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## LEGAL PROTECTION OF OWNERSHIP OF FLATS UNITS AGAINST FOREIGN NATIONALS IN INDONESIA

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### Abstrak

This paper analyzes the legal protection of ownership of apartment units against foreign nationals in Indonesia. The focus of the study in this paper is the ambiguity of protection and legal certainty in the provisions of Article 144 of the Copyright Law jo. Article 71 paragraph (1) PP No. 18 of 2021 concerning Management Rights, Land Rights, Flat Units, and Land Registration, which regulates the granting of Ownership Rights to Flat Units to foreigners over HGB and use rights if land rights are not extended. The method used is a normative legal research approach, namely a statutory approach and a conceptual approach. As an analytical tool for the legal issues studied, the author uses the theory of legal certainty, the theory of legal protection and the theory of justice. The legal materials used are primary legal materials in the form of legislation, which are complemented by secondary legal materials in the form of reputable journals and the latest literature. The results that can be concluded in this study are the Job Creation Act and PP No. 18 of 2021 does not stipulate if the rights to the land that are the basis of the apartment are not extended or renewed, so that it does not reflect the existence of legal certainty over the ownership of flats by foreigners. This also has implications for the legal protection that will be obtained by foreigners, so that foreigners may lose money when buying flats in Indonesia, because their bargaining position is weaker in Indonesian land law. The purpose of this analysis is to provide certainty and legal protection of ownership of flats for foreign nationals in Indonesia.

**Keywords:** Legal protection; flats; foreign nationals

### 1. INTRODUCTION

The creation of property rights for units of flats (Apartement Units) as a new legal institution in the Indonesian legal system meets the principle of horizontal separation adopted by our national land law. This relationship when related to the principle of our national land law does not use the principle of attachment or accessie, but uses the principle of horizontal separation. It is this principle that then becomes the basis in the arrangement regarding flats or apartments or others. But in fact, the concept of the Principle of Horizontal Separation in the laws and regulations on Flats has not been consistently applied, especially regarding the ownership of flats by foreigners (Fathony, 2019).

Initially, the rules for ownership of residential houses or dwellings for

foreigners / foreign nationals (WNA) in Indonesia were based on Law No. 16 of 1985 with implementing regulations, namely Government Regulation No. . 41 of 1996 concerning Ownership of Residential Houses or Dwellings by Foreigners domiciled in Indonesia and Regulation of the Minister of Agrarian State / Head of the National Land Agency No. 7 of 1996 concerning Requirements for Ownership of Residential Houses or Dwellings by Foreigners domiciled in Indonesia and Regulation of the Minister of Agrarian State / Head of the National Land Agency No. 7 of 1996 concerning Requirements for Ownership of Residential Houses or Dwellings by Foreigners domiciled in Indonesia and Regulation of the Minister of Agrarian State / Head of the National Land Agency No. 7 of 1996 concerning Requirements for Ownership of Residential Houses or Dwellings

by Foreigner. However, on December 28, 2015, the President of the Republic of Indonesia, issued Government Regulation No. 103 of 2015 concerning Ownership of Residential Houses or Residences by Foreigners Domiciled in Indonesia. Article 4 pp Number 103 of 2015 concerning the Ownership of Residential Houses or Dwellings by Foreigners Domiciled in Indonesia, determines the residential houses or dwellings that can be owned by Foreigners are:

1. Above-ground dwelling house:

Right of Use;

Right of Use on land Property Rights controlled based on the agreement for granting Right of Use above Hak Milik with the deed of the Land Deed Making Officer (PPAT).

