

THE LEGAL PROTECTION FOR FOREIGNERS TO OWN APARTMENTS IN INDONESIA

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9 ABSTRACT

The purpose of writing this article is to know what are the principles in granting high-rise property rights to foreigners by citizens of Indonesia who in the regulation has been limited for protection to indigenous Indonesian citizens. then the second objective is how the form of legal protection for high-rise property by foreigners to the revocation or exemption of the right to land procurement for public interest whose essence in protecting the citizens of Indonesia. This article is written on the normative legal research, a research conducted by studying and analyzing the legal materials and issues related to the research problem. This research is to solve the emerging problems, and the research result is prescription of what should be done for solving the problems. The findings suggest that the storey house ownership by the foreigners is based on the right to the state land which is the one land right which can be owned by the foreigners living in Indonesia.

Key words: Housing Regulation, Ownership, Property Law.

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1. INTRODUCTION

Storey house or apartment nowadays becomes the main need for the urban society because the urban areas do not have sufficient space to build houses. The recent trend is the building of storey house and storey building, which functions as for residence as well as for business activity, office, and shopping center. However, it needs remembering that housing development [1] cannot only be seen as a means for fulfilling the human living need, but also for one's residence in undergoing social life in the framework of placing his/her identity.

To regulate the storey house with order and legal certainly, the government enacts the regulation of the storey house. The Storey house was firstly regulated in Act No. 16 Year 1985 about Storey House, but in its development this regulation is not in line with the Development of law, every one's need in the residence, ownership, and storey house registration. For this, it is then changed to Act No. 20 Year 2011 about Storey House.

The Storey House Act enactment is philosophically for the fulfillment of the right to own a house which constitutes the national issue and the impact of it is felt by people all over

archipelago. This impact can be seen from a large number of people with low income and improper house, especially those living in urban area, which makes dirty area. One of house need fulfillment can be realized through the storey house development as a part of housing development because of the limited space in urban area. This storey house development can hopefully support the urban development and at the same time becomes a solution of residential quality improvement [2].

In Article 1 number 1 Act Number 20 Year 2011 about Attorney House, it is stated that Storey House means: the storey building which is built in an environment, divided into functionally structured divisions, both in horizontal and in vertical directions and constitute units which each of them can be owned and used separately, mainly for residence, completed with the mutual part, joint goods, and shared land.

Storey House or in another term called condominium or strata tittle or joint property or apartment is a form of housing realization with the building which is both residence and non-residence realized by either the government or the private. This realization must meet the elements of planning, developing, authorizing, managing, and maintaining, based on the act and the governmental regulation [3].

The Storey House utilization can be performed by the legal subject, that is, people and corporation through the temporary ownership or non-ownership as well as the storey house realization by the corporation in the form of Limited Company. The storey house ownership can be performed by the Foreigners and Indonesian Citizens. The Foreigners Intended in this article are those who have legality fulfilled the equipment and got a living permit in Indonesia. For the ownership of storey house and property by the foreigners, the act gives specific treatment that the foreigners can use the living house with the right to use because the storey house ownership in only on the ownership of house and building which are mutual part, join goods, and shared land.

Article 1 number 1 of governmental Regulation Number 103 Year 2015 about Residential House Ownership or Residence by the Foreigners lining in Indonesia states that the foreigners living in Indonesia, who are furthermore called the foreigners, are those who are not Indonesian citizens, who are useful, make business, work or invest in Indonesia.

The land rights, according to Article 16 Act of Basic Regulation of Agrarian Principles, include

“right of Ownership, right of business, right of building use, right to use, right to lease, right to open land, right to gather forest product, other rights which do not belong to the above rights which will be stipulated in act, and the temporary rights as mentioned in article 53.”

The type of land rights for the foreigners who own living houses is the right to use the storey house or apartment on the land of the right to use the state land. The statement is juridically confirmed by article 17 Act No. 20 Year 2011 about Storey House which states that the storey house can be built on the land of:

- Right to own;
- Right to use building or right to use the state land; and
- Right to use building or right to use on the land of right to manage.

Basically the state keeps giving one type of the land right in Act of Basic Regulation of Agrarian Principles to the foreigners for the given time and it must be extended if they still want to use the right through the decree of Agrarian Ministry. However the state can any time revoke the right, both the right to use and the right to own the land, when needed for the land procurement of the public interest. Based on the details above, the legal issues discussed in this writing are:

First: What is the principle of giving the storey house Ownership right to the foreigners?,

Second: What is the form of legal protection for the storey house ownership by the foreigner toward the right revocation or discharge for land procurement for the public interest?

