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Juridical Implications Of Foreign Citizens' Land Ownership Status Through Nominee Agreements Based On The Concept Of Legal Certainty

Andi Erza Ferniawan[*)]

[*)]Faculty of Law, Universitas Islam Sultan Agung (UNISSULA), E-mail: eccamamet@gmail.com

Abstract. *This study aims to determine the juridical implications of the land ownership status of foreign citizens through nominee agreements based on the concept of legal certainty, to find out the legal consequences for perpetrators of nominee agreements for buying and selling land rights for foreign citizens. The approach method used in this study is research with sociological juridical methods, namely analyzing and providing answers about legal issues according to the intended target. Based on the research results, the authors draw the conclusion that 1). Whereas the name loan agreement in practice of land ownership by foreigners is juridically contrary to national land law, namely Article 9, Article 21 paragraph (1), and confirmed by Article 26 paragraph (1) of the UUPA. In addition, this practice is also contrary to the good faith principle of freedom of contract in contract law. In international civil law this practice constitutes legal smuggling of statutory regulations in land law, so that any legal smuggling including this name-borrowing agreement results in the cancellation of the relevant action, in international private law it is called fraus omnia corrumpt, meaning that legal smuggling results in the legal action in its entirety does not apply. 2). The legal consequence for the perpetrator of the nominee agreement on the sale and purchase of land rights for foreign nationals is that the mastery of land ownership rights by foreigners based on a name loan agreement (nominee) cannot be carried out because the agreement is considered invalid and does not meet the legal requirements of the agreement as stipulated in the provisions 1320 Civil Code. The legal consequences of the possession of land rights by foreigners based on a name loan agreement (Nominee) are null and void because the objective conditions are not fulfilled as determined by Article 1320 of the Civil Code.*

Keywords: Agreement; Land; Nominee.

1. Introduction

Own property rights are regulated in the Basic Agrarian Law (UUPA) No. 5 of 1960 concerning Basic Agrarian Regulations. Based on the Basic Agrarian Act No. 5 of 1960 Article 21, the property rights referred to are not for foreign citizens or

foreign business entities. Therefore, the Nominee agreement or Name Borrowing Agreement is a Legal Action which in essence is a violation or an embezzlement of the law.

According to Article 1319 of the Civil Code, there are 2 (two) types of agreements, namely agreements whereby the law is given a special name called an agreement (Nominaat Contract) and an unknown agreement with a certain name which in other words is an agreement without a name inominaat contract.[1]The term (word) of the Agreement is not a new thing, the Agreement is often encountered in everyday life. It seems to be firmly attached to every line of life until now, the agreement is considered a normal thing to happen.

The agreement itself comes from the basic word promise which means an action between two or more people to do something. Subekti in his book entitled The Law of the Agreement argues that an agreement is an event where a person promises to another person or where two people promise each other to do something.[2]

In the Civil Code (Article 1313) explains the meaning of the agreement itself is an act by which one or more people bind themselves to one or more people. It is the event of the agreement that then creates an agreement that connects between two or more people so that it is then referred to as the agreement itself. Therefore, it can be concluded that the relationship between the engagement and the agreement is that the agreement issues an engagement.

Soil plays the most serious role in carrying out a life. According to Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia (abbreviated as the 1945 Constitution of the Republic of Indonesia), namely "Earth and water and the natural resources contained therein are controlled by the State and used for the greatest prosperity of the people."[3]According to Boedi Harsono, the notion of land consists of the visible surface of the earth on land and under water.[4]Land has an important war against all living things on earth, land supports life because land is also a living habitat for living and moving.

Based on Article 9 of the BAL:

1) Only Indonesian citizens can get a full relationship with the earth, water and space, according to the limits according to Articles 1 and 2.

[1]J.Satrio, 1992, Agreement Law, Publisher Citra Aditya Bakti, Bandung, p.116.
[2]Subekti, 2004, Agreement Law, Intermasa, Jakarta, p. 1
[3]Article 33 paragraph (3) of the 1945 Constitution of the Unitary State of the Republic of Indonesia.
[4]Boedi Harsono, Indonesian Agrarian Law, 2018, Djbatan Publishing, Jakarta, p. 8.

