

Implications Of Land Ownership By Foreigners On The Investigation Process Of Criminal Acts By Foreigners

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Abstract: This study aims to analyze the practice of nominee agreements in land ownership by foreigners in Indonesia as a form of legal smuggling in a positive legal perspective. In the regulation of land law in Indonesia, based on the UUPA, land ownership with ownership rights is only by Indonesian citizens. The practice that occurs, foreigners through a name loan agreement to be able to control and own land in Indonesia with property rights. The normative legal research method with a statutory approach and a conceptual approach uses primary legal materials and secondary legal materials. Through literature studies (literature studies). The legal materials obtained were analyzed in a qualitative descriptive manner. The results of the study show that the nominee agreement is an agreement made between a person who according to the law cannot be the subject of a certain land right (property rights), in this case a foreigner with an Indonesian citizen, with the intention that the foreigner can control (own) the land owned de facto, but legally-formally (dejure) the land is owned on behalf of Indonesian citizens. The name loan agreement is clearly a form of legal smuggling to avoid regulations that stipulate that foreigners are not qualified as subjects of land title holders in Indonesia in accordance with the provisions in Article 9 paragraph (1) jo. Article 21 paragraph (1) of the UUPA clearly states that only Indonesian citizens can have a full relationship with earth, water and space, and clearly stipulates that only Indonesian citizens can have property rights.

Keywords: Nominee Agreements, Foreign Nationals, Legal Smuggling.

1. Introduction

Land is a gift from God Almighty to every human being on the face of the earth because land has many benefits in it (Heru Kurniawan, 2016). All human activities and actions are always related to land (H, 2019) In the Indonesian constitution, as stated in Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, it is stated that the earth, water and natural resources contained therein are controlled by the state and used as much as possible for the prosperity of the people (Urip Santoso, 2017) In relation to land, the meaning is that the state through the constitution wishes to acknowledge and regulate that land, which contains so many natural resources, is worthy of being used, managed and utilized for the greater purpose of realizing prosperity for the Indonesian people (Hetharie, 2022) (Arba, 2021)

The meaning contained in Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia is also in line with the regulation of land law in Law Number 5 of 1960. In Article 2 paragraph (1) of the UUPA, the earth, water and space, including the natural resources contained therein, at the highest level are controlled by the state. The meaning of the state controlling the land does not mean that the land is owned by the state, but rather the state has the power to regulate the distribution of land rights that can be

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granted and the legal relationships that arise over a piece of land (Hardianto Djanggih and Salle Salle, 2017).

Then in Article 9 paragraph (1) of the UUPA it states that "only Indonesian citizens can have full relations with the earth, water and space". The provisions that emphasize the explanation of Article 9 paragraph (1) regarding the subject of land rights control are contained in Article 21 paragraph (1) of the UUPA which states that "only Indonesian citizens can have ownership rights". So the UUPA has clearly regulated that only Indonesian citizens can own land in Indonesia with ownership rights (Chayadi, 2020),(Trovani, 2021).

However, in practice, there are quite a few foreign nationals who control land that previously had property rights status, by carrying out legal smuggling, where foreign nationals enter into an agreement or agreement or sale and purchase agreement with Indonesian citizens who hold the rights to the agreed land property. With the aim of owning or controlling land ownership rights in the territory of the Republic of Indonesia (Suwarno, 2020) This has created legal uncertainty and further constitutes an act of legal smuggling in land ownership in Indonesia (Arsela & Nelson, 2021).

Some previous studies include: Research conducted by Rosyani Ada and Akhmad Safik in January 2024, entitled "Legal Analysis of Land Ownership Rights Through Nominee Agreements by Foreign Citizens in Indonesia (Study of Case Decision Number: 2959 K/Pdt/2022)." The research findings show that Decision Number 2959 K/Pdt/2022 has not fully complied with the provisions stipulated in Law No.5/1960 and its implementing regulations, so it does not provide legal certainty for those seeking justice (Ada & Safik, 2024).

Research by Annisa Fitria in August 2018, entitled "Legal Study of Nominee Agreements in Land Ownership by Foreign Citizens in Badung Regency, Bali", which states that agreements using nominee agreements to obtain land ownership by foreign citizens in Indonesia have violated lawful causes, so that the legal consequences of this agreement are null and void. Legally, land ownership lies with Indonesian citizens but indirectly it belongs to foreign nationals, so that legal uncertainty arises for both parties (Annisa Fitria, 2018)

Meanwhile, in contrast to previous research, this research will focus on the practice of nominee agreements, as a form of legal smuggling. One of the practices that occurs in relation to land ownership in Indonesia is where foreign nationals want to own and control land in Indonesia with ownership rights. Because the provisions of the UUPA clearly prohibit land ownership by foreign nationals in Indonesia with ownership rights, the method used by foreign nationals to deceive existing laws is through a name loan agreement (nominee agreement) of Indonesian citizens so that they can control land in Indonesia with ownership rights.

