International Journal of Multicultural and Multireligious Understanding

http://ijmmu.com
editor@ijmmu.com
ISSN 2364-5369
Volume 11, Issue 4
April, 2024
Pages: 363-372

Discourse on Land Law Matters in the Framework of Granting the Status of Land Use Rights for Foreign Citizens in Indonesia

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http://dx.doi.org/10.18415/ijmmu.v11i4.5692

Abstract

The development of agrarian law in Indonesia has experienced a significant shift due to the influence of globalisation with its free market that encourages borderless development between countries. However, the principle held in the Indonesian constitution affirms the ownership of the earth, water, land, and all below and above it is the power of the state, which is intended for welfare, but also takes into account the existence of various types of land rights. The phenomenon of foreign nationals who actually want to smuggle the law by trying to own property rights to land, as well as outsmart the right of use they have, of course, this triggers the urgency of this paper to specifically examine, analyse, and find the dynamics and problems of Land Law in the Framework of Granting the Status of Land Use Rights for Foreign Citizens in Indonesia. This paper is supported by normative juridical research methods with a statutory approach, legal concept approach, legal fact approach, and relevant case law approach. This research has led to the discovery of the failure of positive law to accommodate clear and definite regulatory conditions in order to provide justice and legal protection to the basic rights of Indonesian citizens, especially against the growing phenomenon of the deviation of the Right to Use by foreign citizens in Indonesia. The findings of this research also dive into the formulation of norms needed to ensure justice, usefulness and legal certainty for the guarantee of land rights for Indonesian citizens, with limitations and norms of law enforcement for various potential deviations of the Right to Use by foreigners. In addition, it is necessary to establish a supervisory team by the government, especially related to the granting of the status of the Right to Use the land for Foreign Citizens and the provision of strict sanctions, both criminally and civilly in the form of compensation in the event of a violation of the utilisation and use of the Right to Use land that is not in accordance with its designation to Foreign Citizens domiciled in Indonesia, this is in order to provide a deterrent effect to Foreign Citizens if proven to have violated the law.

Keywords: *Land Law; Right to Use; Foreign Citizens; Indonesia Agrarian Law*

Introduction

Land Law Problems that have occurred in Indonesia are sourced from Legislation that has been formed from the Dutch era until now, one of the causes of various legal problems in Indonesia is in the Land Sector. In the Dutch era, land regulations were divided into three groups (Wardani et.al. 2023),

namely: The three types of groups each have their own legal system and are obliged to obey and comply with the legal system that has been determined at the time of the government at that time, meaning that Europeans in Indonesia at that time were subject to land law formed in the Dutch Civil Code system, while the natives were subject to their respective customary law systems.

Over time until 1960 Indonesia implemented legal unification with the establishment of the Basic Agrarian Law (UUPA), in relation to the application of legal unification caused the division of the land law system for European and Foreign Eastern groups to no longer apply in Indonesia.

The Basic Agrarian Law was formed not only to regulate land, but also mining and all matters related to natural resources, but during the shift from the Old Order Era to the New Order in 1966 there was a significant change in land policy (Priyatno, et.al. 2023). The government during the New Order era made land and natural resources in Indonesia the basis of funding sources for infrastructure development which indirectly "exploited" natural resources and land by giving authority and delegation of rights to land and natural resources to private individuals or private companies, even foreign private companies. The impact of this policy is that land and natural resources in Indonesia are massively exploited by large capital owners, causing "injustice" in the land sector, one clear example is the granting of the status of Right of Use to Foreign Citizens on land owned by Indonesian Citizens.

The granting of Right of Use status on land is one of the types of land rights regulated in Law Number 5 of 1960 concerning Basic Agrarian Principles. Article 16 of the Basic Agrarian Law states that there are several types of land rights, namely: Right of Ownership, Right to Cultivate, Right to Construct, Right of Use, Right of Lease, Right to Open Land, Right to Harvest Forest Products, and other rights (Adjie, 2023).

