International Journal of Criminal Justice Science
Vol 16 Issue 2 July – December 2021

Copyright © 2021 International Journal of Criminal Justice Sciences (IJCJS) – Official Journal of the South Asian Society of Criminology and Victimology (SASCV) - Publisher & Editor-in-Chief – K. Jaishankar ISSN: 0973-5089 July – December 2021. Vol. 16 (2): 177–190. DOI: 10.5281/zenodo.4756069 / IJCJS is a Diamond Open Access (Authors / Readers No Pay Journal). Indexed in Scopus and Emerging Sources Citation Index (Web of Science).

This is an Open Access article distributed under the terms of the Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium, provided the original work is properly cited.

Case Settlement of Nominee Agreement as A Mode of Land Tenure for Foreign Nationals in Indonesia

***Aslan Noor*[1]**
Universitas Singaperbangsa, Karawang, Indonesia

Abstract
A nominee agreement takes place between an Indonesian citizen and a foreign national by means of a power of attorney. This agreement grants an irrevocable right to a foreign national to carry out any legal actions related to a property or a land. This is termed as a legal smuggling and prohibited in Indonesia because it is contrary to national land law This study aimed to find out how to stop foreign nationals from getting land and property rights. This study is based on the principle of Natural Law and the Indonesian Law and the constitution as the agents of implementing this Natural Law The data was collected from library resources and legal documentation. The study used the normative legal research method to find the truth based on the logic of legal scholarship from the normative side. The findings reveal that a nominee agreement is inseparable from the provision of Article 1320 and Article 1338 of the Civil Code as it fulfills the legal requirements of an agreement referred to by the provision of Article 1320 of the Civil Code. The study suggests that if an agreement is detrimental to the interest of the debtor, the debtor can apply for cancellation.

Keywords: Indonesia, foreign national, land titles, property, legal smuggling

Introduction
There is a widespread practice of nominee agreements as well as their prohibitions in various laws and regulations that harm the state finance and threaten the integrity of the Unitary State of the Republic of Indonesia. This practice of *nominee* agreement in Indonesia is often caused by the ambiguity of the regulation on the prohibition of nominee agreement, which are only limited to norms and not yet in the form of an imperative legal rule (see Article 9 and 21 of the UUPA). Since these articles are not made implementing regulations, the notary who should have prohibited it actually execute the opposite. They fail to contradict the nominee as the bearer of land law and civil law and legitimize the nominee agreement, thus setting a standard notary code of ethics.

[1] Study Program of Law, Faculty of Law, Universitas Singaperbangsa, Karawang, West Java, Indonesia. Email: aslan.noor@fh.unsika.ac.id

© *2021 International Journal of Criminal Justice Sciences*. Under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International (CC BY-NC-SA 4.0)

When these nominee agreements in land control are applied to foreign citizens, a great urgency is often seen in their prohibition. A nominee agreement for a foreign citizen is prohibited in Indonesia because it is contrary to national land law (violating the principle of nationality under Articles 9 and 21 of the UUPA) and civil law (violating the principle of validity of the agreement of vide Article 1320 of the Civil Code). Owing to the rise in nominee agreements, the threat of illegal foreign ownership of land in Indonesia has reached an alarming stage, often with the modus operandi of toying with treaty institutions prohibited in Indonesia. Examples can be cited from the Province of Bali, West Nusa Tenggara and the Special Region of Yogyakarta (in the Territory of the Unitary State of the Republic of Indonesia).

The practice of nominee agreement is often a mode of business and investment by foreign nationals under the guise of tourism in order to control land with property rights. The practice of *nominee* agreement is considered an act of legal smuggling by borrowing the name of an Indonesian citizen followed by binding sale and purchase, and obtaining an absolute power of attorney from the Indonesian citizen. Such a nominee agreement to transfer land rights to foreign nationals is prohibited by law. However, when viewed from civil practice (formal juridical), the nominee agreement does not seem to contradict the law and regulations.

If the nominee agreement crisis is not resolved, the state will suffer more losses (estimated at Rp 1.04 billion or around 80 thousand dollars annually). This state loss in operational and other costs alone was estimated to Rp. 145.6 billion in 2014 (Kadafi, 2019). In this regard, the Governor of Bali Wayan Koster stated that illegal land practice occurred in Bali by foreign nationals with the help of local residents. A foreign national would buy land using the name of a local resident, and then turn it into a villa, and rent it out. This illegal practice is carried out through a name borrowing agreement or *nominee* agreement which is one of the efforts of foreigners to be able to hold the status of land ownership, in view of the prohibition or restriction on regulation laid for foreign nationals in Indonesia, who only enjoy the public use rights of lands with super strict requirements.

