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LEGAL REVIEW OF PROPERTY LAND OWNERSHIP BY FOREIGN CITIZENS IN INDONESIA

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Abstract

The importance of the function of a plot of land for humans has resulted in humans being able to defend their land at all costs. Therefore, the former founders of the Indonesian state paid special attention to land that has a high value from any perspective. This is evidenced by the enactment of Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles which in its points expressly constitutes a form of implementation of Article 33 of the 1945 Constitution. The formulation of the research problem is: How can foreign legal regulations get land ownership rights in Indonesia? What are the legal consequences if foreigners own land in Indonesia with property rights status? The research method uses normative or doctrinal legal research methods. The types of approaches taken are statutory approaches, legal concept analysis, legal comparisons, and legal history. The sources of legal materials used are primary, secondary, and tertiary data sources. The technique of collecting legal materials is a literature study. The technique of analyzing legal materials is conceptual. The results of legal research on land ownership by foreign nationals in Indonesia are not at all open to the possibility of obtaining land rights in the land law system, except usufructuary. Legal consequences for foreign citizens owning land in Indonesia with the status of property rights, namely the occurrence of legal problems between the parties' Indonesian citizen's foreign citizens.

Keywords: Law of Land Ownership, Indonesian Citizens, Foreign Citizens.

I. INTRODUCTION

I.1 Background Of The Problem

Land is a place to live, earn a living, produce offspring and carry out customs in religious rites. The importance of the function of a plot of land for humans has resulted in humans being able to defend their land at all costs. Therefore, the former founders of the Indonesian state paid special

attention to land that has a high value from any perspective. This is evidenced by the enactment of Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles, which in its points expressly constitutes the

implementation of Article 33 of the 1945 Constitution.¹

Indonesian agrarian law divides land rights in two forms, first, primary land rights, namely land rights that can be owned or controlled directly by a person or legal entity that has a long period of time and can be transferred to other people or his heirs. Both land rights are secondary, namely land rights which are temporary, because these rights are enjoyed for a limited time. This provision is regulated in Articles 16 and 53 of the laws on agrarian. Land rights are rights that give authority to someone who has land rights, where he can utilize and use the plot of land.²

Ownership rights are only owned by Indonesian citizens (WNI) and several legal entities appointed by Government Regulation Number 38 of 1973, which if violated, their rights are revoked and the land becomes state property. An Indonesian citizen has full rights to the land he owns, so he has the right to transfer his property rights by exchanging, inheriting, granting, and selling to other parties. With the provisions of Article 20 paragraph (1)

of the , the laws on agrarian it does not mean that the inherent nature of property rights (such as the strongest and most complete rights) are absolute and unlimited rights, because in certain situations and conditions, property rights can be limited. This restriction is regulated in Article 6, Article 7, Article 17, Article 18, Article 21 paragraph (1) of the BAL and then Article 26 paragraph (2).³

Regarding the rights to land whose designation differs according to the type of use and the legal subject who will become the owner, it can be explained as follows.

1. Proprietary, which is the fullest and strongest right and is hereditary in nature, which is only granted to a single Indonesian citizen, with the exception of certain legal entities, whose utilization can be adjusted to the designation of the land in the area where it is located.
2. Right to business, which is the right to cultivate land that is directly controlled by the state, for a certain period of time, which can be granted to either a single Indonesian citizen or an Indonesian legal entity (established

¹Elza Syarif, 2012, *Menuntaskan Sengketa Tanah Melalui Pengadilan Khusus Pertanahan*, Kepustakaan Populer Gramedia, Jakarta, P. 1.

²Supriadi, 2007, *Hukum Agraria*, Sinar Grafika, Jakarta, P. 64.

³ A. P. Parlindungan, *Tanya Jawab Hukum Agraria dan Pertanahan*, Mandar Maju, Bandung, P. 28-29.

under Indonesian law and domiciled in Indonesia).

3. Building rights, which is the right to construct and own a building on land that is not one's own, for a certain period of time, which can be owned by either a single Indonesian citizen or an Indonesian legal entity (established under Indonesian law and domiciled in Indonesia).).

