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Indonesian Property Law in Global Competition

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Abstract
Investment in Indonesia is a necessity, in the field of direct investment property by foreigners experiencing obstacles when dealing with the land legal system in Indonesia. Property in this case includes land and buildings or houses attached to one another, on the other hand there are restrictions on the purchase of property for foreigners, where they can only purchase Usage Right of land that has limited period of time and the Building Rights on that, which also is limited time, but foreigners unwillingly to buy property above the Usage Rights. The situation is a result of the unequal treatment between Indonesian and foreign citizens with the intention of protecting the rights of citizens. In the Land Law System of Indonesia, the government regulates land use, ownership, and land transaction through the right to control state by the government. This paper aims to avoid the practice of legal smuggling that has happened so far, and at the same time open up opportunities for foreigners to purchase property in Indonesia legally, which has an impact on increasing the passion for property investment in Indonesia. The research method used is empirical normative, which refers to several cases those are the object of research with a case study approach, a conceptual approach, and a statutory approach. Out of the box thinking is needed from common sense practices that have been carried out by the government in exercising the right to control state.

Keywords: Law, Property, Foreigner, Investment

1. Background

Globalization is interpreted by economic actors as a borderless area (Diener, A.C. Hagen, J., 2009) or no national borders, even stateless (Anthony, 1999), the point is not having citizenship, but citizenship status is not required in financial transactions that are recognized by the world. Today, the use of credit cards or ATMs can be done over the countries by all any citizens, even without a place and time limit. (Hancock, D. and Humphrey, D.B., 1997) When in Saudi, America, or Indonesia in the global economy is considered the same time in which any transactions are carried out at anytime, anywhere, and by anyone, it seems that *Lex Locus Contractus* (Campbell, 1910) Theory as regulated in article 16 *Algemene Bepalingen Van Wetgeving* (Nawi, S., Syarif, M., Hambali, A. R., & Salle, S., 2019) as if it is no longer valid, because all transactions at their respective places when the "deal" has been deemed "done," then the global players have agreed not to question the law of what applies to the financial transaction again.

Moreover, transactions conducted through stock exchanges such as the Jakarta Stock Exchange (JSX) or even Wall Street in New York, or the Nikkei in Tokyo are not a problem for stock brokers, for example. Thus, the

development of law and globalization in the field of financial transactions that are increasingly advancing, moreover supported by information technology between countries, citizenship does not seem to be a problem.

Unlike the investment in property, the property sector in Indonesia does not seem ready to face global competition, because it is still in the inner-box mindset, not out of the box (Attanasio, 2002), the intention is confined to several principles in Indonesian Land Law, such as the principle of nationality (Anggriani, 2012), nationality principle (Sucahya, I.M.D.P. and Wisanjaya, I.G.P.E., 2013), and the principle of attachment (Sutiana, 2014). Property investment in Indonesia becomes unattractive for the investors, because the restriction of rights granted by law to foreign investors makes Indonesia's investment competitiveness becoming weak. This is proven that property supply in Indonesia is only absorbed by 65% (Nuryasman and Yessica, 2017).

The question is, doesn't Indonesian Law also adhere to natural law understanding or thought developed by Grotius (Kusniati, 2011), Why not apply the principles that apply in natural law? In the theory of natural law that affects international law International Treatment Measures (UPI) must not conflict with National Treatment Measures (UPN) (Hall, 2001). But on the other hand, in line with global developments, the UPN must see the development of global business transactions to be able to adjust to UPI, as adopted by Natural Law (Anggriani, 2012).