2) Every Indonesian citizen, male or female, has the same possibility of obtaining a land right and obtaining the benefits and results, either for himself or for others.[5]

As for Article 21 paragraph (1) of the UUPA, only Indonesian citizens are allowed to have ownership rights to land, but in the nominee agreement there is an element of violating the rules and Article 26 paragraph (2) of the UUPA, namely foreigners lending Indonesian citizens' names only to complete de jure requirements. but indirectly the agreement has the goal of shifting the position of ownership rights to the land for foreign nationals.[6]The agreement is regulated in Article 1313 of the Civil Code, which explains: "An agreement is an act by which one or more people bind themselves to one or more other people."[7]

The nominee agreement is seen as contradictory to the terms of the validity of the agreement as contained in the Civil Code, namely something that is lawful, where it is an objective condition that makes the agreement null and void and is deemed to have never happened or is invalid. Because the Nominee Agreement is contrary to the UUPA which states that only Indonesian citizens are allowed to own land with ownership rights, not foreigners.

Indonesia adheres to the Continental European legal system, which clearly states that this legal system does not recognize the concept of a nominee. The nominee itself originates or originates from a country that adheres to the Common Law legal system. The concept of nominee has only recently become known in the legal system in Indonesia since the rapid flow of foreign investment around the 1990s and is used in several legal transactions. The nominee itself is interpreted in general as an agreement by lending the name of an Indonesian citizen carried out by a foreign national.

There is also a definition of a Nominee agreement according to Black's Law Dictionary, namely:

"One who has been nominated or proposed for an office. One designated to act for another in his or her place. one designated to act for anothed as his representative in a rather limited sense. It is used sometimes to signify an agent or trustee. It has no connotation, however, other than that of acting for another, in reprisal for another, or as the grant of another."

[5]*Ibid*, p. 552.
[6]Article 21 paragraph (1) and Article 26 paragraph (2) of Law Number 5 of 1960 concerning Basic Agrarian Regulations.
[7]R. Subekti and R. Tjitrosudibio, 2004, Civil Code, Pradya Paramita, Jakarta, p. 338.

From the above understanding, it can be explained that the definition of a nominee is a party appointed by another party to represent for and on behalf of the party indicating the nominee. The party that appoints the nominee is often referred to as the beneficiary and the nominee who carries out the beneficiary's interests must comply with what has been agreed and in accordance with the orders given by the beneficiary.[8]

Therefore, it can be concluded that in the concept of a nominee agreement there are known to be 2 (two) parties, namely the nominee party who is legally registered and the beneficiary who feels the benefits and benefits carried out by the legally registered party. From the two parties in the nominee agreement, two types of ownership arise, such as land ownership by foreign parties or foreign legal entities that use the nominee concept, namely the owner who is registered and legally recognized (legal owner) and the owner who is actually the beneficiary.

Based on the law, the legal owner of the object is the legal owner, who clearly has the right to transfer, sell, encumber, guarantee and take any action on the object, while the beneficiary is not legally recognized as the owner of the object. Because it is clear that those who are registered as the legal owner are based on the identity of the legal owner in the land certificate, while the beneficiary's name and identity in any form are not recorded in the certificate. By using the name and identity of the nominee as a legally registered party, the beneficiary provides compensation in the form of a nominee fee.

Based on the explanation above, it can be concluded that a nominee is a person appointed or appointed to represent or on behalf of another person in carrying out a certain legal action. Therefore, it can be drawn that in the nominee agreement there are several elements, namely the existence of a power of attorney agreement between two parties, namely the beneficiary owner as the giver of power, which is based on a sense of trust in the nominee. The power given is special in nature with limited types of action and the Nominee acts as if he is a representative of the beneficiary owner before the law.

At present there are many problems caused by non-compliance with the requirements of the Nominee Agreement, especially with regard to issues of land ownership status. Likewise for the future, there will be the issue of taxing property values that were not previously quoted. When problems arise, the losers are foreigners and indirectly Indonesian citizens as nominees and protectors. It is hoped that in the future Indonesian law will have more in-depth

[8]Natalia Cristine purpura, 2006, The Validity of Innominate Agreements in the Form of Nomine Agreements, Master's Thesis of the Faculty of Law, UI, Depok, p. 33

procedures and arrangements regarding the Nominee Agreement in the hope that no one will use shortcuts to play around with the rules.[9]