This study aimed to examine whether nominee agreements for foreign nationals have the legal status (position/binding power) in the context of acquiring foreign land in Indonesia. Owing to the growing cases of nominee agreement, it was necessary to find out their juridical implications. The urgency of such a study lies in the fact that such an agreement involved the use of a power of attorney agreement to acquire land through an Indonesian resident, which was evidently an act of smuggling under national law.

This study has five sections: The first section discussed the background of the topic of study, the second section presented the previous writings related to the topic. Section three and section four examined the problems statement and the theoretical framework of the study. Section five presents the results and discussion, followed by the final scion of Conclusion and recommendations.

Literature Review

Definition of a nominal agreement

A *nominee* agreement, a kind of civil agreement (*principal of contract*), is a formal juridical document which is valid only when both the parties (subjects of

© 2021 International Journal of Criminal Justice Sciences. Under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International (CC BY-NC-SA 4.0)

the rights) are Indonesians. But a new practice has been started, according to which but the nominee agreement is presented prematurely before a notary for implementation. This agreement is then followed by a follow-up/additional agreement even in the form of a power of attorney (last giving) and a debt acknowledgment agreement made by and before a notary, indirectly intended to divert or transfer land right (in the form of property right) to a foreign national. The notary does not reject the practice, even as an agent of the occurrence of the forbidden agreement, is very unfortunate, both in terms of code of ethics and the violation of national land law. Hence, there are at least three parties involved in the forbidden agreement, namely: The Stroman (Indonesian), the Notary and a Foreign national.

The nominee agreement simulation is therefore always followed by a debt agreement for land that is used as collateral for the debt *Stroman* contained in an essential in a Follow-up Agreement called the Debt Recognition Agreement. Mustafa (1985) believes that if the practice of the nominee institution is known by the agencies authorized to regulate and administer agrarian affair, they would declare such sale and purchase as void because all the land belonged to the state, and the law explicitly prohibit the sale or transfer of land or property to any foreign national vice Article 26 paragraph (2) BAL (Basic Agrarian Law) (Mustafa, 1985), even though a nominee agreement.

An increasing practice of the use of a *nominee* agreement, even though it is completely prohibited by the Indonesian Land Law, is also contrary to the principle of nationalism as regulated in Articles 9 and 21 of the UUPA and the terms of the agreement in Article 1320 of the KUHP (the Indonesian Civil Code). There is no explicit regulation in any Indonesian Law to consider nominee agreement as a norm. Hence, wherever a nominee agreement occurs in Indonesia, it is categorized as legal fraud or smuggling of law.

A nominee agreement or legal smuggling?

Sumardjono (2006) reports that a nominee agreement takes place between an Indonesian citizen and a foreign national by means of a power of attorney, which grants the foreign national the power of attorney an irrevocable right to freely carry out legal actions relating to property right to the land. Sumardjono (2006) also emphasized that the main agreement followed by other agreement related to the control of property right over land by foreign national showed that indirectly (through notarial agreement), had become legal smuggling.

Comparing a nominal agreement with smuggling of land law was triggered by the special relationship between an Indonesian citizen and the foreigner who indirectly obtained ownership right of Indonesian land, by using "*Stroman*"(Puppet human guise). The obtaining land ownership in such a manner is actually prohibited, since it appears that a foreign national having bad intention to control a plot of land with the status of Property Right in the Territory of the Unitary State of the Republic of Indonesia. This is executed by means of buying and selling under subterfuge, namely using the name of an Indonesian citizen (borrow name/nominee), which can commonly be: a wife/husband, doll (*Stroman*) having the Indonesian citizenship.

© 2021 International Journal of Criminal Justice Sciences. Under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International (CC BY-NC-SA 4.0)

The result of a research by the Indonesian Nominee Crisis Working Group (K3NI) revealed surprising data that as many as 50 thousand foreigners were estimated to own land property. (Sumerta, 2019). This included 7,500 villas controlled by foreign nationals with nominees without an official legal basis. In addition, it was estimated that as many as 3000 illegal investments were planted on the island of Bali. It was estimated that a total of 10,500 plots of land from small scale to 2,500 hectares experienced nominee cases with an average value estimated at 10.4 billion US Dollars or Rp 109.2 trillion embedded in these cases. These findings were obtained from information after litigation in court. Until now, it was estimated that there were 140 cases of land disputes due to the misuse of the nominee agreement institution which was still active with 55 foreign nationals as perpetrators, who were estimated to have been residing for 20 years in Bali, and who sometimes participated in the sale of good land for business reasons, marriage, work and so on.

In addition, the practice of *nominee* agreement in Indonesia is also often caused by the ambiguity of the regulation on the prohibition of nominee agreement, which are only limited to norms and not yet in the form of an imperative legal rule (see Article 9 and 21 of the UUPA), therefore these articles must be made implementing regulations, so that the notary who should have prohibited it actually did the opposite and contradicted his attitude as the bearer of land law and civil law, and at the same time as the basis for setting the standard notary code of ethics as the one that legitimizes the nominee agreement.

