



## The Philosophical Foundation of the Coherence of Regulations Concerning Apartment in Indonesia

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### ABSTRACT

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A state holds constitutional responsibility of embodying physical, psychological welfare, and social justice for all of its citizens. Developing apartments is one of the Indonesian government's policy to ensure the embodiment of these responsibilities. Regulation on apartment that adheres to horizontal separation principle (*Horizontale scheidings beginsnel*) still often leads to a range of legal issues. Accordingly, it is necessary to find out and comprehend the philosophical foundation of the coherence of regulations concerning apartment. The present study applied normative legal method with statutory and conceptual approaches. In practice, horizontal separation principle is not well-implemented and is not in line with the Basic Agrarian Law (BAL). Right of Ownership of an apartment unit (HMSRS) is a personal right and is separated from common right upon shared objects, parts, and land. This phenomenon can lead to legal issues, particularly when the secondary rights (i.e., right to use building or right to use upon the state land and right to use building or right to use upon the right to manage) are no longer extended. The implementation of horizontal separation has not provided a legal certainty for the community regarding apartment unit ownership. Accordingly, in order to provide legal certainties, the government should enact Government Regulation as further stipulation of Law no. 20 of 2011.

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## 1. Introduction

Article 28H paragraph (1) of the 1945 Constitution asserts that "Each person has a right to a life of well-being in body and mind, to a place to dwell, to enjoy a good and healthy environment, and to receive medical care." (Abdul Kadir Jaelani, Ayu, Rachmi, & Lego, 2020) In this regard, from the constitutional perspective, the state is responsible for embodying physical and psychological welfare, as well as social justice for all of its citizens. (Abdul Kadir Jaelani, Handayani, & Karjoko, 2020)

Based on the General Stipulation I of Law no. 1 of 2011 on Housing and Resettlement Area, the state is responsible for protecting all Indonesian citizen through the provision of housing and resettlement area to allow the society to dwell in an affordable,

proper house in a healthy, safe, harmonious, and continuous environment in the entire Indonesian territory. (Leonard, Pakpahan, Heriyati, Karjoko, & Handayani, 2020) As one of the basic needs, every family supposes to have a house, especially the low-income community and those living in densely populated urban areas. In carrying out the responsibility, the government issues a regulation as a legal umbrella to achieve the state's purposes, namely Law no. 20 of 2011 on Apartment (Law no. 20 of 2011). (Prasetyo, Handayani, Sulistyono, & Karjoko, 2019) In article 1 paragraph (1) of Apartment Law, Apartment refers to a multi-story building built on an environment, which is divided into functionally structured division, horizontally or vertically where each of the divisions can be owned

and used separately, especially for dwelling, especially for dwelling with common parts, objects, and land. (Nugroho, Ayu Ketut, & Karjoko, 2018)

Furthermore, General Stipulation I of Apartment Law asserts that dwelling plays strategic roles to shape national character and personality, and serves as one of the efforts to raise an autonomous, productive Indonesian citizen. Accordingly, the state is responsible for ensuring the fulfillment of rights to place to dwell in the form of a proper, affordable house. (Luthviati, Registration, & Maret, 2020) Considering the limited available lands in urban areas, apartments can be one of the solutions to fulfill the needs of housing. Building apartments is expected to be a solution to increase resettlement quality as well as boosting urban development. (Karjoko, Winarno, Rosidah, & Handayani, 2020)

Besides, building Apartment also aims to fulfill the needs of proper housing for the community by enhancing the function of lands in densely populated areas. Hence, in building apartments, legal certainty regarding tenure and security, the use, natural resources, and comfortable, complete, harmonious, and balance resettlement area should be taken into consideration. However, the fulfillment of the needs of apartment emerges as national issue that significantly affects low-income earners in many regions. (Wibowo, Sulistiyono, & Karjoko, 2019)

From legal perspective, the right of ownership of an apartment unit is based on (horizontal separation principle), which is in line with the stipulation in article 1 paragraph (1) of Law no. 20 of 2011 asserting the presence of common ownership right upon common parts, objects, and land. In addition to horizontal separation, BAL also adheres to the vertical attachment principle (vertical accessie beginsel), a principle that views that buildings and other objects are inseparable entities of a land parcel. (Jatmiko, Hartiwiningsih, & Handayani, 2019)

Article 17 of Apartment Law asserts that an apartment can be built on land with (a) right of ownership (Hak Milik); right of building (Hak Guna Bangunan) or Right to use a state land (Hak pakai atas tanah negara); and c. right of building or right to use upon land under right to manage. Horizontal separation principle allows a number of common ownership rights on one land parcel. Accordingly, there are two rights attached to one land parcel, namely primary and secondary rights. (Sukmoro, Sulistiyono, & Karjoko, 2019) The former refers to an individual's ownership right or the state's right to

control, while the latter refers to the right to use or right to manage, or right of building or right of exploitation, and so on, in accordance with the regulation. (Baranyanan, Handayani, & Isharyanto, 2019)

