person can build his/her building on someone else's land based on a written

[1] Adwin Tista , 2022, "Hakikat Asas Pemisahan Horizontal Dalam Hukum Adat, Al'Adl Jurnal hukum, 18 Juli 2022, p. 356.

[2] Tiyas Vika Widyastuti et.al, "Model Penerapan Asas Pemisahan Horizontal Dalam Lelang Ekesekusi Hak Tanggungan", DIKTUM: JURNAL ILMU HUKUM, Vol. 9 No. 1, January 2021, p. 87

[3] Lilawati Ginting ,et.al , 2021, "Formulation of a Certification Agency for Buildings without Land Right Base on Principle of Horizontal Separation (Comaprison to Japan), ICOLEG 2021, 12 Oktober 2021, p. 177.

[4] Sri Hajati, et.al, 2018, *Politik Hukum Pertanahan Setelah Berlakunya UUPA*, Surabaya: Airlangga University Press, p. 50.

agreement between the land owner and the building owner. In order to guarantee legal certainty and protection, Article 7 of UUBG regulates that every building must fulfill administrative requirements and technical requirements in accordance with the function of the building. These requirements are related to the ownership status of the building.

Article 1 point 18 of Government Regulation Number 16 of 2021 on the Implementation Regulation of Law Number 28 of 2002 on Building (hereinafter referred to as PPBG), stipulates that the ownership status of a building is proven by a proof of right in the form of a building ownership certificate (hereinafter referred to as SBKBG).

SBKBG as evidence of building ownership rights can be utilized as debt collateral with fiduciary burden in accordance with the provisions of laws and regulations. Provisions regarding the object of fiduciary guarantee can be found in Article 1 point 2 jo. Explanation of Article 3 letter a of Law Number 42 Year 1999 on Fiduciary Guarantee (hereinafter referred to as UUJF). [5]

According to these provisions, the immovable object considered as the object of fiduciary collateral is only the building, while the land on which the building is constructed is not collateralized. The existence of SBKBG and its utilization as debt collateral through a fiduciary institution is an implementation of the principle of horizontal separation in providing legal certainty to the building as an object of bank credit guarantee.

However, the implementation of the principle of horizontal separation is still posing obstacles in the context of building guarantees without land rights in terms of legal uncertainty. This is associated with the provisions in Article 305 of the PPBG which states that the transition of SBKBG rights carried out on buildings built on land owned by other parties, the party transferring the rights must obtain the approval of the landowner. This means that if execution of SBKBG must be carried out due to the breach of contract by the debtor, then SBKBG rights transition based on the auction must still require permission from the landowner. In contrast, based on the principle of horizontal separation, permission from the landowner is no longer required as the land has its own law and the

[5] Sulani et.al, "Implementation of Copyrights as An Object Of Fiduciary Collateral in Indonesia", SDG: Journal Of Law And Sustainable Development, Vol. 11 No. 11, Nov 2023, p. 3

building has its own law. Additionally, land and building are also considered as two different objects.

This research aims to analyze the obstacles faced in the implementation of the principle of horizontal separation to provide legal certainty of the building as an object of bank credit guarantee. By acknowledging these obstacles, it is expected that solutions or recommendations will be found that can improve legal clarity and efficiency in the building guarantee process.

## 2. Research Method

This research is a normative legal research that uses a statutory approach. By using a statutory approach, the researcher inventories and uses laws and regulations related to the research topic to analyze and complete the research. It aims to be able to understand the philosophical content behind the law, subsequently it will be able to conclude whether or not there is a philosophical tension between the law and the issue being addressed.[6]

## 3. Results and Discussion

The principle of horizontal separation (horizontale scheiding) in land rights, which is the nature of rights in customary law, is preserved but adjusted to the actual needs of society nowadays. [7] Land rights do not extend to the ownership of buildings on the land. Buildings, plants and other objects on a piece of land belong to the party who built or planted them, whether or not that party is the holder of the land right itself, unless there is an agreement stating otherwise. Lawful acts concerning land rights do not automatically include buildings, plants and/or other objects on it, if the lawful act concerning the land is not expressly stated.[8]

Regarding the principle of horizontal separation or *horizontale scheiding*, Ter Haar states:

> *"Het Inlands bezitrecgt op huizen en geplant gewas is in beginsel afgescheiden van het rect op de grond waarop die goederen voorkomen. Men kan Inlands bezitter*

[6] Peter Mahmud Marzuki, 2008, *Penelitian Hukum*, Jakarta: Kencana Prenada Media Group p. 94.