In the case of land ownership rights, the nominee agreement is used as an effort to provide opportunities for foreign nationals to own land ownership rights in Indonesia under the guise of buying and selling on behalf of Indonesian citizens, so that formally it does not violate the rules. This nominee agreement is made by notarial deed, namely the occurrence of a loan agreement by a foreigner in purchasing a land/land using the name of an Indonesian citizen. In other words, a nominee agreement is an agreement made between a person who according to law cannot be the subject of certain land rights (property rights), in this case a foreigner and an Indonesian citizen, with the intention that the foreigner can control (own) de facto freehold land,[10]

Besides that, an agreement is drawn up between Indonesian citizens and foreigners by way of giving power of attorney, which gives irrevocable rights to the authorizer or Indonesian citizen and gives power to the recipient of the power of attorney for foreign nationals to carry out all legal actions related to land ownership rights. the.[11]The main agreement which is followed by other agreements related to the control of ownership rights over land by foreign nationals shows that indirectly through a notarial agreement has become legal smuggling.[12]

In the case of land ownership rights it is not clearly explained whether this nominee agreement is permissible or not. The politics of agrarian law which in broad outline is the policy adopted by the state in maintaining, preserving, allocating, exploiting, taking, benefiting, managing and dividing land and other natural resources including the results for the benefit of the welfare of the people and the state, which for the Indonesian state is based on Pancasila and The 1945 Constitution of the Republic of Indonesia (1945 Constitution of the Republic of Indonesia) does not specifically regulate.[13]

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[9]Nella Hasibuan, "Making a Nominee Agreement According to the Basic Agrarian Law," Notarial Journal, P-ISSN: 2540-797X, Volume 1 Number 1, p. 43-44, 2016.
[10]Maria SW Sumardjono, Land Ownership by Foreign Citizens through a Nominee Agreement, Regional Working Meeting of the Indonesian Notary Association (INI) of Bali and NTT Regional Managers, Denpasar, 2012, p. 2.https://media.neliti.com/media/publications/213280-penguasaan land-oleh-warga-negara-asing.pdfaccessed on 21 November 2022 at 21.00 WITA
[11]Maria SW Sumardjono, 2006, Land Policy Between Regulation and Implementation, Kompas, Jakarta, p. 162.
[12]*ibid.,*p.17.
[13]Achmad Sodiki and Yanis Maladi, 2009, Politics of Agrarian Law, Crown of Words, Yogyakarta, page 132.

Laws and regulations related to land such as Act No. 5 of 1960 concerning Basic Agrarian Principles, hereinafter referred to as UUPA as juridical provisions which are the implementation of the provisions of Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, then other laws and regulations such as Government Regulation No. 40 of 1996 concerning Business Use Rights, Building Use Rights, and Land Use Rights; Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency No. 3 of 1999 concerning Delegation of Authority to Grant and Cancellation of Decisions on Granting of Land Rights, and others, does not yet regulate the nominee agreement.

The incompleteness of the legal norms of the nominee agreement lies in the foundation of making the nominee agreement itself in relation to land ownership rights. UUPA has regulated the ownership of land rights, but these regulations do not yet cover arrangements regarding nominee agreements as instruments that can transfer ownership of land rights. The nominee agreement as an agreement in general is a legitimate agreement that can be based on the Civil Code, but the nominee agreement as an agreement related to the ownership of land rights does not have a clear legal basis either in the UUPA or its derivative regulations.

The practice that occurs in making nominee agreements for ownership of land rights in general is that the nominee agreement is made by stating that the land was purchased with money from the foreigner concerned and the nominee only borrows his name to be used on behalf of the land in the certificate. All costs arising from the purchase of the land are borne by the foreigner, then an agreement is made between the foreigner and the nominee, a lease agreement without a time limit and with engineered rental fees, so that it seems legitimate and does not violate the regulations.[14]

The incompleteness of legal norms related to the legality of nominee agreements related to ownership of land rights can be traced to the absence of derivative regulations from Act No. 5 of 1960 concerning Basic Agrarian Regulations (UUPA) which prohibit or permit these nominee agreements. However, in theory, when examining the characteristics of land ownership rights, conclusions can actually be drawn on the legality of this. Some of the characteristics of property rights are as follows:[15]

1. It is a hereditary right and can be transferred, meaning that it can be transferred to the rightful heir.

[14]I Wayan Eri Abadi Putra and I Gusti Nyoman Agung, Legal Consequences of Foreign Ownership of Land in Bali with a Nominee Agreement, Section of Civil Law, Faculty of Law, Udayana University, page 3.https://ojs.unud.ac.id/index.php/kerthasemaya/article/download/18936/12406accessed on 21 November 2022.

