

LEGAL ASPECTS OF HOME OWNERSHIP FOR FOREIGNERS

Irawan Soerodjo, S.H., M.Si.

Faculty of Law, UNITOMO, Surabaya,
INDONESIA.

ABSTRACT

Residential houses ownership according to the Government Regulation No. 103 of 2015 consists of single homes (detached house) and apartment units. The legislation requires that the ownership of residential property/housing for foreigners domiciled in Indonesia or their heirs who hold residential permit is limited to granting right to use title of land and the lease with the term period as specified in the legislation, because in principle Freehold, Right to Build, and Right to Cultivate of land can only be owned by Indonesian citizens or Indonesian legal entity. If it is known that a foreigner had left Indonesia, then such Right to Use must be released immediately.

Keywords: Home, ownership, foreigners

INTRODUCTION

Indonesia is a constitutional state based on law and legislation, so that in all actions and legal events, the rights and obligations contained therein. State as the sole carrier of the rights and obligations of the people, one of which is to have control over land and natural resources aimed at prosperity of the people. Article 33, paragraph 3 of the Constitution of the Republic of Indonesia Year 1945 (1945 Constitution) states that : "*The land and water and natural resources contained therein shall be controlled by the state and used for the greatest benefits of the people*".

Based on the above provisions it can be interpreted that the people have the right to use and control the land legally and such does not violate the law. Furthermore, Article 33, paragraph 5 of 1945 Constitution states that: "*Further provisions relating to the implementation of this article are regulated by law*". And currently it is regulated by Law No. 5 of 1960 regarding the Basic Regulation of Agrarian Principles (known as UUPA).

In Article 2 Paragraph 4 of UUPA it is stated that: "*The implementation the State's right to control mentioned above, as required, can be delegated to the Autonomous regions and customary law communities, provided that it is not contrary to the national interest, in accordance with the provisions of Government Regulation.*" In connection with the article, it gives the right to control land to communities and customary law communities as well as the regional to be used for social function.

The understanding of Social Function in the Paragraph II item 4 of General Explanation of UUPA, it is mentioned that the fourth basis is placed in article 6, that "All of the land rights have social functions". This means, that any land rights existing in a person, can not be justified, that the land would be used (or not used) solely for his (her) own interests, especially if it causes losses to the community.¹

Land use must be adapted to the circumstances and the nature of the right, so that it benefits both for the welfare and happiness for those who have the right as well as beneficial for the community and the State. However, such provisions do not imply that individual interests

¹ General explanation of Law No. 5 Year 1960 regarding basic agrarian law

will be driven entirely by the public interest (community). Basic Agrarian Law also pays attention to the interests of the individual.²

The state gives rights of control land as the object of the National Land Law which include, first, the right of the people of Indonesia, containing 2 (two) elements, namely: a. common property element which is civil in nature, but that does not mean the right of ownership in a juridical sense, that is the common land of all the people of Indonesia who have been united into a nation of Indonesia. Article 1, paragraph (1) of UUPA shows the communalistic public nature of the conception of the National Land Law; b. elements public authority duty which is to organize and lead the usage of such common property (land).

Second, rights of control land of the State, this right gives the authority to physically control and use such as land rights due to its nature solely as a public authority as explained in Article 2 of the UUPA. Third, customary (*ulayat*) rights of customary law communities, customary (*ulayat*) rights are still recognized as long as the customary rights are still alive, and its implementation is based on the provisions of the UUPA and interests of developments currently in process. Fourth, the rights of individuals, including, land rights, donations of freehold land, security right of land (encumbrance) and ownership of the apartment units.³

Article 16 of UUPA mentions the types of land rights, namely the freehold title, right to cultivate, right to build, right to use, lease rights, land clearing right, forestry rights, others rights that are not included in the rights mentioned above will be determined by the Law. In addition there are other rights that are temporary in nature as mentioned in Article 53 of UUPA, however, these rights are restricted in nature.