2. METHOD OF APPROACH

This article is written on the normative legal research, a research conducted by studying and analyzing the legal materials and issues related to the research problem. This research is to solve the emerging problems, and the research result is prescription of what should be done for solving the problems. Likewise, with this method the research is to answer the legal issues on the ownership of strata title or storey house by the foreigners in Indonesia. Statute approach and consensual approach are also used in this research.

The statute approach is done by studying all the acts and regulations dealing with the analyzed legal issues. This approach will open the researcher's opportunity to study the consistence and appropriateness between an act and another act or between act and 1945 Constitution of the Republic of Indonesia or between regulation and act of land affairs and storey house.

The conceptual approach is an approach starting from perspectives and doctrines in legal science. With study of the perspective and doctrines, it will find an idea of legal understandings, legal concepts, and legal principles relevant to the legal issues of this research. This article tries to dig out the concept relating to storey house, right to own storey house, and the concept of the foreigners who can own the storey house or strata title in Indonesia.

The legal material resource used in this research is Primary Legal materials, namely, authoritative legal material that has authority, consisting of legislation rule, official notes or minutes relating to an act discussion. In this research, the legislation rule as the primary legal material includes Act Number 20 Year 1961 about Revocation of Right on land and The Goods on the land, Act number 20 Year 2011 about Storey House, Act Number 2 Year 2012 about Land Procurement for public Interest Development, Governmental Regulation Number 103 Year 2015 about Ownership of Living House or Residence by Foreigners living in Indonesia. The secondary legal materials include all legal publications which are not official documents. These Publications cover text-books, thesis, dissertations, legal dictionary, comments on verdicts and legal expert's opinions published in journals, magazines, or internet/website.

3. DISCUSSION

3.1. Right to own the Storey House by the Foreigners

Foreigners are foreign citizen and not Indonesian citizen, both privately and corporation doing business and living in Indonesia with legal permission. The foreigners certainly have different right to live as well as living house ownership.

Act of Agrarian Principles (Act No.5 Year 1960) has given some types of rights on the land for everyone, including ownership right, right of building use, right of business use, and specifically for the foreigners and foreign corporations they can only have the right to use because the act prohibit to give the right to own to the foreigners.

Definition of Foreigner in article 1 number 9 of Act of the Republic of Indonesia Number 6 Year 2011 about Immigration Affairs states that Foreigners is a person who is not Indonesian citizen. The storey house ownership by the foreigner is built on the land of the right to use the state land or right to use the land of ownership right, and leasing with agreement.

Article 1548 of Civil law Book states that “Leasing is an agreement with which a party binds himself/herself to give the other party the pleasure of goods for the given time and the last mentioned party undertakes the payment of the decided price”. So, leasing is an Agreement with which a party binds himself/herself to give the other party the pleasure of goods, for the given time and the certain party undertakes the payment of the decided price. [4]

The stipulations concerning the right to use for the foreigners regulated in Article 4 section b of governmental Regulation Number 103 Year 2015 about the ownership of living House or Residence by the Foreigners living in Indonesia states that the living house or residence that can be owned by the foreigners is Single House on the land of right to use or right to use on the right to own which is authorized on the agreement of giving the right to Use on the Right to Own with the deed made by the Official of Land Deed Maker. In addition, it can also be storey House Unit built on the land of Right to use.

Act of agrarian Principles prohibits the land ownership by the foreigners on the right to own, right to use building and right of business use. It is on the Indonesian citizen who can have the right to own (Article 21 section (1) of Act of Agrarian Principles). This stipulation affirms that land is possession (right) of Indonesian nation, so that it is natural if the land, especially with the right to own, can only be owned by the Indonesian citizen, whereas the foreigners cannot have the right to own the land.

Land authorization by the foreign citizen and foreign Corporation with the representative in Indonesia is only given with the Right to Use. Giving the Right to use can be given: [5]

- For the given time or during the land is used for the certain requirement;
- Freely, with payment or giving service of anything.

Right to use is the right to use and/or to take product of the land directly owned by the state or the land of other people, who give authority and obligation decided in giving decision by the official who has authority to give or in agreement with the land owner, not leasing agreement or land cultivation agreement, anything not in contrast to life and the Stipulations of agrarian principles. The time given to the Right to use is 25 years and can be extended to the longest time of 20 years and cannot be extended again, but can be renewed.

Right to use is the land right that can be owned by the foreigners living in Indonesia or the foreign corporation with representative in Indonesia. Right to use according to Act of Liability Right (Act Number 4 Year 1992) is the right that can be encumbered with liability right (both Right to use on the state land and Right to use on the land of Ownership Right). [6]

The Single House given to the Right to use is given for 30 (thirty) years and can be extended for the next 20 (twenty) years. When this time of extension is end, the Right to Use can be renewed for 30 (thirty) years as long as the foreigner still has a living permit in Indonesia.

