

Chaotic real estate rules for foreigners

The agrarian and spatial planning minister, who is also chairman of the National Land Agency, recently issued Regulation No. 29/2016 on procedures for the issuance, relinquishment or transfer of rights over house or residence ownership by foreigners domiciled in Indonesia (Permen 29).

Permen 29 revokes a previous ruling promulgated early this year. Nevertheless, the writer views that Permen 29 does not stipulate more detailed provisions as per instructions from Government Regulation (PP) No. 103/2015 on house or residence ownership by foreigners domiciled in Indonesia but instead causes chaos and even deviates from the expected harmony.

Hans Kelsen, a philosopher of law, explains his theory on the hierarchy of legal norms by arguing that legal norms are hierarchical and leveled in one structure, where a lower norm is derived, applicable and referred to a higher norm.

The higher norm is derived, applicable and referred to an even higher norm, and so it goes on until reaching a norm that cannot be sourced any longer, and is hypothetical or fictive, namely a principle norm.

Permen 29 stipulates a brand new norm that is not recognized under the law on condominiums and the Agrarian Law that regulate the rights of land. Permen 29 introduces terminology on the right of use over condominium units that essentially deviates from the concept and meaning of the original right, namely the right of ownership over a condominium unit.

According to the Condominium Law, the right of ownership of a condominium unit means an individual right that is separated from joint rights over joint equipment, joint facilities and joint land, where those joint rights are calculated based on a comparative proportional value.

As evidence of ownership of a condominium unit over Hak Milik (Freehold title) or the right of ownership, Hak Guna Bangunan (Building Rights Title), Hak Pakai (Right to Use Title) over state land, the right to build or the right of use over the right of management, a certificate of right of ownership over a condominium unit (SHMSRS) is issued.

An SHMSRS is issued for every person who is qualified as a holder of the right of land. The Condominium Law also stipulates that a person means an individual or legal entity. Accordingly, it is clear that an SHMSRS can be owned by an individual or legal entity so long as they are qualified as a holder of the right of land.

Legally interpreted, if a condominium is constructed over right of ownership, then an SHMSRS can only be owned by an Indonesian as the right of ownership can only be held by an Indonesian. If a condominium is constructed over right of use, then an SHMSRS can be owned by an Indonesian, foreigner, Indonesian legal entity and foreign legal entity, as set out under the Agrarian Law.

Permen 29 provides a new meaning that deviates from what is regulated under the Condominium Law, where the right of ownership of condominium units is construed as



Eddy Leks

JAKARTA

ownership by Indonesians of condominium units over the right of ownership, right to build or right of use over state land, as well as the right to build or right of use over the right of management.

The Condominium Law stipulates that an SHMSRS is issued to those qualified as a holder of the right of land, not only to Indonesians. As previously explained, an SHMSRS can also be owned by an Indonesian legal entity.

Furthermore, Permen 29 regulates that the right of use over condominium units means the right of ownership over a condominium unit that is owned by a foreigner. This provision directly violates the provisions of the Condominium Law as, by having this new provision, even though Permen 29 limits the right of use over condominium units that are able to be obtained so long as the condominium unit is constructed over the right to build or right of management, it means that a foreigner may buy an SHMSRS over the right of ownership or right to build.

The Permen further regulates that the alteration of "right of ownership" to "right of use" over condominium units occurs by law. This provision alone fundamentally violates provisions under the PP which regulate that a foreigner can only own a condominium unit that is constructed over right of use. The provisions of the PP follow the Condominium Law and Agrarian Law.

The conception of the right of ownership over condominium units is hugely different to the right of ownership regulated under the Agrarian Law. The terminology of right of ownership in the right of ownership over condominium units refers to the ownership of a condominium unit, not to be interpreted as the right of ownership in the Agrarian Law, which is the strongest and fullest right, and therefore can only be owned by an Indonesian.

Altering the words "right of ownership" to become "right of use" over condominium units in order to equate rights of land that can be owned by a foreigner, namely the right of use, is fundamentally wrong, misguided and adversely affects the existing land system.

Referring to what Hans Kelsen said, it is crucial that a lower regulation follows and refers to a higher-ranked regulation. This is imperative to maintain balance and harmony in the existing legal system. If the government is willing to facilitate foreigners, then the promulgated laws must reflect that. Rules that deviate from the existing structure could potentially cause chaos and disruptions for all stakeholders.

The writer is the founder and managing partner of Leks&Co. He is experienced in the areas of general corporate/commercial and commercial dispute resolution.