

Ownership Of The Right To An Apartment Unit By A Foreign Citizen After The Enactment Of The Job Creation Law

Ilham Nugroho^{1*}, Imam Koeswahyono²⁾, Hanif Nur Widhiyanti³⁾

¹⁾Magister kenotariatan Universitas Brawijaya,

^{2,3)}Universitas Brawijaya

*Corresponding Author

Email: ilham.nugroho71@gmail.com

Abstract

The Law No.11 of 2020 On Job Creation is a new law that aims to facilitate investment initiated by the government of President joko widodo, in the regulation has expanded the rights to apartment units by foreign citizens. In this context, the issuance of these regulations is important to ensure legal certainty, justice and expediency. This article explores the expansion of property rights to the unit flats associated with the principle of nationality in Law No. 5 of 1960 on agrarian principles. In the expansion of property rights to units of flats by foreign nationals in the job creation law should not ignore what is the purpose of the construction of flats in Indonesia.

Keywords : Job Creation Law, Foreign Nationals, The Principle Of Nationality

INTRODUCTION

The development of flats in Indonesia because of its existence is very effective in the use of land, because the development of multi-storey or horizontal. Another advantage is that urban planning is more efficient because residential and office areas are closer which makes the land that was previously supposed to be built a footprint house can be used for other functions (Kuswahyono, 2004). at the beginning of the construction of flats in indonesia which is based on the establishment of Law No. 16 of 1985 concerning flats which clearly and unequivocally describes in Article 3 Paragraph (1) letter A where the purpose of the construction of flats aims to meet the needs of decent housing for the people, especially low-income groups that ensure legal certainty in its use, where in Paragraph (2) , (1) by the word of God. So it is appropriate that changes in the rules regarding the allocation of flats cannot rule out the existence of a decent housing need for low-income people.

With the rapid development of flats in Indonesia, the government has updated the regulations on flats set out in "law No. 20 of 2011 on flats" that repeal and replace " Law No.16 of 1985 on flats". Which in Article 2 sub-letter c states that the maintenance of flats is based on nationalization. This is in line with law No. 5 of 1960 on the basic basic agrarian regulation which also describes the principle of nationality in Article 9 paragraph (1) which states that:

"Only Indonesian citizens can have a full relationship with the earth, water and space, within the limits of the provisions of Article 1 and Article 2"

Ownership of the right to an apartment unit by a foreigner was originally regulated in Article 4 of" Government Regulation No. 103 of 2015 concerning the ownership of residential or residential houses by foreigners residing in Indonesia", but the regulation has been revoked along with the repeal of " government regulation no. 40 of 1996 on right to use, right to use building and right to land "and replaced by" Government Regulation No. 18 Of 2021 On Management Rights, Land Rights, Apartment Units, And Land Registration. Where the government regulation is the implementing regulation of "Law No.11 of 2020 on job creation" that has changed " Law No.20 of 2011 on flats and Law No.1 of 2011 on housing and residential

areas in the amendment of the regulation the government together with the House of Representatives has changed the possibility of foreign citizens ' ownership of property rights to sarusun in Indonesia, referring to two new regulations governing flats in Indonesia, as well as the types of flats that unit flats are not allowed and are allowed for foreign citizens. When referring to Article " 144 paragraph (1) letter C of the job creation law" states that: "the right of ownership of an apartment unit can be given to: foreign citizens who have a permit in accordance with the provisions of the regulations peratundang-undangan". In the uuck implementing regulation on the right to a Sarusun that can be owned by foreign citizens in Article "41 paragraph (1) sub letter B PP 18 of 2021" states that: "flats built on land plots: right to use or right to use buildings on state land, on management rights land; or on property rights land."

The new regulation expands the possibility of rights to apartment units by foreigners in Indonesia which were previously regulated in " Article 4 of government regulation number 103 of 2015" which states that "residential houses or dwellings that can be owned by foreigners as referred to in "Article 2 Paragraph (1)" letter b are: b. Sarusun built on Land Use Rights. And in " Article 1 Number 6 of the regulation of the Minister of Agrarian Affairs and Spatial Planning/ head of the National Land Agency" states that:" the right to use an apartment unit is the right to own an apartment unit owned or owned by a foreigner" with the extension of ownership of an apartment by a foreigner that can be built on the right to use the building or the right to use on state land; or the right to use the building or the right to use the right of management.

From the above legal problems it makes UUCK which is intended to provide ease of investment and legal protection for Indonesian citizens and foreign citizens actually experience conflicts that cause legal uncertainty which of course results in the disinterest of investors in Indonesia due to the expansion of the scope of ownership of rights to flats there is a conflict of norms.