[7] Brigitta Naomi Hutagalung et.al, " Horizontal legal protection for building owners on the execution of land in horizontal perspective", IJOBSOR, Vol. 11 No. 2, 17 Sep 2023, p. 390

[8] Eddhie Praptono et.al, "The Principle of Horizontal Separation in the Sale and Purchase of Land which Contains a building Rental Agreement", Journal of Legal Subjects, Vol. 4 No. 01, Dec 2023, p. 4

> *zijn van bomen en huizen op ander mans erf* or property rights in houses and plants are in principle separate from rights in the land on which they are located, one person may have property rights in trees and houses on another person's land. [9]

The principle of horizontal separation, which is the principle of customary law, is then adopted by Law Number 5 of 1960 concerning Basic Agrarian Principles (hereinafter referred to as UUPA) as Indonesian Agrarian Law. Since the UUPA is founded on customary law, the conceptions/principles/principles of customary law are *mutatis mutandis* embraced by the UUPA. [10] As stipulated on Article 5 UUPA:

> "The agrarian law applicable to the earth, water and airspace is customary law, insofar as it does not contradict the national and State interests, which are based on national unity, with Indonesian socialism as well as with the regulations contained in this law and with other statutory regulations, all with due regard to the elements that rely on religious law."

Whereas the UUPA adheres to the principle of horizontal separation, the law of property, insofar as it concerns land and objects attached to land, including the law of housing and buildings and plants, must also adhere to the principle of horizontal separation, because the components of property should be in the same pivot.[11] The concept of separation of property rights to land and property rights to objects attached to land which is the principle of the principle of horizontal separation can be seen, among others, in the laws and regulations governing buildings.

Building is a physical form of construction work that is integrated with the place where it is partly or entirely above and/or in the land and/or water, which functions as a place for

[9] Sri Harini Dwiyatmi, "Asas Pemisahan Horizontal (Horizontale Scheiding Beginsel) dan Asas Perlekatan (Verticale Accessie) Dalam Hukum Agraria Nasional", REFLEKSI HUKUM: Jurnal Ilmu Hukum Vol. 5 No. 1, Oktober 2020, p. 126

[10] Made Wiwin Dharma Lestari, et.al, "Pengaturan Asas Perlekatan dan Asas Pemisahan Horizontal Dalam Kaitannya Dengan Rumah Susun Di Indonesia", Jurnal Kertha Desa, Vol. 10 No. 8, Dec 2022, p. 769

[11] Djuhaendah Hasan, 2011, *Lembaga Jaminan Kebendan Bagi Tanah Dan Benda Lain Yang Melekat Pada Tanah Dalam Konsepsi Penerapan Asas Pemisahan Horisontal*,, Jakarta: Nuansa Madani p. 94.

humans to carry out their activities, both for residential or living space, religious activities, business activities, social, cultural activities, and special activities. [12]

Based on Article 35 of Law Number 28 of 2002 on Building (UUBG) which has been amended by Law Number 11 of 2020 on Job Creation (UUCK), building construction is organized through the stages of planning, implementation and supervision. The building can be built on one's own land or on land owned by others, provided that if the building is built on land owned by others, there must be a written agreement between the landowner and the owner of the building which is used as the basis for the right.

Furthermore, the explanation of Article 35 paragraph (3) explains the meaning of a written agreement made between the landowner and the building owner is an authentic deed containing provisions regarding the rights and obligations of each party, the period of validity of the agreement, and other provisions made before an authorized official. The agreement must pay attention to the function of the building and the form of its utilization, either in whole or in part. So based on the provisions of Article 35 UUBG, building ownership can be different from land ownership.

To ensure certainty and legal order, every building must fulfill administrative requirements and technical requirements of the building. Administrative requirements are in the form of clarity of land status which is an absolute requirement in establishing buildings, building ownership status and certainty that the building has obtained Local Government approval. Meanwhile, technical requirements that must be complied with are related to building procedures and building reliability in order to ensure the safety of users and the environment.