The said restriction is that there is prohibition on ownership of land and houses by foreigners. Only Indonesian citizens are entitled to obtain freehold title on land, while the foreigners are only allowed to acquire the rights to use and lease right. Under certain circumstances foreigners may gain rights either through inheritance without a will or asset integration due to marriage and sale-purchase, exchange, grant, award through a will, award according to the custom and other actions as set forth in government regulations.

Foreigners who live and occupy residential houses in Indonesia receive special treatment in legislation. This means that there are restrictions on ownership of the residential houses by foreigners which are very different from the Indonesian citizens. Foreigners who work and live in Indonesia also need residential house, while the laws restrict and even prohibit the ownership of residential house by foreigners.

Therefore, through this paper, Writer does the writing and legal research regarding home ownership by foreigners living in Indonesia. As for the legal issues discussed in this paper are, **first**, whether foreigners can own land rights in Indonesia? **Second**, how is ownership by a foreigner of the residential house or apartment unit according to the land law?

RESEARCH METHODS

Research is a fundamental tool in the development of science. The research's aim is to reveal the truth systematically, methodologically and consistently, including legal research. As a *sui generis* science, legal study is a science of its own kind, legal studies has a distinctive

² *Ibid*

³ Arie S. Hutagalung, Markus Gunawan, *Kewenangan Pemerintah di Bidang Pertanahan*, 2009, Raja Grafindo Persada, pg. 20. Also read Budi Harsono, 1971, *Undang Undang Pokok Agraria : Sejarah Penyusunan, Isi dan Pelaksanaannya*, Jilid I, Djambatan, Jakarta, pg. 22.

character which is normative in nature.⁴ Thus the method of research in the legal studies also has its own method. Methods and procedures of research for natural sciences and social studies can not be applied in the legal studies.⁵

The type of research in this paper uses the normative juridical type with normative legal research methods, including reviewing and analyzing the legal materials and legal issues related to the problems studied. This research is done to solve problems that arise, while the results will be achieved is in the form of prescriptions about what ought to be done to resolve the issues.

The approach used in this research is the Statute approach, the historical approach and the conceptual approach. Historical approach enables the researcher to understand the law in more depth about a system or an institution or a specific legal arrangement so as to reduce errors, both in the understanding and application of an institution or a specific legal provision. The organization of law which is now prevailing contains the elements of the organization of the law in the past and they form seeds of the organization of law in the future.

The Statute approach is performed by reviewing all laws and regulations pertaining to the legal issues that are being addressed. The Statute approach will open up opportunities for the researcher to study the consistency and compatibility between one law and the other law or between the law and the Constitution of the Republic of Indonesia of 1945 or between the regulation and the land law.⁶

The historical approach is performed by examining the background of what is being studied and the development of the legal issues at hand. The research is done in order to tracking the history of legal institutions from time to time. On the other hand the researcher also shall be able to look for basic philosophy of the dynamics of the law from time to time.

The conceptual approach is an approach that departs from the views and doctrines in legal studies. These views and doctrines will find ideas that give birth to notions of law, legal concepts and principles of law that are relevant to the legal issues encountered in this study .

Sources of legal materials used in this research is the Primary Law Materials, which are authoritative legal materials, meaning that such legal materials have the authority, which consists of legislation, official records or treatises.

In this research, the legislations used as the primary legal materials are the Law of the Republic of Indonesia Number 5 of 1960 regarding the Basic Regulation of Agrarian Principles and Government Regulation No. 103 of 2015 regarding the Ownership of Residential Property or Housing by Foreigners Domiciled in Indonesia.

Secondary law materials covering all publications regarding the law which are not official documents. Publication regarding the law includes text books, theses, law dissertations, legal dictionaries, comments on the court decision, also the opinions of legal experts published via journals, magazines or the website.