The implementation of horizontal separation principle in regulation on apartment leads to a range of issues in community due to the separation of ownership rights of land from the apartment building or objects on it. In general, this issue emerges because the secondary rights (i.e., right of building or right to use the state land and right of building and right to use upon right to manage) expires. According to Gustav Radbruch, a law contains three basic values, namely fairness, usefulness, and legal certainty. These three values do not always in harmony, it often contradicts one another. (A. Kadir Jaelani, Handayani, & Isharyanto, 2019)

Following the horizontal separation principle, the ownership of land is separated from that of objects upon it, accordingly, the right holder of land and the building upon it can be different. Besides, one of the important aspects of the horizontal separation principle in BAL is the relationship between land and other objects on it. Legal certainty of the object attached on the land is pivotal since it significantly affects any legal relationship related to the object and the land. (Kuncoro, Handayani, Muryanto, & Karjoko, 2019) Grounded from the description above, this article discusses the issues on the implementation of the horizontal separation principle in the apartment unit and its association with right upon land attached to it in order to provide legal certainties for the concerning parties. (Rosidah, 2020)

## 2. Results and Discussion

### 2.1. Horizontal separation principle in regulation concerning apartment

Indonesia's Basic Agrarian Law (BAL) adheres to two principles, namely horizontal separation and vertical attachment principles. The horizontal separation principle holds that buildings, plants, and objects attached on it are not part of land. Accordingly, this principle views that ownership right of land does not necessarily result in rights upon the buildings or objects on it. (Zubaidi, Pratama, & Al-Fatih, 2020) However, in making law related to land ownership, it is possible that a landowner also serves and the owner of the building and objects upon it when the landowner is the person

who possess the right holder of the building or objects upon the land, or when there is a legal action stated in an agreement. (Gunawan, 2020)

The vertical attachment principle asserts that in the land law that adheres to “attachment principle”, buildings and plants serve as parts of the land. Accordingly, rights on land necessarily cover the ownership of buildings and plants on it unless there is another agreement made with the builders or the planters (Article 500 and 571 of Indonesian Civil Code). Legal action related to a land also relates to the plants and buildings upon it. (Ichlas, 2020)

According to Djuhaendah Hasan, the vertical attachment principle (verticale accessie beginsel) and horizontal separation principle (horizontale scheidings beginsel) are contradictory. Horizontal separation principle is associated with the provision of legal certainty of land and objects upon it. (Jatmiko et al., 2019) From legal perspective, the ownership right of apartment unit is based on (horizontal separation principle), which is in line with the stipulation in article 1 paragraph (1) of Law no. 20 of 2011 asserting the presence of common ownership right upon common parts, objects, and land. This principle holds that ownership of a land is separated from that of any object upon it. This principle separates a land parcel from any object upon it. With this regard, Terhaar, as cited by Imam Sudiyat, argues that land is separated from any object upon it so that the owner of land may differ from the owner of the object upon it. (Leonard et al., 2020)

Mariam Darus Badruzaman provides an example of the use of horizontal separation principle in BAL by stating that BAL does not only adhere to the attachment principle but also to the horizontal separation principle that is taken over from Custom Law. The sale-purchase activity of land does not necessarily include the buildings and plants upon it. To include the buildings and plants upon the land, the sale deed should explicitly state it. (Handayani, 2015)

The implementation of horizontal separation and the provision of apartment is in line with the principle the BAL adheres to, although BAL does not explicitly regulate it. It is implied that BAL adheres to two principles (i.e., horizontal separation and vertical attachment) when we view article 5 that reads : (Prasetyo et al., 2019) “The Agrarian law which applies to the earth, water and air space is Adat- Law as Far as it is not in conflict with the National and State's interests based on the unity of the Nation, (Wibowo et al., 2019) With Indonesian

Socialism as well as with the regulations stipulated in this Act and with other legislative regulations, all with due regard to the elements based on the elements based on the Religious Law” (Wibowo, 2020)

With regard to the ownership right evidence, due to the implementation of horizontal separation principle, the land and the buildings upon it can be certified separately. With separated land and building certificates, both objects possess equal legal standing and can defend each right in accordance with the law. Besides, the system of ownership of a story building on a land parcel can be used individually, meaning that the right holder of the land also serves as the owner of the building. Law on apartment introduces a new ownership institution as a property right, namely ownership right of the apartment unit (HMSRS). (Zubaidi et al., 2020)

This right is based on the concept of individual and joint ownership of an object. Joint ownership of an object or a building can be divided into two types. First, joint ownership with legal bonds that emerge among the owners. Meaning that the owners cannot freely transfer their rights to others without other owners' consent. Second, joint ownership without legal bonds among the owners. (Iswantoro, Saputra, Doyoharjo, & Luthviati, 2020)

Based on the description above, the implementation of horizontal separation can be applied in Apartment Law because it is in line with the principle the BAL adheres to, however, in practice, the joint land ownership in Apartment Law is different from that in BAL. Article 1 number 4 of Apartment Law asserts that Joint land is a land parcel for a building used based on the joint right that is not separated from the building of the apartment in which the boundaries have been determined in the building permit. (Fatimah, Iswantoro, Basuki, Saputra, & Jaelani, 2020)