The clarity of a building's ownership status is proven by a building ownership certificate (SBKBG) issued by the government. SBKBG as a statement that the building in question is really his property and the responsibility of the building becomes his responsibility. In addition to ensuring building ownership rights, SBKBG also has a function to record building owners and ensure that buildings are legal, legitimate and have met technical standards. SBKBG is the embodiment of the implementation of the principle of horizontal

[12] Michael Sofian Tanuhendrata et.al, "Stengthening The Law on The Construction of High Rise Building That is Beneficial to Support National Development", Global Legal Review, Vol. 1 No. 2, Oct 2021, p. 125

separation in the law governing objects. Due to the existence of SBKBG, land and objects attached to land, especially in the form of buildings, are recognized as two separate objects, each of which has its own proof of ownership rights.

The legal relation between humans and objects gives rise to a right called property rights. The definition of property rights (*zakelijk recht*) is a right that gives direct power over an object that can be defended against any person. According to Prof. L.J. van Apeldoorn, property rights are property rights that give direct power over an object. Direct power means that there is a direct relationship between the entitled person and the object. [13]

Property rights can divided into 2 types, namely :

a. The right to provide enjoyment is the right of a legal subject to enjoy an object in full, namely in the form of property rights (*eigendom*), control rights (*bezit*), business use rights (*erfpacht*), building use rights (*opstal*), the right to collect products (*vruchtgebruik*) and the right to use the yard (*servituut*) or *erfdienstbaarheid*;
b. A property right that provides security (*zakelijk zekerheidsrecht*), is the right to make an object a guarantor of a particular debt, namely in the form of a pledge (*pand*), mortgage (*hypotheek*), fiduciary (*fiduciare eigendoms overdracht*) and Mortgage on Land and Objects Related to Land.

Depending on the type of property rights, a property owner can use their property as collateral in a debt agreement they enter into.

Collateral is a means of protection for the security of creditors in a debt or credit agreement.[14] With the existence of collateral, it is expected to provide certainty for creditors to get repayment of their debts. In banking practice, the terms guarantee and collateral are distinguished. Guarantee means the bank's trust / confidence in the ability

[13] Dwi Dasa Suryantoro, "Eksistensi Hak Kebendaan Dalam Perspektif Hukum Perdata BW", Legal Studies Journal, Vol. X No. X, Feb 2023, p. 23

[14] Acep Rohendi, et.al, "Copyright as Credit Collateral In Legal Perspective: Evidence From Indonesia", SDG: Journal Of Law And Sustainable Development, Vol. 11 No. 11, Nov 2023, p. 5

or ability of the debtor to carry out its obligations, while collateral is defined as goods or objects that are used as collateral to pay off debtor customer debts. [15]

Buildings, except buildings for official purposes that become state or regional property, can be used as debt collateral. This is stipulated by Article 303 jo. Article 307 of Government Regulation No. 16 of 2021 on the Implementing Regulations of Law No. 28 of 2002 on Building (PPBG). For buildings erected on one's own land, they can be pledged through a mortgage institution, while for buildings erected on land owned by others, they can be pledged through a fiduciary institution.

Fiduciary is regulated by Law No. 42/1999 on Fiduciary Guarantee (UUJF). Fiduciary is the transfer of ownership rights of an object on the basis of trust with the provision that the object whose ownership rights are transferred remains in the possession of the owner of the object.[16] In fiduciary, there is a transfer of ownership of an object on a fiduciary basis with the condition that the object whose ownership rights are transferred to the fiduciary remain in the possession of the owner of the object (fiduciary). Consequently, the juridical ownership of the pledged object is transferred to the creditor (fiduciary), while the economic ownership of the pledged object remains in the hands or in the possession of the owner. [17]

Initially, the object of fiduciary security was only movable objects. This is clear, because fiduciary security is a breakthrough in pawn guarantees, especially regarding the requirement for the object of the pawn to be in the hands of the pawn recipient.[18] During its development, to address the needs of economic movement, this institution was expanded to include permanent objects that could not be encumbered by a mortgage.

Article 1 paragraph (4) of the UUJF emphasizes that what is meant by an object is anything that can be owned and transferred, both tangible and intangible, registered and unregistered, movable and immovable, which cannot be encumbered by a mortgage or

[15] Imran Zulfitri, et.al, "Sistem Eksekusi Jaminan pada Pembiayaan Syariah di Perbankan Syariah", SYARIAH:Jurnal Hukum Islam dan Ekonomi, Vol. 1 No. 2, Des 2023, p. 139

[16] Sri Turatmiyah, et.al, "Model of Agreement Executing Fiduciary Collateral Objects with Underhand Selling", SIMBUR CAHAYA, Vol. XXX No. 1, JUNI 2023, p.2

[17] Rachmadi Usman, 2008, *Hukum Jaminan Keperdataan* Jakarta: Sinar Grafika Offset p. 152.