4. Right of Use, which is the right to use and or collect proceeds from land owned by other people or directly controlled by the state, which is not a lease or land cultivation, which can be granted for a certain period of time to a single Indonesian citizen, an agency Indonesian law (established under Indonesian law and domiciled in Indonesia), foreign nationals domiciled in Indonesia, as well as foreign legal entities having representatives in Indonesia.⁴

I.2 Research Method

This research method uses normative or doctrinal legal research methods. The types of approaches used in this research are the statutory approach, the legal concept analysis approach, the comparative law approach, and the legal history approach. Sources of legal materials used are primary, secondary, and tertiary data sources. The technique of

data collection is done by literature study. The technique of analyzing legal materials uses documentation.

II. DISCUSSION

Based on the results of research on land ownership in Indonesia, it is stated in Article 9 of the laws on agrarian, which states that only Indonesian citizens (WNI) are allowed to have a full relationship with the shared land. with regard to Property Rights (according to Article 21 paragraph (1) of the laws on agrarian). In other words, only Indonesian citizens can have property rights. According to the laws on agrarian , property rights, usufructuary rights, and building use rights cannot be granted to foreigners or foreign legal entities. Foreign Citizens who are domiciled in Indonesia and Foreign Legal Entities that have representatives in Indonesia may be granted a Right of Use.

According to the laws on agrarian, property rights, usufructuary rights, and building use rights cannot be granted to foreigners or foreign legal entities. Foreign Citizens who are domiciled in Indonesia and Foreign Legal Entities that have representatives in Indonesia may be granted a Right of Use. In very special cases, foreigners may control and use land with

⁴Kartini Muljadi dan Gunawan Widjaja, 2008, *Seri Hukum Harta Kekayaan Hak-hak Atas Tanah*, Ed. 1, Cet. 5, Kecana Prenada Media Group, Jakarta, P. 25-26.

Ownership Rights, Cultivation Rights, and Building Use Rights, and even that is only allowed for 1 (one) year, namely for Indonesian citizens who change citizenship, and foreigners who acquire it through ab intestate inheritance. In other words, for a foreign citizen who due to inheritance gets one other than the usufructuary right, for 1 (one) year since the transfer of his citizenship, or since the right is granted, the rights must be transferred, or if not transferred, it will result in the land rights fall to the state, the transfer of land rights is null and void, according to the provisions stipulated in Article 21 paragraph (3), Article 30 paragraph (2), and Article 36 paragraph (2) of the agrarian law.

So, for foreign nationals, there is absolutely no possibility of obtaining land rights in the land law system, except for use rights. Likewise for Foreign Legal Entities. However, Foreign Legal Entities can own land in Indonesia through a national company under the Indonesian legal system. The rights of foreign citizens to control over land in Indonesia are:

1. Subject of Land Ownership

In principle, property rights can only be owned by people (het

natuurlijke persoon), either alone or together with other people. Meanwhile, legal entities cannot own land with the principle of property rights, unless legal entities are determined by the government and have fulfilled the requirements (see Article 21 paragraph (1) and paragraph (2) of the laws on agrarian).

Based on the provisions of the old agrarian law, that everyone is allowed to own land with "eigendom rights", both Indonesian citizens and foreign nationals, both for native Indonesians and for non-natives. Even legal entities have the right to have this eigendom right, both Indonesian legal entities and foreign legal entities.

In accordance with the provisions of Article 9 paragraph (1) of the laws on agrarian in conjunction with Article 21 paragraph (1) of the laws on agrarian, it is expressly stated that only Indonesian citizens can have ownership rights over land, where there is no distinction between native Indonesians and non-Indonesians. - people of foreign descent. Although, according to the provisions of Article 9 paragraph (2) of the the laws on agrarian, there are no differences between citizens, in terms of land ownership there are differences for

those who have single and dual citizenship.

In addition to the requirements for Indonesian citizenship as described above, specifically for the ownership of agricultural land, other conditions are still required. These conditions relate to the provisions regarding the threshold of land ownership or the maximum limit of agricultural land that can be owned and controlled by a person (Article 1 jo 6 of Law Number 56 (Perpu of 1960) concerning joint ownership of agricultural land which is less than 2 hectares (two hectares) hectares) as referred to in Article 9 paragraph (2) and 33 of the laws on agrarian.