Ownership right on an apartment unit is personal and is separated from common right upon shared objects, parts, and land. Although the horizontal separation principle can be applied in Law no. 20 of 2011, (Iswantoro, Fatimah, Tahir, & Jaelani, 2020) the practice is not consistent with the horizontal separation principle regulated in BAL. The government should enact a Government Regulation as the further stipulation of Law no. 20 of 2011 so that the implementation of horizontal principle can be more optimum and effective. (Tahir et al., 2020)

*2.2. Indonesian regulation of apartment that provides legal certainty*

One of the pivotal aspects of land law is the relationship between land and objects on it. Legal certainty of the object on the land is pivotal since it significantly affects any legal relationship related to the object and the land. There are two contradictory principles, namely horizontal separation, and vertical attachment. (Intaniasari, 2020) The horizontal separation between the ownership of the right of land and that of objects upon it creates a boundary on a person's ownership upon a land. The relationship between the rights of an apartment unit and other rights leads to issues on legal certainty related to the ownership of rights of an apartment unit. (Soediro, Handayani, & Karjoko, 2020)

The goal of housing program is to provide legal certainties related to the provision, settlement, management, and ownership of an apartment unit. However, in practice, such a goal is difficult to obtain. Let alone the government has not enacted Government Regulation as a legal umbrella for its implementation. In addition to the absence of the Government Regulation, some of the norms of Law no. 20 of 2011 require further explanation, for instance, the norm regarding joint ownership. (Nugroho et al., 2018)

In article 1 paragraph (1) of Apartment Law, Apartment refers to a multi-story building built on an environment, which is divided into functionally structured division, horizontally or vertically where each of the divisions can be owned and used separately, especially for dwelling, especially for dwelling with common parts, objects, and land. The norm of this article stipulates that there is a jointly-owned land, which in practice, leads to a number of legal issues because it refers to a land parcel jointly owned by a number of legal subjects. (Respati, Purwanto, Santoso, & ..., 2017)

Meanwhile, an apartment can be built not only on land under right of ownership but also under other types of rights. Article 17 of Apartment Law asserts that an apartment can be built on land with (a) right of ownership (*Hak Milik*); right of building (*Hak Guna Bangunan*) or Right to use a state land (*Hak pakai atas tanah negara*); and c. right of building or right to use upon right to manage. This phenomenon can lead to legal issues, particularly when the secondary rights (i.e., right to use building or right to use upon the state land and right to use building or right to use upon the right to manage) are no longer extended by the state. (Erina & Yanis, 2020)

Besides, problems also emerge related to the right of ownership of apartment unit. Article 46 paragraph (1) of Apartment Law asserts that

ownership right on an apartment unit is personal and is separated from common right upon shared objects, parts, and land. In addition, article 47 paragraph (1) of Apartment Law stipulates that as a proof of ownership of an apartment unit upon land with right of ownership, right of building, or right to use the state land, right of building or right to use upon a land under right to manage, a certificate of right of ownership of apartment unit is issued. (Soediro et al., 2020)

According to Van Apeldoorn, legal certainty comprises two aspects, it can be determined in a legally concrete and safe matters. In other words, the justice seeker wants to find out the law of certain issue before he/she files a lawsuit and looks for protection. Furthermore, regarding legal certainty, Lord Lloyd states that without legal certainty, people do not know what to do, which leads to uncertainty that eventually triggers chaos. Thus, legal certainty asserts the implementation of clear, consistent law, where the implementers could not be influenced by any subjective condition. (Iswantoro, Fatimah, et al., 2020)

With regard to the ownership right of apartment, it is not enough to use apartment law as the basis to settle a dispute on apartment unit. Apartment Law also stipulate the right ownership of the object attached on land, namely Right of Building and Right to use. Both rights do not serve as a proof of ownership of an apartment unit. Because it deals with the right of ownership of a land and it refers to article 16 of BAL, where right of ownership is the most powerful right. (Baranyanan et al., 2019)

### 3. Conclusion

The philosophical perspective of the coherence of regulation on apartment in Indonesia, Apartment Law is made in accordance with the hierarchy of law. The content of the norms constitutes the depiction of concrete norms established based on the abstract norms in Pancasila and preamble of the 1945 Constitution. Accordingly, from philosophical perspective, Law no. 20 of 2011 possess proper validity based on the hierarchy of norms and law in Indonesia. Besides, although horizontal separation principle can be applied in Law no. 20 of 2011, the practice is not consistent with the horizontal separation principle regulated in BAL. The government should enact a Government Regulation as further stipulation of Law no. 20 of 2011 so that the implementation of the horizontal separation principle can be more optimum and effective. Based

on horizontal separation principle, the ownership right of an apartment unit is separated from the common rights over common parts, objects and land. In practice, this condition leads to legal certainty for the community related to ownership of apartment unit. Accordingly, in order to provide legal certainties, the government should enact Government Regulation as further stipulation of Law no. 20 of 2011.

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