

# Control of land rights by foreign nationals through nominee agreements in Bali

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## ABSTRACT

Property rights as the most absolute right that can be owned by a legal subject is something that is very important for the Indonesian nation. Land, as a basic need in carrying out life, has a social function designated and utilized for the greatest prosperity of the Indonesian people. On that basis, the ownership of the Freehold Land is only limited to Indonesian Citizens and some legal entities are excluded. This has created dissatisfaction for foreign nationals who wish to own land indefinitely in Bali, Indonesia. This dissatisfaction gave rise to the idea of carrying out legal smuggling through the practice called nominee agreements. This writing is intended to examine legal smuggling carried out through the nominee agreement, as well as the parties participating in the implementation of this legal smuggling.

## ABSTRAK

Hak Milik sebagai hak yang paling mutlak yang dapat dimiliki oleh subjek hukum adalah suatu hal yang sangat penting bagi Bangsa Indonesia. Tanah, sebagai kebutuhan pokok dalam menjalankan kehidupan, memiliki fungsi sosial yang diperuntukkan dan dipergunakan bagi sebesar-besarnya kemakmuran rakyat Indonesia. Atas dasar itu, kepemilikan tanah Hak Milik tersebut hanya dibatasi bagi Warga Negara Indonesia dan beberapa badan hukum yang dikecualikan. Hal ini menimbulkan ketidakpuasan bagi Warga Negara Asing yang ingin memiliki tanah tanpa batas waktu di Bali, Indonesia. Ketidakpuasan inilah yang menimbulkan suatu gagasan untuk melakukan penyelundupan hukum melalui praktek perjanjian pinjam nama atau seringkali disebut perjanjian nominee. Penulisan ini ditujukan untuk mengkaji penyelundupan hukum yang dilakukan melalui perjanjian nominee tersebut, serta pihak-pihak yang turut serta dalam pelaksanaan penyelundupan hukum ini.

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## I. INTRODUCTION

Land is a very important element of life in people's lives. All ownership, control or use of land in an area must be used as much as possible for the public interest. The state as the highest organization that regulates the people, is the party responsible for all aspects of people's lives, regulates the rights and obligations to maintain public order by creating a legal norm in the form of laws and regulations. Even with the highest controlling rights owned by the State of the Republic of Indonesia, land as an important element does not belong to the state, but belongs to the entire Indonesian nation (Kartini

Muljadi & Gunawan Widjaja, 2016a) In matters related to land, to achieve the purpose of utilizing and using land for the prosperity of the people, the government has formed several basic land regulations, namely the Basic Agrarian Law Number 5 of 1960 which must be obeyed and used as guidelines according to the intention and Goal. Land rights are also divided into several types of rights, such as Property Rights, Building Use Rights, Business Use Rights, and Use Rights, which are adjusted to the subject of ownership and the designation of their use.

Apart from only looking at the land sector in Indonesia, the government must also consider several other aspects for the prosperity of the people, one of which is investment or investment. This investment is limited to domestic investors and foreign investors who can be in the form of foreign legal entities or Foreign Citizens (WNA). As a developing country, Indonesia needs substantial funds to support its development. H. Salim HS & Budi Sutrisno, 2008). Land is one of the things that supports every investment in Indonesia.

Regarding foreign investors who invest in Indonesia, the government provides a right to land that can be used for Foreign Nationals, namely Hak Pakai. This type of land rights is the only land right that can be owned by a Foreign National for a certain period. Hak Pakai is the right to use or collect the proceeds from land owned by another person or directly controlled by the state, which is not a lease or tillage of land (Kartini Muljadi & Gunawan Widjaja, 2016) Further arrangements regarding land rights are contained in Article 41 and Article 42 of the Basic Agrarian Law (UUPA).