Problem statement

A nominee agreement takes place between an Indonesian citizen and a foreign citizen by means of a power of attorney, which grants the power of attorney or an irrevocable right to a foreign national to carry out any legal actions related to a property or a land, which is termed as a legal smuggling (Sumardjono, 2006). This kind of a nominee agreement is prohibited in Indonesia because it is contrary to national land law (violating the principle of nationality under Articles 9 and 21 of the UUPA) and civil law (violating the principle of validity of the agreement of vide Article 1320 of the Civil Code).

There is widespread practice of nominee agreements in spite of their prohibitions by various laws and regulations. These agreements harm state finance and threaten the integrity of the Unitary State of the Republic of Indonesia. This is the subject of this current research to examine the legal status (position/binding power) of nominee agreement in the context of acquiring foreign land in Indonesia and what are its juridical implication. The problem becomes worse when it is stated that a power of attorney agreement in the context of a nominal agreement is a commitment to acquire land by false means of borrowing a name, which is evidently an act of smuggling under national law.

There is an urgent need to resolve this widespread threat of illegal foreign ownership of land in Indonesia, which has reached an alarming stage. This could become so popular due to the modus operandi of toying with the Indonesian laws. This study aimed to find out how to stop foreign nationals from getting land and property rights, though acquire these rights through seemingly legal means, hence the legal norms need to be made stricter.

© 2021 International Journal of Criminal Justice Sciences. Under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International (CC BY-NC-SA 4.0)

Theoretical Framework

The study takes a recourse behind the theory of Natural Law which is found both empirically (concrete) and metaphorically (abstract). Hugo Groteus defines the characteristics of natural law as of Divine origin, coming from God and written in the mind and soul of humans. This Natural law postulates the relationship between the humans and all the land on this earth. The Natural Law theory expostulates God as the owner of all land, the nation as the beneficiary / connoisseur (who enjoys nothing to prevent access to land for others), the state as the ruler (responsible for making rules / regulations, managing / carrying out land management including registering land etc.). in other words, the Natural law places God's position as the owner of this universe, and the concept of Motherland (the land where one was born), is the highest legal relationship in defending the Unitary State of Indonesia from the threat of the principle of internationalism. The relationship between citizens and land is the embodiment of the concept of nation and state in the form of regional relations as a metaphor for the homeland (principle of nationality) as regulated in Article 1 of Law no. 5 Year 1960.

Hence, according to the Natural Law, the state is in control in defending the territory of the Republic of Indonesia from the threat of encroachment on the territory of other countries (Noor, 2006) and citizens as owners of land (Ardiwilaga, 1962). Indonesia adheres to the theory of natural law related to land and agrarian regulations by stipulating it in the State Basic (Pancasila), Constitution (UUD45) and UUPA (Dahlan ,2001; Parlindungan, 1993). This relationship is hierarchical-constitutional in terms of the nation and state regarding land (vide the first precept of Pancasila and the 3rd paragraph of the Preamble to the 1945 Constitution).

This study is based on the principle of Natural Law and the Indonesian Law and the constitution as the agents of implementing this Natural Law

Research Method

This study uses the normative legal research method, a scientific research to find the truth based on the logic of legal scholarship from the normative side. Ali (2014) recommends to make a doctrinal inventory of library research or legal document studies. The data was therefore collected from library resources and legal documentation. A Doctrinal research aims at only the written regulations or primary legal materials and expert opinions as secondary legal material, as found in library resources, legal dictionary and other legal material. The library research or document study referred to in this method was mostly carried out to collect the secondary legal material (Soekamto and Mamudji ,1990).

The current research can be classified as normative legal research focusing on legal materials related to the issue of nominee agreement. The research approach is focused on various normative juridical approach that examines legislation (Soemitro,1982) namely the *statute approach*, the *fact approach*, and the legal concept approach (*conceptual approach*). The research procedure of this study involved first checking the ambiguity or the void in the legal norms, especially in those laws related to the nominee agreement. The researcher studied thoroughly both the general civil laws and the Indonesian land law, originating from the UUPA. The data analysis of the legal material collected was carried out in a qualitative juridical manner, by means of descriptive, analytical, and juridical arguments.