2. Research Methods

This study uses a normative legal method (normative juridical), namely studying and analyzing norms in the form of laws and court decisions. In the perspective of normative law, law is defined as a text contained in laws and regulations (law in book) or norms as a guideline for community action (Bachtiar, 2018). Which examines the reality that occurs in the practice of land ownership in Indonesia by foreign nationals by referring to the provisions of laws and regulations applicable in national land law. The approaches used are the statute approach and the conceptual approach (Rully Indrawan, 2017). with primary legal sources and secondary legal sources. The technique of collecting legal

materials through literature studies (library studies). The legal materials obtained are analyzed qualitatively in order to answer existing problems.

3. Results and Discussion

Globalization is one of the factors in Indonesia that many foreign citizens have emerged and increased the bond between foreign citizens and Indonesian citizens. The development between the needs of one country and another has both positive and negative impacts on Indonesia. In fact, not a few foreigners who have lived in Indonesia for a long time have permits related to land ownership in Indonesia, so it is necessary to formulate policies for foreigners to obtain a place to live. Or certainty, law and convenience of services and permits granted by land rights.

National development covers all aspects of national life, one of which is the economy. For this reason, the government attracts foreign investors to invest in Indonesia by issuing various regulations that make it easier for Foreign Citizens (WNA) to buy property or land, not limited to usage rights. Law Number. 5 of 1960 concerning Basic Agrarian Principles (hereinafter referred to as UUPA) and the Indonesian Civil Code (hereinafter referred to as KUHPerdota) (second book) concerning objects. In the Regulation of the Minister of ATR/Head of BPN Number 13 of 2016 concerning Procedures for Granting, Releasing or Transferring Rights to Ownership of a Residential House or Residence by Foreigners Domiciled in Indonesia (hereinafter referred to as the Regulation of the Minister of ATR/Head of BPN Number 13 of 2016) where the regulation states that foreign land ownership can be in the form of a single house or an apartment with the note that it is only for foreigners who have a residence permit in Indonesia (Rachmayuni, Patawari, & Lisa, 2021)

This often causes problems when many foreigners want to own land and houses with ownership rights. This is certainly contrary to Law Number 5 of 1960 concerning Basic Agrarian Principles (hereinafter referred to as UUPA) especially Article 21 which stipulates that only Indonesian Citizens (WNI) can have ownership rights to land. So then it is worked around by making a name borrowing agreement (nominee) where a foreigner borrows or uses the name of an Indonesian citizen who is appointed as a nominee to be registered as the owner of the land. The nominee agreement is made in a sale and purchase transaction so that it seems as if the agreement does not violate the law formally. (W, 2024) The purpose of this is so that foreigners can control (own) de facto land, but legally-formally (de jure) the land is in the name of an Indonesian citizen (Maria SW Sumardjono, 2012)

One of the theories in international civil law is the theory of legal smuggling. In international civil law, the term legal smuggling in several countries is different, for example *wetsontduiking* (Netherlands), *"fraude a la loi"* (France), *"fraus legis"* (Latin), *"Gesetzesumgehung"*, *das Handeln in fraudem legis* (Germany), *"fraudulent creation of point of contacts"* (English), *"frode alla legge"* (Italian). In Indonesian international civil law, it is known as legal smuggling. Legal smuggling is a foreign legal principle that is sometimes set aside and uses national law or vice versa for certain benefits/purposes. The purpose of legal smuggling is to be able to avoid an undesirable legal consequence or to realize a desirable legal consequence.

In the legal system in Indonesia, nominee agreements as one form of innominaat agreements are not regulated explicitly and specifically, but in practice, many parties use nominee agreements for the transfer of land ownership rights, buying property or investing in Indonesia. A nominee is someone who acts on behalf of another party as a representative in a limited sense. Sometimes the term is used to indicate an agent or guardian. (Garner, 1992) So the existence of nominee agreements in Indonesia tends to be used more as a way to carry out legal smuggling.

Agreements are regulated in the Civil Code book III chapter II entitled concerning obligations born from contracts or agreements. Agreements as a legal event, meaning events whose consequences are regulated by law. This agreement gives rise to a legal

relationship between the related parties. Because of this legal event, the right to achievement and the obligation to achieve arise. Article 1313 of the Civil Code: "an agreement is an act by which one or more persons bind themselves to one or more other persons" (H Salim, 2006).

