



## Comparison of Mortgage Rights Mechanisms in Indonesian and Common Law Legal Systems

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### Abstract

This article discusses the comparison between the mortgage rights mechanism in the Indonesian legal system (*Hak Tanggungan*) and the mortgage system in common law. The main focus lies on the legal characteristics of each system, such as the nature of the right, publicity principle, executory power, debtor protection, and the separation of ownership. Through a normative juridical and comparative law approach, it is found that the Indonesian system emphasizes legal certainty and execution efficiency, while the common law system tends to offer greater protection to debtors through the principle of equity of redemption and the separation of legal and equitable ownership. These differences reflect contrasting orientations between procedural efficiency and substantive justice in protecting the rights of parties in secured transactions.

**Keywords:** *Hak Tanggungan; Mortgage; Comparative Law; Secured Credit; Enforcement*

### Introduction

#### Background

In the realm of property financing, the mechanisms of collateral such as *hak tanggungan* in Indonesia and mortgage in the common law system are crucial legal instruments that provide protection for creditors in the event of debtor default. *Hak tanggungan* in Indonesia is specifically regulated under Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land, and serves as the primary form of security right over land and buildings, which is attached specifically to the secured object.<sup>1</sup> Meanwhile, a mortgage in the common law system functions as a proprietary interest attached to real property, granting the creditor direct execution rights.<sup>2</sup>

The differences between mortgage and *hak tanggungan* lie not only in substantive legal aspects, but also in procedural matters such as registration and enforcement. The common law system emphasizes flexibility and certainty through rapid non-litigious execution procedures, while Indonesia adopts a more

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<sup>1</sup> Law of the Republic of Indonesia Number 4 of 1996 on Mortgage Rights on Land and Objects Related to Land.

<sup>2</sup> Grant Gilmore, *Security Interests in Personal Property* (New York: Foundation Press, 1965), pp. 23–45.

formal and rigid approach.<sup>3</sup> This distinction is important to study in the context of legal harmonization and improving the legal protection for parties involved in property transactions, especially with the increasing presence of foreign investment in Indonesia.<sup>4</sup>

Moreover, the advancement of digital technology in the management of hak tanggungan registration in Indonesia presents both challenges and opportunities in enhancing efficiency and transparency in dispute resolution.<sup>5</sup> Therefore, a comparative analysis of mortgage rights mechanisms between the Indonesian legal system and the common law system provides a comprehensive understanding and policy recommendations for developing a more effective and responsive secured transactions legal framework.

## Methodology

This article employs a normative juridical method with a comparative law approach. The data used consists of secondary legal materials, including legislation (Law No. 4 of 1996 and the *Land Registration Act 2002*) and legal literature by scholars. The analysis aims to compare the characteristics and legal implications of Indonesia's *Hak Tanggungan* and the mortgage system in common law jurisdictions.

## Discussion

Security Rights (*Hak Tanggungan*) are a form of real security right that grants a creditor a preferential position in the repayment of debt, using land rights as collateral. This institution is regulated under Law No. 4 of 1996 on Security Rights over Land and Objects Related to Land (UUHT). In the Indonesian legal system, *Hak Tanggungan* possesses several defining characteristics that distinguish it from other forms of security interests.

### 1. Preferential Position (*Droit de Préférence*)

*Hak Tanggungan* grants a preferential position to the secured creditor over other creditors with respect to the collateral. This means that the holder of the Security Right has the first claim to the proceeds from the execution of the collateral, except for state claims as stipulated by law. This is affirmed in Article 1 point 1 of the UUHT, which states: "*Hak Tanggungan* over land and objects related to land, hereinafter referred to as Security Right, is a security right imposed on land rights as referred to in Law No. 5 of 1960 on Basic Agrarian Principles, which grants a preferential position to a certain creditor over other creditors."<sup>6</sup>

### 2. Accessory Nature

*Hak Tanggungan* is accessory in nature, meaning it cannot stand alone but must be attached to a principal agreement, usually a debt contract. If the principal obligation is extinguished, the security right is also terminated. Therefore, the existence of *Hak Tanggungan* is dependent upon the existence of the primary debt relationship.<sup>7</sup>

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<sup>3</sup> Soerjono Soekanto and Sri Mamudji, *Normative Legal Research: A Brief Overview* (Jakarta: RajaGrafindo Persada, 2001), pp. 78–79.

