

Legal Certainty of Property Ownership for Foreigners

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Abstract

Basically, only Indonesian citizens are allowed to own land in Indonesia. The government's efforts to encourage development and economic growth in the country by strengthening foreign investment have implications for property ownership regulations for foreign citizens who are interested in owning land, buildings or residences in Indonesia. The purpose of writing this article is to examine the legal certainty of property ownership for foreigners. The writing method used is the Normative Juridical Method using primary legal sources and supporting legal materials which are then analyzed through legal interpretation of relevant regulations. The results of this research are Foreign citizens in Indonesia basically only have ownership rights to land and buildings through use rights and lease rights. Details of the implementation of the Basic Agrarian Law are regulated through Government Regulation no. 40 of 1996 concerning Business Use Rights, Building Use Rights and Land Use Rights as well as Government Regulation no. 41 of 1996 concerning ownership of residential houses or residences by foreigners. Furthermore, this regulation was followed up with Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency No. 7 of 1996 concerning requirements for residential ownership, which was later replaced by Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency No. 8 of 1996 concerning requirements for ownership of a residence or residence by foreigners.

Keywords: *Legal Certainty, Property, Foreigners*

I. INTRODUCTION

Law Number 5 of 1960 concerning Basic Agrarian Principles (UUPA) confirms that only Indonesian citizens have full ownership rights to land. The meaning of the exclusive relationship between Indonesian citizens and land is explained in Explanation II number 5 of the UUPA, which states that based on Article 9 together with Article 21 paragraph (1) of the UUPA, only Indonesian citizens have absolute ownership rights to land. This provision describes the principle of nationality in

property ownership, especially land. Over time, the principle of nationality not only applies to land, but also to other physical property such as housing and settlements.¹ The issuance of Law Number 1 of 2011 concerning Housing and Residential Areas (hereinafter referred to as the Housing and Housing Area Law) and Law Number 20 of 2011 concerning Flats (hereinafter referred to as the Condominium Law) shows a commitment to applying the principle of nationality to property in the form of housing and flats. The explanation to these articles explains that the "Nationality Principle" is intended to emphasize that land ownership rights only apply to Indonesian citizens, while foreigners are only permitted to use rental or use rights over houses. The application of the principle of nationality in home ownership is in line with the principle of nationality in ownership of land rights, which emphasizes that only Indonesian citizens can have full connection with land in the territory of Indonesia.² Article 52 in the Housing and Residential Areas Law states that foreigners can live in or use houses with rental or use rights, and the implementation of these provisions must be in accordance with applicable laws and regulations. The implication of these rules is that foreign nationals cannot have ownership rights to property, and the transfer of property ownership to foreign nationals is prohibited. Foreigners can own property, both land and residential buildings or flats, but with usage rights that have strict restrictions.³

In addition to the provisions previously mentioned, laws and regulations in the land sector regulate the status of property use rights for foreign citizens, namely:

1. Article 42 of Law no. 5 of 1960 concerning Basic Agrarian Principles (UUPA) which states that use rights can be owned by: (a) Indonesian citizens; (b) Foreigners living in Indonesia; (c) Legal entities established in accordance with Indonesian law and located in Indonesia; (d) Foreign legal entities that have representation in Indonesia.
2. Article 45 Law no. 5 of 1960 UUPA which regulates rental rights.
3. Article 39 of Government Regulation Number 40 of 1996 concerning Business Use Rights, Building Use Rights and Land Use Rights which also regulates rental rights.

¹Endang Suhendar, Land as a Commodity, Institute for Community Studies and Advocacy, Jakarta, 2000

²Suharnadi and Iskandar, Property Ownership in Indonesia, Leglation Journal, Volume 9 Issue 2 June 2021

³Muhamad Nando Gasan, Ownership Rights of Flat Units on Building Use Rights by Foreigners in Indonesia, Thesis, Faculty of Law, Univ Bandar Lampung, 2021

4. Article 49 Regulation of the Minister of State for Agrarian Affairs/Head of the National Land Agency No. 9 of 1999 concerning Procedures for Granting and Cancellation of Granting Rights to State Land and Management Rights.

