

Legality of stipulating cv as the subject of the right to build land right through a circular

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Abstract

The objective of this research was to find out whether the determination of CV as the subject of land right of Building Use Right through a circular letter can be justified. The granting of Building Use Right to CV is stated in the Ministerial Circular Number 2/SE-HT.02.01 dated 08 June 2019. It cannot be categorized as providing a legal basis because the Building Use Right Holders are Indonesian Citizens and Legal Entities established in Indonesia and domiciled in Indonesia. This research used a normative research method with a statutory approach and this research was a prescriptive research. The results of this study indicated that Article 36 Paragraph (1) of Basic Agrarian Law jo. Article 19 Government Regulation 40/1996 that those who can have rights to land of Building Use Right are Indonesian citizens and legal entities established in Indonesia and domiciled in Indonesia.

Keywords: building use right, ministerial circular number 2/se-ht.02.01 on 2019

Introduction

Land is an inseparable part of human life, so that the building use right is a human right which legally contains control and ownership (Rosmidah, 2013). In addition, land is used to build residences and for businesses such as agriculture, plantations or other types of business. The land rights mentioned in Article 4 paragraph (1) of the Basic Agrarian Law are in Article 16 paragraph (1) of the Basic Agrarian Law, namely: Ownership Rights, Business Use Rights, Building Use Rights, Use Rights, Lease Rights, Land Opening Rights, Collecting Rights Forest Products, other rights that are not included in the aforementioned rights which will be determined as well as rights that are temporary in nature as mentioned in Article 53 of the Basic Agrarian Law.

One of them is the Building Use Right. According to Article 35 paragraph (1) of the Basic Agrarian Law, Building Use Right means having the building use right and owning buildings on land that is not his/her own, with a maximum period of 30 years. Those who can have rights to Building Use Right are Indonesian citizens and legal entities established under Indonesian law and domiciled in Indonesia. However, on June 8, 2019, the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency issued Circular Number 2/SE-HT.02.01/V1/2019 concerning the Granting of Building Use Right for CV (Komanditer Alliance). This creates a problem because CV is not a legal entity but a business entity and another problem is that it states that the applicant is a complementary company in the CV (Comanditaire Vennootschap). However, they act not for and on behalf of CV but for and on behalf of all participants in the CV. Moreover, in the certificate, it is on behalf of the individual in the CV, not on behalf of the CV.

Another problem that arises is that the determination of CV as the subject of land right of Building Use Right through a circular letter cannot be justified because it is a nominee agreement, which is a name loan agreement, and this is

banned in Indonesia. A nominee is someone who acts on behalf of the other party as a representative in a limited sense. Sometimes, the term is used to denote an agent or guardian. The term nominee is often equated with the term representative or loan name, based on a statement or power of attorney made by both parties. It is in the context of the nominee agreement that one must be careful because only borrowing names to cover and hide assets that are prohibited or violate the law.

Based on the above background, the formulation of the problem that will be examined in this paper is to explain whether the determination of CV as the subject of land right of Building Use Right through a circular letter can be justified.

Research Methods

This type of research was normative legal research. Normative legal research is research that provides a systematic explanation of the rules governing a particular legal category, analyzes the relationship between regulations, explains areas of difficulty and possibly predicts future development (Marzuki, 2011) ^[5]. In this study, the researchers used a statute approach, which means examining all laws and regulations related to the legal issue that is being handled (Marzuki, 2019) ^[6]. The nature of this research is prescriptive research which means that the science of law studies the objectives of law, the values of justice, the validity of legal rules, legal concepts, and legal norms.