2. Apartment Units built on a plot of Right of Use land.

Article 5 of Government Regulation No. 103 of 2015 concerning The Ownership of Residential Houses or Dwellings by Foreigners Domiciled in Indonesia, specifies "Foreigners are granted the Right of Use for new dwelling houses and Property Rights on the basis of the above Right of Use to arrange the purchase of new units". It can be interpreted as legally allowing foreign persons or legal entities domiciled in Indonesia to own units of flats, as long as they qualify as holders of rights to the common land on which the building stands. Based on these provisions, in principle, foreign persons and legal entities can have units of flats built on Right of Use land, for which this right of use is granted for a period of 30 years and can be extended for 20 years. If it runs out, it can be renewed again for 30 years. However, after the issuance of Government Regulation No. 18 of 2021 concerning Management Rights, Land Rights, Flats Units, and Land Registration as implementing regulations of the Copyright Law, Government Regulation No. 103 of 2015 concerning Ownership of Residential Houses or Dwellings by Foreigners Domiciled in Indonesia was declared revoked.

Based on this, it is known that the granting of property rights to units of flats based on the right of use or building use rights (HGB), with restrictions as referred to in Article 72 Government Regulation No. 18 of 2021 concerning Management Rights, Land Rights, Flats Units, and Land Registration in the form of a minimum price, land plot area, number of land plots

or units of flats, and allotments for residential or residential homes. So that it can be interpreted that the property rights to units of flats by foreigners no longer have a time limit, while in contrast to Government Regulation No. 103 of 2015 concerning Ownership of Residential Houses or Dwellings by Foreigners Domiciled in Indonesia where the Regulation emphasizes that foreign nationals can only use the right of use and lease rights on property in the form of houses / dwellings in Indonesia. Based on these provisions, the provisions of Article 144 of the Copyright Law jo. Article 71 paragraph (1) of Government Regulation No. 18 of 2021 concerning Management Rights, Land Rights, Flats Units, and Land Registration, which regulates the granting of Property Rights of Flats Units to foreigners above the HGB and the right of use is vague.

The principle of horizontal separation allows buildings to stand on land Building Use Rights, Right of Use for Management Rights, where each of these rights has a period of time, while the granting of property rights to flats to foreigners is interpreted as having no period of time considering that the concept of property rights is the strongest and fullest right, so that the concept of granting property rights to flats on land rights of use or HGB which has a period of time is considered vague to legal protection and The legal status of foreigners if later the land based on the right of use and HGB as the basis for the construction of flats is not extended or renewed. Whereas in Government Regulation No. 18 of 2021 concerning Management Rights, Land Rights, Flats Units, and Land Registration, it is also determined that property rights to these flat units can be guaranteed in the form of dependent rights and Fiduciaries can be inherited if a Foreigner dies.

On the other hand, in the UUPA there is a principle of Nationality which essentially means that the entire territory of the Indonesian state is the unity of the land, water, and all Indonesian people are united as the Indonesian nation. Therefore, the relationship between the Indonesian nation and earth and water is a lasting relationship. The status of property rights granted to foreigners to owned flats is also not in line with the principle of Nationality adopted by the UUPA. Based on the aforementioned problems, it is undeniable that the birth of land registration related to the flat system does not refer to the previous law, namely

Law No.20 of 2011 concerning Flats and UUPA (Dharsana & Budiarta, 2021). Therefore, moving on from the various briefs above, the author is interested in researching by raising the title of the article, namely "LEGAL PROTECTION OF OWNERSHIP OF FLATS UNITS BY FOREIGN NATIONALS IN INDONESIA".

## **2. METHODS**

The research method used to compile this journal is to use normative legal research. Normative legal research is also called doctrinal legal research, also referred to as library research or document study. It is called normative and doctrinal legal research, because this research is conducted or aimed only at written regulations or other legal materials. The type of approach used in this research is the statutory approach and the conceptual approach. The legal materials used in this paper are collected through a literature study, namely by examining primary legal materials in the form of legislation, which is complemented by secondary legal materials in the form of reputable journals and the latest literature. The analytical techniques used in this paper are description techniques, interpretation techniques and argumentation techniques. After all the materials have been collected, then the legal materials are analyzed with relevant theories and then conclusions are drawn to answer the problem.

## **3. DISCUSSION**

The enactment of Law No. 11 of 2020 concerning Job Creation (Copyright Law) which contains various materials in it, one of which is the unit of flats, has an impact on the establishment of Government Regulation No. . 18 of 2021 concerning Management Rights, Land Rights, Flats Units, and Land Registration, as a new regulation, one of which regulates units of flats. The establishment of the Ciptaker Law and Government Regulation No. 18 of 2021 is none other than Indonesia's desire to encourage an increase and ease of investment in Indonesia, thus providing an opportunity for foreigners to own units of flats.

