



Fraus legis in land ownership conducted by foreign citizen in perspective of Indonesian land law

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ABSTRACT

Indonesia has a close relationship with the earth, water, space, and the natural wealth contained therein, so the land tenure hierarchy in Indonesia places the nation's rights in the highest order. Based on the concept of the nation's rights, only Indonesian citizens are allowed to have full relations with the territory of Indonesia, while foreigners are not allowed. In practice, foreign nationals have abused their rights so that they can have land rights in the form of property rights in which there is a law smuggling action. One of the problems that arise is the recognition of ownership of land rights in the form of islands by foreign citizens. The purpose of this research is to analyze the ownership of land rights by foreign nationals associated with the abuse of rights by foreign nationals, the ownership of land rights in the form of islands by foreign nationals in the Indonesian land law system is associated with the right to control by the state and the concept of land rights. land in the form of islands in the Indonesian land law system. This research uses secondary data which is arranged in a systematic, comprehensive, and integrated manner to achieve clarity of the problem to be discussed. The results of the study show that foreign nationals can have land rights in the form of usage rights and rental rights. This policy is given the embodiment of the principle of justice. but is not allowed to have land rights in the form of property rights. In practice, there are many cases of abuse of rights by foreign nationals which are legal smuggling carried out through marriage, rental agreements with irrelevant terms, and control of usufructuary rights over a land area that violates the rules. The state's right to control land originates from the Indonesian nation's right to land. The state can grant land rights to foreign nationals as long as the land has not been granted other land rights.



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INTRODUCTION

Indonesia adheres to the concept of a welfare state. The main key in the welfare state is regarding the guarantee of people's welfare by the state. Jurgen Habermas argues that guaranteeing the welfare of all people is the main thing for a modern state. The modern state is the personification of the legal system, meaning that the state in all its activities is always based on law. The task of the state, according to modern understanding, is to carry out the public interest to provide the greatest possible prosperity and welfare based on justice in a rule of law.

The conception of the Indonesian state is a constitutional state, which implies that the administration of government and a state is based on law. The most essential meaning of a rule of law state is that all relations between the state and society or between fellow members of society are based on legal rules, both written and unwritten.

State law is based on a desire that state power must be exercised on the basis of good and just laws. Law is the foundation of all state actions, and the law itself must be good and fair. Good because it is in accordance with what society expects from the law, and fair because the basic intent of all laws is justice. There are four main reasons for demanding that the state be organized and carry out its duties

based on law, namely: legal certainty, demands for equal treatment, democratic legitimacy, and demands for reason.

The existence of land is an important natural resource for the Indonesian state. Article 1 paragraph (1) of the UUPA which states that "All Indonesian territory is the unity of the homeland of all Indonesian people, united as the Indonesian nation" and Article 1 paragraph (2) which reads that: "All earth, water and space, including the natural wealth contained therein within the territory of the Republic of Indonesia as a gift from God Almighty, is the earth, water and space of the Indonesian nation and constitutes national wealth". This means that the land, water and space within the territory of the Republic of Indonesia, for the independence of which the Indonesian people as a whole fought for, also belong to the Indonesian people, so they are not solely the rights of their owners. Likewise, land in regions and islands does not solely belong to the indigenous people of the area or island concerned. Thus, the relationship between the Indonesian nation and Indonesia's land, water and airspace is a kind of ulayat right relationship which is raised at the highest level, that is, at the level that concerns the entire territory of Indonesia. As for the relationship between the nation and Indonesia's earth, water and space, it is an eternal relationship. This means that as long as the Indonesian people who are united as the Indonesian nation still exist and as long as Indonesia's earth, water and space still exist, under no circumstances will any power be able to break or abolish this relationship.

Indonesia is a country rich in natural resources, thereby encouraging foreigners to invest in Indonesia. Indonesia is an investment destination country for many foreign investments (abbreviated PMA). They are interested in entering Indonesia because of Indonesia's strategic position in Southeast Asia. In addition, Indonesia has qualified human resources and abundant natural resources. Many foreign countries are interested in investing in Indonesia because Indonesia is very strategic. The large population of Indonesia is an opportunity for foreign investors to expand their market, because a good market will be profitable for investors.

Foreign investment is needed to finance the accelerated national development program. The flow of foreign capital into Indonesia can move the wheels of the economy and state revenues. Foreign investment coming into Indonesia will certainly contribute to job creation for Indonesian people.