RESEARCH METHODS

The type of research in this thesis research is a type of normative juridical research. Normative juridical research is legal research that lays down the law as a construction of a system of norms, meaning that the norm system is a collection of principles, norms, rules of legislation, Court decisions, agreements and also doctrine (teachings) (Abdulkadir Muhammad. 2004). Primary legal material is a source of legal material that includes the most important laws and regulations and is sorted according to the hierarchy of laws and regulations, secondary legal material is a collection of legal material obtained from books related to rights to flats, scientific journals or law journals. The analysis techniques used are grammatical interpretation, historical interpretation and systematic interpretation to analyze primary and secondary legal materials.

RESULT AND DISCUSSION

The release of UUCK in this case, especially in Article 144 paragraph (1) letter c which aims to encourage the development of the property industry and will have a double impact on the growth of various other industries. Expansion of the granting of property rights over units of flats (HMSRS) on land building rights granted to foreigners including foreign legal entities. In Article 144 paragraph (2) explains, the right of ownership over the unit of flats on the land right to use the building can be transferred or transferred and secured by foreigners. In addition, the property rights to the apartment unit can be guaranteed by being burdened with a mortgage in accordance with the provisions of the legislation, as stated in Article 144 paragraph (3) (Suhaeila Bahfelin, 2020). In Article 145 of the job creation law explains that the property rights of flats

that can be given to foreigners are flats that are on the land of building rights and use rights on state land or management rights (HPL). The article is further regulated in PP No. 18 of 2021 concerning management rights, Land Rights, apartment units, and Land Registration which was promulgated on February 2, 2021. Based on Article 71, it is explained that the flats that can be owned by foreigners are flats that are built on building rights land (HGB) and use rights on state land, freehold land, and HPL land.

In Article 71 of PP 18 of 2021, it also explains that what is meant by other economic areas is urban and/ or urban supporting areas, tourism areas, or areas that support vertical residential development and have an economic impact on the community and will be further regulated in ministerial regulations that have not yet come out. Based on Article 188 paragraph 2 of the regulation of the Minister of Agrarian Affairs and Spatial Planning/ head of the National Land Agency Number 18 of 2021, that the ownership of HMSRS intended for foreigners is the ownership of the building or unit only, not the right to land with it. If a foreigner resells the HMSRS to an Indonesian it will be included back in the land rights with him. In fact, the explanation presented by the Minister of ATR/BPN will complicate the legal construction. This is because to issue a certificate of ownership of the apartment unit must consist of a copy of the land book and a letter on the common land rights according to the provisions, the relevant flat floor plan showing the apartment unit owned, as well as a question about the amount of the right to the common part, the common object and the common land in question are all an inseparable unit (Adrian Sutedi. 2010)

Expansion of ownership of flats which can be given to foreigners where it will ignore the basic purpose of flat development as contained in the consideration of considering letter d of the flat law which explains “that the state is obliged to meet the needs of affordable housing for low-income people.” That is, the allocation of flats is aimed and prioritized to people with low income, not foreigners who certainly have an income far above the average income of the Indonesian people. Second, that the granting of property rights to Sarusun to foreigners has denied the principle of nationality as adopted in the Constitution and the flat law.

If compared to the previous regulation, the actual location of the difference is in the regulation on the ownership of apartment units by foreign citizens, which has undergone several changes, namely in Article 144 and Article 145 which expand the provisions that foreign citizens can own apartments above building Rights, which is clarified in Article 71 of government regulation number 18 of 2021. Based on this, it is clear that the articles in the job creation law and PP number 18 of 2021 that expand the ownership of apartment units by foreign citizens are not limited to land rights, but can also be built on building rights land (Sulistiyono, Sudarwanto. 2022).

When talking about land in Indonesia can not be separated from the UUPA where the Basic Law as an umbrella of land law in Indonesia, in the UUPA contained the principle of nationality. The understanding of the principle of nationality can be seen in Article 9 of the UUPA which regulates that only Indonesian citizens are entitled to own land in Indonesia with the status of property rights, so foreign citizens or foreign companies can only have limited land rights, such as the right to use as stipulated in the UUPA. The principle of nationality can also be interpreted that land as the highest rank is only intended for the Indonesian nation, land cannot freely be the object of business world traffic as it applies to non-land objects .

Provisions on the principle of nationality in the Constitution can be seen in Article 21 paragraph (1) that can have property rights are Indonesian citizens only. In addition, it can also be seen in Article 30 paragraph (1) which states that the right to use business can only be owned by Indonesian citizens and Indonesian legal entities. Similarly, Article 36 paragraph (1) states that only Indonesian citizens and Indonesian legal entities can have the right to use the building. As well as in Article 46 paragraph (1) which states that only Indonesian citizens have the right

to open land and collect forest products.