Restrictions on the granting of land rights granted to Foreign Nationals refer to the principle of social functions owned by land, where the social function is utilization that has a direct impact on the Indonesian people and is also related to the basic provisions of the state as stated in Article 33 of the 1945 Constitution. Article 9, paragraph (1) of the Basic Agrarian Law states that only Indonesian citizens can have a full relationship with the earth, water and space.

Like this type of Right of Use, a period of ownership is given so that foreign nationals' land ownership in Indonesia is not an absolute thing forever, but is limited. The principle also guides this limitation that land in the territory of the Republic of Indonesia is entirely the property of the Indonesian nation, so unlimited ownership is only intended for Indonesian citizens. All matters related to land ownership in Indonesia must be carried out with strict protection by means of selection and careful consideration intended to achieve equal ownership of land rights (Supriadi, 2010)

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An agreement is an activity in which two or more persons undertake to carry out a thing (Subekti, 2005) The nominee agreement in this discussion is defined as an agreement involving one Indonesian who lends his name to be used by a Foreign National in the case of committing a legal act. Black's Law Dictionary defines a nominee agreement as *“One who has been Nominated or proposed for an office. One is designated to act for another in his or her place. one designated to act for another as his or representative in a rather limited sense. It is sometimes used to signify an agent or trustee. It has no*

*connotation, however, other than acting for another, in representation for another, or as the grante of another.”*

The implementation of the nominee agreement involves several parties, namely the party whose name is legally recorded and the party who benefits by the activities carried out by the party whose name is legally recorded and in the case of land, Notaries & PPAT, who should know that the nominee agreement is prohibited by law. This is because there is a material reward given to the Indonesian citizen to want to borrow his name in the ownership document of the land rights.

The provisions in Article 9 jo. 21 of the Basic Agrarian Law state that those who can have Property Rights are: for Indonesian citizens; for legal entities determined by the government can have the status of Property Rights under existing conditions; Foreign Nationals who obtain land rights through inheritance are obliged to relinquish their land rights within 1 (one) year from the receipt of the inheritance. If the right is not waived, the right to the land is abolished by law and the land becomes state land; and For Foreign Nationals who were originally Indonesian citizens who are obliged to relinquish their land rights within 1 (one) year from the change of citizenship of the subject. If the right is not waived, the right to the land is abolished by law and the land becomes state land.

Referring to subjects who can have Property Rights, except due to the inheritance or transfer of citizenship, it is not allowed for any reason for Foreign Nationals to own Hak Milik land throughout the territory of Indonesia, this is an absolute and certain thing in law (Boedi Harsono, n.d.)

The discussion on this matter is very interesting because for fellow Indonesian citizens, the land that is the right of the Indonesian nation must be maintained for the greatest benefit for the Indonesian people. As mentioned above, Foreign Nationals can be granted the Right of Use whose ownership is timed. (Supriadi, 2010)

Article 41 PP No. 40 of 1996 concerning Business Use Rights, Building Use Rights and Land Use Rights, states that Right of Use can be charged to: State lands; Land Management Rights; Title Land.

The term of Hak Pakai is 25 years and cannot be extended but can be renewed for 20 years. The period of time can be limited and unlimited depending on the purpose of utilizing the land.

However, many Foreign Nationals are dissatisfied with only the granting of Right of Use, so with the aim of smuggling the law the nominee agreement is used to obtain more absolute land rights, namely Property Rights. Based on the background description of the writing, in this study there are 2 (two) problem formulations, namely: What is the validity of the nominee agreement for the ownership of Foreign Nationals Title to land in Bali?; How is the role and responsibility of Notaries & PPAT in the implementation of nominee agreements for the ownership of Foreign Nationals for Property Rights to land in Bali?