After the issuance of the Job Creation Law and PP 18 of 2021, it is determined that foreigners can have property rights to units of flats. Article 71 paragraph (1) of PP 18 of 2021 states that the arrangements that can be owned by foreigners are limited to flats built on land bidnag:

1. the right of use or right of use of buildings on state land;
2. the right of use or right to build above the right of management; or
3. right of use or right to build on land title

This provision has led to a shift in the openness of Indonesian law, especially in land and occupancy law in Indonesia, to the existence of foreigners as subjects of property rights which in this case are as subjects of property rights of units of flats which are no longer limited to right of use or land but also the right of use of buildings, even the right of use or right of use of buildings on state land.

The Flats Law says it can be built on land owned by others (the principle of horizontal separation), but the certificate of title to a unit of flats units of flats with common land shows the existence of a principle of attachment in addition to the principle of horizontal separation. tag. As Van Kan stated, that the law should be in charge of ensuring legal certainty in human relations. Legal certainty is the legal apparatus of a country capable of guaranteeing the rights and obligations of every citizen. Thus, the opportunity for foreigners to have property rights to flats units to foreigners above the Building rights (HGB) and the right to use in Article 144 of the Copyright Law jo. Article 71 paragraph (1) of Government Regulation No. 18 of 2021 makes it increasingly noticeable that the principles adopted in the Flats Law are increasingly visible, so that it does not guarantee legal certainty regarding the status of foreigners against property rights to flats units.

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In the ownership of flats through the use of state / regional property in the form of land and the utilization of waqf land by means of rent with proof of ownership in the form of a certificate of ownership of buildings of flats shows the application of the principle of horizontal separation consistently. Many do not realize from within agrarian law, the principle of horizontal separation alone is always seen so that in accordance with the political attitude of the Basic Agrarian Law (UUPA) which is reflected in Article 3 and Article 5

on the subject of a legal system being built not always based on one original legal system as the *volkgeis* of a society that is building that legal system, will always be built as well. In other words, the principle of attachment in agrarian law is certainly possible and existing. Therefore, the basis for foreigners' ownership of flats that should use the principle of horizontal separation must be proven by the certificates and /or deeds owned by each party because in order not to conflict with the concept of foreigners who cannot have rights to land and on the other hand so that foreigners have legal certainty in the ownership of their flats units.

Van Kan stated that, legal certainty is a legal device of a country capable of guaranteeing the rights and obligations of every citizen. Against this, the scheme that can be pursued against the affirmation of the principle of horizontal separation which refers to evidence to determine the legal certainty of status in the ownership of flats for foreigners is the issuance of certificates and / or deeds of units of flats based on the deed of separation of flats on units of flats, Joint Parts, Common Objects and Common Land. However, foreigners must meet the requirements as specified in the laws and regulations in order to have a flat house unit in Indonesia. In other words, the regulation of the certificate of title to units of flats must now accommodate the principle of horizontal separation as per Government Regulation No. 4 of 1988 concerning previous Flats.

Article 69 paragraph (1) of Government Regulation No. 18 of 2021 states that foreigners who can own a residential or residential house are foreigners who have immigration documents in accordance with laws and regulations. Based on Article 1 number 14 of Law No. 6 of 2011 concerning Immigration, immigration documents are travel documents of the Republic of Indonesia, and stay permits issued by immigration officials or foreign service officials. Article 48 paragraph (3) of Law No. 6 of 2011 concerning Immigration distinguishes stay permits according to visas owned by foreigners, including Diplomatic Stay Permits, Service Stay Permits, Visit Stay Permits, Limited Stay Permits, and Permanent Stay Permits. Against the provisions of ownership of flats in Indonesia later, the commonly used stay permits are Limited Stay Permits as evidenced by a Limited Stay Permit Card (KITAS) and a Permanent Stay Permit proven by a Permanent Stay Permit Card (KITAP).