[15]Eddy Ruchiyat, 2006, National Land Politics to the Reform Order, Alumni, Bandung, p. 52

2. Can be transferred, namely sold, exchanged for other objects, donated and given by will.

Therefore, it can be seen that the nominee agreement is null and void because the objective conditions are that for certain matters in this case property rights, based on Article 21 paragraph (1) of the UUPA, can only be owned by Indonesians and not foreigners. Further understanding of the rights posed by the nominee agreement can be made by looking at the definition of rights. Sudikno divides rights into 2 (two) types, namely absolute rights and relative rights.[16]

According to Subekti, "The agreement made between a foreign citizen and an Indonesian citizen is based on a false cause, namely an agreement made on the pretext of hiding a cause that is actually not permissible."[17]

The classification of land ownership rights in the nominee agreement has not been regulated and formally juridical does not violate the BAL. However, in practice these rights in the nominee agreement are similar to property rights. A legal certainty is needed that explains and regulates the ownership of land ownership rights in the nominee agreement. The legal basis that can be used is the UUPA with a focus on regulating property rights in Articles 20 to Article 27 of the UUPA.

Property rights, which are hereditary, strongest and fullest rights that people can have over land, represent the principle of nationality in agrarian law in Indonesia. This principle is stated in Article 1 of the UUPA, namely:

1) The entire territory of Indonesia is the unity of the homeland of all Indonesian people, who are united as the Indonesian nation.

2) The entire earth, water and space, including the natural wealth contained therein within the territory of the Republic of Indonesia as a gift from God Almighty is the earth, water and space of the Indonesian people and constitutes national wealth.

3) The relationship between the Indonesian people and the earth, water and outer space referred to in paragraph 2 of this article is an eternal relationship.

4) In the sense of the earth, besides the surface of the earth, it also includes the body of the earth beneath it and that which is under water.

[16]Sudikno Mertokusumo, 2005, Knowing the Law of an Introduction, Liberty, Yogyakarta, page 54.
[17]Subekti, 1992, Anthology of Law Studies, Alumni, Bandung, page 137.

5) In the sense of water, it includes both inland waters and the territorial sea of Indonesia.

6) What is meant by outer space is the space above the earth and water referred to in paragraphs 4 and 5 of this article.

Based on the brief description of the background above, the author is interested in further studying these issues in a scientific thesis entitled "Juridical Implications of Land Ownership Status of Foreign Citizens through Nominee Agreements Based on the Concept of Legal Certainty".

2. Research Methods

The approach method used in this study is research with sociological juridical methods. The sociological juridical approach technique is used to analyze and provide answers to legal issues according to the intended target.[18]The juridical factor is based on the applicable legal provisions relating to the ownership status of foreign citizens' land rights through nominee agreements. Sources and types of data used in this study are primary data and secondary data, namely primary data, secondary data and tertiary data.Data collection methods include Library Research ie. the process of collecting secondary data to answer the problems that have been formulated by analyzing library materials related to the problems studied, both sourced from primary, secondary and tertiary legal materials.[19]

3. Results and Discussion

3.1. Juridical Implications of Land Ownership Status of Foreign Citizens Through Nominee Agreements Based on the Concept of Legal Certainty

The Civil Code (KUH Perdata) article 1313 states that "An agreement is an act in which one or more people bind themselves to one or more other people" so that from this statement it can be concluded that an agreement on behalf of its implementation certainly involves more from 1 (one) person so that the agreement can be realized and also in the agreement involving Foreign Citizens (WNA) and Indonesian Citizens (WNI) which of course the agreement is carried out for borrowing Indonesian citizens' names by foreigners for an activity, one of which is selling activities buy land.

An engagement as stated in Article 1233 of the Civil Code which states "Agreement is born because of an agreement or because of a law." so that in the implementation of agreements by foreigners and Indonesian citizens it is

[18]Burhan Ashshofa, 2007, Research Methods. Media Press, Semarang, p.46.
[19]Muhammad Nazir, 1988, Research Methods, Ghalia Indonesia, Jakarta, p. 111

included as one of the conditions for the formation of an agreement, namely an agreement on behalf of. The law of engagement in its implementation maintains an open system that can be interpreted, namely that everyone is able to enter into an agreement, both those whose name has been determined and whose name has not been determined by law.[20]

An engagement that arises because of an agreement will also give rise to a right and obligation that arises because it is desired by legal subjects.[21]An agreement will be carried out, of course, with a condition that follows, as well as related to the agreement on behalf of the foreigner and the citizen. Regarding the conditions for procuring an agreement, it can be seen in Article 1320 of the Indonesian Civil Code, which states: "For a valid agreement to occur, 4 (four) conditions need to be fulfilled:

1. their agreement that binds him;

2. the ability to make an engagement;

3. a certain subject matter;

4. an undisclosed reason.