© 2021 International Journal of Criminal Justice Sciences. Under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International (CC BY-NC-SA 4.0)

Results and Discussion

Legal Status of Nominee Agreement and the Mode of Control of Land Ownership by Foreign Nationals

Article 1313 of Civil Code states: "An agreement is an act with one or more people binding themselves to one or more people (Tan Tong 2007). Subekti (1979) posits that an agreement is an event where one person promises something to another person or where two people promise each other to carry out something. Satrio (1993) defines an agreement as a contract between two or more people that creates an obligation to do or not to do something special. Subekti (1979) explicitly distinguishes between Agreement, Engagement and Contract. A contract is an agreement made by the parties in written form to complete a legal action, giving rise to an engagement. The relationship between the agreement and the engagement is that an agreement gives birth to an engagement. Engagements originate from agreements because most engagements are outcomes of agreement (Sutarno,2003). An agreement is also a source of national land law in addition to regulation and customary law in resolving concrete cases. An agreement entered into by the parties is also the law for the concrete relationship concerned (e.g., Article 1338 of the Civil Code). However, there are limitations, namely specifically in the field of land law, as long as the agreement entered into does not violate or contradict the provision of the UUPA.

According to Badrulzaman (2006), there are 10 principles of agreement, namely: freedom of agreement, consensus, belief, binding power, legal equality, balance, legal certainty, morals, propriety, and custom. Badrulzaman (2006) seems to suggest that in the Indonesian legal system, there is absolutely nothing known about the *nominee* agreement, so that there is no specific and firm arrangement regarding this nominee agreement. Black's Law Dictionary defines nominee as “one designated to act for another as his representative in a rather limited sense. It is used sometimes to signify an agent or a trustee. It has no connotation, however, other than that of acting for another, in representation of another, or as the grantee of another. Bryan A. Garner (1972) defines a nominee as someone appointed to act on the other party as a representative in a limited sense. A nominee acts from time to time as an agent or a confidant. Hence, a nominee has no other meaning than a representative of another party or as a guarantor of another party. Therefore, in a *Nominee Agreement,* the *nominee* in practice is the one who acts as a representative of a foreign national. The UUPA (Law of Basic Agrarian Principles, however, defines nominee as a borrower, an Indonesian citizens, who is involved in buying and selling. Hence, when a nominee buys or sells a land for a foreign national (otherwise prohibited by formal juridical), he does not violate the rules.

In the context of land ownership agreements, the conditions for the validity of an agreement are regulated in Article 1320 of the Civil Code (KUH Perdata), namely: first, there must be an agreement which binds people; second, there should be the ability to make an engagement; third, there should exist a certain thing (object) to agree upon; and finally, there should be a lawful cause to enter into an agreement. Let us look at each of these four conditions in detail:

The first condition of binding people together is a subjective condition which, if violated, the agreement can be canceled (Salim, 2005). The validity of a subjective

© 2021 International Journal of Criminal Justice Sciences. Under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International (CC BY-NC-SA 4.0)

agreement is the agreement or consensus of all the parties. This agreement is regulated vide Article 1320 paragraph (1) of the Civil Code. What is meant by agreement is the conformity of the statement of will between one or more persons with the other party. What is appropriate is a statement because the will cannot be seen / known to others. This subjective agreement can also be marked by offer and acceptance: written, spoken, secretly, and with certain symbols. The agreement in writing, can be done with an authentic deed or a deed under the hand. The distinctive difference between an authentic deed and a private deed lies in the burden of proof as regulated in Article 1865 of the Civil Code, namely; If the authentic deed is denied by the opposing party, the opposing party must prove the falsity of the deed. If the deed under the hand is denied by the opposing party, then the person who submits the deed under the hand as evidence must prove the authenticity of the deed under the hand. Therefore, proof of an authentic deed is called proof of falsity, while proof of an underhand deed is proof of authenticity (Miru,2007)

The second requirement is also a subjective condition, that of the ability to make an engagement. This ability relates to the ability to carry out a legal action. Legal actions are those that will have legal consequences. The people who make the agreement must be people who are capable and have the authority to carry out legal actions as determined by law. Such individuals must be 21 years old and married. People who are not authorized to carry out legal actions are minors and therefore must be placed under guardianship.

The third and fourth conditions are termed as objective conditions. If these conditions are violated, the agreement is void for the sake of law. For instance, the third condition of having a certain thing has the achievement (or principle of the agreement) as the object of the agreement. Achievement is termed as the obligation of the debtor and the right of the creditor. This achievement consists of positive and negative actions. Achievement also consists of giving something, doing something, and not doing anything (Article 1234 of the Indonesian Civil Code). The fourth and final condition is of having a lawful reason to enter into an agreement (Jehani, 2007).

In contract law there are certain legal consequences if these subjective and objective conditions are not fulfilled. For instance, if the subjective conditions are not met, the agreement can be canceled (*vernietigbaar*) as long as there is a request by certain people or interested parties. If the objective conditions are not met, then the agreement is void by law (*nietig*), without the need for a request from the parties, thus the agreement is considered to have never existed and is not binding on anyone. Regarding the prohibition and Notary's authority to make a deed, a Notary Deed is an agreement of the parties that bind together to make an agreement, by fulfilling the legal conditions of an agreement (Article 1320 of the Civil Code).