Continuation of Natural Law, is the recognition of the principle of Equality Before the Law (Johnson Jr., 2010). The treatment of international law should be able to regulate global development and game or global development and global playing. Global development is a rapid development in business transaction activities, now it has reached the digital world of global transactions (Wiwoho, 2014), example; someone who has an ATM Bank BNI in the interior of North Sumatra when going to England can take Pound Sterling as long as the funds are there, then move to Saudi in the form of Riyals, even to Israel can use transactions that are opened in his hometown for example on the island of Samosir, thus developing financial transactions resulting in Indonesia having come into play in the global activities of each of the business development activities called Global Development (McMichael, 2005) growing now there is a "*Go-pay*", there is another *Gojek* feature (Muttaqin, 2020), various delivery companies including companies that can open business opportunities in Indonesia such as *Alibaba* (Qing, 2008), *Traveloka* (Harita, F. M., Sadono, T. P., Sya, M., Fernando, J., & Goswami, J. K., 2020), or *Bukalapak* (Rohandi, 2017), which is now increasingly crowded and growing and encouraging Indonesia's competitiveness in the field of non-cash business is related to various feature transactions (Yudhanti, 2018).

In the case of property in Indonesia, the role of Land Law is still very strong due to the treatment of the principle of nationality, where property in Indonesia is related to the prevailing legal system, almost all property investment uses land owned by developers with the status of building rights. Rights that can only be owned by Indonesian citizens or legal entities that are subject to the laws in force in Indonesia, thus properties that are simple flats, commercial flats, and also specifically for business areas such as non-residential office flats, cannot be owned by foreigners, because there are restrictions by the Basic Agrarian Law.

There is legal smuggling in foreigner personal property ownership or also foreign legal entities which have been known as dummy, nominee, and strawman; where foreign nationals buy property through the hands of Indonesian citizens, transactions are carried out in various ways, including: by marrying a local citizen, granting power to a foreigner for an unlimited time or conducting a lease transaction for an indefinite period of time followed by a letter selling power from citizens to foreigners (Dewi, O.R. and Putu, N.L, 2019). In addition, there are also more risky legal practices, for example the purchase of property by Indonesian citizens followed by a letter of acknowledgment in the form of a "notarial deed" that purchases and ownership of the property by foreigners. These practices not only have occurred irregularities and smuggling of the law, but also harm to foreign parties and citizens, such as risks to taxation, criminal acts, the emergence of disputes if one party (married couple) dies. If the law opens opportunities for foreigners to own property, basically it can encourage state revenues such as income tax, luxury tax, or tax on the acquisition of land and building rights (BPHTB) which can be applied to foreign nationals in larger amounts, for example 10 % of what has been valid so far is 5%.

A foreign citizen to own a property in Indonesia must establish an Indonesian legal entity, Indonesian investment law disclosure can be utilized by foreigners, but for activities that are property investment in Indonesia is still

relatively low, because Indonesia's property competitiveness is weak, exemplified The Right to Build in Indonesia is no more than 30 years compared to Singapore for 95 years (Hampden-Turner, 2009), Malaysia for 125 years (Ali, 2009), how passionate the neighboring countries open up new opportunities for investors to own property, the property business in Singapore which is much more expensive in Indonesia as well as Malaysia as well as the quality of the mud and surrounding areas, from the explanation above can be outlined the question is What is the best way to open the market globally of the property business in Indonesia by developing Indonesian Property Law without violating the applicable legal system?

2. Research Method

The research method is empirical normative, which refers to several cases those are the object of research with a case study approach, a conceptual approach, and a statutory approach (Budiartha, 2019). To struggle with the conflict between the international need to obtain legal ownership of property in Indonesia and the practice of legal smuggling due to different treatment from the legal system in Indonesia, case studies in several areas by applying a horizontal separation system can answer the legal impasse between land and property law (Roestamy, 2017).

The community's need for alternative solutions to obtain certainty for ownership of property separated from land can encourage the independence of property law in Indonesia and at the same time open up opportunities for foreigners to own property separate from land. Sources of data those primary, secondary, and tertiary (Suherman, & Retnaningsih, S., 2022) are done by analyzing the laws and regulations and some views of experts, which are summarized from literature sources. The case studies were obtained by referring to legal documents at the notary and banking offices that have made guarantee contracts from buildings separated from land in three cities in Indonesia, including Jakarta, Surabaya, and Medan.