From these requirements there are subjective conditions, namely in No.s 1 and 2 and objective conditions in No. 3 and 4, where if the subjective conditions are not complied with then the agreement can be canceled. In No. 1 states related to the agreement which refers to the fulfillment of negotiations between related parties which in this case can be carried out either orally or in writing or accompanied by an authentic deed or private deed.[22]

Therefore, if the foreigners and Indonesian citizens reach a mutual agreement, then the terms of the agreement can be passed. Furthermore, in No. 2 regarding competence in carrying out agreements, the parties participating in an agreement, namely legal subjects, certainly have the authority, rights and obligations in carrying out a legal action, both Indonesian citizens and foreigners who have bound themselves so that they can be said to be competent.[23]

The statement of the contents of Article 1320 can be clearly identified, that is, an agreement that is valid under the law, of course, must fulfill all four of these

[20]*Ibid.*p. 132.
[21]Djamali, Abdoel, 2016, Introduction to Indonesian Law, Rajagrafindo Persada, Jakarta, p.163.
[22]Hetharie, Yosia, 2019, "Nominee Agreement as a Means of Controlling Property Rights over Land by Foreign Citizens (WNA) According to the Civil Code." Sasi 25, no. 1.30.
[23]*Ibid.*, p. 31

conditions, the same is the case with agreements on behalf of. An agreement on behalf that has been established between foreigners and Indonesian citizens when viewed from the conditions contained in Article 1320 and fulfills all of these conditions can be said to be an agreement.

It is reaffirmed in Article 1338 of the Civil Code which states "All agreements made in accordance with the law apply as laws for those who make them." But in article 1338 it also states "Agreements must be carried out in good faith." so of course in making an agreement on an appropriate name based on the provisions of the Civil Code it must also be based on good faith so that it can become a binder for the parties involved.

The link between articles 1320 and 1338 can reflect an open system that has been described previously, which means that everyone is free to enter into an agreement if he fulfills the stated conditions based on the Civil Code.[24]Agrarian Law which has a "dualism" meaning with the Civil Code which is mediated by the formation of Act No. 5 of 1960 concerning the Principal Agrarian is expected in the future to be able to eliminate this "dualism" meaning and can complement agrarian-related legal policies in Indonesia.[25]

Agreements in the name related to land can be reviewed within the scope of Act No. 5 Year 1960 concerning Basic Agrarian Affairs, which expressly explains in Article 9 regarding the ownership of a land right which is stated as follows "Only Indonesian citizens can have a full relationship with the earth, water and space, within the limits of the provisions of Article 1 and Article 2" so that it can be interpreted that it is possible for a land to be fully good in terms of use and ownership only by Indonesian citizens which is clarified again regarding the ownership rights to the land in Article 21 paragraph (1) which states "only Indonesian citizens can have property rights".

Based on these two articles, there is a meaning that a land that can be used fully can only be fulfilled by Indonesian citizens so foreigners are not allowed to grant full rights related to land. A land ownership can also be reached by way of buying and selling, if the buying and selling activities are carried out in Indonesia then it should be adjusted to the existing legal provisions in this case, namely in accordance with the Basic Agrarian Law along with the Government Regulation of the Republic of Indonesia No. 24 of 1997 related to the Amendment to Regulation of the Government of the Republic of Indonesia No. 10 of 1961 concerning Land Registration.

[24]Hetharie, Josiah. Op. cit. p. 163.
[25]Committee I of the Regional Representatives Council of the Republic of Indonesia, 2014, Politics of Agrarian Law, Secretariat General of the Regional Representatives Council of the Republic of Indonesia, Jakarta, p.65.