DISCUSSION

Ownership of Right on Land by Foreigners

⁴ Philipus M Hadjon dan Tatik Sri Djatmiati, *Argumentasi Hukum*, Gajah Mada University Press, Yogyakarta, 2005, hal.1

⁵ Peter Mahmud Marzuki, *Penelitian Hukum*, Prenada Media, Jakarta, 2006, pg.26

⁵ Peter Mahmud Marzuki, *Penelitian Hukum*, Prenada Media, Jakarta, 2006, hal.26

⁶ *Ibid*.pg.93.

Foreigners are individuals who are not citizens of Indonesia (Article 1 paragraph 9 of the Law of the Republic of Indonesia Number 6 of 2011 regarding Immigration). A foreigner domiciled in Indonesia, who hereinafter referred to as a foreigner is a person who is not an Indonesian citizen whose whereabouts benefits, does business, works or invests in Indonesia (Article 1 paragraph 1 of Government Regulation No. 103 of 2015 regarding Ownership of Residential Properties or Housing By Foreigners domiciled in Indonesia).

Foreigners that are non-Indonesian citizens are foreign nationals both legal entities or private in nature which with the permission of legislation can carry out activities and have a place to stay in Indonesia. Basic Agrarian Law or abbreviated as UUPA provides various types of rights to control land, especially for foreigners which is to obtain right to use only. Legal entities, both Indonesian and foreign legal entities, and foreigners are only allowed to control and use land, if it is expressly allowed by the relevant regulations.

The law prohibits land ownership by foreigners on freehold title, right to build and right to cultivate. Only Indonesian citizens may have freehold title (Article 21 paragraph (1) of UUPA. The provision states that the land belongs to (the right of) the people of Indonesia, so it is natural that land, especially the ones having freehold title, may only be owned by Indonesia citizens, whereas foreigners can not own freehold title on land.

Philosophically there is a close connection between the nation and land, so it is set forth in the UUPA that those who may have freehold title are only Indonesian citizens, while foreigners are forbidden to own land having freehold title. Prohibition of land ownership by foreigners reflects the nationality principle as set forth in Article 1 paragraph (1) that the entire territory of Indonesia is an integral part of homeland of the people of Indonesia united as Indonesian nation.

The entire territory of Indonesia is a gift from the God Almighty which is the right of the people of Indonesian and constitutes national assets. The relationship between Indonesian nation and the entire earth, water and air space which constitute the territory of Indonesia is everlasting relationship in nature. Therefore it is natural that if land is deemed as one of the gifts for the people of Indonesia, the right is solely given to Indonesian citizens, not to foreign (people) citizens.

Such also applies to the Right to Cultivate (HGU) and Right to Build (HGB) which can only be owned by Indonesian citizens and Indonesian legal entities. Foreigners and foreign legal entities are prohibited from owning land having HGU and HGB. If they (foreigners and foreign legal entities) own the land with HGU and HGB then within 1 year they shall relinquish their rights or assign their rights to other parties. If such provision is not complied with, then the right on the land is void and the land shall become the state property, provided that the other parties' rights shall be respected or taken into account in accordance to the prevailing regulations.⁷

In the explanation of Article 30 and Article 36 of UUPA it is explained that HGU and HGB may not be owned by foreigners. Legal entities that may own such right are legal entities having national progressive capital, whether native or non-native. For legal entities having foreign capital, it is only possible to be granted HGU and HGB, if such is required by the Law governing national development plan (Article 55 of UUPA).

Linkage that foreigners living in Indonesia can only occupy the residence through the right to use and lease. Definition of home according to the Dictionary of Indonesian Language: (1)

⁷ See Article 30 paragraph (2) and Article 36 paragraph (2) of UUPA.

building for a place to stay; or (2) buildings in general (such as buildings).⁸ According to the Law of the Republic of Indonesia No. 1 of 2011 regarding Housing and Residential Area, in Article 1 paragraph 7 it is stated: "*A house is a building that serves as decent residence, tools to nurture family, a reflection of the dignity of its inhabitants, as well as an asset for the owner*".