The Storey House in Act of Storey House has some types, namely:

- General Storey House is the Storey House which is realized to meet the house need of the society with low income.
- Specific Storey House is the Storey House which is realized to meet the specific need.
- State Storey House is the Storey House which is owned by the state and functions as living house or residence, family guidance facility, and supporting means of duty realization of the official and/or the civil servant.
- Commercial Storey House is the Storey House which realized to get profit.

1 If the Storey house is built on the land of Ownership Right. It can only be owned by the Indonesian citizen. If the storey house is built on the land of Right of Building Use, it can be owned by (i) Indonesian Citizen and (ii) Indonesian corporation living in Indonesia. This is the concept which is the most used and available in Indonesia. Most of strata title building is built on the right of Building Use. [7]

If the house of storey house is built on the right to Use, the right can be owned by (i) Indonesia citizen (ii) foreign citizen (iii) Indonesia corporation, and (iv) foreign corporation with representative in Indonesia. This right is the best right basis that can be owned directly by the foreign citizen or the foreign corporation [8]. Because the state has prohibited and limited the ownership of land and storey house built on the right to own by the foreign Citizen, so that the citizen is only permitted to buy a new storey house unit with the Right to own on the Storey house Unit on the Right to Use.

3.2. The Revocation of right to use the State Land

The previous discussion state that the storey house ownership by the foreigners (foreign citizen) is only given with the right to use in case of the storey house built on the right to use the state land which is explicitly regulated in act of storey house. Governmental Regulation Number 103 Year 2015 about Ownership of Living House or Residence by the Foreigners living in Indonesia also decides that the storey house unit built on the land of the Right to Use can be owned by the foreigners as long as they have living permit in Indonesia for 30 (thirty) years and can be extended for 20 (twenty) years. If this extension has ended, the right to Use can be renewed for 30 (thirty) years. For this, if during the time of extension the foreigners are still alive and have living permit, giving the right to use can be 90 (eighty) years.

When the state uses its authority to realize development to improve the people's welfare through the fields of Indonesia people's livelihood, it will revoke the land right and goods on the land for the public interest. This land right revocation will impact the existence of storey house owned by the foreign citizen. It means that if the right revocation is realized, the foreigner's ownership of storey house unit becomes vanished.

Principally the land has social function for the society. This function has broad meaning, which does not ignore someone's private land right. The form of utilization or social function for the society is the procurement and provision of land for the public interest. It means that if the public interest needs, the land right holder has right to get damages.

Article 1 of Act No. 5 Year 1960 about Act Agrarian Principles state that all over Indonesia regions are the united homeland consisting of all Indonesia people unified as Indonesian nation. It means that the land on all over Indonesia is the mutual right of Indonesian nation and everlasting like communal land (ulayat) right customary law Society. From the above understanding, the Indonesian nation's Right contains two elements, namely: [9]

- Civil mutual ownership element, but it does not mean ownership right in juridical meaning, mutual land of all Indonesian people has unified into Indonesian nation (Article 1 section (1) Act of Agrarian Principles.
- Public authority element, that is for organizing and leading the authorization and utilization of land which is mutually owned.

The public aspect is reflected from the state's authority to organize the land in all over the region of the Republic of Indonesia. The duty and authority are performed by the state as the right to authorize the state which is formulated in Article 2 of Act of Agrarian

Principles which constitutes the authentic interpretation of the meaning authorized by the State in Article 33 section (3) 1945 Constitution. The right then becomes the development

foundation as the government's program. The land procurement and provision are as the interest/hierarchy of land right in Indonesian, which has been regulated in National Land Law, that Right to Authorize the land as the legal object includes: [10]

Indonesian nation's right;

The Indonesian nation's right contains 2 elements, namely: a. civil mutual ownership element, but it does not mean ownership right in juridical meaning. Mutual land of all Indonesian people which have been unified into Indonesian nation as in Article 1 section (1) of Act of Agrarian Principles indicates the communalistic public nature of National Land law conception; b. Public authority element, that is for organizing and leading the authorization of land which is mutually owned.

Right to authorize the State Land;

This right gives authority to authorized the land physically and use it as the land right due to the characteristic as the public authority as explained in article 2 of Act of Agrarian principles.

Communal Land (ulayat) right of Customary Law society;

This right is still admitted as long as the right is still alive. The realization is based on the stipulations of Act of Agrarian Principles and the development interest realized at this time.

Personal right covers:

- Land right;
- Land endowment of ownership right;
- Land guarantee right (liability right);
- Ownership right of storey house unit.