3. Results and Discussions

3.1 Overview of Property Law and Globalization

Understanding of Property Law in the legal literature in Indonesia is still not widely known, the definition of Property Law requires a legal basis to be recognized before the judiciary. There are several scopes of law relating to Property Law, namely; Land Law that is subject to the Basic Agrarian Law (UUPA) (McCarthy, 2016), Building Law which is subject to the Building Law (UUBG) (Pamuji, K., Nasihuddin, A. A., Ardanariswari, R., Supriyanto, S., & Rosyadi, S., 2019) and the Apartment Law (UURS) (Rachmawati, F., Soemitro, R. A. A., Adi, T. J. W., & Susilawati, C., 2018), Underwriting Rights as stipulated in the Mortgage Rights Act (UUHT) (Kusumastuti, D., 2016), including the derivation of legislation as implementing regulations and their derivatives. Understanding of Property Law cannot be released also with the concept of Building Use Rights (HGB) regulated in Basic Agrarian Law in article 35 and the concept of Use Rights in Basic Agrarian Law in articles 41 - 43.

From this explanation, the writer draws a line that some elements of Property Law include rights to property which in this case is limited to land and buildings and the rights in it, and is related to guarantee law in it, of course, the involvement of elements of building management buildings and flats become an important part.

It is known that according to Basic Agrarian Law articles 37-39 that the Right to Build can only be owned by Indonesian citizens or Indonesian legal entities, the question is whether the article includes protecting the Indonesian people or has treated Indonesia's non-international Land Law system? It must be remembered that the Basic Agrarian Law was formalized in 1960 when Indonesia's struggle against the Netherlands was still felt, therefore the closure of the land system in Indonesia was intended to make the Indonesian people host their own country because land was a sacred, religious, including self-esteem, family, the future of life and death for citizens. Many land disputes cannot be resolved and cause casualties to the people.

In Indonesia, land management is regulated in Basic Agrarian Law article 2 through the right to control state by the government (Bakri, 2011), where the state has the right to regulate the designation, use, maintenance and provision of land; including regulating legal relations between legal subjects and land, and regulating legal

relations between legal subjects regarding land. Indonesia does not adhere to the domain of the state, but adheres to the domain of the nation in terms of land ownership according to the land legal system, that the state does not have rights to land, but controls through the system of right to control state by the government (Kusumadara, 2015). In Singapore land is not owned by its people, but is owned by the state, so the state domain applies (Hwang, B., Ming Shan, and Supa'at, N.B.S., 2017). Meanwhile, in Malaysia, the domain of land is king, because the king is the holder of sovereignty over land (Jenkins, G. and Victor T., 2003). Whereas in Thailand, there was a development of land tenure where some were controlled by the king, while others were owned by the people. In Malaysia the king can release the land either by purchase or gift by and to the people, because with the power he has the king can release the rights to land to the community, for example in the public interest, even in the interests of building affordable housing for the people. The rights of the people are given in the form of leases or usage rights, known as leasehold (for 75 years to 90 years) and freehold (for a period of more than 100 years) (Hamman, 2019).

Unlike in Indonesia, if the community has flats or apartments, both residential and non-residential, it is still overshadowed by the expiration of the Right to Building, considering the flats are built on Building Right with a maximum term of 30 years, and in practice, National Land Agency could grant a lower time period.

3.2 Global Competition and the future of Property Law in Indonesia

The thought of developing Indonesian Property Law cannot be released with reform efforts regarding land rights, specifically relating to ownership of property in this case the Building Rights (HGB) and the Right to Use. Both of these rights become obstacles in the development of Property Law in Indonesia, bearing in mind that there is a limited period of time, namely the HGB for 30 years (in practice it is also often granted only 20 years), then the use rights as rights that open up opportunities for foreign ownership of property for a period of 10 year is a very short time for long-term investments such as property.