According to the Civil Code (KUH Perdata), the house is immovable property by its nature (Article 506). Immovable properties are such as land and everything attached to or incorporated in it, or trees and plants whose roots are embedded in the soil or fruit on the trees that have not been picked, as well as mine items (minerals).

Immovable properties due to its function or intended use (Article 507 of the Civil Code), such as factory and the goods it produces, mills, and so on. Also housing and objects attached to the board or wall such as mirrors, paintings, jewelry, *et cetera*. In addition it also includes objects relating to land ownership such as fertilizer, honey on trees and fish in the pond, and so on. Other immovable properties in the form of building materials coming from the ruins of buildings that will be re-used to build the building, and others.

Immovable properties due to the provisions of the law, for example, right to use produce, and the right to use of the immovable properties, *hak pengabdian tanah, hak numpang karang, et cetera*. (Article 508 of the Civil Code). In addition, pursuant to the provision of Article 314 of the Commercial Code (KUHD), vessels measuring gross weight of more than 20 m³ may be recorded in a register of ships so that they are included in the category of immovable properties.

Ownership of Single House and Apartments by Foreigners.

Home ownership by foreigners is set forth in Government Regulation No. 103 of 2015 regarding Ownership of Residential Property/Housing By Foreigners Domiciled in Indonesia. Government regulation sets limit on occupied homes, namely single house (detached house) and apartment units. According to Article 1 paragraph 2: "*Single house is a house that has its own plot of land and one of the walls of the building is not built right on the limit of the plot*". Furthermore, in Article 1 paragraph 3 it is stated: "*Apartment units hereinafter referred to as Apartment Units are apartments whose main purpose is to be used separately from their main function as housing and have a connecting to a public road*".

Furthermore in Article 2 paragraph 1 and 2 it is stated under (1) Foreigners can own a house for residence or housing with the right to use. (2) Foreigners who may have a residence or housing as referred to in paragraph (1) are foreigners who hold residence permits in Indonesia in accordance with the provisions of the legislation. Thus, the terms and conditions for foreigners who would like to own residential house and housing are to meet the residence requirement. So, not all foreigners are eligible to obtain the rights granted by the legislation to own a residential house or housing, unless they fulfil the predetermined requirements.

Residential houses or housing that can be owned by Foreigners are single houses (detached houses) built on Right to Use land over state land or Right to Use over Freehold Title controlled by agreement to grant Right to Use over Freehold Title with Land Deed Official deed. In addition, residential houses that can be owned by foreigners are apartment units in an apartment complex built on the Right to Use land. The apartment units can be owned by foreigners living in Indonesia on condition they have a residence permit. This means that ownership of the apartment units are granted to foreigners living legally in Indonesia.

⁸ <http://kbbi.web.id/rumah>, accessed on 30 January 2016

Single house is a house that has its own plot and one of the walls of the building is not built right on the limit of the plot. Single house given over the Right To Use land as referred to in Article 4 paragraph a item 1, is given for a period of 30 (thirty) years. Such Right to Use, may be extended for a period of 20 (twenty) years. Single house on Right to Use over Freehold Title controlled by agreements are subject to the provisions of Articles 1320 and 1338 of the Civil Code and shall be recorded in the land book and title deed (certificate) of the relevant land.

In accordance to such agreement, it may be given Right to Use for an agreed period of not more than 30 (thirty) years. Such period may be extended for 20 (twenty) years at the longest in accordance with agreement with the holder of right on the land. Right to Use may be renewed for a period of 30 (thirty) year at the longest in accordance to the agreement with the holder of land right as long as such Foreigners still hold residence permit in Indonesia.

If foreigners or their heirs no longer hold residence permit or no longer domiciled in Indonesia, then within a period of 1 (one) year they shall relinquish their rights or assign their rights to other eligible parties. If no relinquishment or assignment of the house and land to other eligible party is made, then right to the land is cancelled and the land shall be directly controlled by the state. While the other parties' rights which are embedded to the land shall be honored.