The Basic Agrarian Law, together with the Housing and Residential Areas Law, the Condominium Law, and other previously mentioned laws and regulations, only allow foreign nationals to have rights to property in the form of use rights, and not provides the possibility of owning property rights. Ownership rights are only permitted for Indonesian citizens, in accordance with the principle of land ownership by the Indonesian people. This right is the highest right to land which covers all property in the territory of Indonesia, is eternal, and is the basis for other land tenure rights. Therefore, property rights can only be granted to Indonesian citizens as part of the Indonesian nation.

The provisions in the Basic Agrarian Law have become the rationale for Government Regulation Number 41 of 1996 concerning Ownership of Residential or Residential Houses by Foreigners Domiciled in Indonesia, which stipulates that property can only be granted through use rights. The existence of regulations regarding the settlement of foreigners is proof of the attention of legislators to the interests of foreigners living in Indonesia with their various needs. This government policy provides legal certainty for foreigners living in Indonesia to own a house as a place to live in Indonesia. This Government step was taken with the aim of increasing foreign investment, increasing foreign exchange flows, supporting the property industry, contributing positively to employment, and advancing the national economy as a whole.⁴

This general policy underlines the principle of nationality, which means that although there is a need for foreign citizens to own a house in Indonesia, this is only possible through granting individual use rights with a certain time limit, which must meet the subject and object requirements, and must not interfere with the sovereignty of the State. . The principle of nationality is also reflected in the State/Government's support for citizens in home ownership, especially for those with low incomes, including in providing guarantees of legal certainty regarding home ownership by these citizens.⁵

As time goes by, the government wants to change this provision by changing it to property rights, even President Joko Widodo has issued a decree approving the granting of property rights to foreign citizens. This provision has been announced by members of the Presidential Communications Team through national media, stating

⁴Urip Santoso, *Housing Law*, Kencana, Jakarta, 2014, p. 351

⁵Mohammad Yamin Lubis and Abdul Rahim Lubis, *Property Ownership in Indonesia including Home Ownership by Foreigners*, CV Mandar Maju, Bandung, 2013, p 31

that property ownership in Indonesia for foreign citizens (WNA) is permitted to compete at the regional level.⁶This is contrary to the spirit of the UUPA, the Housing and Settlement Areas Law, and the Condominium Law which emphasizes the principle of nationality. This decision has created a conflict of norms in the regulation of granting property rights to Indonesian citizens and foreign citizens in Indonesia.

II. LITERATURE REVIEW

The aspect of justice in regulations governing land rights for foreign nationals (WNA) can be seen from two perspectives. On the one hand, foreigners and foreign legal entities are given the opportunity to have rights to land and buildings. However, on the other hand, to ensure the same protection is given to Indonesian citizens, especially those who need economic assistance, requirements and restrictions are imposed on foreigners and foreign legal entities who wish to have rights to land and buildings.

Certainty refers to circumstances or situations that are clear and definite, as well as provisions that have been established. Essentially, the law must be clear and fair. The presence of clarity as a guide to behavior and fairness to support a system that is considered reasonable. Only through justice and clarity implemented with certainty can the law fulfill its function. Legal certainty is an issue that can only be answered through a normative, not a sociological, approach.⁷

Utrecht explained that legal certainty has two aspects. First, the existence of generally accepted rules allows individuals to know what actions are permitted or prohibited. Second, legal certainty also includes protection for individuals from arbitrary government actions, because the existence of general rules allows individuals to know the limitations and obligations that the State can impose or carry out on individuals.⁸

Legal certainty is a guarantee of justice in the law. Norms that promote justice must be truly effective as rules that are followed. According to Gustav Radbruch, justice and legal certainty are inseparable elements of law. He argued that justice and legal certainty must be prioritized, while legal certainty must be maintained to maintain the stability and order of a country. Finally, obedience to positive law must always be

⁶Kurniawan A Wicaksono and Lili Sunardi, President Restuis "Property Rights" of Foreigners, *Bisnis Indonesia Newspaper* June 24 edition, Pg 1.