The perspective of the development of Property Law in Indonesia in the context of facing global competition by looking at the practice of customary law in force in Indonesia that applies the principle of horizontal separation, namely the separation of ownership between buildings and land (Roestamy, Konsep Kepemilikan Rumah Bagi Warga Negara Asing dalam Rangka Percepatan Peningkatan Investasi di Indonesia, 2016). So far, there has not been any dispute over ownership of property, in this case a house or place of business built on common property, or communal ownership (a customary community association) (Hopkins, 2016).

Ter Haar (1948), states that ownership rights to houses and plantations are basically separate from the rights to the land on which the objects are located. Thus, the principle of horizontal separation can be interpreted as a doctrine that separates land ownership from objects attached to it, including in the case of land transactions, such as in buying and selling.

The principle of horizontal separation is adhered to in the Customary Law (Diala, 2017), as adheres to the separating land right from everything that exists on it, which places land objects so high compared to other objects (Hasan, 1996). Some examples of the adoption of these principles in Customary Law are seen from the practice of inhabiting and owning a house on someone else's yard that the right to own and inhabit one's own house in the yard of another person (that right can be revoked) next to the house of the owner of his own yard, is called the right to hitch a ride (*recht als bijwoner*); while the right to own and inhabit one's own home in the yard of another person who is not inhabited by the owner, is called a right ride a house (*recht als opwoner*). Home or yard passengers, such as ovaries, protectors, magersari, passengers as illustrated by Iman Sudiyat (1981).

With the application of the principle of horizontal separation hereditary and followed by indigenous peoples, basically it becomes one of the sources of the Basic Agrarian Law where customary law is the source of National Agrarian Law from the formal meaning. Therefore, in the research of this paper in line with the dissertation topic that the author will compile, the principle of horizontal separation becomes one of the analysis blades to see the development of Property Law in Indonesia.

If Indonesia wants to develop a solid Property Law system, then the building legal position must be ordered as an independent law, which is liberated from the Land Law regime, because of a misunderstanding in the drafting of apartment laws, especially regarding the understanding of flats with overlapping between building rights and land rights.

Indonesian apartment law which is one of the pillars of Property Law becomes rigid, indeed the law of objects is rigid law, but building law basically does not recognize the principle of nationality, the building legal system recognizes the principle of internationality as explained in the Law Building articles 8-12 which states that everyone can have the right to building, so not every citizen of Indonesia as the right to building. In contrast to the Right to Ownership, Business Permit, and Right to Build, which can only be owned by Indonesian citizens or legal entities that are subject to applicable law in Indonesia.

If Indonesia does not want to be said to have discriminated in granting rights, the author would like to say the limitation of the granting of rights as such is the principle of different treatment, where the principle is not in line with natural law as mentioned above, namely a conflict between International Treatment Measures and National Treatment Measures.

Judging from the UUBG legislation theory, the natural law or natural law theory developed by Grotius, namely the phrase "everyone" means that UUBG has made a legal breakthrough in the legal system of things in Indonesia. The legal system of objects has a rigid nature, where a material right cannot be said to be an object before there is a law that regulates and determines it as an object in the civil law system (Meliala, 2014). The apartment system in Indonesia is still influenced by the principle of vertical attachment (*Verticale Accessie Beginsel*) (Utomo, 2019) with the understanding that wants to enforce Civil Code article 571 which states: "that ownership rights to a piece of land include ownership rights to everything that is on it and in the land." This article also affects Law No. 4 of 1996 concerning Mortgage Rights (UUHT) which then affected the registration system of ownership of flats units (HMSRS), which until now still has not seen laws and regulations governing the existence of separate rights from apartment units, namely shared land, buildings together, and shared objects.

That in the legal system of objects there is not one object that can be said that objects subject to the legal system of objects or the Indonesian legal system are not expressly stated in the law, the interpretation carried out by Government Regulation No. 24 of 1997 concerning Land Registration has closed the opportunity of developing Property Law by applying the principle of vertical attachment.