Results and Discussion

Article 33 paragraph (3) of the 1945 State Constitution of the Republic of Indonesia is a constitutional basis for the formation of politics and National Agrarian Law, which contains orders to the state so that the land, water and assets contained therein in state control are used to achieve the greatest possible benefit for prosperity of all Indonesian people. As a follow-up to Article 33 paragraph (3) of the

1945 Constitution, Law Number 5 of 1960 concerning Basic Agrarian Principles was issued, hereinafter known as UUPA (Basic Agrarian Law). (Urip Santoso, 2005). Land rights are rights that give the right holder the authority to use and/or take advantage of the land he has held. Every citizen, community group, or legal entity can have rights over land according to the types stipulated in the provisions referred to. Land registration is carried out to ensure legal certainty for the community in owning, controlling and utilizing the land. Therefore, for the control of land that has been registered, a certificate of title will be issued. Registration of land rights, including data maintenance activities, must be recorded in a certificate of land rights. The Head of the Land Office and Land Titles Registrar or Temporary Land Titles Registrar in carrying out the registration of this transfer of rights refers to Government Regulation Number 24 of 1997 concerning Land Registration and Regulation of the State Minister for Agrarian Affairs/Head of Agency Number 3 of 1997 regulating the implementation procedure for registration of transfer of land rights which must be carried out by the parties in charge of carrying out registration activities.

The land rights are regulated in Article 4 paragraph (1) of the Basic Agrarian Law, namely "On the basis of control from the state as meant in Article 2, it is determined that there are various rights over the surface of the earth, which are called land that can be given to and owned by people, either alone or together with other people and legal entities". The land rights mentioned in Article 4 paragraph (1) of the Basic Agrarian Law are spelled out in Article 16 paragraph (1) of the Basic Agrarian Law, namely: Ownership Rights, Business Use Rights, Building Use Rights, Use Rights, Lease Rights, Land Opening Rights, Collecting Rights Forest products and other rights that are not included in the aforementioned rights which will be stipulated by law as well as rights which are temporary in nature. Here, more specifically, we will discuss building use rights which are one of the rights to land that are primary in nature, this is because the Building Use Rights are a support for housing development facilities which are currently growing rapidly. Building use rights are rights to construct and own buildings on land that are not their own for a maximum period of thirty years.

The meaning of statutory regulations is that statutory regulations include all forms of statutory regulations made at the central government level (state) as well as at the regional government level (province and district). Another definition of statutory regulations according to Attamimi is state regulations, at the central level and at the regional level which are formed based on statutory authority, both attributable and delegate in nature. (Maria Farida Indrati Soeprapto, 2006). General principles for the Formation of Legislation are as follows (Ni`matul Huda, 2011)

- a. The law is not retroactive. There is in Article 13 *Alemene Bepalingen van Wetgeving* (hereinafter referred to as A.B) which translates to: "The law is only binding for the future and has no retroactive force.
- b. Inviolable law, which means:
 - a. There is a possibility that the contents of the law may deviate from the Constitution.
 - b. Judges or whoever they are does not have the right to have a judicial review of the law. This right belongs only to the legislators.
- c. Law as a means to the maximum extent possible to achieve spiritual and material welfare for society and

individuals.

- d. Higher law override lower laws (*lex superiori derogate lex inferiori*). Whereas the lower level statutory regulations may not conflict with the higher level statutory regulations in regulating the same matters. The legal consequences of this principle:
 - a. Law made by a higher authority have a higher position;
 - b. Lower law should not conflict with higher laws (Umar Said Sugiarto, 2013);
 - c. Legislation can only be revoked, amended, or supplemented by or by law of the same or higher level.
- e. Law that are specific override laws that are general (*lex specialis derogate lex generalis*).
- f. The recent law overturns the previous law (*lex posteriori derogate lex priori*).

The formation of good statutory regulations must be carried out based on the principles as stated in the Laws on the formation of statutory regulations, namely: clarity of objectives; institutions or forming officials must be appropriate; suitability between types, hierarchy, and content of content; can be implemented; efficiency and efficiency; clarity of formulation; openness. The content contained in a statutory regulation must also reflect the principles including: protection; humanity; nationality; kinship; archipelago; Bhineka Tunggal Ika; justice; equal position in law and government; order and legal certainty and or balance, harmony and harmony.

