



UDC 34

## RIGHT OF USE AGREEMENTS AS AN ALTERNATIVE TO LAND OWNERSHIP FOR FOREIGN NATIONALS IN INDONESIA

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### ABSTRACT

One of the forms of ownership of land rights for foreigners in Indonesia in addition to being given the Right to Rent is the Right to Use which is very attractive, because the granting of a very long period of time can be up to 80 years, and can provide opportunities for economic value on the status of land in the form of financial value. The Government of Indonesia formed a regulation granting the status of Land Use Rights for Foreign Citizens is for private residences, but in reality Foreign Citizens secretly use the status of Land Use Rights for business activities such as: villas, elite boarding houses, cafes and restaurants because of the absence of strict regulations and supervision and sanctions from the Government of Indonesia to Foreign Citizens as applicants and users of the status of Land Use Rights imposed on land owned by Indonesian Citizens.

### KEY WORDS

Agreement, right of use, alternative, land ownership, land rights, foreign citizen.

In Indonesia, especially in Bali, there are so many foreign citizens stay as permanent resident and also doing their business because of kindly local citizens and the cultural customs. There are two forms or classification of ownership of land rights in Indonesia that are most in demand, namely: 1. Right of Use; 2. Right of Lease (Adjie H. 2023); for Foreign Citizens in addition to the granting of the status of the Right of Lease is the granting of the Right of Use regulated in the Basic Agrarian Law Number 5 of 1960 (BAL) article 42 which in its provisions contains the granting of the status of the Right of Use for Foreign Citizens without any limitation on the period of the Right of Use and the area of land that can be charged with the Right of Use. In the provisions of Government Regulation No. 40 of 1996 on Cultivation Rights, Building Rights, and Land Rights in Article 39 and Article 45, foreign nationals can be granted the Right to Use for 25 years and the status of the Right to Use can be extended again for 25 years or an unspecified period of time as long as the land is used for certain purposes (this causes no definite limit on the land area and time period). In Government Regulation No. 103 of 2015 concerning the Ownership of Residential Houses by Foreigners Residing in Indonesia in article 6, the Right of Use for Foreign Citizens is granted for 30 years, extended for 20 years, and can be renewed for 30 years (this causes there to be no limit on the land area and the minimum or maximum period), Furthermore, in Government Regulation No. 18 of 2021 concerning Management Rights, Land Rights, Flat Housing Units, and Land Registration Article 52 in conjunction with the Job Creation Law No. 11 of 2020, the contents of the provisions are the same as Government Regulation No. 103 of 2015, namely Foreign Citizens are given a period of Use Rights for 30 years, extended for 20 years, and can be renewed for 30 years, and can be renewed for 30 years and there are provisions for the Right of Use as long as it is used for an unspecified time as long as it is used and utilized it can continue to be given the status of the Right of Use to Foreign Citizens, and in making the Deed of Agreement which is held before a Notary there is no rigid standard, this is where it is analyzed that there can be potential legal problems for Indonesian Citizens, namely material and immaterial losses for decades of not being able to utilize and utilize their own property rights land because they are charged with the status of the Right of Use, Although there is a nominal transaction agreement granting the right to use



on land owned by foreign citizens in the form of money with a value of tens of billions of rupiah, but when viewed in the future the value of money that becomes an agreement in the transaction is meaningless for Indonesian citizens and violates the provisions of Article 33 paragraph 3 of the 1945 Constitution. The Right to Control or sometimes called the Right to Control the State (RCS) as mandated in Article 33 Paragraph 3 is the only ownership right to land explicitly granted by the Constitution to the Indonesian state (Afifah Kusumadara, 2013).

The research method used in writing this journal is a normative juridical research method (Soekanto, S. 2003) using a statutory approach and a legal concept analysis approach.

## **RESULTS AND DISCUSSION**

The initial idea of the establishment of the Basic Agrarian Law Number 5 of 1960 is actually a concept of the State participating in regulating the utilization of natural resources as a means to meet the needs of the people from each issuance of land regulations or restrictions for everyone who is required to obey and obey to be able to use land facilities in Indonesia. the provisions of Article 33 of the 1945 Constitution of the Republic of Indonesia state that: "the earth, water, and natural resources contained therein shall be controlled by the State and utilized to the greatest extent for the prosperity of the people", this provision is the constitutional basis for the formation and formulation of the Basic Agrarian Law. According to UUPA, foreign nationals can become holders of Right of Use, but this provision has not functioned optimally (Maria S. W. Sumardjono, 2007).

Article 42 of the Basic Agrarian Law states that those who can have the right of use are: a. Indonesian citizens; b. foreigners domiciled in Indonesia; c. foreign legal entities established under Indonesian law and domiciled in Indonesia; d. foreign legal entities having representatives in Indonesia.