<sup>4</sup> International Finance Corporation (IFC), *Doing Business 2020: Comparing Business Regulation in 190 Economies* (World Bank Group, 2020), pp. 102–105.

<sup>5</sup> Ministry of Agrarian Affairs and Spatial Planning/National Land Agency (ATR/BPN), "Digitalization of Mortgage Services," available at <https://www.atrbpn.go.id/> (accessed May 30, 2025).

<sup>6</sup> Law of the Republic of Indonesia No. 4 of 1996 on Security Rights over Land and Objects Related to Land, State Gazette of the Republic of Indonesia Year 1996 Number 42, Supplement to State Gazette Number 3632, Article 1 point 1.

<sup>7</sup> Subekti, *Pokok-Pokok Hukum Perdata* [Principles of Civil Law], Jakarta: Intermasa, 2008, p. 88

### 3. Publicity (Publisitas)

To ensure legal certainty and protect third-party interests, Hak Tanggungan must be registered with the Land Office. Registration is essential for the Security Right to become legally effective. According to Article 13(1) of the UUHT: "Security Right is created upon its registration in the land book of the relevant land right and in the certificate of that land right at the Land Office."<sup>8</sup>

### 4. Executory Power

One of the key features of Hak Tanggungan is its executory power. The certificate of Security Right contains an executory title, marked with the phrase "For the sake of Justice in the name of the Almighty God," giving it the same enforceability as a final and binding court decision. This allows the creditor to execute the collateral without going through lengthy court procedures.<sup>9</sup>

### 5. Indivisibility

Hak Tanggungan is indivisible, meaning it continues to encumber the entire collateralized property until the entire debt is paid, unless otherwise agreed. This principle is enshrined in Article 2(1) of the UUHT, which states:

"Security Right continues to encumber the entire object of the Security Right as referred to in Article 4(1), as long as it has not been extinguished as stipulated in Article 18, even if part of the debt has been repaid."<sup>10</sup>

### 6. Right to Follow (Droit de Suite)

As a general principle of real security rights, Hak Tanggungan follows the object regardless of who possesses it. In other words, the security remains attached to the land even if the ownership is transferred. This ensures that the creditor's rights remain enforceable. Article 7 of the UUHT states: "Security Right continues to encumber the object regardless of in whose hands it is."<sup>11</sup>

A mortgage is a type of real security interest commonly used in common law jurisdictions as collateral for a debt, typically related to land or buildings. It grants the creditor the right to payment secured by the property and has distinctive features that differentiate it from security institutions in other legal systems.

#### 1. Real Right with Accessory Nature

A mortgage is a real right that is accessory in nature, meaning it is dependent on the underlying debt and cannot exist independently of the creditor-debtor relationship. When the underlying debt is fully paid, the mortgage is extinguished.<sup>12</sup> This is a key characteristic that distinguishes it from ordinary ownership.

#### 2. Separation of Legal and Equitable Ownership

In a mortgage, there is a separation between legal ownership and equitable ownership. The debtor retains legal title to the property, while the creditor holds an equitable interest until the debt is

<sup>8</sup> Law No. 4 of 1996, Article 13 paragraph (1).

<sup>9</sup> *ibid.*, Article 14 paragraph (2).

<sup>10</sup> *Ibid.*, Article 2 paragraph (1).

<sup>11</sup> *Ibid.*, Article 7.

<sup>12</sup> Megarry, R., & Wade, H. W. R. (2012). *The Law of Real Property* (8th ed.). London: Sweet & Maxwell, p. 506.

discharged.<sup>13</sup> This system incorporates the principle of the “equity of redemption,” which gives the debtor the right to redeem the property before foreclosure.

### 3. Creditor’s Right to Foreclose

A mortgage grants the creditor the right to enforce the security interest by foreclosing on the property if the debtor defaults. Foreclosure typically occurs through court proceedings or via a “power of sale,” allowing the creditor to sell the property without judicial intervention.<sup>14</sup> This provides a relatively quick and efficient remedy for creditors.