Construction and ownership of Apartment units are regulated in Law of the Republic of Indonesia Number 16 of 1985 regarding Apartments as replaced by the Law of the Republic of Indonesia Number 20 of 2011 regarding Apartments. The definition of Apartment in accordance to Article 1 paragraph 1 of the Apartment Law No. 20 of 2011 is a multi-storey building which is built in a community which is divided into functionally structured sections, both horizontally and vertically, consisting of units, each of which can be owned and used separately, especially for housing equipped with common parts, common properties, and the common area.

Furthermore, in Article 1 paragraph 3 of Apartment Law there are also called apartment units which form parts of the Apartment whose designated purpose is to be used separately as residential housing having requirement that it must have the connecting facility to a public road so that the owner can be free to use it individually without disturbing the activities of others. So in the apartment complex besides common right, there is also an individual right, namely the ownership of the apartment unit.

Apartment construction using common land, which is a parcel of land that is used on the basis of inseparable common rights, upon which Apartment is erected which specifies its limit by a building permit requirements as set forth in Article 1 paragraph 4 of the Apartment Law. This right to common land in turn determines whether or not a person may own freehold title to the Apartment unit. Apartment in Apartment Law consists of several types:

- a. General Apartment is apartment built to fulfill the housing need of low-income people.
- b. Special Apartment is apartment built to fulfill special needs.
- c. State apartment is apartment owned by the state and serves as a residence or housing, fostering families facility, as well as supporting facility on the implementation of official duties and / or civil servants.
- d. Commercial Apartment is apartment built to earn profit.

Article 17 of the Apartment Law states that the apartments may only be built on the land having 1) Freehold Title; 2) Right to Build or Right to Use over State Land; 3) Right to Build

or Right to Use or Right to Use over Right to Manage. Ownership of apartment by foreigners in Government Regulation Number 103 of 2015 is for apartment units built on Right to Use land plot.

Right to Use is right to use or to collect the produce from the land controlled by the state or on land owned by another person who gives authorizations and obligations as set forth in the decision of administration by the competent authority or in agreement with the land owner which is not a rental agreement or land management agreement. The period given for the Right to Use is 30 years and may be extended for a maximum period of 20 years and can not be extended anymore, but it can be renewed.

Right holder is obligated for: 1) good maintenance of land and buildings on it as well as preserving the environment; 2) returning the land given with the Right to Use to the State after the Right to Use is cancelled; 3) handing over Right to Use Certificate which has been cancelled to the Land Head Office of city/local district; 4) Holder of Right to Use is entitled to retain and use the land given with the Right to Use for a definite time for personal usage as well as to transfer such rights to other parties and encumbered it, or as long as it is used for certain purposes.

The administration of the time period on the Right to Use on State Land or Right to Use on Freehold Title land is very important from the investment's point of view. Right to Use may be owned by an Indonesian citizen and Indonesian legal entities established under Indonesian law and domiciled in Indonesia. Right to Use is the only rights to land that can be owned by foreigners domiciled in Indonesia or foreign legal entities that have representatives in Indonesia. Right to Use according to the Mortgage Law (Law of the Republic of Indonesia Number 4 of 1992) is a right that can be encumbered with mortgage (both Right to Use on State Land or Right to Use on Freehold Title Land).⁹

Right to Use shall be registered because it is the object of land registration. The Land Registry Understanding is set forth in Government Regulation No. 24 of 1997 regarding the Land Registration. Article 1 paragraph 1 Government Regulation No. 24 of 1997 states: "*Land Registration is a series of activities continuously undertaken by the Government, constant and orderly covering the collection, processing, bookkeeping, and presentation as well as the maintenance of physical data and juridical data in the form of maps and lists*". Regarding the land areas and the apartment units, it shall cover the delivery of documents as evidence of its right to the plot of land whose right is current and freehold title of the apartment units as well as certain encumbered rights.