## II. METHODS

In this study to ensure the implementation of objective research and following applicable legal rules, this research uses normative juridical research methods with an approach through applicable laws and regulations (positive law) or *statute approach and general legal concepts or conceptual approach*. (Soerjono Soekanto & Sri Mamudji, 2019) In this study, secondary data was used as a type of data used in obtaining data and information. There are primary legal materials in the secondary data used, namely as follows: Constitution of the Republic of Indonesia of 1945; Civil Code; Basic Agrarian Law

Number 5 of 1960; PP No. 40 of 1996 concerning Business Use Rights, Building Use Rights and Land Use Rights; Law No. 2 of 2014 concerning Amendments to Law No. 30 of 2004 concerning the Position of Notary.

In addition to the primary legal materials mentioned above, the doctrines of experts, legal principles and legal theories are also used which can be found in books and scientific works.

### III. RESULTS AND DISCUSSION

#### **1. Validity of Nominee Agreement for Ownership of Foreign Nationals Title to Land in Bali**

Based on the provisions in Article 1313 of the Civil Code, (Rachmadi Usman, n.d.) an agreement is defined as an act in which one or more persons bind themselves to one or more persons (Tan Thong Kie, 2007) In determining the validity of a treaty, 4 elements must be fulfilled (Salim HS, 2013) as in Article 1320 of the Penal Code, namely: The existence of a word of agreement from both sides; Ability to perform legal acts; The presence of objects; and The existence of halal causation

In more detail, the elements of the agreement are as follows (Natalia Christine Purba, 2006): Legal rules of agreements that can be written or unwritten; Legal subjects who support rights and obligations in an agreement; Object or also called achievement, is, the act of giving something, doing something, or not doing something; The word of agreement between the parties; and Legal consequences arise in the form of rights and obligations.

Referring to Article 9 jo. 41 of the UUPA outlined above, Foreign Nationals are not allowed to own Property Rights land in Indonesia. This provision is further emphasized in Article 26 paragraph (2) of the UUPA, which states that violations related to the subject of ownership of land rights can result in the transfer of the Property Rights to a foreign party can be null and void and the land falls to the state. (Undang-Undang Hak Tanggungan, Pasal 26 Ayat (2), n.d.)

Reviewing the fulfillment of the conditions for the validity of an agreement, in the nominee agreement related to land ownership, the first condition, namely the agreement between the two parties, is fulfilled. This is evidenced by the signatures and volunteerism between the two parties to represent the other party in legal actions.

The second condition of proficiency in legal acts can also be fulfilled, considering that a subject's ability is seen from an adult age to do a legal act on its own without the need for the consent of others and not in the guardianship of any party.

The third condition is that an object must be in agreement to determine the purpose and purpose and the rights and obligations arising from the agreement can be fulfilled, that is, in the case of the nominee agreement for the ownership of property rights to the land, the object is the ownership of the rights to the land. However, in this third condition, it can also be argued that if the object that gives rise to the rights and obligations in the agreement is not allowed, or causes undesirable consequences, then the third condition can be said to be not fulfilled.

The fourth condition, lawful causation, in this case, was not fulfilled considering that the creation of a nominee agreement showed bad faith from the beginning with the aim of smuggling the law into the UUPA which prohibits foreign ownership of Hak Milik land. Article 1338 of the Criminal Code states that any agreement must be entered into in good faith. (Kitab Undang-Undang Hukum Perdata, Pasal 1338, n.d.) Agreements entered into and executed in bad faith may be canceled. This legal

smuggling is carried out to support the intention of Foreign Nationals to own land which is very clearly only intended for Indonesian citizens to maintain the supply of existing land so that foreigners do not control it. This intention is supported by the other party agreeing in his interest to lend his name as legally recorded to assist in the exercise of such bad faith. Therefore, because this nominee agreement was entered into based on bad faith smuggling law, the fourth condition of lawful causation was not reached.

In order for a treaty to be said to be a valid agreement, the four absolute conditions as mentioned above must be fulfilled in their entirety. Based on these considerations, the nominee's agreement in terms of obtaining ownership of Hak Milik land in Bali by Foreign Nationals is invalid. Any agreement that has been made null and void and any control of land in Bali based on the nominee agreement is considered an unlawful act.