### 4. Debtor’s Duty to Preserve the Property

The debtor is obliged to maintain the property to preserve its value during the term of the mortgage. If the debtor causes damage or diminishes the property’s value, the creditor may seek legal recourse to protect their interest.<sup>15</sup>

### 5. Registrability and Publicity

In many common law jurisdictions, mortgages must be registered with the land registry to be effective against third parties. Registration serves as a public notice mechanism, ensuring legal certainty.<sup>16</sup>

Aspect	Hak Tanggungan (Indonesia)	Mortgage (Common Law)
Nature of Right	Accessory real right	Accessory real right
Publicity	Mandatory registration as a condition for the right’s creation	Registration to protect third parties
Executory Power	Exists, can be executed directly without court order	Generally requires court proceedings, except for power of sale
Debtor Protection	Limited, no explicit redemption principle	Has the principle of equity of redemption
Separation of Ownership	No separation between legal ownership and equitable interest	Separation between legal ownership and equitable interest

In the Hak Tanggungan system, registration is an absolute requirement for the right to be valid and effective against third parties.<sup>17</sup> This provides legal certainty and strong protection for the creditor. Conversely, in the common law system, a mortgage can legally exist even if it has not been registered, but registration is necessary for the creditor’s rights to be protected against third parties<sup>18</sup>. Thus, the Indonesian system emphasizes registration as a condition for validity, whereas common law treats registration as a protective measure.

Hak Tanggungan has executory power that allows creditors to directly execute the collateral without first going through court proceedings.<sup>19</sup> This accelerates the resolution process and provides certainty to the creditor. In the common law system, mortgage execution generally requires court proceedings unless there is a “power of sale” clause that grants creditors the right to sell the property directly without court intervention.<sup>20</sup> This mechanism offers additional protection to the debtor.<sup>21</sup>

<sup>13</sup> Gray, K., & Gray, S. (2011). *Elements of Land Law* (5th ed.). Oxford: Oxford University Press, pp. 213-215.

<sup>14</sup> Smith, L. (2017). *Property Law* (3rd ed.). London: Routledge, pp. 187-190.

<sup>15</sup> Lowry, J., & Rawlings, R. (2017). *Property and Trust Law* (6th ed.). Oxford: Oxford University Press, p. 135.

<sup>16</sup> Land Registration Act 2002 (UK), Sections 27-28.

<sup>17</sup> Law No. 4 of 1996, Articles 4 and 10.

<sup>18</sup> Land Registration Act 2002 (UK), Sections 27-28.

<sup>19</sup> Law No. 4 of 1996, Article 14 paragraph (2).

<sup>20</sup> Smith, L. (2017). *Property Law* (3rd ed.). London: Routledge.

<sup>21</sup> Gray, K., & Gray, S. (2011). *Elements of Land Law* (5th ed.). Oxford University Press.

Mortgage in common law includes the principle of equity of redemption, which allows the debtor to redeem the property before final execution.<sup>22</sup> Meanwhile, Hak Tanggungan in Indonesia does not explicitly recognize this principle, limiting the debtor's ability to retain rights over the property in cases of default. This shows that the common law system provides broader legal protection to the debtor. Mortgage in common law separates legal ownership and equitable ownership, so the debtor retains legal rights to the property as long as the obligations have not been fulfilled.<sup>23</sup> In Indonesia, Hak Tanggungan does not separate legal ownership and creditor's interest, meaning the debtor remains the full owner until the Hak Tanggungan is executed.<sup>24</sup>

The comparison between hak tanggungan in Indonesia and mortgage in the common law system shows that although both aim to provide security to creditors, there are significant differences in terms of procedures, flexibility, and legal protection for the parties involved. The common law system offers a faster and more adaptive process, while the Indonesian system provides legal certainty through structured procedures.

In the context of globalization and increasing foreign investment, it is important for Indonesia to consider legal reforms that can enhance the efficiency and flexibility of its security rights system without sacrificing legal certainty. This can be achieved through the digitalization of the hak tanggungan registration process, simplification of procedures, and improvement of human resource capacity in land law.

## Conclusion

The Indonesian Hak Tanggungan system prioritizes creditor protection and speedy enforcement through mandatory registration and direct executory power, but offers limited debtor protections. In contrast, the common law mortgage system balances creditor and debtor interests by allowing judicial oversight and the equity of redemption, providing greater debtor safeguards. These differences reflect distinct legal traditions and impact the efficiency and fairness of mortgage enforcement in each system.

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<sup>22</sup> Subekti, *Fundamentals of Civil Law*, Intermasa, 2008.

<sup>23</sup> Gray & Gray, *Elements of Land Law*, 2011, pp. 213-215.

<sup>24</sup> Law No. 4 of 1996, Article 2 paragraph (1).

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