The issuance of the Certificate of Property Rights to units of flats, the certificate of title to Common Land must be stored in the Petanahan Office as a warrant and in the land book and the certificate of title to the land is given a note regarding the separation and issuance of certificates of title to units of flats as specified in Article 8 Paragraph (2) of the Regulation of the Head of the National Land Agency No. 4 of 1989.

The validity period of the Flats Unit Property Rights is the same as the validity period of land rights (HGB, Right of Use) where on the land a flat building is built. So that if the validity period of the land on which the flat building stands ends, then by itself the validity period of the Flats Unit Property Rights also ends, but the ownership status of the owner of the flats unit remains attached as long as it has not been given and compensation received. Thus, if the land rights (HGB and Right of Use) are not renewed or extended, based on the ownership of a certificate of property rights to the land, the status of foreigners' ownership of the flats unit remains as the holder of the property rights until compensation is given and received.

With the issuance of the Certificate of Property Rights to Units of Flats, legal certainty is realized which is one of the purposes of building flats. Such certainties include (Sutedi, 2010):

Certainty of the status of Property Rights to Flats Units, namely in the description of which it can be clearly known the Property Rights of the Flats Unit standing on the land of Property Rights, Building Use Rights or Right of Use of State Land;

Certainty of the subject of Property Rights to Units of Flats, namely in the certificate, it can be clearly known that the Property Rights of the Flats Unit belong to individuals or legal entities

Certainty of the Object of Property Rights to The Unit of Flats, namely in the certificate can be clearly known the location of the unit of flats. The location of the unit floor of the flats, the area (size) of the flats units, the boundaries of the Property Rights of the Flats units which are individual and separate, as well as the amount of Joint Rights in the Common Section, Common Objects and Common Land.

However, the Flats Law, the Job Creation Law, and Government Regulation

No. 18 of 2021 do not regulate further if the rights to the land on which the flats are based are not extended or renewed. When viewed from the theory of Preventive Legal Protection from Philipus M. Hadjon, which states that the protection provided by the government with the aim of preventing before a violation occurs, this is contained in the legislation with the intention of preventing a violation and providing a limit in carrying out an obligation. Examining this theory, it is clear that the granting of property rights to units of flats to foreigners in the Job Creation Law and Government Regulation No. 18 of 2021 does not reflect preventive legal protection for foreigners, because there are no provisions if the rights to the land on which the flats are based are not extended or renewed. Thus, it is possible for foreigners to lose money if they buy flats in Indonesia, because their bargaining position is weaker in Indonesia's land law. Due to the many problems in the Job Creation Law, the Constitutional Court decided the unconstitutional Job Creation Law through the Constitutional Court Decision No.91/PUU-XVII/2020 related to the Job Creation Law which was decided on November 25, 2021.

In addition to implementing the constitutional court's decision, if the government wants to provide opportunities for foreigners to enjoy space in the form of flat units in Indonesia, there needs to be legal protection and certainty for foreigners for ownership of flats units in Indonesia which can be done with several efforts including:

Clarify the construction of millik rights of flats units by foreigners so as not to conflict with existing laws and regulations.

if the government will still provide Property Rights of Flats Units above Building Use Rights to Foreigners, it is hoped that in the future the government can affirm in implementing regulations, Ministerial regulations and or in the *juknis* (technical instructions) applied by BPN that the Flats Units given to Foreigners are only in the form of their Land Upper Space separate from their common land. Thus, to maintain the principle of nationality, the government must be able to apply the horizontal principle in the provision of units of flats, which has been difficult to realize. On the other hand, it must also resolve the overlapping, obscurity, and vacancy of laws and regulations related to the regulation of ownership of flats by foreigners later.

#### Clarifying the Registration System for Flat Ownership in Indonesia

A consequence of the adoption of the Principle of Horizontal Separation which separates buildings and plants from their land is about evidence of ownership of objects. If so far the evidence of ownership of objects attached to the land has always been found in the certificate of land, then a consequence and the Principle of Horizontal Separation is the existence of evidence of the ownership of separate objects for the land and for the building or plant. So that the building or house has its own identity that is separated from the evidence of ownership of the land.