⁷Dominikus Rato, *Looking for Legal Philosophy: Understanding and Understanding the Law*, Laksbang Pressindo, Yogyakarta, 2010, p. 59

⁸Riduan Syahrani, *Summary of the Essence of Legal Science*, Citra Aditya Bakti Publisher, Bandung, 1999. p. 23

adhered to. The theory of legal certainty is based on values that include justice and happiness.⁹

III. METHODOLOGY

In collecting the data and materials needed to answer the problem formulation in this research, a normative juridical approach method was applied. The normative juridical approach used in this writing focuses on the application of the rules or norms contained in positive law to evaluate the problems being discussed. This approach discusses, analyzes and explains the issues raised, as well as identifying the concepts and principles contained in the relevant laws and regulations. In this research, the legislative approach refers to the Criminal Code (KUHP), the Basic Agrarian Law, and other regulations relevant to the research. Analysis of legal materials is carried out by combining prescriptive and deductive methods, which are based on general data, legal principles, theories and statutory regulations which are arranged systematically as an arrangement of legal facts.

IV. RESULT AND DISCUSSION

A. Ownership of a Residential House or Residence by a Foreigner

According to Government Regulation Number 41 of 1996 Articles 1 and 2, foreign individuals living in Indonesia are allowed to own a house as a residence or residence on land which constitutes the right to use state land which is controlled through an agreement with the holder of the land rights, which is regulated by Deed of the Official Land Deed Maker (PPAT).

By referring to this regulation, basically, foreign nationals (WNA) living in Indonesia are permitted to own one house unit as a place to live, be it an independent house or a unit in an apartment built on use-right land, with certain conditions.:

1. An independent house can be built on land that has the right to use state land or ownership rights granted by the holder of that right, which is documented through a PPAT deed.
2. The agreement granting Usage Rights to land which is a Property Rights must be recorded in the land book and the related Ownership Rights certificate. The term of the Right to Use is in accordance with the agreement, but must not exceed 25 years. The term of the Right to Use cannot be extended, but can be renewed for a

⁹Achmad Ali, *Revealing the Veil of Law (A Philosophical and Sociological Study)*, Toko Gunung Agung Publisher, Jakarta, 2002, p. 95

period of 25 years based on a new agreement in the agreement, as long as the foreign citizen still lives in Indonesia.

3. If a foreign citizen who owns a house built on land granted through the State Land Use Rights or based on an agreement with the holder of that right no longer lives in Indonesia, then within one year they must release and transfer the rights to the house and land to another party. others who meet the requirements.
4. However, if within the specified time the rights to the land have not been released, then the house built with the right to use state land, the house and the land controlled by the foreigner will be auctioned off. If the house is built with the right to use the land, then the house will belong to the owner of the Hak Milik.

Property ownership by foreigners can be done in the following ways:

1. Purchase land that has the right to use state land together with the house standing on it by paying the Land and Building Rights Acquisition Fee (BPHTB) in accordance with the provisions applicable to the land and building concerned.
2. Buying land that has the right to use state land by paying BPHTB for the land, and then building your own house on it. The conditions are to obtain a Building Construction Permit (IMB) and pay Value Added Tax (VAT) for the building.
3. Purchase land that has use rights over the land owned by the use rights holder (after obtaining written permission from the property rights holder) together with the house standing on it by paying BPHTB for the land and building.
4. Buy land that has use rights over the land owned by the use rights holder (after obtaining written permission from the property rights holder), then build your own house on it. The conditions are to obtain a Building Construction Permit (IMB) and pay Value Added Tax (VAT) for the building.
5. Obtaining the right to use land owned by the owner of the property rights through an agreement, as well as getting the house on it, by paying the Land and Building Rights Acquisition Fee (BPHTB) for the land and building.
6. Obtain ownership through an agreement, pay the Land and Building Rights Acquisition Fee (BPHTB) for the land, and then build your own house on it. The conditions are to obtain a Building Construction Permit (IMB) and pay Value Added Tax (VAT) for the building.

Legal actions such as those mentioned above are juridically contrary to Article 26 paragraph (2) of the UUPA which states that all forms of transactions such as buying and selling, exchange, grants, inheritance, and other actions intended to transfer property rights to foreigners, Indonesian citizens those who have foreign citizenship, or are legal entities, will be declared legally null and void and their land will become

state ownership. However, the rights of other parties who are bound remain valid and all payments received by the owner cannot be refunded.