The Indonesian government continues to improve the efforts and methods that need to be carried out to attract investors to invest in Indonesia and for smooth investment activities. One of the government's policies to provide facilities to investors is in the form of land rights for PMA. This is done because land is an important asset that can be used as an investor to make it easier for him to carry out his business. This is very important for the government to consider, because the government must follow existing laws, so that they do not conflict with justice.

For foreigners, the prohibition on land ownership in the form of property rights in accordance with Article 21 UUPA applies, and legal entities wishing to be domiciled in Indonesia must meet the conditions set by the government. This is an effort so that land in Indonesia is not owned by foreigners because it is an absolute right for Indonesian citizens. Legally, it is not possible for foreigners to own land with the status of Freehold, but in practice, many foreigners buy land with the status of Freehold by borrowing a name or using the name of someone who is an Indonesian citizen for certain purposes. At PT PMA, the company usually buys land in the form of freehold rights by borrowing the name of one of the company's directors or commissioners. Even though the name on the certificate is written in the name of an Indonesian citizen, the land belongs to the PT PMA or a foreign shareholder in the PT PMA. Between PT PMA and Indonesian citizens, the holders of ownership rights make a loan agreement that the land in the name of the Indonesian citizen actually belongs to the company or belongs to a foreigner in the PMA company.

The way foreigners have land rights in the form of property rights is through marriage to Indonesian women. The foreigner who is married to the Indonesian woman buys land using the name of his wife or child who is an Indonesian citizen with ownership rights. Judging from Article 26 paragraph (1) of the Citizenship Law which states that: "An Indonesian woman who marries a foreigner man loses citizenship of the Republic of Indonesia if according to the law of her husband's country of origin, his

wife's citizenship follows her husband's citizenship as a result of the marriage." Based on Article 26 paragraph (1) of the Citizenship Law, if it is connected with cases of ownership of islands with the status of Property Rights using the name of an Indonesian citizen's wife who has a foreigner's husband, then within one year the rights must be relinquished, if this is not done it will be deleted because the law or the land fell to the state based on Article 21 paragraph (3) UUPA.

Historically, the ban on land alienation or *grondververemdings-verbood* is nothing new in Indonesia. This was previously regulated in *Staatsblad van Nederlandsch-Indie* 1875 No. 179 (abbreviated S. 1875 No. 179), which regulates the prohibition of land alienation. Based on these regulations, there are differences in treatment among fellow natives. This is due to land alienation S. 1875 No. 179 focuses on class division, not on the principle of citizenship or nationaliteit as used in the UUPA.

In contrast to S. 1875 No. 179, UUPA prioritizes the principle of citizenship in determining land alienation. Article 1 of the UUPA is an article which clearly explains that there is a relationship between the Indonesian people and all Indonesian territory which is a unified whole, eternal in nature, in other words there is no power that can break or abolish this relationship and become the parent of land tenure rights. Another. Apart from being communal, the rights of the nation are also religious in nature because land is a gift from God Almighty. So it can be understood that the communalistic nature represents the social relationship between humans and the land, while the religious nature represents the spiritual relationship between humans and the land, and the eternal nature represents the emotional relationship between humans and the land. The relationship between the Indonesian nation and its territory is a "belonging" relationship, not "ownership". Bearing in mind that this relationship is intact and eternal, efforts to divide the territory of the unitary state of the Republic of Indonesia are prohibited.

Foreign nationals domiciled in Indonesia cannot own land even though they already have a building on it. This is as a result of the adherence to the Horizontal Separation Principle in the national land law which does not allow foreigners to own land even though it already has a building on it. The principle of the Principle of Horizontal Separation is that the ownership of a building is separate from the control over the land, unless in reality the ownership of the building and the control over the land rights are in the hands of one person. Ownership of land does not automatically cover buildings and plants on it. Legal actions regarding land do not automatically cover buildings and plants on it, and vice versa.

LITERATURE REVIEW

As explained in the previous chapter, that in the UUPA there are principles of national agrarian law which are the basics (of a general nature) contained in legal regulations. These foundations contain ethical values recognized by a society. The principles contained in the UUPA apart from the principle of land rights having a social function are the principle that only Indonesian citizens have ownership rights to land which is found in Article 9 paragraph (1) of the UUPA, that "only Indonesian citizens have a full relationship with the earth, water and outer space, within the limits of Article 1 and Article 2." This principle is also found in Article 21 paragraph (1) of the UUPA, namely: "Only Indonesian Citizens can have Property Rights." This principle emphasizes that only Indonesian citizens are domiciled as subjects of property rights. This principle is also known as the principle of nationality. The principle of nationality is the protection of human rights for Indonesian citizens to have property rights over land where property rights cannot be owned by foreign nationals and the transfer of property rights to foreign nationals is prohibited by threat of being null and void.