Although the parties can make any agreement, there is an exception, namely the agreement must not conflict with the legislation of any public order, morality and decency. In contract law, there are 5 important principles, namely the principle of freedom of contract; the principle of consensus; the principle of legal certainty; the Good Faith Principle; and the principle of personality. The first principle of freedom of contract, under Article 1338 paragraph (1) of the Civil Code reads: "All agreements made legally valid as the law for those who make it." The principle of freedom of contract is a principle that gives freedom to the parties to: make or not make an

© 2021 International Journal of Criminal Justice Sciences. Under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International (CC BY-NC-SA 4.0)

agreement; to make an agreement with anyone; to determine the contents of the agreement, its implementation and terms; and to determine the form of the agreement, namely written and oral.

The second principle of consensus falls under the Article 1320 paragraph (1) of the Civil Code. It is determined as one of the conditions for the validity of the agreement, namely the consensus or agreement of both parties. The principle of consensus is a principle which states that agreements are generally not held formally, but only with the agreement of both parties. An agreement is a conformity between the will and a statement made by both parties. The third principle of legal certainty is related as a result of the agreement between the judges or third parties must respect the substance contract made by para parties, as appropriate to law. They must not interfere with the substance of the contract made by the parties. This principle can be seen in Article 1338 paragraph (1) The Civil Code which reads: ''The agreement made validly valid as law."

The fourth principle of Good Faith Principle falls under Article 1338 of paragraph (3) of the Civil Code which reads "An agreement must be carried out in good faith." The principle of good faith is the principle that the parties, namely creditors and debtors, must carry out the substance of the contract based on firm trust or belief or good will of all the parties. The principle of good faith is divided into two types, namely: Good faith is relative, that is, people pay attention to the real attitude and behavior of the subject; and good faith is absolute, whose assessment lies in common sense and justice. It is an objective measure to assess a situation (impartial assessment) according to objective norms. The last principle of personality is the principle that determines that someone who makes an agreement does it only for individual interests. This can be seen in Article 1315 of the Civil Code, namely: "In general no one can bind himself in his own name or ask for a promise to be made than for himself."

Validity of a nominee agreement

Article 1340 of the Civil Code reads: "An agreement is valid only between the parties who make it." If we examine further, Article 1320 of the Indonesian Civil Code regarding the validity of an agreement, the paragraph (4) states: "Every sale and purchase, exchange, gift, gift by testament and other acts intended to directly or indirectly transfer rights property to a foreigner, to a citizen who in addition to Indonesian citizenship has foreign citizenship or to a legal entity, except those stipulated by the Government as referred to in article 21 paragraph (2), is null and void in accordance with the provisions of article 26 The UUPA because law and land fall to the State, provided that the rights of other parties that burden him continue and all payments that have been made received by the owner cannot be claimed again. With regard to the control of land by foreign nationals, the form of agreement made by a Notary/PPAT for foreign nationals in the transfer of ownership right to land is categorized in to six types (Sumardjono, 2006):

1. Deed of Sale and Purchase by borrowing the name of an Indonesian citizen. Through this type of sale and purchase deed, there is a pseudo ownership of the land, because the names of Indonesian citizens are only borrowed for certificates, while in fact the money to buy the land comes from a foreign national.

© 2021 International Journal of Criminal Justice Sciences. Under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International (CC BY-NC-SA 4.0)

2. Deed of Debt Recognition. This deed takes place through a debt acknowledgment deed, in which an Indonesian citizen whose name is borrowed has a debt to a foreign national because the source of the funds or money comes from a foreign citizen.
3. Lease Deed. Through this lease deed, a foreign citizen will be able to take advantage of the land he has mastered with a lease term that can continue to be extended and passed on by his heirs.
4. Deed of Granting Mortgage. Through a deed of acknowledgment of debt previously made by an Indonesian citizen with a foreign national, it must be bound by a deed of granting mortgage rights, because land in the name of an Indonesian citizen is used as collateral for the repayment of the debt.
5. Statement for legal protection. Through a statement, Indonesian citizens provide their statements to provide legal protection to foreign citizens and will take legal actions if there are orders and instructions from a foreign citizen.
6. Power of attorney. With the power of attorney, land is controlled by borrowing the name of an Indonesian citizen, which can later be transferred at the request of a foreign citizen. With the power of attorney, a foreign citizen can take advantage of and collect results from the land they control. Article 1 paragraph (7) of Law no. 30 of 2004 concerning the Position of a Notary, states "A Notary Deed is an authentic deed made by or before a Notary according to the form and procedure stipulated in this law."