Apart from that, it is also necessary to pay attention to the Policy Regulations which are a tool or instrument to regulate the population from the top down. The policy according to Heinz Eulau and Kenneth Prewith is a permanent decision which is characterized by consistency and repetition of behavior of those who comply with the decisions. By providing rewards and sanctions according to Bagir Manan, policy regulations have the following characteristics:

- a. Policy Regulations are not statutory regulations;
- b. The principles of limitation and examination of statutory regulations cannot be enforced in policy regulations;
- c. Policy regulations cannot be tested *wetmatigheidly* because they are not based on statutory regulations to make policy regulatory decisions;
- d. Policy regulations are made based on *freis ermesssen* and the absence of the administrative authority concerned to make legislation;
- e. The examination of a policy regulation is more left to *doelmatigheid* (public benefit) so that the touchstone is general principles of proper governance;
- f. In practice, it is formatted in various forms and types of rules.

In Indonesia, according to Jimly Asshiddiqie, policy regulations can be made in the following forms:

- a. Circular, for example: Bank Indonesia Circular;
- b. A warrant or instruction, for example a Presidential instruction;
- c. Work manual;
- d. Operational guidelines;
- e. Technical Instructions;
- f. A guide book or guidance;
- g. Terms of Reference (ToR);
- h. Project Design.

Various kinds of theories regarding justice and a just society. These theories concern rights and freedoms, power opportunities, income and prosperity. Among these theories can be called Aristotle's theory of justice in his book *Nicomachean Ethics*. Aristotle's theory of justice, his view of justice based on Aristotle's philosophy of law, must be considered as the core of his philosophy of law, because law can only be established in relation to justice. (L.J. Van Apeldoorn, 1996). In essence, this view of justice is a provision of equal but not equal rights. Aristotle distinguished his equal rights according to proportional rights. The human view of equality of rights is as a unit or the same container. This is what can be understood that all people or every citizen before the law is the same. Proportional equality gives each person what is due according to the abilities and achievements he has done. This justice can be divided into 2:

- a. "Distributive" justice is the justice that gives each person a portion according to his achievement. This justice focuses on the distribution, honorarium, wealth and other goods that can equally be obtained in society. Putting aside the mathematical proof it is clear that what Aristotle had in mind was the distribution of wealth and other valuables based on the prevailing values among the citizens. Fair distribution may be a distribution that is in accordance with the value of its goodness, that is, its value for society.
- b. "Commutative" justice gives equal amounts to everyone without differentiating their performance, in this case related to the role of the exchange of goods and services. From this division of justice Aristotle gets a lot of controversy and debate.

On June 8, 2019 the Ministry of Agrarian Affairs and Spatial Planning/National Land issued Circular Letter Number 2/SE-HT.02.01/V1/2019 concerning Granting Building Use Rights for CVs stating:

- a. In order to provide convenience for land services, a Comanditaire Venootschap (CV) can apply for land rights in the form of Building Use Rights;
- b. Submission of applications is made by members of the limited and complementary or their proxies acting for and on behalf of and with the approval of all members of the limited and complementary;
- c. Apart from those stipulated in the provisions of laws and regulations regarding Land Management and Regulation Standards, the requirements for granting Building Use Rights to the Comanditaire Venootschap (CV) also attach the Articles of Association/Bylaws that have been registered at the Ministry of Law and Human Rights

The scope set out in this Circular Letter includes the provision of granting Building Utilization Rights to Comanditaire Venootschap. National Land Agency (BPN) stated that this has led to a widening of the meaning and even the contention of this policy aims to make it easier for CVs to increase investment. This is a breath of fresh air for business people. With the existence of the Circular Letter UPA and Government Regulation number 40 of 1996 concerning Business Use Rights, Building Use Rights and Land Use Rights (hereinafter referred to as Government Regulation 40/1996) regarding the subject of Building Use Rights holders.