The application of the nationality principle contained in the UUPA, especially in terms of ownership of land, has consequences for differences in treatment between Indonesian citizens and foreigners. The difference in treatment is considered reasonable, especially in relation to the position of land for Indonesian people who have an important position. However, the nationality principle does not completely prohibit having land rights, for example, in very limited cases, foreigners are allowed to control and use land with ownership rights, business use rights, and building use rights for a period of

1 year, that is, if those Indonesian citizens who change citizenship and foreigners who receive inheritance by inheritance according to law (Ab Intestato).

Based on the conception of the nation's rights that only Indonesian citizens are allowed to have full relations with the territory of Indonesia, while foreigners are not allowed. Article 9 Juncto Article 21 UUPA contains the principle of nationality which is also in line with the rights of the nation. The principle of nationality that requires only Indonesian citizens who have full relations with land and other natural resources in Indonesia is not a discriminatory act because in any case the Indonesian nation must be the host in its own home and there is no need to sacrifice national interests to please others or to induce investment. foreign capital.

The rental rights for the buildings referred to are intended for the buildings only, not as referred to as rental rights for agricultural land in Article 10 of the UUPA. The right to rent is a form of legal relationship in a lease agreement to rent a house or building that already exists on a plot of land to be occupied without controlling the rights over the land by paying the owner a sum of money as rent.

The provisions regarding the certainty of the time limit for the agreement on the use rights over land or lease rights over land or buildings are a reason behind the conclusion of a name loan agreement as a form of ownership of land or buildings by foreigners. The agreement is commonly referred to as a no-name (nominee/nominee agreement) which uses the name of a native Indonesian person in exchange for compensation in the form of money, goods, or ownership if the outsider or foreigner returns to his country.

RESEARCH METHODS

The research uses secondary data that is used is descriptive analysis, the data analysis used is qualitative juridical analysis, namely the data obtained is then arranged systematically, thoroughly, and integrated to achieve clarity of the problem to be discussed.

RESULTS AND DISCUSSION

NOMINEE AGREEMENTS IN FOREIGN OWNERSHIP

The nominee is an agreement made between a person who based on law cannot be the subject of certain land rights (in this case property rights/building use rights), namely a foreigner and an Indonesian citizen, which is intended so that foreigners can control the land with ownership rights/building use rights. but legally, the land in question is in the name of an Indonesian citizen. The ownership in question is an indirect ownership that is created from a legal relationship between an Indonesian citizen and a foreigner which is linked in an agreement called the Nominee/Trusted Agreement, which is an agreement that contains a statement that the land does not belong to the Indonesian citizen but belongs to the foreigner who is given the opportunity to manage the land.

The nominee/nominee agreement can be interpreted as a power of attorney statement agreement, an Indonesian citizen stating that the land is not his property but authorizing the foreigner to manage the land. With a nominee agreement, it is enough for a foreigner to borrow an identity from an Indonesian citizen to include his name in a land certificate and foreigners consider that this agreement is far more practical and profitable for both parties. But the efforts made by foreigners in making the nominee agreement are legal smuggling which is carried out by disguising the actual actions. Besides that, the nominee agreement mentioned above was made on the basis of bad faith because it violated the prohibition in Article 26 paragraph (2) of the UUPA.

The Nominee Agreement is legal smuggling and cannot be protected under the pretext of freedom of contract as stipulated in Article 1338 BW. Even so, freedom of contract cannot occur if it conflicts with decency or public order or there is a cause that is not prohibited and there is good faith. This is expressly contained in Article 1320 paragraph (4) jo. Article 1337 Civil Code. Subekti argued that agreements

made between Indonesian citizens and foreigners based on false causes, namely agreements made on the pretext of hiding the real cause, are not permissible. The agreement is deemed to have been canceled from the start and the judge has the authority, because of his position, to pronounce the cancellation, even though it was not requested by a party (absolutely cancelled). In addition, Subekti also explained that not all agreements made have binding power as laws. Only legally binding agreements are binding on both parties.