The Basic Agrarian Law, precisely in Article 26 paragraph (2) states "Any sale and purchase, exchange, gift, gift with wills and other acts intended to directly or indirectly transfer property rights to foreigners, to a citizen who in addition to Indonesian citizenship, having foreign citizenship or to a legal entity, except for those stipulated by the government referred to in Article 21 paragraph (2), is null and void because the law and the land fall to the state, provided that the rights of other parties burdening it continue as well as all payments that have been received by the owner cannot be claimed again.

Based on this statement, it has been expressly stated that buying and selling carried out with foreigners is not allowed except in circumstances according to the requirements in that article. However, a legal entity, namely an Indonesian legal entity or a foreign legal entity, can control and use land with the conditions stated in Article 30, namely "Those who can have usufructuary rights are Indonesian citizens and legal entities established according to Indonesian law and domiciled in Indonesia.

Land ownership rights can be obtained by foreign nationals as stated under Article 21 paragraph (3), which contains conditions if it meets the requirements for property rights for foreigners, namely "foreigners who after the enactment of this law obtain property rights due to inheritance without a will or mixing of assets due to marriage." Likewise, Indonesian citizens who have ownership rights and after the enactment of this law lose their citizenship are obliged to relinquish said rights within one year of obtaining said rights or losing said citizenship.

However, this does not rule out the possibility of problems such as Indonesian residents who at that time still had the status of foreigners so that foreigners living in Indonesia still had property rights related to land.[26]It is another case if the foreigner and the Indonesian citizen do not carry out the agreement on behalf of but rather a leasing agreement, then this is permissible if viewed based on the Basic Agrarian Law, namely Article 41 and Article 42 which allow foreigners to have usage rights. Judging from various aspects related to land-related arrangements, it can be said to be fair because both foreigners and foreigners are allowed to have land rights which are limited by the requirements of the articles in the Basic Agrarian Law which have been clarified previously.[27]

Agreements on behalf of the Basic Agrarian Law, to be exact, if linked to Article 21 regarding the ownership of land rights and linked to Article 26 which states that it is related to the sale and purchase of land in Indonesia, then agreements on behalf of it can be said to violate the objective terms of the agreement as stated in the Indonesian Criminal Code. Civil law, to be precise, Article 1320

[26]Sancaya, I. Wayan Werasmana. Op. cit. p.3
[27]*Ibid.*p. 58.

because the agreement was implemented, including the prohibition, which resulted in the non-fulfillment of Article 26 paragraph (2) of the Basic Agrarian Law.

The agreement on behalf of is said to be null and void since the beginning because the agreement made does not have binding authority similar to the law on the parties making the agreement. In Indonesian law (KUHPerdata) there is no specific regulation regarding this name-borrowing agreement because this name-borrowing agreement is an agreement made by a foreign citizen with an Indonesian citizen.

This name borrowing agreement is included in a special agreement in the Civil Code, namely an anonymous agreement or often referred to as an innominaat agreement. This name loan agreement is very prone to disputes or problems because this agreement is an agreement that has not been specifically regulated in positive law. This name borrowing agreement is valid if in an agreement it fulfills the legal requirements of the agreement, good ethics and lawful causes, and does not conflict with existing laws.

The object of this name lending agreement is freehold land which is clearly stipulated in the UUPA that foreign nationals may not own freehold land in Indonesia. Borrowing a name in order to run its business, the contents of the name loan agreement must contain that foreign nationals can control land with rights of ownership in the sense that controlling is managing, controlling, utilizing, in controlling land owned by foreign nationals, according to the term of use rights (HGB) specified is 20 to 25 years and can be extended but may not rule forever, borrowing names forever violates good ethics (legal smuggling).

A name loan 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 and an Indonesian citizen, with the intention that the foreigner can control (own) the land with the right of ownership in de facto, but legally-formally (dejure) the ownership of the land is in the name of Indonesian citizens. In other words, Indonesian citizens borrow their names by foreigners to act as nominees.[28]

A name loan agreement is clearly a form of legal smuggling to avoid regulations stipulating that foreigners do not meet the requirements as subject holders of land ownership rights in Indonesia in accordance with the provisions in Article 9 paragraph (1) jo. Article 21 paragraph (1) of the UUPA clearly states that only

[28]Maria SW Sumardjono, 2001, Land Policy Between Regulation and Implementation, Kompas, Jakarta, p. 17.

Indonesian citizens can have full relations with the earth, water and space, and clearly stipulates that only Indonesian citizens can have property rights.