Law Number 56 (Perpu) 1960, and regarding the prohibition of "absentee" agricultural land ownership (Article 3 PP Number 224 of 1961 juncto PP Number 41 of 1964). Regarding the conditions mentioned in Article 21 paragraph 1 in conjunction with paragraph 4 of the laws on agrarian, it is a regulation regarding general requirements for individuals to own land with property rights, meaning that these conditions must be met by every owner. Therefore, what is determined by the "Landreform" regulations are

special conditions, meaning specifically for the ownership of agricultural land, while for agricultural land, it is not required that the owner must be a farmer.

2. Land Ownership Rights for Foreign Citizens

In principle, only Indonesian citizens can own land, but in certain cases and for a limited time by the laws on agrarian it is still possible for foreigners (foreigners) and or Indonesian citizens with dual citizenship to own land with rights. owned by. Given that possibility is on the basis of humanitarian considerations.

The regulation on the permission of foreigners to own land with property rights is explicitly regulated in the provisions of Article 21 paragraph 3 of the laws on agrarian which stipulates that foreigners who after September 24, 1960 obtain property rights due to inheritance without a will or mixing of assets due to marriage, are obliged to relinquish that right within a short period of time. 1 (one) year from the date of obtaining the right. This provision also applies to an Indonesian citizen who has property

rights and after September 24, 1960 loses his citizenship.

The period of one year is calculated from the loss of Indonesian citizenship. Then, what are the provisions if the person receiving the property rights is an Indonesian with dual nationality or if the original owner is a single Indonesian citizen, that the provisions of Article 21 paragraph 3 of the laws on agrarian also apply to them based on the provisions referred to in Article 21 paragraph 4 of the laws on agrarian.

In the elucidation of Article 21 paragraph 3 of the laws on agrarian, it is determined about ways to obtain rights without having to take positive actions that are intentionally aimed at the transfer of the rights in question. Other methods are not allowed because they are prohibited by Article 26 paragraph 2 of the laws on agrarian, as well as buying, exchanging, granting, and giving by will ("legat").

The practice of land tenure for foreign nationals in Indonesia with the status of property rights It is legally impossible for foreigners to own land with Hak Milik status, but the practice that has occurred in Indonesia so far is that foreigners purchase land with Hak

Milik status by borrowing names. a person who is an Indonesian citizen for certain purposes.

Land rights are inherent rights and cannot be simply removed. The legal basis for the provisions of land rights is regulated in Article 4 paragraph (1) of the laws on agrarian that on the basis of the state's right to control over land, it is determined that there are various types of rights on the surface of the earth called land which can be given to and owned by good people themselves. or together with other people and legal entities." The land rights referred to include property rights, cultivation rights, building rights, use rights, rental rights for buildings, land clearing rights, and the right to collect forest products. The control of land rights by foreign nationals in Indonesia is only limited to Use Rights, Rental Rights to Buildings, Building Use Rights, Business Use Rights, and Temporary Land Rights.⁵

According to Article 41 paragraph (1) of the laws on agrarian, the right to use is the right to use and collect land products which are directly controlled by the State or the property

⁵ Urip Santoso, 2008, *Hukum Agraria dan Hak-Hak Atas Tanah*, Cet. 4, Kencana, Jakarta, P. 87.

rights of another person who gives the authority and obligations specified in the decision to grant it by the competent authority, give it or in an agreement with the owner. land that is not a lease agreement or land management agreement, everything as long as it does not conflict with the laws on agrarian. Use rights are rights granted to single Indonesian citizens, Indonesian legal entities, and foreign citizens domiciled in Indonesia as well as foreign legal entities that have representatives in Indonesia.⁶

In Article 44 paragraph (1), rental rights for buildings are rights owned by Indonesian citizens, Indonesian legal entities, foreigners domiciled in Indonesia and foreign legal entities that have representatives in Indonesia to establish and own buildings on land owned by other people by paying a certain amount of rent and within a certain period of time agreed by the land owner and the holder of the building lease. In Article 35 of the laws on agrarian, the right to use a building is the right to construct and own a building on land that is not one's own for a maximum period of 30 years and can be extended for a period of 20

years. According to Article 28 paragraph (1) and Government Regulation (PP) Number 40 of 1996, the right to cultivate is the right to cultivate land controlled directly by the State which is useful for companies, plantations, agriculture, fisheries and animal husbandry. In Article 16 paragraph (1) and Article 53 of the laws on agrarian, temporary land rights are rights that include liens on land, profit-sharing business rights, boarding rights, and rental rights on agricultural land.⁷