Thus, the building, the house must be listed separately, so that later there will be a separate certificate of building or certificate of the house and the certificate of land on which the building stands. The need for a separate certificate on the building or house or plant is to prove the existence of a person's property rights to objects not land of a fixed nature. Especially if the building, house or plant is located on *hak atas tanah* land owned by someone else based on the right of rent, or right of use or also on the HGB or HGU. To be used as evidence for the existence of this right, these objects must have their own separate identities. With the existence of a separate certificate between the building, house or plant and the soil, this will facilitate the implementation of guarantees on objects based on the Principle of Horizontal Separation. So that the building or house can be used as its own object of guarantee without having to pledge the land.

The Principle of Horizontal Separation is very useful in serving the needs in development, so that the mortgage of the building or factory as a company asset is easier to place. This is certainly assuming that the buildings are mandatory to be registered (Djuhaendah, 2011). A matter of thought was about the registration agency for the building or house or plant. So far, BPN has registered land rights, but if it is going to implement the Horizontal Separation Principle consistently, then there needs to be other relevant agencies to serve registration for non-permanent land objects. For this reason, there needs to be a reference or cooperation between relevant agencies such as the Ministry of Justice, National Land Agency (BPN). The Minister's Office, and specifically for crops, for plantations or forestry needs to be involved by the

Ministry of Agriculture and Forestry to carry out registration for non-land objects in the form of perennials. For its efficiency so that the place of registration of land, houses or plants and so on it is carried out under one roof. With the registration of land and non-fixed land objects in the future we will know the certificate of ownership of separate land and the non-land objects attached to it, namely in the form of a certificate of hak atas tanah as proof of land ownership and a certificate of ownership of the building.

The solution is without violating the Principle of Nationality, then for Foreigners should only be given a Certificate of Ownership of Buildings (SKBG) not a certificate of property rights for units of flats (SHMSRS). So it is clear that all it has is the unit and does not include the right to land with it. So, foreigners can still have Flats Units above HGB. The provision of proof of ownership in the form of SKBG will also replace the collateral media allowed for foreigners, namely with a fiduciary title not a Dependent Right. This is because the SKBG does not include land with it, but only consists of a copy of the building book, a copy of the lease agreement on the land, a drawing of the floor plan concerned, and an explanation of the size of the rights of the common part and the common object concerned. However, this provision must also be explained clearly and in detail regarding its implementation so as not to confuse BPN in realizing these provisions

Regulate compensation if the period of rights to the land on which the construction of the flats is based is not extended or renewed.

If the agreed time period ends, how the building is built on proprietary land, the problem is the same as the description above, that the right to use the building is the responsibility of the builder (developer) not the responsibility of the land owner, then the law must emphasize the arrangement that if the period of the right to land which is the basis for the construction of the apartment is not extended or renewed, then the person who builds the building is obliged to compensate for the loss. For reasons of not being extended or renewing the land rights which are the basis for the construction of flats due to changes in rights due to the spatial plan, appropriate compensation can be given to the right holder. The state can take over part of the land whose rights have been changed by

providing appropriate compensation. As Aristotle's theory of cumulative justice, which applies to everyone equally, the compensation that must be given by the State or the developer must be calculated from the value or price of the apartment unit owned by the holder of the property right of the apartment unit.

#### 4. CONCLUSIONS

Based on the discussion above, it can be concluded Employment Creation Law and Government Regulation No. 18 of 2021 concerning Management Rights, Land Rights, Flat Units, and Land Registration does not stipulate if the land rights on which the flats are based are not extended or renewed, so that it does not reflect the legal certainty of ownership of flats by foreigners. This also has implications for the legal protection that will be obtained by foreigners, that the Job Creation Law and Government Regulation No. 18 of 2021 also does not reflect preventive legal protection for foreigners so that foreigners may lose money when buying flats in Indonesia, because their bargaining position is weaker in Indonesian land law.

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