This is then reaffirmed in Article 26 paragraph (2) of the UUPA which states that every sale and purchase, exchange, grant, gift by will and other acts intended to directly or indirectly transfer property rights to foreigners, to a citizen Besides Indonesian citizenship, having foreign citizenship is null and void by law.

Legal smuggling is foreign law rules that are sometimes set aside and use national law or vice versa for certain gains/purposes. The purpose of legal smuggling is to be able to avoid an unwanted legal consequence or to realize a desired legal effect. In relation to land ownership by foreigners, loan agreements are often covered with various agreements to "safeguard" the name of the foreigner and the Indonesian citizen whose name is used as the person who legally "owns" the shares or the land/property signs a statement acknowledgment that the shares or land/property are not his, and his name is only "borrowed".

Therefore, the agreement is not legally valid in accordance with the statement of Article 1234 of the Civil Code which states "Each agreement is to give something, to do something and not to do something" becomes "Blank notes" because everything is made based on mere pretense. Maria SW Sumardjono said that "The main agreement followed by other agreements related to the control of land rights by foreign nationals shows that indirectly through a notarial agreement, law smuggling has occurred".[29]

That the existence of agreements made by a Notary with the aim of securing the assets that are the object of the Nominee is essentially based on bad faith so that it can be said that the Agreement made by the Notary has actually damaged the authority of the Notary profession itself and of course course is very contrary to Article 16 paragraph (1) letter a of Act No. 2 of 2014 concerning Amendment to Act No. 30 of 2004 concerning the Position of Notary which states that: independent, impartial, and protect the interests of the parties involved in legal actions.

The made-up agreement (proforma) is certainly a fake agreement so that it does not have binding force as stipulated in Article 1335 of the Civil Code which states that: "an agreement with false causes or contents is not legally binding" so that the imposition of an object with HT is based on fictitious debts which are legally flawed.

[29] *ibid.,* p. 16.

The embodiment of this name borrowing agreement is in the agreement made by the parties, namely between Foreign Citizens and Indonesian Citizens as the power of attorney (Nominee) which is created through a package agreement that essentially intends to provide all the authority that may arise in legal relations between a person and his land to a foreign citizen as the recipient of the power of attorney to act like an actual owner of a plot of land which according to the law cannot be owned (property rights or building use rights). Agreements using Indonesian citizens as nominees constitute legal smuggling because the substance is contrary to the Basic Agrarian Law (UUPA).[30]

Thus it can be said that the name loan agreement (Nominee) is made on the basis of bad faith, which qualifies as a simulation agreement (absolute simulation) and is a form of law smuggling where substantially the provisions in Article 9, Article 21 and Article 26 paragraph (2)) UUPA cannot be deviated.[31]In the opinion of Mariam Badrulzaman, referring to the provisions of Article 1320 of the Civil Code paragraph (1) it can be said that the principle of freedom of contract is limited by consensus or agreement of the parties who make it. This provision indicates that the agreement is influenced by the principle of consensualism. That in Article 1320 and Article 1337 of the Civil Code it is clear that the parties are not free to enter into agreements involving causes that are prohibited by law or contrary to decency and public order.

The legal consequences if the agreement is made contrary to the cause is that it can cause the agreement in question to be invalid.[32]Cause or causa is interpreted as the contents of the agreement, regarding the contents of the agreement must be lawful, meaning not contrary to law, decency norms, and public order. Does not conflict with the law in relation to land tenure by foreigners, it should be interpreted that the agreement made does not conflict with the UUPA, while direct or indirect language in the UUPA can refer to customs in Nomonee agreements related to improper ownership of assets by foreigners, for example rent rent up to 100 years or more.

Based on the discussion above, the authors conclude that the name borrowing agreement in practice of land ownership by foreigners legally contradicts national land law, namely Article 9, Article 21 paragraph (1), and is confirmed by Article 26 paragraph (1) UUPA. In addition, this practice is also contrary to the good faith principle of freedom of contract in contract law. In relation to international civil law, this practice constitutes legal smuggling of statutory

[30]Maria SW Sumardjono, 2007, Alternative Policies for Regulating Land and Building Rights for Foreign Citizens and Foreign Legal Entities, Kompas, Jakarta, p. 18.
[31]*Ibid.*
[32]Mariam Darus Badrulzaman, 1994, The Principle of Freedom of Contract and Its Relation to Standard (Standard) Agreements, Alumni, Bandung, p. 43.

regulations in land law as explained in the discussion above, so that any legal smuggling including loan agreements results in the cancellation of the relevant act, in international private law it is called fraus omnia corrumpt.