Article 1868 of the Civil Code states that: "Authentic deed is a deed in the form determined by law, made by or before public officials, who have the power to do so, at the place where the deed was made. Article 1868 of the Civil Code is the source for the authentic notary deed, it is also the legal basis for the existence of the notary deed, with the following conditions: (a) The deed must be made by (*door*) or before (*ten overstaan*) a General Officer; (b) The deed must be made in the form prescribed by law; and (c) Public officials, by or before whom the deed was made, must have the authority to make the deed (Adjie 2008). Article 52 paragraph (1) and Article 53 UUJN confirm that in certain circumstances a Notary is prohibited from making a deed. This prohibition only applies to the legal subjects. If a legal subject is prohibited, then the any deed is not allowed to be made. (Adjie 2009)

A notary deed is an authentic deed with evidentiary value but if an outwardly denial is made, it is no longer authentic. In other words, the assessment of the evidence must be based on the requirements of the Notary deed as an authentic deed. In case, if the formal aspect of a notary deed is disputed by parties, the formality of the deed must be proven, in terms of its day, date, month, year and time. In addition, it must also be able to prove the untruth of the statements or statements of the parties submitted before a Notary, and the untruth of the signatures of the parties, witnesses, Notaries.

Likewise, if they are going to prove the material aspects of the deed, the person concerned must be able to prove that the Notary did not explain or state the truth in the deed, or the parties who have correctly said (in front of the Notary) have said incorrectly and reverse evidence must be carried out to deny the material aspects of the deed. The authentic deed should also have a perfect evidence. If the evidence is

© 2021 International Journal of Criminal Justice Sciences. Under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International (CC BY-NC-SA 4.0)

perfect, the notary deed does not need to be assessed or interpreted, other than what is written in the deed. While the deed is under hand has the power of proof, as long as the parties admit it or there is no denial from either party. If the parties admit it, then the private deed has perfect evidentiary power as an authentic deed (Adjie 2008).

- *Land tenure held by a foreign national*

The Land tenure held by a foreign national varies widely. There is the acquisition of land tenure in accordance with the procedures set by the government and there are also land tenure practices which are basically forms of legal smuggling. The forms of land tenure by foreign nationals in accordance with the procedures established by the government can be identified in many ways, namely: (a) Land tenure with the right to use (Article 42 of the Basic Agrarian Principle); (b) Land tenure with rental right for building (Article 45 UUPA); (c) Ownership of residential houses or dwellings by foreign nationals on land with Right to Use (PP No. 41 of 1996 concerning Ownership of Residential or Residential Houses by Foreigner Domiciled in Indonesia).

Land tenure can also be understood by using a "guise/borrow name/nominee", a practice that is often carried out in relation to the land tenure model. By using this guise, for example, buying and selling on behalf of an Indonesian citizen with the source of the money from a foreign citizen, in a formal juridical manner, does not violate the regulations. However, in addition, efforts are made to make agreements between foreign citizens and Indonesian citizens by granting power of attorney (which becomes absolute power), which gives rights that cannot be withdrawn by the power of attorney (Indonesian citizen). This power of attorney authorizes the recipient, the foreign national, to carry out all legal activities with regard to land rights, which according to law should be carried out by the right holder (Indonesian citizen).

Land tenure is also a form of covert land control by foreign nationals, often by mixed-married couples between foreign nationals and Indonesian citizens. Those who do not have a marriage agreement find it difficult to manage the separation of assets. For example, if a married couple buys a plot of land with property rights, and if the source of funds is from the foreign national, they do not reveal their marital identity, and then the formal juridical does not violate the regulations. But there is ownership of land (property rights) by couples with dual citizenship which of course does not meet the requirements as property rights subject.

Land tenure is also understood in terms of granting mortgage rights to foreign creditors, who have the potential to manage a covert transfer of land rights (property right). In practice, foreign nationals prefer to use treaty instruments. The agreement referred to in this case is *nominee agreement*. Regarding the meaning of the term *nominee* in the practice of land tenure, according to Sumardjono (2006), what is meant by *nominee* or *trustee* is an agreement with the use of power. The agreement with the power of attorney in question is an agreement that uses the name of an Indonesian citizen and the Indonesian citizen submits a power of attorney to a foreigner to be free to take any legal action on the land they own (Sumardjono,2006). In practice the term *nominee* is often equated with the term representative or

© 2021 International Journal of Criminal Justice Sciences. Under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International (CC BY-NC-SA 4.0)

borrowing a name, based on a statement or power of attorney made by both parties. A foreigner borrows the name of an Indonesian citizen in order to include his name as a land owner on his certificate; but the Indonesian citizen can deny that the actual owner is a citizen and that a deed was made by him.