Article 6 Act Number 5 Year 1960 about Regulation of Agrarian Basic Principles state that all and right has social function. In Addition, in general elucidation the meaning of social function of land right does not only refer to the ownership right but also to social function of all land rights. It has been explained in General Elucidation (II number 4). Moreover, it is explained in number 4 of general elucidation that: "All land right have social functions". It means that whatever land right of someone cannot be justified that his/her land will be used (or not to be used) only for his/her personal interest, particularly if it makes people lost. [11]

The land utilization has to be adjusted to the condition and characteristic of the right, so that it becomes useful both the owner's welfare and happiness and the society and State. However, the stipulation does not mean that the individual interest will be distressed by the public (society) interest. Act of Agrarian Basic Principles Regulation also pays attention to the individual interest. The social and individual interest have to meet each other, so that at the end the main purposes such as prosperity, justice and happiness will be reached for all Indonesian people (Article 2 section 3). [12]

Concerning the social function, it is common that the land has to be well maintained in order the fertility increases and the damage can be private. The obligation to maintain the land is not only burdened to the owner or the right holder, but also to every one, corporation or institution which has legal relation to the land. This stipulation implementation will pay attention to the interest of the party with economically weak.

According to article 2 Act No. 20 Year 1961 about Revocation of Land right and Goods on the Land, this revocation is proposed by the party with interest to the President through Ministry of Agrarian Affairs (now Ministry of Agrarian Affairs and Spatial Order/Head of National Land Affairs board of the Republic of Indonesia), via Head of Agrarian Inspection (now office of national Land Affairs Board of Provincial Region) accompanied by:13

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- Plan of the allocation and reason;
- Details of the name of the right, and location, width, and type of land right to be revoked;
- Plan of the camp for the people whose right will be revoked.

Due to the urgency of land right revocation used for the public interest, it can also be implemented for the right to own the storey house unit built on the right to use the state land for the foreigners (foreign citizen). However, the logical consequence is that the right ownership and the storey house unit have to get the legal protection for defending the storey house ownership by the foreigners.

The term “teori perlindungan hukum” in English is legal protection theory, in Dutch called *theorie van de wettelijke bescherming*, and in German called *theorie der rechtliche schutz*.¹⁴ In these terms, the legal protection is meant as an action to protect or to help the legal subject with legal devices. With this understanding of legal protection, there are elements of legal protection, namely: the subject that protects, and the object that will be protected with device, instrument and effort which are used for the reached protection.

Theoretically Philipus M. Hadjon in Salim¹² divides legal protection into two forms, namely:

- Preventive protection; and
- Repressive Protection.

The preventive protection is the preventive legal protection. This protection gives opportunity to people to propose objection (*inspraak*) of their opinion before the government’s decision gets a definitive form. So, this legal protection aims at preventing the dispute and has essential meaning for the government’s action based on the freedom to act.¹⁵

The repressive legal protection functions to settle when a dispute happens. Nowadays Indonesian has various boards which partially handle the legal protection for the people, classified into two parts, namely:

- Court in general Judiciary scope; and
- Government institution which constitutes administrative appealing institution.

Based on the theoretical explanation of legal protection, the preventive legal protection can be proposed by every foreigner who defends his/her rights to get damages which will be obtained due to the revocation of land right, namely, the right to own the storey house unit built on the right to use the state land.

The foreigners can propose objection (*inspraak*) of their opinion before the government’s decision and government’s action through the previous notice has been notified before about the revocation of land right although the government forces, but it can prevent the dispute. From this, the foreigners can have the usefulness and certainty of the damages that will be obtained from the state and government’s action to revoke the land right for the public interest.

Article 8 of Act No.20 year 1961 about Revocation of land Right and Good in the Land state that if the party who has the land right to be revoked is not willing to receive money of damages because the amount of it is not reasonable, he can appeal to High Court which jurisdiction covers the place and location of the land and/or the goods. This court will decide the number of damages. After decided in the decree of land right revocation and after the payment of damages, the land with the revoked right become the land authorized directly by the state.

4. CONCLUSIONS

The storey house ownership by the foreigners is based on the Right to Use the state land which is the one land right which can be owned by the foreigners living in Indonesian or the foreign corporation that has representative in Indonesian. Example, the Single House given on the land of right to Use is given for the given time to the renewal about 80 (eighty) years.

The legal protection is given to the foreigners for the revocation of right to use the state land taken over by the state for the public interest. Because the right to use the state land given to the foreigners has long enough time, it is appropriate and based on the legislation rule that foreigners will get damages, and if the party who has the land right to be revoked is not willing to receive money of damages the amount of it is not reasonable, he/she can use the repressive legal protection, by appealing.

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