Unlike the treaty law which adheres to the principle of *consensualism* (Sewu, 2019) as regulated in the Civil Code article 1320 and the principle of freedom of contract as stipulated in article 1338, where the parties can freely make agreements and act as laws and bind both parties to make the agreement as long as it does not conflict with statutory regulations, customs and decency as regulated in the Civil Code article 1339.

The practice of objects apart from land as described above, in the customary legal system in Minangkabau has been accepted by the community and has legal force (Nurdin, Z. and Tegnan, H., 2019), in Yogyakarta the practice is known as "*Magersar,"* where land in the Sultanate area of Yogyakarta belongs to the king. Building owners who try or reside on land owned by the sultan (*sultan ground*) must obey the *Magersari Principle* or Land Law that applies in the sultanate of Yogyakarta (Agustina, I.H. and Hindersah, H., 2019).

In Jakarta, buildings are now available in the basement and under the highway as a development of the Mass Rapid Transportation (MRT), many businesses and even the infrastructure such as railroad stations and carriages are among the property of others on it (buildings and public facilities). In many buildings and malls in the business district (Said, L.B. and Syafey, I., 2019), many buildings are built on highways such as Harco Mangga Dua, then crossing the road from Pondok Indah Mall 1 (PIM-1) to PIM-2, many available stalls and modern shops of value expensive (Kocur-Bera, 2019). Basically, the practice of the principle of horizontal separation is well known in cities such as Jakarta, in Surabaya there is what is known as a green letter namely the ownership of a shop on a local government land, in Medan, a Chinese businessman named Chong Afie got a grand from the sultan of land in the Kesawan Medan golden triangle area, by issuing Grand Chong Afie he built the Business Complex in the

Kesawan area with a land lease system (Asari, 2019), but his shop was owned by an individual person and could be transferred securely to the parties others as building owners. So basically, the practices of the principle of horizontal separation already exist but the Indonesian Property Law system has not been accepted even though the Building Law and Apartment Law are well known.

The classic problem in Indonesia is to apply the registration of buildings to a big question, where is the authority? The struggle between the Ministry of Public Works and the Ministry of Land which have registered ownership rights of flats (HMSRS) under their authority based on Government Regulation (PP) 24/1997, is a mistake and caused Property Law to stagnate and have no competitiveness. As a result, property deals can only be given to local residents or Indonesian citizens. Indonesian property does not have global competitiveness, because it is not attractive.

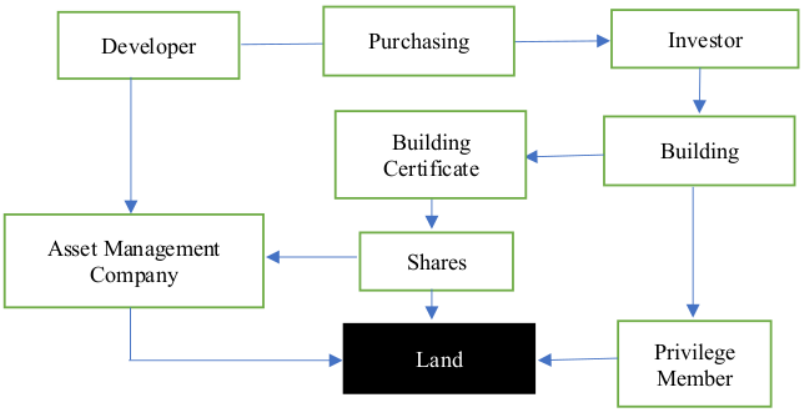
The debate has caused Indonesia's Property Law to be very slow to develop, because the current system has weak competitiveness. Aside from being foreign, the ownership of Indonesian citizens only over the property still has a question mark with the application of the principle of attachment to the shared land having an impact on the ownership rights of flats.