In the provisions of Article 41 of Law Number 5 of 1960 concerning Basic Agrarian Principles, it is stated that the Right of Use is a right granted to use and/or collect products from land directly controlled by the State or land owned by others (Gold & Zuckerman, 2014), which gives the authority and obligations specified in the decision to grant it by the official authorised to grant it or in an agreement with the land owner (Suartha, et.al., 2020), which is not a lease agreement or a land processing agreement (Kusumadara, 2023), everything related to land as long as it does not conflict with the spirit and provisions of the Basic Agrarian Law.

As for what distinguishes the granting of the status of Land Use Rights from the granting of other land rights, the right to use is the only type of granting of land rights in the Basic Agrarian Law that can be given to individual Foreign Citizens or by forming a Limited Liability Company or Foreign Legal Entity, because the granting of the status of Land Use Rights gives limited authority but does not contain the term limit referred to in accordance with the provisions of the Basic Agrarian Law Article 41 states that:

1. The right of use is the right to use and/or collect products from land directly controlled by the State or land owned by others, which gives the authority and obligations specified in the decree granting it by the official authorised to grant it or in an agreement with the land owner, which is not a lease agreement or a land processing agreement, everything as long as it does not conflict with the spirit and provisions of this Law.

2. The right of use may be granted:
   a. For a certain period of time or as long as the land is used for a certain purpose;
   b. For free, with payment or with the provision of any services.

3. The granting of the right of use must not be accompanied by conditions that contain elements of extortion.

In accordance with the provisions of Article 42 of the Basic Agrarian Law, the granting of the right of use status can only be owned by:

1. Indonesian citizen;
2. Foreign citizens domiciled in Indonesia;
3. Legal entities that have been established according to the Indonesian legal system and the legal entity is domiciled in Indonesia; and
4. Foreign legal entities that have representatives in Indonesia.

The granting of Right to Use status for Foreign Citizens has also been regulated in Articles 5 and 6 of Government Regulation Number 103 Year 2015, in Article 5 it is stated: "Foreigners are granted the Right of Use for Single House for new purchase and the Right of Ownership on Flat on the Right of Use for Flat for new unit purchase" (Iswara, et.al. 2023). Article 6 states:

1. Single House granted on Hak Pakai land as referred to in Article 4 letter a number 1, shall be granted for a period of 30 (thirty) years.
2. The Right of Use as referred to in paragraph (1) may be extended for a period of 20 (twenty) years.
3. In the event that the extension period as referred to in paragraph (2) expires, the Right of Use may be renewed for a period of 30 (thirty) years.

The birth of the Reform Order became a momentum to restore the spirit of the ideals of the establishment of the Basic Agrarian Law with the issuance of TAP MPR IX Agrarian Reform in 2001, the basic principle of agrarian reform is the restructuring of control, ownership, use, and control of land and natural resources with the aim that justice can be felt by all levels of Indonesian society (UNPAD, 2022).

In 2021, the National Land Agency issued a number of Government Regulations related to land as a follow-up to the Job Creation Law. There is a misalignment of agrarian regulations after the Job Creation Law was enacted (Astariyani, et.al., 2023). In addition, there is a Government Regulation, Number 18 of 2021 which does not mention the Basic Agrarian Law as a reference basis for the establishment of the granting of the status of the Right to Use land for Foreign Citizens and the Job Creation Law has been cancelled because it was declared unconstitutional by the Constitutional Court, but in the course of time the Government re-issued Law Number 6 of 2023 concerning Job Creation to replace the previous Job Creation Law which was declared unconstitutional, Government Regulation Number 18 of 2021 should be revoked and not applicable because the Basic Law is legally flawed. In the provisions of Government Regulation No. 18 of 2021 which ignores the basic concept of land in the Basic Agrarian Law, where the Job Creation Law does not mention the Basic Agrarian Law as a basis of reference. Of course, if we consider that the Basic Agrarian Law is positive law, applicable law, it should be a provision that is referred to regarding the new land laws that are currently being formed, instead of being ignored and ignored by the government (UMA, 2022).