Foreigners are given the Right to Use for single house through new purchases and Freehold Title on Apartment Unit on Right to Use for purchase of new apartment units. The apartment units may also be obtained through lease and shall constitute as an agreement. Article 1548 of the Civil Code states that: "*Lease is an agreement under which a party binds himself to confer onto another party the enjoyment over an object for a definite period of time and for a price, which the later agrees to pay*".

A lease is an agreement whereby a party binds himself to confer onto another party the enjoyment over an object, for a definite period of time and for a price which the later agrees to pay.¹⁰ In relation to the rights over land, a lease may be done against all land rights, namely the freehold title, Right to Build, Right to Cultivate and Right to Use.

⁹ Adrian Sutedi, *Hukum Rumah Susun & Apartemen*, Sinar Grafika, Jakarta, 2010, pg. 268-269.

¹⁰ R. Subekti, *Aneka Perjanjian Buku II*, Citra Aditya Bakti, Bandung, 1995, pg.39

A party which becomes a tenant of the land may be anybody without any restrictions, so that foreigners and foreign legal entity may become a subject (lessee) of the right to the land both for residential (housing) and for businesses (investment) purposes. An individual or legal entity has the right to lease the land when he is entitled to use another parties' land for building purposes by paying the owner a sum of money as rent (Article 44 paragraph (1) UUPA).

CONCLUSION

Foreigners are non-citizens of Indonesia whose existence benefits, do business, work or invest in Indonesia, both private and legal entities conducting activities and domiciled in Indonesia who have residence permits and meet requirements predetermined by the legislation. The government gives the right to foreigners living in Indonesia by granting the right to acquire a residence. The foreigners are forbidden to have freehold title, Right to Cultivate, and Right to Build over land. The land right that can be owned by foreigners is the Right to Use on state land or on land having freehold title. In addition, foreigners may have the right on land with lease right to erect a building.

In the UUPA and Government Regulation No. 103 of 2015 it is stated that foreigners may only have single houses and apartments, not on freehold land but on Right to Use land or lease rights. Ownership of apartment units for foreigners is subject to the provisions of the apartment law, while single houses are subject to the land law. Acquisition of a single house obtained through sale and purchase of houses on the Right to Use land or on the lease rights. Both kinds of such rights (right to use and the lease right) have a limited time period as specified in the agreement and legislation.

REFERANCE

- [1] Adrian, S. (2010). *Hukum Rumah Susun & Apartemen*. Jakarta: Sinar Grafika.
- [2] Adrian, S. (2006). *Peralihan Hak Atas Tanah dan Pendaftarannya*. Jakarta: Sinar Grafika.
- [3] Parlindungan, A.P. (1999). *Pendaftaran Tanah Di Indonesia*. Bandung: Mandar Maju.
- [4] Arie S. Hutagalung, Markus Gunawan, (2009). *Kewenangan Pemerintah di Bidang Pertanahan*. Raja Grafindo Persada.
- [5] Budi, H. (1971). *Undang Undang Pokok Agraria : Sejarah Penyusunan, Isi dan Pelaksanaannya*, Jilid I, Jakarta: Djambatan.
- [6] Philipus, M., Hadjon, dan Tatik Sri Djatmiati, (2005). *Argumentasi Hukum*, Yogyakarta: Gajah Mada University Press.
- [7] Peter, M. M. (2006). *Penelitian Hukum*, Jakarta: Prenada Media.
- [8] Subekti, R. (1995). *Aneka Perjanjian Buku II*. Bandung: Citra Aditya Bakti.
- [9] Law No 5 of 1960 regarding Basic Agrarian Law.
- [10] Government Regulation No. 103 of 2015 regarding Ownership of Residential House or Housing By Foreigners Domiciled in Indonesia.
- [11] <http://kbbi.web.id/rumah>