Apart from the Nominee/Trusted Agreement, another thing that can be done by foreigners to control land in Indonesia is by transferring land rights from Indonesian citizens to foreigners followed by an application for rights. These are 2 (two) legal actions, namely the relinquishment of land rights by Indonesian citizens and requests for land rights by foreigners. Applications for rights can be submitted to the Head of the Land Office, after issuance of a certificate of usage rights in the name of an Indonesian citizen then a deed of sale and purchase is drawn up from the citizen to the foreigner. Or the second way is by relinquishing rights from Indonesian citizens to foreigners who then apply for their rights to the City/Regency Land Office where the land object is located.

Based on the description above, it is absolutely not possible for foreigners to obtain land rights in the land law system, except for usufructuary rights. The same is true for foreign legal entities. However, foreigners, in this case foreign investors, can own land in Indonesia through a national company in the context of foreign investment (PMA) based on the legal system in Indonesia. In practice, there is a lot of abuse of rights by foreigners related to land ownership rights. Abuse of these rights can occur, for example, through mixed marriages. In mixed marriages, usually one of the spouses who is an Indonesian citizen owns land in the form of property rights. With this mixed marriage, foreigners get ownership rights because of the mixing of assets when they marry with Indonesian citizens. Due to this mix of assets, they must relinquish their ownership rights within one year when the rights are obtained or when the person loses his citizenship as stipulated in Article 21 paragraph (3) of the UUPA. If within that period of time a person does not relinquish his property rights, then this right will be null and void because the law and land belonging to the foreigner are controlled by the state.

LEGAL TRAFFICKING IN NOMINEE AGREEMENTS

Regarding the misuse of rights by foreigners related to ownership of land rights in Indonesia, foreign nationals who obtain land rights in the form of property rights obtained due to inheritance should be released to the state or a change in their land rights which was originally a property right to a usufructuary right, is rarely done in practice. , so that foreigners can still control land rights in the form of property rights. Likewise for private land acquired due to mixed marriages, the right to the land should be reduced to a Right to Use, but in practice not many do this.

With regard to land ownership by foreigners in Indonesia, it is carried out in various ways which constitute the abuse of rights by foreigners. Abuse of these rights in the form of:

1. Land Ownership Agreement and authorization in the Land Ownership Agreement;
2. Option Agreement, where Indonesian citizens give the option to buy land with ownership rights and/or buildings to foreigners because the funds used to buy these objects are provided by foreign parties;
3. The rental agreement with the term is irrelevant;
4. Special power of attorney to sell, this power of attorney contains the granting of power of attorney with the right of substitution from the Indonesian citizen as the authorizing agent to the foreign party as the recipient of the power of attorney, to carry out legal actions to sell or transfer land and buildings;
5. Will grant; And
6. Declaration of Heirs.

In practice, these methods are widely used, even though based on laws and regulations they are prohibited. The abuse of rights by foreigners is not entirely the fault of foreigners themselves, but Indonesian citizens are also involved because they have supported the abuse of rights by foreigners for

various reasons. Legal awareness and legal knowledge of the community regarding the ownership and transfer of rights by foreigners is felt to be lacking. Many people do not understand the legal consequences of transferring rights to foreigners.

Mochtar Kusumaatmadja stated that things that must be reflected in efforts to reform law are legal education in Indonesia, which includes changes in one's attitude towards problems (attitudinal problems) and education or professional skills training as a substitute for education with the pretense of "univerister academic" or "scientific theoretical" which now dominates Indonesian legal education.

The readiness of law enforcers is needed in implementing existing laws, so that existing regulations can be controlled properly through law enforcement officers who have high morality. Therefore, the law enforcement recruitment system also needs attention. This means that since the beginning there has been a grouping or division according to their competence so that law enforcement officers with high morals and mastery of their fields are obtained.

CONCLUSION

Based on the description above, it is necessary to enforce the rules on land rights for foreigners, and renewal at the same time enforce the law prohibiting land ownership by foreigners to protect Indonesian citizens' land rights from foreign exploitation. Utilization and use of private land can be carried out in accordance with the nature and contents of the authority of property rights over land, without the shadow of private land being exploited and falling into the ownership of foreigners. Utilization and use of privately owned land that is in accordance with the nature and authority in it and can keep exploitation away from foreign parties is the imposition of ownership rights with usufructuary rights or rental rights for buildings.

Development requires the renewal of attitudes from the people who are developing. Indonesia's current condition requires a change in attitude from the Indonesian people themselves so that development can be carried out as expected. Mochtar Kusumaatmadja considers that for the sake of development, updating attitudes, traits or values is very necessary. The problem is which values from the existing state of society are to be abandoned and replaced with new values that are thought to be more in line with today's (world) life, and which old values can and should be maintained.

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