- *The Strength of Binding Nominee Agreement on control over Land Ownership by Foreign Citizens*

The principle of the power of binding an agreement can be found on its legal basis in Article 1338 paragraph (1) of the Civil Code, which states: "All agreements made legally are valid as law for those who make them." This statement is the most popular one because this is where the principle of freedom is based. There are studies (Miru, 2007) based on Article 1320 of the Civil Code, especially paragraph (1), which have highlighted three main things (principles) contained in this statement, namely: (a) it posits "all agreements made legally" which refers to the principle of freedom of contract; (b) in the phrase, "are valid as law" we see the principle of binding power or what people call the principle of *pacta sun servanda*' and (c) the expression "for those who make them" shows the principle of personality.

However, the statement is a united expression and cannot be broken up as mentioned above. The purpose of its breaking up in three parts was only to look at the content of the article. Article (2) or paragraph (2) determines that the agreement may not be canceled unilaterally without the consent of the other party. This is very reasonable, so that the interests of the parties can be protected. The reason is that when the agreement is made with both parties, the cancellation must also be upon the agreement of both parties. A unilateral cancellation is only possible if there is sufficient reason by law. Article (3) paragraph (2) is based on the principle of good faith, namely that every agreement must be carried out in good faith (Miru,2007). Moreover, the agreement is also not only binding on things that expressly stated therein but also for everything which according to the nature of the agreement, is required by propriety, custom, or law (Article 1339 of the Civil Code). This article stipulates that in an agreement, the parties are not only bound by what is expressly agreed in the agreement, but are also bound by propriety, custom, and law. Other things that bind the parties to the agreement are: the contents of the agreement; propriety; habit; and Constitution (Miru,2007)

Furthermore, Article 1340 of the Indonesian Civil Code stipulates that the agreement is only valid between the parties who make it. The agreement may cause a loss to the parties who make it, so a person should not enter into an agreement that burdens a third party. Similarly, granting rights to third parties can only be done in accordance with what is stipulated in article 1317 of the Civil Code.

Article 1341 of the Civil Code stipulates that each creditor may apply for the cancellation of all acts not required by the debtor or whichever is detrimental to creditors if it is proven that at the time when the act was committed, the debtor knew that the act had a detrimental effect on the creditors. In order to apply for the cancellation of acts carried out free of charge by the debtor, it is sufficient for the creditor to prove that the debtor at the time of committing the act knew that he was causing a loss to the person who benefited him, regardless of whether the person receiving the benefit also knew or not. Article 1341 thus gives the creditor the right

© 2021 International Journal of Criminal Justice Sciences. Under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International (CC BY-NC-SA 4.0)

to request the cancellation of the agreement; however, the Article also protects the third party if he has good intentions in obtaining rights from the debtor. The acquisition of the third party's rights is also for free, even if he has good intentions, he is still not protected, if the debtor knows that the agreement or action is detrimental to the creditor.

Article 6:248 expresses the principle of binding force: "Agreements are not (only) binding for what is expressly stated in it, (but also for everything which, according to the nature of the agreement, is required by propriety, custom, or law" This principle states that an agreement results in a legal obligation and the parties are bound to carry out the contractual agreement, and that an agreement must be fulfilled. This is considered to have been given and we never question it again. Social life is only possible if one can trust the words of others. Science may not be able to provide more explanation from that, except that the contract is indeed binding because it is a promise, similar to the law because the law is seen as an order from the legislator. If the certainty of the fulfillment of contractual agreements is removed, this will at the same time destroy the entire system of exchange (goods-services) that exist in society. Therefore, "fidelity to a given promise is part of the requirements that reason demands natural"(Budiona, 2006)

Binding of a pact, too, is specified in Article 1313 of the Indonesian Civil Code. It is an agreement made by a person that binds the person who makes it. The parties must obey what was agreed upon, which obligation originated from the agreement, and which has the power as law for those who make it (Article 1338 of the Civil Code). In essence, the agreement is only binding on the parties who made it, and does not bind third parties (Article 1340 in conjunction with Article 1917 of the Civil Code). However, the provisions of Article 1341 of the Civil Code provides an exception, namely an agreement made by the debtor which harms the interests of the debtor, then the debtor can apply for cancellation to the extent of the loss. The power to bind an agreement as stipulated in article 1339 of the Civil Code, that: "An agreement is not only binding on things - things that are expressly stated in it."

Budiono (2006) cites that in an agreement a person creates a legal obligation and that he is bound by his contractual promises and he must fulfill these promises. This is as something by itself and people no longer even question why it is so. A life association is only possible, among others, if a person can believe the words of others (Ibrahim & Sewu, 2003). Secondly, promises by the spoken word are also binding if they are put by parties themselves and set in their scope and impact. The term *pacta* is used for such agreements which has a very limited meaning. It refers to an agreement to write off debt or delay in payment of debts; but, the agreement itself cannot be enforced by law using legal remedies. Such agreements are only useful as a self-defense effort (exception) against legal remedies carried out in order to collect debt payments.