Legal Consequences for Foreign Citizens Owning Land in Indonesia with Property Rights Status Based on the Basic Agrarian Law (the laws on agrarian) relating to the control of land rights, namely the prohibition of foreigners from owning land with Ownership status as based on Article 21 paragraph (1) of the Agrarian Law. There is a tendency for someone to have a right to land that has the status of property rights because it is the strongest and most complete right and has no expiration date. This is what causes someone to try to take shortcuts in order to be able to control property rights to land with a legal act that is

⁶Urip Santoso, Op.Cit, hal. 115

⁷Kartini Muljadi dan Gunawan Widjaja, 2003, Hak-Hak Atas Tanah, Kencana, Jakarta, P. 59-60.

disguised and qualified as legal smuggling. This clearly ignores the principles of good faith and nationality contained in the laws on agrarian so a name borrowing agreement is made known as the nominee agreement.

Nominee is an agreement made between a person who by law cannot be the subject of certain land rights (in this case Property Rights / Building Use Rights), namely a foreigner and an Indonesian citizen, which is intended so that foreigners can control the land with Ownership Rights/Building Use Rights. but legally, the land in question is in the name of an Indonesian citizen. Ownership in question is an indirect ownership created from a legal relationship between Indonesian citizens and foreigners who are linked in an agreement called a Nominee/Trusted Agreement, which is an agreement that contains a statement that the land is not owned by Indonesian citizens but belongs to foreigners who are given the opportunity to manage the land.⁸

The nominee agreement can be interpreted as a statement of authorization agreement, an Indonesian citizen states that the land does not

belong to him but gives power to foreign nationals to manage the land. With the nominee agreement, foreigners simply borrow the identity of an Indonesian citizen to include his name in a land certificate and the foreigner considers that this agreement is much more practical and beneficial for both parties. However, the efforts made by foreigners in making the Nominee Agreement are legal smuggling carried out by disguising themselves from the actual actions. In addition, the Nominee Agreement above was made on the basis of bad faith because it violates the prohibition in Article 26 paragraph (2) of the laws on agrarian.⁹

In addition to the Nominee/Trusted Agreement, other things that foreigners can do to control land in Indonesia are by transferring land rights from Indonesian citizens to foreigners, followed by an application for rights. These are two legal acts, namely the release of land rights by Indonesian citizens and requests for land rights by foreigners. The application for rights can be submitted to the Head of the Land Office, after the issuance of the right of use certificate on behalf of the Indonesian citizen, a

⁸Maria Sumardjono, *Op.Cit.*, P. 14.

⁹ Maria Sumardjono, *Op.Cit.*, P. 15.

deed of sale and purchase is made from the Indonesian citizen to the foreigner. Then after everything has been agreed between the Indonesian citizen and the foreigner, the right to transfer is carried out through the release of the recognized rights to the land rights application.

III. CLOSING

Legal regulations on land ownership for Foreign Citizens, the rules governing it are clear. Starting from the 1945 Constitution of the Republic of Indonesia, then the Basic Agrarian Law Number 5 of 1960 and other laws and regulations (lex specialist), namely Government Regulation (PP) Number 40 of 1996 concerning Cultivation Rights (HGU), Building Use Rights (HGB), and Land Use Rights and Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 3 of 1999 concerning Delegation of Authority for Granting and Canceling Decisions on Granting Land Rights.

2. The legal consequences for foreign citizens owning land in

Indonesia with the status of property rights, namely the occurrence of legal problems between the parties Indonesian Citizens (WNI) and Foreign Citizens if one of the parties files a lawsuit related to the making of deeds that underlies the legal relationship . The problem that arises is related to the control of land rights, namely the prohibition of foreigners from owning land with the status of property rights. There is a tendency for someone to have a right to land that has the status of property rights because it is the strongest and most complete right and has no expiration date. So that it causes someone to try to take shortcuts in order to be able to control property rights to land with a legal act that is disguised and qualified as legal smuggling. This clearly ignores the principles of good faith and nationality contained in the laws on agrarian, so a name borrowing agreement is made known as the nomiee agreement.

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