[18] Ni Kadek Diah Feryantini, et.al, "Tinjauan Yuridis Terhadap Pelaksanaan Eksekusi Jaminan Fidusia Menurut Undang-Undang Fidusia Nomor 42 Tahun 1999", Komunikasi Yustisia Vol. 5 No. 1, Maret 2022, p.221

mortgage. The explanation of Article 3 letter a of the UUJF, explains that objects that are included in the immovable category that can become objects of fiduciary guarantees are buildings on land owned by others that cannot be encumbered with mortgage rights based on the Mortgage Rights Law.

Referring to the provisions above, it is clear that buildings can be secured through 2 institutions, namely mortgage rights and fiduciary guarantees. If the building is pledged as a unit with the land on which it stands, the institution used is a mortgage right. If the building is pledged separately from the land on which it is built, it must be done through a fiduciary guarantee institution. This is a form of implementation of the principle of horizontal separation.

After the enactment of the Government Regulation on Building as the implementation of UUBG and complementary to UUCK (Omnibus Law), there is SBKBG as a proof of rights for building owners. The Ministry that issues the SBKBG is the Ministry of Public Works and Housing of the Republic of Indonesia. The Ministry can delegate its authority to the local government. The existence of proof of ownership that is separate from proof of ownership of land rights, the building can be used as collateral in a fiduciary guarantee institution. This is highlighted by the provisions of Article 307 paragraph (1) of the PPBG that SBKBG can be utilized as debt collateral with fiduciary burden in accordance with statutory provisions.

The process of the building guarantee with SBKBG evidence of rights is basically similar to the fiduciary guarantee process in general, namely the process of binding the credit agreement as the *principal agreement*, and binding the fiduciary as an *accessoir agreement*.

The provision of collateral in the form of building fiduciary must pay attention to several important conditions, among others:

1) ". There must be a written consent from the owner/holder of the land on which the building is constructed, stating: a) Agreeing to grant fiduciary security over the building; b) In the event of execution of the security, the land owner will not obstruct the execution process of the building.
2) Must be equipped with a Building Construction Permit in the name of the fiduciary, whose ownership is separate from the ownership of the land.

3) Equipped with an agreement and/or mutual agreement between the landowner and the building owner, that the ownership of the building is indeed in the hands of the fiduciary as the legal owner of the building."[19]

The approval of the owner/holder of land rights is needed, this is because the transfer of building rights can only be carried out if there is approval from the land owner, as stipulated in Article 305 of the PPBG, which states that:

(1) Transfer of SBKBG rights carried out on Building constructed on self-owned land, the party receiving the rights shall make a land utilization agreement with the landowner.
(2) Transfer of SBKBG rights carried out on Building constructed on land owned by other parties, the party transferring the rights must obtain approval from the landowner.
(3) The party transferring the rights as referred to in paragraph (2) together with the recipient of the rights may make a renewal of the land utilization agreement with the landowner.
(4) The renewal of land utilization agreement as referred to in paragraph (3) is signed between the assignee and the landowner.

The completion of written consent from the landowner at the time of encumbering the fiduciary guarantee will reduce the risk of obstacles when execution must be carried out due to the default of the debtor as the guarantor. Since the consequence of execution is the transfer of SBKBG rights from the old owner to the new owner as the buyer of the executed collateral object.

## 4. Conclusion

The implementation of the principle of horizontal separation in providing legal certainty of building as an object of fiduciary guarantee is the issuance of SBKBG as proof of ownership rights to buildings that are separate from proof of rights to the land on which they are built, so that the building can be pledged separately from land rights through a fiduciary guarantee institution. In order to minimize the risk of obstacles at the time of execution due to the breach of contract of the debtor as the guarantor, the process of

[19] Irma Devita, "Fidusia Bangunan Yang Didirikan di Atas Tanah Yang Tidak Dapat Dibebani Dengan Hak Tanggungan", https://irmadevita.com/2013/apakah-bentuk-jaminan-untuk-bangunan-di-atas-tanah-hak-orang-lain/., diakses Jumat, 23 April 2021.

charging the fiduciary guarantee must be completed with the written consent of the landowner.

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