In Government Regulation No. 40 of 1996 in article 39 which contains provisions that can have the Right of Use are: a. Indonesian citizens; b. Legal entities established under Indonesian law and domiciled in Indonesia; c. Departments of Non-Departmental Government Institutions, and Regional Governments; d. Religious and social bodies; e. Social organizations; e. Religious and social organizations; e. Religious organizations; e. Social organizations; e. Religious organizations; e. Social organizations. Religious and social bodies; e. Foreigners domiciled in Indonesia; f. Foreign legal entities having representation in Indonesia. Foreign legal entities that have representatives in Indonesia; g. Representatives of foreign countries and representatives of international bodies. Representatives of foreign countries and representatives of international bodies.

Article 45 of Government Regulation No. 40/1996 which contains provisions on the term of the Right of Use are: 1. The Right of Use as referred to in is granted for a maximum period of twenty-five years and may be extended for a maximum period of twenty years or granted for an indefinite period as long as the land is used for certain purposes; 2. After the term of the Right of Use or its extension as referred to in paragraph (1) expires, the right holder may be granted a renewal of the Right of Use on the same land.

In Government Regulation No. 103 of 2015 which regulates the Right of Use for Foreign Citizens in Indonesia. (Maria S. W Sumardjono, 2007) In the provisions of Article 4 of Government Regulation No. 103 of 2015, it is stated that the granting of the status of the Right of Use on Freehold land granted to Foreign Citizens on land: 1. Right of Use on State Land; or 2. Right of Use on Property Rights controlled based on an agreement to grant Right of Use on Property Rights with a Notary deed and a Land Deed Official (PPAT). The regulation of the period of granting the status of right of use on land for foreigners is specifically mentioned that they can only control one parcel of land rights, while in the provisions of Article 6 of Government Regulation No. 103 of 2015 it is stipulated that: 1. The Right of Use granted on Freehold land as referred to in Article 4 letter a number 1, shall be granted for a period of 30 (thirty) years; 2. The Right of Use as referred to in paragraph (1) may be extended for a period of 20 (twenty) years. 3. In the event that the extension period



as referred to in paragraph (2) expires, the Right of Use may be renewed for a period of 30 (thirty) years.

In Government Regulation Number 18 of 2021 concerning Management Rights, Land Rights, Flat Housing Units, and Land Registration in conjunction with the Job Creation Law number 11 of the Year. Article 52 of Government Regulation Number 18 of 2021 stipulates that: 1. Right of use on State Land and Management Rights Land with a term is granted for a maximum period of 30 (thirty) years" extended for a maximum period of 20 (twenty) years, and renewed for a maximum period of 30 (thirty) years; 2. Right of use during use is granted for an unspecified period as long as it is used and utilized; 3. Right of use with a term on Land of ownership rights, is granted for a maximum period of 30 thirty years and can be renewed with a deed of granting right of use on Land of ownership rights. (there are no further limitation provisions related to this rule specifically on Hak Pakai on Hak Milik land); 4. After the period of grant, extension, and renewal as referred to in paragraph (1) expires, the Land of right of use reverts to Land under Direct Control of the State or Land under Management Rights; 5. Land under Direct Control of the State as referred to in paragraph (4), rearrangement of use, utilization, and ownership becomes the authority of the Minister and may be given priority to former right holders with due regard to the conditions of the granting of rights are fulfilled properly by the right holder; c. the right holder still qualifies as a right holder; d. the land is still being cultivated and utilized properly in accordance with the condition of the land, the nature, and the purpose of the granting of rights; e. the conditions of the granting of rights are fulfilled properly by the right holder; f. the right holder still qualifies as a right holder; g. the land is still in accordance with the spatial plan; h. it is not used and/or planned for the public interest; i. natural resources and the environment; and the condition of the Land and the surrounding community.

In Government Regulation Number 18 of 2021, it does not refer to the basic provisions of the Basic Agrarian Law in the phrase weighing and remembering, it only includes the 1945 Constitution and the Job Creation Law Number 11 of 2020 which was declared unconstitutional by the Constitutional Court, so this Government Regulation should not be enforced so that it does not cause double meaning or multiple interpretations in its implementation. so that in the case of this Journal Research, it can be analyzed that there has been an Empty Norm, which has not been regulated regarding the Term of the Right to Use on Freehold land which is imposed with the status of Right to Use, because the Status of Land Use Rights granted to Foreign Citizens is a legal problem that does not provide the value of legal certainty over land ownership in Indonesia. (Rumbayan T.M., 2011).

In conducting scientific research, a research study is conducted on the topic of the problem under review, namely: 1. Does the legislation governing the Right of Use on Freehold Land provide a sense of justice and legal protection for land rights owners? 2. How should the regulations on the Right of Use on Freehold land be made in order to provide legal protection for Indonesian citizens?