## **2. The Role and Responsibilities of Notaries & PPAT in the Implementation of Nominee Agreements for Foreign Nationals' Ownership of Land Title in Bali**

In addition to the party who borrowed the name and the party who lent his name, there is also the involvement of the Notary & PPAT in making agreements and deeds that participate in legalizing legal actions based on the nominee's agreement. Notaries & PPAT, as public officials, should clearly understand how the provisions of laws and regulations apply. In the process of transferring land rights, Notaries can make a Sale and Purchase Binding Agreement as a preliminary, and PPAT is needed to make a deed of transfer of rights, which is generally in the form of a Deed of Sale and Purchase, will be needed later in the process of returning the name of the right. (Annisa Setyaningsih, 2020)

As per Article 1 of the Law on the Position of Notary, a Notary is a general officer authorized to do authentic deeds. Although for Notaries & PPAT, there is no need to account for the information stated by the parties, if the Notary & PPAT knows the purpose and purpose and legal smuggling that occurs, then Notaries & PPAT can be considered to participate in the conspiracy of legal smuggling. With the understanding of positive law in force in Indonesia, Notaries & PPAT, as parties directly related to the community, are expected to be able to uphold applicable legal norms and stand on the law in every action.

The making of an authentic deed contrary to the law is categorized as a legally defective deed and results in the cancellation of the deed in favor of the law. The deed that is null and void is considered to have never existed. The act or the consequences are very vulnerable to economic losses suffered by the parties, which creates liability for each party concerned. Liability, in this case, is the responsibility for the actions committed and also related to the responsibility of the Notary & PPAT for the deeds he did, participation in unlawful acts, and legal smuggling activities based on applicable laws and regulations. (Selamat Lumban Gaol, 2019)

Sanctions for Notaries & PPAT who violate the provisions of office ethics can be in the form of a written reprimand or even up to the revocation of the permit, depending on each case and deed, the extent involved and the consequences arising from the issuance of the authentic deed.

#### IV. CONCLUSION

The provisions as in Article 9 jo. 21 of the Basic Agrarian Law state that ownership of Property Rights land for Foreign Nationals is prohibited because generally, Hak Milik land is for Indonesian citizens, which is the absolute land right, without a period that legal subjects in Indonesia can own. This is due to the achievement of the goal of the Indonesian state, which states that land is a social function that belongs to the Indonesian nation and is as much as possible intended for the prosperity of the Indonesian people.

A nominee agreement is a name loan agreement carried out between Foreign Nationals who borrow the name of an Indonesian Citizen, aiming that the Foreign Citizen can own Hak Milik land by registering the name of an Indonesian citizen as the owner. Since this is a thing and purpose prohibited by law, this purpose is not a lawful cause and purpose. Therefore, the terms of validity of the agreement are not fulfilled, and the nominee agreement is not valid. The consequence of the invalidity of the nominee agreement is that it is null and void, and everything that has been done based on the agreement is deemed to have never existed.

On the other hand, Notaries & PPAT, as general officials have a role in the implementation of nominee agreements in the transfer of land rights, which results in the land of Hak Milik can become the property of foreign parties. In this case, the contribution of Notaries & PPAT is seen from the authentic deed made as the basis for implementing the name reversal and transferring land rights. Suppose the Notary & PPAT knows all the arrangements and scenarios made in the name loan agreement. In that case, the Notary & PPAT can be considered to have participated in the implementation of legal smuggling and in committing unlawful acts.

On the basis of the things described above, the Notary & PPAT who makes an authentic deed containing all rights related to the nominee agreement or makes an authentic deed based on the nominee agreement made, then the authentic deed made is considered legally defective and null and void. Sanctions can be given to Notaries & PPAT as general officials in the form of written reprimands or even dismissals, depending on the extent of involvement and the consequences caused.

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