The Term of Right of Use in Government Regulation Number 18 of 2021 in Article 52 states that:

1. The right of use on State Land and Land under Management is granted for a maximum period of 30 (thirty) years, extended for a maximum period of 20 (twenty) years, and renewed for a maximum period of 30 (thirty) years.
2. Right of use during use is granted for an indefinite period as long as it is used and utilised.
3. Right of use with a term on Land of ownership, granted for a maximum period of 30 (thirty) years and renewable by deed of grant of right of use on Land of ownership.

With reference to the problematic, this paper specifically leads to the context of finding, examining, and fixing related legal problems on the Granting of Land Use Rights Status to Foreign Citizens in Indonesia.

Method

This article is based on normative juridical research methods (Hutchinson & Duncan, 2012), supported by the statutory approach, legal conceptual approach, and legal fact approach (Sudiarawan, et.al. 2020). With the discovery of sources of legal material as a study material both primary, secondary and tertiary legal materials. In this article which is prescriptive analytical in nature, found through literature studies then the source of legal material is analysed and reviewed with interpretation techniques and legal systematization techniques (Hutchinson, 2015).

Results and Discussion

At this time in Indonesia, the direction of development in the use and utilisation of land has shifted from capitalist to commercial, even when the monopoly of foreign capitalists and foreign private corporations dominates in Indonesia, the State administrators issued regulations that make it quite easy for foreign nationals to obtain ownership status and utilisation of land, one of which is temporary land use rights (Sudiro, 2018). In the provisions of Agrarian law in Indonesia that contain regulatory material on land, it is stated that land is one of the objects that has always been the focus of discussion in legal research (Butt & Lindsey, 2008). To regulate the utilisation and use of land rights in Indonesia, it is regulated in the Land Law, namely Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles (Kusumadara, 2013). The right to control land by the State and the status of land ownership rights is one type of land ownership status that was first introduced through the Basic Agrarian Law (Subawa, et.al. 2024).

The legal relationship between Indonesian Citizens (WNI) or Foreign Citizens (WNA) in carrying out a legal action related to land is also regulated in Law Number 5 of 1960 concerning Basic Agrarian Principles or abbreviated as UUPA. One of the principles contained in the Basic Agrarian Law is the principle of nationality (Subawa, et.al. 2023a), which means that only Indonesian citizens have full rights to land (Rahmawati & Sudarwanto, 2023). In accordance with the provisions in Article 21 paragraph 1 of the Basic Agrarian Law, the rights in question are property rights to land while foreign citizens or foreign legal entities in Indonesia are given the status of Use Rights with a certain period of time. In the event that there is one implementing regulation of the Basic Agrarian Law that has not been implemented clearly and well, it is the issuance of a Government Regulation on the Right of Use (Sumardjono, 2007). In order to prepare the Draft Government Regulation on the Right of Use, especially on the granting of the Right of Use for foreigners, several aspects must be considered, namely: juridical aspects, normative aspects, political aspects, social aspects, and economic aspects of society (Sumardjono, 2001).

The actual idea of the establishment of the Basic Agrarian Law is a concept of the State participating in regulating the utilisation of natural resources as a means to meet the needs of the people and land regulations or restrictions for everyone who is required to obey and comply in order to use the land facilities in question (Solehudin, 2022). Article 2 paragraph 1 of the Basic Agrarian Law stipulates that: "water, space, and air, including the natural resources contained therein, are at the highest level controlled by the State as the organisation of the power of all the people" (Bedner & Arizona, 2019). Furthermore, Article 2 paragraph 2 of the Basic Agrarian Law stipulates that the right of State control as referred to in Article 1 paragraph 1 authorises the State to:

1. Regulate the allocation, use, supply, and maintenance of the earth, water, and airspace.
2. Determine and regulate legal relations between persons and the earth, water, and airspace.
3. Determine and regulate legal relations between persons and legal acts concerning the earth, water, and space.