Granting Building Use Rights to CV which is regulated in a Circular Letter can be said to not provide a legal basis and legal certainty for the parties concerned, this can be seen from the following aspects:

- a. Ministerial Circular in the Hierarchy of Legislation
According to the provisions contained in Article 1 number 2 of Law Number 12 of 2011 concerning the Establishment of Legislative Regulations. Legislation is a written regulation that contains legally binding norms and is established or stipulated by a state institution or competent official through the procedures stipulated in the Legislation. As stipulated in Article 7 paragraph (1) of Law Number 12 Year 2011, the types and hierarchy of the Prevailing Laws consist of: the 1945 Constitution of the Republic of Indonesia; Decree of the People's Consultative Assembly; Government regulations; Presidential decree; Provincial Regulations and Regency/City Regional Regulations. In order to orderly arrangement of statutory regulations, it is necessary to distinguish clearly between decisions that are regulating (*regeling*) from decisions that are administrative (*beschiking*). It can be seen that a circular is not a statutory regulation (*regeling*) nor a state administrative decision (*beschiking*) which is administrative in nature, but a policy regulation (*beleidsregel*/policy rules) or *pseudo wetgeving*. *Beleidsregel* and *pseudo wetgeving* are legal products whose contents are materially binding to the general public but are not statutory regulations.

Circulars both before and after the enactment of Law 12 of 2011 are not categorized as statutory regulations. A ministerial circular is not a statutory regulation, this is because the ministerial circular does not contain behavioral norms (prohibitions, orders, permits and exemptions), authority (authorized and unauthorized) and stipulations. A circular letter should only explain and/or contain technical instructions for a general rule. However, it is common to find that circular letters create new norms which are confusing, especially if the circular is more obeyed by subordinates in the circular letter-making official rather than complying with the provisions contained in the hierarchy of laws and regulations. In principle, a circular is an official text containing notification, explanation, and/or instructions on how to carry out certain things that are deemed important and not urgent because considering that the contents of a circular letter are only in the form of a notification, automatically the content of the material does not constitute a legal norm as is the norm of a statutory regulation. invitation. Therefore a circular cannot be used as a legal basis to annul a Ministerial Regulation, let alone a regulation contained in the hierarchy of laws and regulations which are solely for clarifying the meaning of the regulation to be notified. The circular also has no sanctions because it is not a norm.

- b. The problem with applying for Building Use Rights is the members of the CV are not on behalf of the CV itself but on behalf of the members. This has become a conflict in granting Building Use Rights to CV. This pertains to the contents of the Circular Letter, namely Number 5 letter a which regulates that the applicant for a Building Use Right Certificate is a CV, but the name of the holder of the land rights listed in the certificate is the name of the CV who is an individual. In the legal basis, it is stated that Law Number 5 of 1960 concerning Basic Basic Regulations for Agrarian

Principles (UUPA) and Government Regulation Number 40 of 1996 as the legal basis for granting Building Use Rights for CV but it is a violation of UUPA and Government Regulation 40 of 1996 itself. Because a CV cannot be treated as a legal entity that can become a holder of building use rights. As regulated in Article 36 Paragraph (1) UUPA jo. Article 19 PP 40/1996 that those who can have rights to land with the status of Building Use Rights are Indonesian citizens and legal entities established in Indonesia and domiciled in Indonesia.

Conclusion

It can be seen that a circular is not a statutory regulation (*regeling*), nor a nugara administrative decision (*beschikking* which is administrative in nature permits a policy regulation (*bekeidsregel*/policy rules) or pseudo statutory regulations (*pseudo wetgeving*). *Beleidsregel* and *pseudo wetgeving* are legal products whose content is materially binding to the general public but is not statutory regulation due to the absence of the authority of the formers to form it. Ministerial circular is not statutory regulation because it does not contain norms of behavior. is an official text containing notification, explanation and/or instructions on how to carry out certain things that are deemed important and not urgent. It can be concluded that the determination of CV as the subject of Land Right of Building Use Right through a circular cannot be justified.

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