Legal experts must contribute input to the government that the signals given by regulations must be formulated immediately, and in the opinion of the author can be in the form of government regulations if they see the Apartment Law (UURS) No. 20/2011 Article 49 is the newest one, while the Building Law (UUBG) No. 28/2002 article 8 jo. PPBG No. 36/2005 article 12 paragraph (4) which mandates registration of ownership of buildings in the form of a President Decree. The difference between these two laws seems to raise doubts from the government itself, so that until now both Government Regulation (PP) and President Decree (PERPRES) that will sustain the development of Property Law as intended have not yet been realized.

One aspect of strengthening building law both residential and commercial apartment buildings is one of the pillars of Indonesian Property Law that must be strengthened and provide legal certainty in entering global competition. Land Law, building law, and apartment law are the golden triangle of the development of Indonesian Property Law.

Image of civil relations for the construction of foreign clusters in real estate by applying the principle of horizontal separation. An alternative for granting access to foreigners can be given a landed house with a foreign cluster model, meaning that the developer builds a special cluster that will be inhabited by foreigners who are interested in buying property in Indonesia. By granting rights to the landed house building, the developer forms one asset management property company that owns the foreign cluster referred to, then the government issues a building certificate as proof of ownership of the landed house, then, when the property sale transaction is made, a proportional system of landed house prices can be given by companies in the form of shares of the asset management company that owns and manages the foreign cluster as shown in the figure 1 as below:

Figure 1: Foreign Cluster Landed House Model



In this case, the buyer at the same time gets a membership card to get access to social services and public facilities. The sale of these foreign clusters ultimately provides three pieces of evidence; 1). Building ownership, 2). Ownership of shares of the company, and 3). Membership to get facility access. These three pieces of evidence, civil law can be traded to foreign fellow foreign parties. There are several benefits to be gained here.

First, the existence of legal certainty of ownership of landed house property for foreigners in Indonesia, so they do not need to use dummy or nominee to gain access to property in Indonesia, secondly, specifically for foreign clusters, the government can set a foreign property tax for ownership as well as any transfer transactions from one owner to another, for example by providing sales tax and land and building tax as well as land and building tax on double the charge applicable to Indonesian citizens. In this case the government will get foreign exchange earnings and taxes from the property as mentioned. Third, with this foreign cluster system, it will encourage the passion of Indonesian property which has been for the upper middle cluster, its market is limited to big cities, such as Jakarta, Surabaya, Medan, Bandung and Denpasar, developing into the opening of the markets of Singapore, Malaysia, Australia, Japan and other eastern countries, even penetrated European and American markets, because the market so far, the market provided by the government is the usage rights which have a limited period of time which is usually 10 years to a maximum of 20 years, it is also rare.

3. Conclusions and Suggestions

The development of Land Law by reviewing the expiration period of rights, especially Building Rights and Right to Use is the key to Land Law reform in Indonesia which is part of agrarian reform, because global competition sees limited land tenure as unattractive and unable to compete with neighboring ASEAN countries that have first reformed the rights to property, especially ownership of flats with a much longer period and better than what is held by Indonesia.

To provide stronger competitiveness, from investment property openness for foreigners to own property in Indonesia, has an impact on investment competitiveness, because property ownership is related to the livelihood of people, so they can live in a safe and comfortable place to live. Development of building law that has internationality characteristics can be done by providing legal certainty over building ownership, one of which is how building registration is realized in the legal system of objects by applying the principle of horizontal separation so that ownership of objects on land is not dependent on land rights.

Therefore, in accordance with the high demand from foreigners to own property in Indonesia in line with the increase in foreign investment, it is necessary to develop a model for foreign property ownership with a landed housing cluster model on property companies by registering buildings as a base for building ownership rights that are indeed not legally prohibited by proportional ownership of land over cluster land through indirect investments, namely ownership of shares of property companies that own and control the land area of each cluster. This can be done, for example, in the Jakarta reclamation project or high-middle housing projects in major cities in Indonesia, so that Indonesia's competitiveness can play in the global sphere.

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