The Basic Agrarian Law (UUPA) has the following main objectives:

1. To lay the foundation for the preparation of a national agrarian law that is a tool of prosperity, happiness and justice for the State and the peasantry, in the framework of a just and prosperous society.
2. As a legal basis to establish unity and simplicity in land law.
3. As a legal basis to provide legal certainty regarding land rights for the people as a whole.

Land is part of the earth's surface which is a unit of land that has certain boundaries, on the land there are land rights both owned by individuals and legal entities (Sangsun, 2007). The use of land in Indonesia is one of the most important things because no human or other living creature can live without land, humans work and live daily on the land and the main source of food is also obtained and grown on the land. Apart from providing benefits, land also provides potential problems and can trigger a social crisis.

The impact of the issuance of Government Regulation Number 18 of 2021 as a derivative regulation of Law Number 11 of 2020 concerning Job Creation on Government Regulation Number 103 of 2015 is not too significant regarding the time period because in the provisions of PP 103 of 2015 concerning the Ownership of Residential or Residential Houses by Foreigners Domiciled in Indonesia content of the time period in accordance with the provisions in Article 7 paragraphs 1, 2 and 3 remains the same (Mahendra & Yustiawan, 2023).

But in its development the Indonesian House of Representatives approved and passed the Job Creation Law which was promulgated by the government and took effect in the provisions of 02 February 2021, In the course of time the Constitutional Court of the Republic of Indonesia cancelled the provisions in the Job Creation Law Number 11 of 2020 with the condition that it must be corrected within the period based on Decision Number 91 / PUU-XVII / 2021, the decision was read out on 25 November 2021 (Hermanto & Aryani, 2021).

In its development, the President issued a Government Regulation in Lieu of Law Number 02 of 2022 concerning Job Creation which is enough to make legal dynamics questionable because the mandate of the Constitutional Court's decision on the Job Creation Law was declared unconstitutional with conditions and its substance was required to be corrected within 2 years, But suddenly the Government Regulation in Lieu of the Law was issued which made it ambiguous and created a legal vacuum because the Job Creation Law had not yet been revised but another Government Regulation in Lieu of the Law had emerged, the urgency of interests and legal certainty for other implementing regulations became unclear because the old rules had not yet provided legal certainty (Subawa, et.al. 2023b) and real impact on society but had been replaced without involving academics or legal practitioners (Hermawan,et.al., 2022).

In its development again and again the government stipulates Government Regulation in Lieu of Law Number 2 of 2022 concerning Job Creation into Law Number 06 of 2023, here an analysis of legal thinking can be taken that there is no sufficiently urgent interest or urgency related to the problems that must be taken and formed into a new regulation (Dharsana, et.al. 2023), because the Constitutional Court alone in the consideration of its decision states that the Job Creation Law must be corrected or revised because some of the provisions in it are conditionally unconstitutional (Hermanto, 2023), but why does the Government not comply with the considerations and excerpts of the Constitutional Court's decision but instead make a new legal product whose relevance is not much different from the Job Creation Law (Wiratraman, 2022), and this has become a big question in the community, even a lawsuit has been filed to request the cancellation of the issuance of the regulation to the Constitutional Court (Rahmawati & Rahayu, 2023).

Thus it can be concluded based on the results of this analysis, according to the author's observations related to the enactment of Law Number 11 of 2020 concerning Job Creation which has been replaced or the issuance of Government Regulation in Lieu of Law Number 02 of 2022 concerning Job Creation which has been ratified by Law Number 06 of 2023, the rules cannot be implemented because the legal product has not yet issued implementing regulations governing the Term of Use Rights on Freehold Land used by Foreign Citizens because the Job Creation Law must be corrected with a period of 2 years based on the mandate of the Constitutional Court order because Government Regulation Number 18 of 2021 concerning Management Rights (Mahy, 2022), The Government Regulation Number 18 of 2021 concerning Management Rights, Land Rights, Flat Housing Units, and Land Registration as an Implementing Regulation of Law Number 11 of 2020 which has been replaced by Law Number 06 of 2023 raises real uncertainty why Government Regulation Number 18 of 2021 is declared to remain in effect (Aulia & Holis, 2023), while the Law which is the main reference has been revoked, Government Regulation Number 18 of 2021 should also be revoked (Mujiburohman, et.al., 2023).