Conclusion

This study examined the use of a nominee agreement and discussed its validity as well as the binding force of the *nominee* agreement. The findings reveal that a nominee agreement is inseparable from the provision of Article 1320 and Article 1338 of the Civil Code. A *Nominee* Agreement fulfills the legal requirements of an

© 2021 International Journal of Criminal Justice Sciences. Under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International (CC BY-NC-SA 4.0)

agreement referred to by the provision of Article 1320 of the Civil Code. If the *nominee* agreement takes into account the validity requirements, and is based on the provisions of Article 1338 of the Civil Code, the *nominee* agreement already has binding power for the parties.

Based on the principle of *Pacta Sunda servanda,* that the agreement made by the parties, including the *nominee* agreement has binding force seems like law to the parties concerned. In essence, the nominee agreement is only binding on the parties who made it, and not binding on third parties (Article 1340, of Indonesian Civil Code). The provision of the article 1341 of The Civil Code also provides the exception that if an agreement is detrimental to the interest of the debtor, the debtor can apply for cancellation.

References

Adjie, Habib (2008). Indonesian Notary Law, Refika Aditama, Bandung, 2008.

Adjie, Habib (2009) *Civil and Administrative Sanction Against Notaries as Public official*, Refika Aditama, Bandung.

Ali, Zainuddin (2014). *Legal Research Method*, Jakarta, Sinar Graphic, 2014, p. 18.

Ardiwilaga, Rustandi (1962). *Indonesian Agrarian Law in theory and practice*, The New Age, Jakarta, 1962, p. 7

Badrulzaman, Mariam Darus (2006). *Book III of the Civil Code,*Alumni, Bandung, 2006, pp.108-120

Budiona, Herlien (2006). *Principles of Balance for Indonesian Covenant Law* (Covenant Law Based on Indonesian Wigati Principles), PT. Citra Aditya Bakti, Bandung, 2006

Dahlan, Abdul Azis (2001). *Encyclopedia of Islamic Law*, Ichtiar Baru, van Hoeve, Jakarta, 2001, pp. 486 and 1177

Garner, Bryan A. Op. Cit, p. 1072

Ibrahim, Johannes and Lindawa Sewu, (2003). *Business Law in Modern Human Perception* ,Refika Aditama, Cet. First, Bandung, 2003.

Jehani, Liberty*, Practical Guidelines for Drafting a Letter of Agreement,*Visimedia, Jakarta, 2007.

Kadafi, Mohd (2019). Governor of Bali Will Act against Foreigners Who Manipulate the Land of the Gods for Tourism, https://www. google.com/amp/s/m.merdeka.com/amp/events/gubernur-bali-akan-tindak-wna-yang-manupulasi-land-dewata-for-pariwisaa.html. accessed on 27 October 2019

Miru, Ahmadi (2007). *Contract Law, Contract Drafting*, Raja Grafindo Perkasa, Jakarta, 2007.

Mustafa, Bachtiar (1985). *Agrarian Law* and *Perspective*, Remaja Karya, Bandung, 1985

Noor, Aslan (2006). *The Concept of Land Ownership for the Indonesian Nation in View of Human Right Teaching*, Mandar Maju, Bandung, 2006, p. 9

Parlindungan, AP (1993). *Commentary on the Basic Agrarian Law*, Mandar Maju, Bandung, 1993, p. 28 and 35

Salim, Abdul (2005). *Business Law For Company,* Prenada Media, Jakarta, 2005

Satrio, J (1992). The Law of Bond, Born From Covenant, Citra Aditya Bakti, bandung ; 2001

© *2021 International Journal of Criminal Justice Sciences*. Under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International (CC BY-NC-SA 4.0)

Soekamto, Soerjono and Sri Mamudji (1990). *Normative Legal Research A Brief Overview*, Jakarta, Rajawali Press, 1990, p. 14-15.

Soemitro*,* Roni Hanitjo (1982). *Legal and Jurimetric Research Methodology,* Jakarta, Ghalia Indonesia, 1982, p. 20.

Subekti*, Covenant Law, Intermasa,* Jakarta, 1979

Sumardjono, Maria SW (2006). *Land Policy Between Regulation and Implementation,* Kompas, Jakarta, 2006, p. 162.

Sumerta, Dewa Putu (2019). State of Loss, 50 thousand Foreigners Control Land in Bali, https://m.inilah.com/news/detail/2190114/negara-rugi-50-ribu-wna-kuasasi-tanah-di-bali. accessed on 27 October 2019

Sutarno*, Legal Aspects of Credit in Bank,* Alfabeta, Bandung, 2003, p. 74.

Tan Tong, Kie (2007). Notary Study and Miscellaneous Notary Practicse, Jakarta: Ichtiar Baru, Jakarta, 2007, p. 402.

© *2021 International Journal of Criminal Justice Sciences*. Under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International (CC BY-NC-SA 4.0)