The purpose of the research in this journal is to critically examine the laws and regulations governing the granting of the status of the Right of Use on Freehold land for Foreign Citizens in order to provide the value of justice and legal protection for Indonesian Citizens and to know, examine, and analyze how the form of regulations on the granting of the status of the Right of Use on Freehold land should be prepared by the Government in order to provide the value of justice and legal protection for Indonesian Citizens.

Justice and legal protection can only be understood if it is positioned as a state that the law intends to realize (Astariyani, Ni LuhGede, 2018). Furthermore, there are several indicators that must be met to fulfil the criteria of justice and legal protection related to the Granting of Use Rights Status to Foreign Citizens in order to fulfil the criteria of justice and legal protection for Indonesian Citizens, namely: 1. Fulfilment of aspects of justice and legal protection in terms of the basic rights contained in the provisions of the 1945 Constitution Article 33 Paragraph 3 and the universal principle that every Indonesian citizen has the same right to obtain these fundamental rights; 1. Guarantee and fulfilment of fundamental rights for Indonesian citizens to obtain access to information on legal products based on the values of justice and legal protection; 2. Realisation of the constitutional rights of every Indonesian



citizen in accordance with the principle of equality before the law; 3. The realisation of the constitutional rights of every Indonesian citizen in accordance with the principle of equality before the law; 4. The certainty of the implementation of the socialisation of land regulations has been implemented evenly throughout the territory of the Unitary State of the Republic of Indonesia in order to realise the value of justice and legal protection for Indonesian citizens.

In this journal research, there are 2 classifications of theories used to review and analyse it (Soehino, 1984), namely: 1. Justice Theory. According to Aristotle, the purpose of law is justice alone and the content of the law is determined by ethical awareness of what is said to be fair and what is said to be unfair. The law should have a function not only to uphold justice but also as a determinant of proportionality in relation to the discussion of this journal, namely the limitation of the period of granting the status of Use Rights to Foreign Citizens, so that Indonesian Citizens can empower, manage their own property rights without being bound by a long period of Use Rights. (Ahmad Ali, 2009).

The concept of justice is determined by the behaviour, nature, or attitude that resides in the human soul as a reference for life and society (Nasution B.J., 2014). The existence of the concept of legal justice regarding the order of human life patterns is not only guided by the standard rules stipulated in the provisions of laws and regulations, but also guided by all norms, values, and morals inherent in every human being in a State of Law. In Indonesia, which adheres to a democratic legal system, it upholds the values of justice in it and in principle should provide a sense of justice for all Indonesian people.

As a country based on positive law in a state of law, legal justice is required to be applied professionally, proportionally, properly, correctly, and wisely so that it is in accordance with the principles of expediency, justice and equality in the law itself. A democratic state prioritizes the concept of legal justice in creating a legal state that provides a sense of justice to every citizen with regular regulations in its enforcement, so as to produce good and quality law in order to achieve the goals of justice and welfare for the Indonesian people as a whole as the holder of power and sovereignty of the State and the concept of justice in the Regulations governing the granting of Use Rights to land can be applied to provide legal justice in real terms, but it has not been implemented in real terms. 2. Theory of Legal Protection. Etymologically, the word "protection" is composed of the basic word *lindung* which means shelter or thing (action) or called "protection" which means "the act of protecting". Protection means providing guarantees for something as a consequence of the protector. Thus, in the notion of protection there is an object that is protected in this case relating to rights that must be maintained and respected where rights contain the notion of belonging, possession, authority or power to do something determined by law which is the responsibility of the State to ensure the fulfilment of these rights (Husen Alting, 2010). The provision of legal protection to the community is intended as a guarantee of their rights, among others: 1. the existence of legal certainty against all actions of the authorities to citizens; 2. the right to compensation for losses provided by the government in proportion to the losses suffered by citizens; 3. the right to file a lawsuit or appeal to the authorized state equipment or the authorities; 4. the right to submit their interests and or objections before a decision is taken from the authorized authorities. Legal protection is a description of the operation of the legal function to realize legal objectives, namely justice, benefit and legal certainty. "Legal protection is a protection given to legal subjects in accordance with the rule of law, both preventive (prevention) and repressive (coercion), both written and unwritten in order to enforce the rule of law. From the explanation of the experts above, it provides an understanding that legal protection is a form of the operation of legal functions to realize legal objectives, namely justice, benefit and legal certainty" (Rozali Abdullah, 2001).