In the UUPA, only Use Rights can be owned by foreign citizens as regulated in Article 42 of the UUPA. This is because property rights, business use rights and building use rights can be transferred and transferred to other parties, as stated in Article 20 paragraph (2) UUPA concerning Property Rights, Article 28 paragraph (3) UUPA concerning Business Use Rights, and Article 35 paragraph (3) UUPA concerning Building Use Rights, whereas for Use Rights, if you want to carry out a transfer, you must first obtain permission/approval from an authorized official or have it included in the relevant agreement (Mahadewi. 2019). So with the provisions for the transfer of Use Rights must have prior approval/permission from the authorized official and must have been stated in the relevant agreement, then this can prevent foreign citizens from having a close relationship with land in Indonesia (Anggriani. 2012). In Article 47 of Law number 11 of 2011 concerning Flats, it is regulated that SHMSRS is issued to those who meet the requirements as holders of land rights, while the UUPA regulates that those who can become Building Use Rights holders are Indonesian citizens and Indonesian legal entities. This clearly creates a conflict of norms between the Job Creation Law and UUPA

UUCK when related to UUPA regarding the subject and object of ownership of rights to apartment units and building use rights, a conflict of norms will arise. This is because even though the Apartment Unit given to Foreigners only has the right to the room, if the object is above the building use rights, this is contrary to UUPA. A conflict of norms can occur if in one object of regulation there are two conflicting norms so that only one norm can be applied to the object of regulation and the other norm must be set aside. When examined in terms of legal principles, what applies between the Job Creation Law and UUPA is the Principle of *Lex Specialis Derogat Legi Generali*. This principle means that a special law (norm/legal rule), namely UUPA, eliminates the validity of a general law (norm/legal rule), namely the Job Creation Law. Specificity is prioritized over general regulations and it is no longer debated that everything related to special matters is the most important.

The rationality of prioritizing this special law is that special legal rules are certainly more relevant and compatible and more tailored to the needs of more specific laws and subjects that cannot be reached by general legal rules. Since its formation, these special legal provisions have the potential to deviate from general provisions with the intention of complementing or even making improvements or corrections to general legal provisions (Irfani. 2020). In this case, the UUPA is the basis or guideline for every regulation regarding National Land, as well as the Flats Law, which originally also originated from Article 4 of the UUPA. Meanwhile, the Job Creation Law is a general law that not only regulates land but also consists of amendments to 82 other laws and regulations.

The existence of norm conflicts will have an impact on the failure to realize the principle of legal certainty which is the goal of every formation of laws and regulations. Legal certainty is a determining factor in ensuring trust from both its own citizens and foreign nationals. This is related to attracting the interest of foreign nationals who want to invest or just work in a particular country, so that the person concerned feels safe with the existence of laws and their enforcement in accordance with laws and regulations. With the existence of legal certainty in every policy or regulation, every legal process that takes place can be predicted. Related to the existence of the expansion of ownership rights to apartment units by foreign nationals which is indeed aimed at realizing investment facilities, the term harmony means harmony, suitability, conformity and balance (Sulistiyawan.2019).

Legal harmonization is an adjustment to laws and regulations, government and judge decisions, legal systems, and legal principles that aim to increase legal certainty, legal clarity, and justice. As stated by Moh. Hasan Wangkusumah that legal harmonization is a scientific activity as a process of adjusting written laws based on philosophical, juridical, sociological, and

economic values (). Because the ownership of apartment units by Foreign Citizens regulated in the Job Creation Law according to the author is contrary to the Principle of Nationality contained in the UUPA, harmonization or adjustment of the regulations in the Job Creation Law should be carried out, so that it is in accordance with the UUPA which only limits Foreign Citizens to only having Usage Rights, so that the Principle of Nationality can be maintained and legal certainty can be achieved, while currently the status of the Job Creation Law is conditionally unconstitutional for 2 years with the opportunity to make improvements.

CONCLUSION

The government through the Job Creation Law provides opportunities for foreign citizens to own ownership rights to apartment units, this has sparked debate that granting ownership rights to apartment units does not necessarily provide ownership rights to the land. The granting of these rights is limited to the space above state land, this is known as the principle of horizontal separation. The housing that can be owned by foreign citizens has also been limited, and its location, this is intended to facilitate foreign citizens who meet the requirements. In general, the impact of granting ownership rights to apartment units for foreign citizens is a good impact. However, this expansion is contrary to the UUPA which adheres to the principle of nationality where ownership rights and building use rights are only for Indonesian citizens. This expansion, which aims to facilitate investment, certainly cannot ignore the principle of nationality contained in the UUPA, so it is necessary to harmonize the norms contained in the UUPA so that the expansion of the scope of ownership rights to a house by foreign citizens can be implemented.

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