In addition, there is no general or specific classification that discusses the Right to Use, including the minimum and maximum term of the Right to Use in detail in Law Number 11 of 2020 which has been declared unconstitutional by the Constitutional Court and there is also no detailed discussion in Law Number 06 of 2023 as a replacement for the Job Creation Law, there is absolutely no discussion whatsoever about the Right to Use land both in terms of general understanding, and the term, in the legal product only discusses the Land Bank and also compensation for the Right to Use and Management land. so that Government Regulation Number 103 of 2021 should be revoked, In addition, according to the author's observations in each law regulation has detailed rules for each specificity so that it is quite odd in each different law regulation from various other sectors to be included in 1 volume of law regulation books whose codification or provisions of the content of the regulations are different. Based on the results of this research, there are legal problems that may occur in the future related to the provisions of the time period stipulated in the Basic Agrarian Law, Government Regulation Number 103 of 2015, Government Regulation Number 18 of 2021, and the Job Creation Law Number 06 of 2023, it is clear and clear that it slowly "reduces" the fundamental rights of Indonesian Citizens due to the absence of justice and legal protection for the issuance of these legal regulations and has the potential to cause conflicts and other legal problems in society at a later time due to the "partiality" of the government in forming regulations in the land sector that are favourable to Foreign Citizens.

The provisions of the right of use mentioned in Article 16 paragraph 1 letter d of the UUPA are specifically regulated in Articles 41 to 43 of the UUPA, which in this case, the right of use is aimed at the right to use and/or collect products from land directly controlled by the State or land owned by others (Sumarja, 2015), which gives the authority and obligations specified in the decision to grant it by the official authorised to grant it or in an agreement with the owner of the land which is not a lease agreement or a land processing agreement (Fahmi & Armia, 2022), everything as long as it does not conflict with the spirit and provisions of the UUPA (Rumbayan, 2011).

The apparent problem is related to the Government in implementing the provisions of Articles 42 and 45, especially in enforcing the provisions of Articles 9, 21, 26 and 27 of the UUPA, has issued Minister of Home Affairs Instruction No. 14 of 1982 on the Prohibition of the Use of Absolute Power of Attorney as a Transfer of Land Rights (Minister of Home Affairs Instruction No. 14 of 1982). This instruction was issued in response to the many violations of the provisions of Articles 9 and 26 of the UUPA, namely the practice of transferring land ownership rights to foreigners by means of legal smuggling (Kusuma, et.al., 2022).

In addition, legal smuggling occurs through the institution of marriage regulated in Article 35 paragraph (2) and Article 36 paragraph (1) of Law No. 1 Year 1974 on Marriage (UUP). The issue of property in marriage, whether joint property, inherited property or acquired property, opens up great opportunities for foreigners to obtain and own land titles in Indonesia. At the practical level, the Minister

of Home Affairs Instruction No. 14 of 1982 has not been able to direct foreigners to own HP or HSB, and prevent ownership of freehold land by foreigners, because the absolute power of attorney made by a notary in relation to the deed of sale and purchase binding agreement or what is later better known as the Preliminary Sale and Purchase Agreement is not included in the prohibited use. This means that there is a gap between the *ius constitutum* and the *ius constituendum* regarding the prohibition of ownership of freehold land by foreigners, because the *ius constitutum* still opens up opportunities for ownership of freehold land by foreigners. In *ius constituendum*, foreigners should not be able to own freehold land, but in *ius constitutum*, it is still possible for foreigners to own freehold land allow foreigners to own freehold land ownership. *Ius constituendum* in this case is the aspired law or at the level of legal rules/norms is the rule of prohibition of ownership of freehold land by foreigners to protect the land rights of Indonesian citizens, so that there is not an inch of freehold land owned by foreigners.