B. Legal Certainty of Property Ownership for Foreigners in Indonesia

One of the goals of law, along with the benefit and justice for each individual as part of a diverse society in their interactions with other individuals regardless of their origins, is legal certainty. Legal certainty regarding property ownership for foreign citizens is regulated on the following:

1. Provisions regarding property ownership for foreign citizens in Indonesia in the property sector are currently regulated by Article 57 of Law no. 1 of 2011 concerning Housing and Settlement Areas (PKP). This article refers to Article 57 of Law no. 1 of 2001 concerning Housing and Settlement Areas, which stipulates that foreign citizens can occupy or occupy houses through rental rights or use rights. The duration of foreign ownership of property is adjusted to Law no. 5 of 1960 concerning Basic Regulations on Agrarian Principles, which limits the period of use rights for foreign citizens to a maximum of 25 years initially, can be extended to 20 years, and can be renewed again for a maximum of 20 additional years.
2. Government Regulation Number 41 of 1996 concerning ownership of a house as a residence or residence for foreign nationals living in Indonesia is regulated in several articles as follows:
 - a. Article 1 states that: (a) Foreign citizens domiciled in Indonesia are permitted to own a house for residence or residence with certain land rights; (b) Foreign nationals domiciled in Indonesia, as intended in paragraph 1, are foreign nationals whose presence in Indonesia provides benefits for national development.
 - b. Article 2 stipulates that a house as a residence or dwelling that can be owned by a foreign citizen as mentioned in article 1 is: (a) A stand-alone house built on land; (b) Usage Rights on State land; (c) Those controlled based on an agreement with the land rights holder; (d) Apartment units built on Right to Use land on State land.
 - c. Article 6 states that: (a) If a foreign citizen who owns a house built on state land, or based on an agreement with the land holder no longer lives in Indonesia, then within one year he or she must release or transfer the right to house and land to other people who meet the requirements; (b) If within the time specified in paragraph (1) the right to the land has not been released or transferred to another party who fulfills the requirements, then: (1) The house built on Right to Use land on State land will be controlled by the state to be

auctioned ; (2) A house built on land based on an agreement as explained in Article 2 letter b, will belong to the holder of the rights to the land in question.

- d. Article 7 states that further provisions necessary to implement this Government Regulation will be determined by the Minister of State for Agrarian Affairs after hearing the considerations of the National Housing and Settlement Development Policy and Control Agency.

Based on research regarding property ownership rights for foreign citizens considered from the perspective of human rights (HAM) and legal certainty, it was concluded that property ownership status for foreign citizens meets human rights standards without discrimination or restrictions based on their citizenship status. They have the right to use the property for 25 years, and this period can be extended for subsequent years in accordance with applicable regulations.

V. CONCLUSION

Based on the provisions in Law no. 5 of 1960 concerning Basic Agrarian Principles (UUPA), which is explained in Article 9 and Article 21 paragraph (1) of the UUPA, only Indonesian citizens have ownership rights to land in accordance with the principle of nationality in land property ownership. Foreigners are not permitted to own land, even in cases of inheritance or mixing of property with dual citizenship, where a person has foreign citizenship and is an Indonesian citizen, they will be subject to sanctions to relinquish their ownership rights within one year; otherwise, the land will become State property based on Article 26 paragraph (2) UUPA.

Foreign citizens in Indonesia basically only have ownership rights to land and buildings through use rights and lease rights. UUPA implementation regulations are regulated through Government Regulation no. 40 of 1996 concerning Business Use Rights, Building Use Rights and Land Use Rights (HGU, HGB, HPAT), as well as Government Regulation no. 41 of 1996 concerning Ownership of Residential Homes by Foreigners. Furthermore, regulations from the Minister of Agrarian Affairs/Head of the National Land Agency regarding requirements for residential ownership are regulated through Regulations from the Minister of Agrarian Affairs/Head of BPN No. 7 of 1996, which was later replaced by Regulation of the Minister of Agrarian Affairs/Head of BPN No. 8 of 1996 concerning requirements for foreigners to own a residence or residence.

Foreign nationals living in Indonesia are only allowed to use property with use rights and lease rights for 25 years, which can be extended for another 20 years, because they do not have rights to land owned by law.

ACKNOWLEDGEMENT

In writing this article, the author would like to express many thanks to the lecturers and colleagues who have helped in preparing this article. The author cannot fail to say that in this article there are still shortcomings in the structure and content, the author hopes for criticism and suggestions from readers for the perfection of this article.

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