In relation to land ownership by foreign nationals, name-borrowing agreements are often layered with various agreements to "secure" the foreign national's name and the Indonesian national whose name is used as the person who legally "owns" the shares or land/property signs a statement of acknowledgement that the shares or land/property are not his/hers, and his/her name is only "borrowed". Thus, the agreement is not legally valid according to the statement of Article 1234 of the Civil Code which states "Every obligation is to give something, to do something and not to do something" to become an "empty note" because everything is made based on mere pretense. Maria SW Sumardjono said that "The principal agreement followed by other agreements related to the control of land rights by foreign nationals shows that indirectly through a notarial agreement, legal smuggling has occurred".

Furthermore, according to Maria SW, (Maria Sumardjono, 2007) A nominee agreement is an agreement made between a person who according to law cannot be the subject of a certain land right (property right), in this case a foreigner with an Indonesian citizen, with the intention that the foreigner can control (own) the de facto land, but legally and formally (dejure) the land is in the name of an Indonesian citizen. In other words, the name of the Indonesian citizen is borrowed by a foreigner to act as a nominee.

Regarding land ownership rights for foreign nationals, this is not regulated in the UUPA. Article 21 of the UUPA states that: (a) Only Indonesian citizens may have ownership rights. (b) The Government determines the legal entities that may have ownership rights and their requirements. (c) Foreigners who after the enactment of this Law obtain ownership rights due to inheritance without time or a mixture of assets due to marriage, as well as Indonesian citizens who have ownership rights and after the enactment of this Law lose their citizenship, are required to relinquish those rights within a period of one year since the acquisition of those rights or the loss of citizenship. If after the said period has passed the ownership rights are not relinquished, then those rights are void by law and the land falls to the state, with the provision that the rights of other parties burdening it continue. (d) As long as a person in addition to his Indonesian citizenship has foreign citizenship, he cannot have land with ownership rights and the provisions in paragraph 3 of this article apply to him.

Furthermore, the provisions in Article 26 paragraph (1) of the UUPA (Law Number 5 of 1960 concerning Basic Agrarian Regulations) regulate the acquisition of land ownership rights. This article states that legal acts such as buying and selling, exchange, gifts, grants by will, and other acts intended to transfer ownership rights and their supervision are regulated by government regulations.

One of the studies from the Indonesian Nominee Crisis Working Group (K3NI) revealed surprising data that as many as 5,000 (five thousand) Foreign Citizens (WNA) are estimated to own property and land on the island of Bali. That based on the regulations of the Minister of Agrarian Affairs and Spatial Planning of the Republic of Indonesia, it is very clear that foreigners are prohibited from owning land in Indonesia. This phenomenon is very common, especially in Bali, Batam and big cities in Java. Many properties in Bali are actually owned by foreigners, but when checked at the local land office, they are registered in the name of Indonesian Citizens. In practice, land or property in Indonesia actually belongs to Foreign Citizens, but on the certificate it is stated in the name of their trusted person and as a safeguard for Foreign Citizens, Indonesian Citizens whose names are used as the person who legally owns the shares or land or property sign a statement of acknowledgement that the shares or land or property are not theirs and their names are only borrowed (Paulinah, Qamariyanti, Faishal, & Notary and PPAT, 2022).

In relation to land ownership in Indonesia, the State has the authority to regulate and manage land for the purpose of developing the country, the right to control the state here does not mean that the state owns the land, but the state has the power to regulate, manage and preserve the land in relation to land rights and legal relationships created over the land (Hardianto Djanggih and Salle, 2017). Due to the state's authority to regulate, manage and preserve the allocation of land for the development of the Indonesian community, nation and state, the state through the UUPA regulates that legal subjects who can have rights to land are only Indonesian citizens who can own land in Indonesia with ownership rights.

4. Conclusions

The agreement to borrow a name in the practice of land ownership by foreign nationals legally conflicts with national land law, namely Article 9, Article 21 paragraph (1), and is reinforced by Article 26 paragraph (1) of the UUPA. In addition, this practice also conflicts with the principle of good faith, the principle of freedom of contract in contract law. In relation to the law, this kind of practice constitutes legal smuggling of statutory regulations in land law as explained in the discussion above, so that every legal smuggling including this agreement to borrow a name results in the cancellation of the relevant act.

To prevent the practice of nominee agreements by foreigners in the future, the government needs to strictly enforce the law, revise regulations that open legal loopholes, improve supervision of notaries and PPAT, and build a transparent and integrated land ownership registration system. As a legal alternative for foreigners who want to invest in property without violating agrarian law, there is a mechanism for the right to use a house or apartment as stipulated in the Regulation of the Minister of ATR/Ka. BPN Regulation No. 13/2016, as long as the foreigner has a residence permit in Indonesia. The findings in this article can be used as an academic and juridical basis to encourage judicial review of regulations that have multiple interpretations and the formation of new regulations that explicitly prohibit nominee practices, while strengthening the supervision of land ownership by foreigners in order to maintain agrarian sovereignty in accordance with the mandate of the UUPA.

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