3.2. Legal Consequences for Executors of the Nominee Agreement Against the Sale and Purchase of Land Rights for Foreign Citizens

Mastery of land ownership rights by foreigners based on a loan agreement (nominee). but in fact they secretly agreed that the agreement that appeared to come out was not valid. In fact, the use of nominees has been expressly prohibited in share ownership according to Act No. 25 of 2007 concerning Investment and also Act No. 40 of 2007 concerning Limited Liability Companies.

Based on Act No. 25 of 2007 concerning Investment, agreements to borrow names (nominees) in share ownership are prohibited, as stated in Article 33 paragraph (1) of the Investment Law. So both domestic investors and foreign investors who invest in Indonesia are not justified in entering into nominee agreements in share ownership for and on behalf of other people, because the purpose of this Article is to prevent the occurrence of a company that is normatively owned by someone, but materially or substantially the owner of the company is someone else.[33]

As for the sanctions for those who enter into the name borrowing agreement (nominee) as regulated in Article 33 paragraph (2) of the Investment Law, namely null and void and the agreement is deemed to have never existed. In Act No. 40 of 2007 concerning Limited Liability Companies, Article 48 also regulates share ownership, where the company shares issued by the company are on behalf of the owner. So investment in shares made by investors through the nominee in the name loan agreement (nominee) when viewed legally belongs to the nominee.[34]

The legal consequences of an ownership right over land belonging to Indonesian citizens by foreigners through a name loan agreement (Nominee), are in the form of the emergence, change, or disappearance of a certain legal relationship. The main agreement which is followed by other agreements related to ownership of land with ownership rights by foreigners as described above shows that there has been legal smuggling through notarial agreements.

The Indonesian citizen who acts as a nominee who lends his name to the foreigner is bound by a legal relationship that gives benefits and does not care

[33]David Kairupan, 2013, Legal Aspects of Foreign Investment in Indonesia, Kencana Prenada Media, Jakarta, p. 89
[34]*ibid.,*p. 90

about the material truth of the agreement. As explained above, the validity of an agreement must fulfill the provisions of Article 1320 of the Civil Code, requiring four conditions, namely:

1. Agree those who bind themselves;

2. Capable of making an agreement;

3. Regarding a certain matter;

4. For some lawful reason.

Regarding the third and fourth terms or conditions, namely objective conditions, conditions that must be met by the object or object being agreed upon. What is meant by the third condition is that in an agreement there must be an object or something that is agreed upon and the fourth condition emphasizes that the thing agreed must not conflict with the applicable laws and regulations. Because the objective conditions are not met, the agreement is null and void. This means that from the beginning there was never an agreement and there was never an agreement.

As Maria SW Sumardjono said, the substance of the agreement violates objective requirements and therefore is null and void.[35]Article 1335 of the Civil Code states that an agreement made with false or prohibited causes has no power. In this case, the agreement is deemed to have been canceled from the start because not all agreements made have binding force as law. Only valid agreements are binding on both parties. So that the pretended agreement has no binding force because it is made invalid.[36]

Based on the discussion above, the author concludes that the control of land ownership rights by foreigners based on a nominee agreement cannot be carried out because the agreement is considered invalid and does not meet the requirements for the validity of the agreement as stipulated in 1320 of the Civil Code. The legal consequences of the possession of land rights by foreigners based on a name loan agreement (Nominee) are null and void because the objective conditions are not fulfilled as determined by Article 1320 of the Civil Code.

[35]Maria SW Sumardjono, Op. cit, p. 18
[36]Ibid, p. 85

4. Conclusion

Juridical Implications of the Land Ownership Status of Foreign Citizens Through a Nominee Agreement Based on the Concept of Legal Certainty that the name loan agreement in practice of land ownership by foreigners is juridically contrary to national land law, namely Article 9, Article 21 paragraph (1), and confirmed by Article 26 paragraph (1) UUPA. In addition, this practice is also contrary to the good faith principle of freedom of contract in contract law. In relation to international civil law, this practice constitutes legal smuggling of statutory regulations in land law as explained in the discussion above, so that any legal smuggling including loan agreements results in the cancellation of the relevant act, in international private law it is called fraus omnia corrumpt.

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