Hans Kelsen's theory of legal protection expresses his view regarding: "the loyalty of citizens to the state and the right to state protection", meaning that loyalty and protection do not indicate anything other than the obligations imposed by the legal order to citizens who are the subjects, so that the citizen's right to protection contains no content other than the obligations of state organs towards citizens imposed by the legal order. In examining the problems in this journal, Hans Kelsen's theory is used which is related to the provisions in Article 42 of the Basic Agrarian Law Number 5 of 1960, Government Regulation Number 40



of 1996, Government Regulation Number 103 of 2015 or Government Regulation Number 18 of 2021 in conjunction with the Job Creation Law Number 11 of 2020 which turns out that the State has not provided real legal protection for Indonesian Citizens on the Granting of the Right to Use status for Foreign Citizens in Indonesia because it seems that it is still in favour and provides more benefit value for Foreign Citizens in terms of utilizing the Right to Use land granted by the State on Freehold land.

Furthermore, in the making of the agreement on the Right of Use agreement between Foreign Citizens and Indonesian Citizens, it is usually done in front of a Notary with an agreement that is immediately signed for up to 50 years or 80 years without seeing the potential losses that will be caused to Indonesian Citizens because they cannot utilize and empower the potential economic value of the land they own because the value of the land price agreed upon is tens of billions at this time, even though there is an agreement in accordance with the provisions of Article 1320 of the Civil Code, Basic Agrarian Law Number 5 of 1960, Government Regulation Number 40 of 1996, Government Regulation Number 103 of 2015, Government Regulation Number 18 of 2021 in conjunction with the Job Creation Law Number 11 of 2020, when analyzed more deeply, the agreement is actually detrimental to Indonesian citizens because of the length of time and there is no limit to the land area promised, even though the agreement is legal and legally allowed by the government that formed the regulation, but in the implementation of the use of the Right to Use the land is not in accordance with its designation for residence by foreign citizens, it is used as a place for businesses such as cafes, restaurants, villas, and restaurants: cafes, restaurants, villas, and elite boarding houses to rent back to others. This is what the Indonesian Government does not realize due to weak supervision, lack of assertiveness, and incompatibility and incompleteness of regulatory provisions on the Right to Use for Foreign Citizens in Indonesia. The regulations formed by the Government are very quickly changing and changing but only focus on the length of the Right to Use period without looking at the legal aspects and other potential legal problems that may occur in the decades to come. Indonesian citizens will only become spectators and lose the values of the benefits, religious magic of their land even though in the agreement on the Right of Use agreement between foreign citizens and Indonesian citizens have made payment agreements and have paid taxes to the state treasury in one transaction Granting the Right of Use on Freehold land, for foreign citizens the tax paid is very cheap because of the weak rules formed by the government and the cheap dollar to rupiah exchange rate in granting the Right of Use for foreign citizens, and will certainly be paid directly by foreign nationals, because for 80 years he will continue to benefit from the application of the Right of Use on Freehold land, because various land regulation policies that exist today should be aimed at the interests of social justice for the entire community, because the basic principles contained in the Basic Agrarian Law are not static (Sumardjono M. S. W, 2001).

## **CONCLUSION**

The conclusion of this research is that there is still weak protection and legal certainty for Indonesian Citizens on the granting of the status of the Right of Use to Foreign Citizens by the Government because it does not see the limitation of the period and the limitation of the area of land that can be charged with the Right of Use, this needs to be done as an effort to save the rights of Indonesian Citizens based on Article 33 paragraph 3 of the 1945 Constitution in order to be able to utilize and utilize the potential of their own property rights today even for decades to come. so that the values of usability and benefits of land can also be felt by their children and grandchildren for decades to come, so that the values of usability and benefits of land can also be felt by their children and grandchildren decades later and Indonesian citizens do not only become spectators of foreign citizens who have a lot of money capital by circumventing land regulations in Indonesia that are not in accordance with their designation as a place of residence but use it for business premises. This happens because the government makes it easy for foreign nationals to own land facilities in Indonesia (Dyah Ayu Grashinta, 2010).



There needs to be a role of Notary in terms of regulation of the current Law/Government Regulation and in forming agreements relating to the Right of Use imposed on Freehold land between Indonesian Citizens and Foreign Citizens to explain in advance the potential future things that will happen in the future related to the length of the term of the right of use there is no limit on the size of the Right of Use land for Foreign Citizens and the Notary should suggest that the period of time of the Right of Use agreement on Freehold land should be made per 5 years or 10 years so that the value of the economic benefits of land and the welfare of Indonesian Citizens on the Right of Use of the land can be more tangibly felt. and the Government should revoke all provisions related to the right of use on Freehold land, and the Government should revoke all provisions that have the potential to cause harm or legal problems for Indonesian Citizens, especially related to the Right to Use land and form a new Land regulation that clearly and definitely contains the provisions of the minimum limit on the granting of the status of the right of use whose period should not be too long and there is a limit on the area of land that can be given to Foreign Citizens and there is a standard form of agreement format made before a Notary related to the Right to Use on Freehold land and there is a supervisory team formed to examine and supervise the suitability of the application and utilization and use of the Right to Use by Foreign Citizens if it is not appropriate must be given civil or criminal sanctions.

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