The regulation of land rights for foreigners should be able to the regulation of land rights for foreigners should ensure legal protection of the land rights of Indonesian citizens from foreign exploitation, so that no foreigner can own land (Yubaidi, 2020). This gap can occur because in addition to the weaknesses in the absolute power of attorney regulation, the government has issued many laws and regulations that are inconsistent / do not support the position of Article 9 paragraph (1), Article 21 paragraphs (1) and (3) and Article 26 paragraph (2) of the UUPA, as the legal politics of the prohibition of ownership of freehold land by foreigners. The laws and regulations issued tend to encourage foreign ownership of freehold land (Fitzpatrick, 2007). These regulations include, for example, permits for transfer of rights, ease of land acquisition, PPJB, land use brokering, property in marriage, permits for notary honorary councils, residence permits for foreigners, and build-to-sell (Khrisna, 2017).

In addition to the emergence of inconsistent laws and regulations as described above, on the law enforcement side, the decisions are not as expected. Court decisions are not as expected in the face of concrete events, as indicated by several decisions that are not in line with the provisions of Article 26 paragraph (2) of the UUPA. Such decisions may also be due to the fact that the institution/ procedure for land administration has not been regulated in order to uphold the provisions of Article 21 paragraph (3), Article 26 paragraph (2), and Article 27 letter a number 4 of the LoGA. Legislation that has the potential to weaken the UUPA, court decisions that are not as expected, and the unregulated institutions or procedures for controlling land affected by the provisions of Articles 21 paragraph (3), 26 paragraph (2), and Article 27 letter a number 4 of the UUPA at the practical level have implications for the frequent occurrence of legal smuggling of the prohibition of ownership of freehold land by foreigners. Examples of court decisions that are not in line with Article 26 paragraph (2) of UUPA are Denpasar District Court Decision No. 368/Pdt.G/2005/ PN.Dps., dated 21 June 2006 jo. No. 31/Pdt/2007/PT.Dps., dated 13 June 2007 jo. No.170 K/Pdt/ 2008, dated 10 September 2009 jo. No. 302 PK/Pdt/2011, dated 30 September 2011, a case between Michael Alfred Emil Staeck and Kerstin Helena Staeck as plaintiffs/ counterclaim defendants against Sitarasmi Margana as defendant/ counterclaim plaintiff).

In this context, in the future if foreign nationals want to obtain land use rights, a good agreement can be made with Indonesian citizens that does not only benefit one party. Indonesian citizens are also expected to have a strong legal position and legal protection from the government regarding their land rights. The government should provide legal counselling and socialisation of every regulation stipulated, especially regarding regulations, consequences of Land Use Rights regulations, obligations and sanctions, and prohibitions in making an agreement on Land Use Rights Agreements to be implemented by the public through Notaries / PPATs or Officers of the Ministry of Agrarian Affairs / National Land Agency so that every level of society knows and understands the law on every regulation issued by the Government.

Conclusion

The Indonesian State is currently unable to provide justice and protection to Indonesian Citizens due to the absence of clarity and restrictions on the granting of the period of use rights status on land owned by foreigners, due to the inconsistency of various regulations made and issued by the Government, the State should be obliged and play a role in being at the forefront of protecting the rights of its citizens. The existence of Foreign Citizens in Indonesia in the context of granting the status and use of Land Use Rights on Freehold land, should still refer to any applicable laws and regulations, specifically and related to Land Tenure Rights that can be owned by Foreign Citizens, namely the Right to Use. There needs to be regulations that regulate and limit the period of the Right to Use on Freehold land so that it is not too long and in order to provide a sense of justice and legal protection for Indonesian citizens because they can feel and utilise their own land. In addition, the existence of a form of legal certainty and protection for Indonesian citizens is expected to no longer occur a form of legal problems, namely legal smuggling by foreign citizens.

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