

## VALIDITY OF LAND RENTAL AGREEMENT FOR FOREIGN NATIONALS' BORROWING PRACTICES

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### Abstract

*Nominee practice in Indonesia is found in the case of Denpasar High Court Decision, which leases between Indonesian Citizens (WNI) and Foreign Citizens (WNA) are permitted in practice based on Article 45 Letter B of the Basic Agrarian Law. The research method used is normative juridical. The results show that nominee practice includes the preparation of lease agreements that are not related to each other, which shows the characteristics indirectly aims to transfer Ownership Rights to land to foreigners. The legal status and certainty of the Lease Agreement deed along with other supporting agreements made before the Notary can be categorized as legal smuggling, so it is appropriate that the Notary's deeds are declared null and void and have no binding legal force. The land with a Freehold Certificate Number 6196/Canggu which is the object of the case should fall to the State and become State land.*

*Keywords: Land; Lease agreement; Legal smuggling; Sale and Purchase.*

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### Abstrak

Praktik Nominee di Indonesia terdapat dalam perkara Putusan Pengadilan Tinggi Denpasar yang pada dasarnya sewa menyewa antara Warga Negara Indonesia (WNI) dan Warga Negara Asing (WNA) diperbolehkan dalam praktik berdasarkan Pasal 45 huruf b Undang-Undang Pokok Agraria. Metode penelitian yang digunakan yuridis normatif. Hasil menunjukkan bahwa dalam praktik nominee meliputi Pembuatan akta perjanjian sewa menyewa yang tidak terkait satu dengan lainnya, yang menunjukkan ciri praktik Nominee yang secara tidak langsung bertujuan mengalihkan Hak Milik atas tanah kepada warga asing. Kedudukan dan kepastian hukum akta Perjanjian Sewa Menyewa beserta perjanjian-perjanjian pendukung lainnya yang dibuat di hadapan Notaris tersebut dapat dikategorikan sebagai penyelundupan hukum, sehingga sudah sepatutnya akta-akta Notaris tersebut dinyatakan batal demi hukum dan tidak mempunyai kekuatan hukum mengikat, serta tanah bersertipikat Hak Milik Nomor 6196/Canggu yang menjadi obyek perkara seharusnya jatuh kepada Negara dan menjadi tanah Negara.

*Kata Kunci: Tanah; Perjanjian sewa menyewa; Penyelundupan huku; Jual dan beli.*

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## INTRODUCTION

Humans as legal subjects, are essentially social beings who in their lives, cannot be separated from interacting and socializing with other humans, and often these interactions give rise to mutually beneficial cooperation between the parties. This cooperation is usually stated in an agreement, which then causes a bond. One form of agreement that is frequently utilized, especially in Indonesia, is a *Nominee* agreement, also referred to as a name-borrowing arrangement.<sup>1</sup> Although it is not governed by the Civil Code, the use of a *Nominee* agreement or name-borrowing agreement might be classified as an innominate agreement as it is based on the needs of the parties. Even though the Civil Code does not regulate *Nominee* agreements, they must still adhere to the valid requirements of agreements as outlined in the code, one of which is regarding a legitimate reason: a *Nominee* agreement or name-borrowing agreement must not conflict with Indonesian laws and regulations.<sup>2</sup>

*Nominee* It seems that when students have more faith in their abilities, they are less likely to put things off until later. A higher self-efficacy score is associated with greater academic success since it indicates that the student is confident, well-organized, and able to avoid procrastination. Students' self-management scores are positively correlated with their self-efficacy scores.<sup>3</sup> This *Nominee* is embodied in the agreement letter that the parties made, specifically between the foreign citizen and the Indonesian citizen who was granted the power of attorney (*Nominee*). This agreement package is essentially intended to give the foreign citizen who received the power of attorney all the authority that may arise in the legal relationship between a person and his land to act as the actual owner of a plot of land that the law prohibits him from owning (Ownership Rights or Building Use Rights).

In Indonesia, the *Nominee* notion is used in a variety of legal activities, such as foreign nationals owning land, *Nominee* shareholders owning shares, and directors using the *Nominee*'s name to govern a firm (shadow director).<sup>4</sup> The Parties that are legally deemed to have no power or authority to accomplish something or gain something because of their status or position employ the *Nominee* idea. Through a *Nominee* agreement, the party designates another party who is legally entitled or permitted to take their place to ensure that their interests are upheld.

*Nominee* refers to a person who has been appointed or designated to represent or act as a substitute for another person in a particular matter.<sup>5</sup> Undoubtedly, the *Nominee* is a party appointed by another party to act and represent the party that appointed him. The beneficiary is the person who names the

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<sup>1</sup>Ifada Qurrata A'yun Amalia, "Legal Consequences of Cancellation of Agreement in Decision Number 1572 K/PDT/2015 Based on Articles 1320 and 1338 of the Civil Code," *Bonum Commune Business Law Journal* 1, no. 1 (2018): 61–72, <https://doi.org/10.30996/jhbhc.v1i1.1750>.

<sup>2</sup>Clarine Neonardi and Gunanegara, "Ownership of Registered Land Rights Originating from Nominee Deeds," *Journal of Comprehensive Science* 1, no. 4 (2022): 819, <https://doi.org/10.59188/jcs.v1i4.112>.

<sup>3</sup>Gunawan Widjaja, "Nominee Shareholders in the Perspective of the New UUPt and the New Investment Law and Their Problems in Practice," *Journal of Law and Capital Markets* 3, no. 4 (August 2008): 43, [https://www.academia.edu/43200719/Jurnal\\_Hukum\\_dan\\_Pasar\\_Modal\\_Nominee\\_Shareholders\\_dalam\\_Perspektif\\_UUPt\\_](https://www.academia.edu/43200719/Jurnal_Hukum_dan_Pasar_Modal_Nominee_Shareholders_dalam_Perspektif_UUPt_).

<sup>4</sup>Henjoko and Budiman Ginting, "Legal Analysis of the Statement Letter of the Parties Related to the Beneficial Owner in Making a Notarial Deed," *Rechtsnormen Journal of Legal Communication and Information* 2, no. 1 (2023): 21, <https://doi.org/10.56211/rechtsnormen.v2i1.282>.

<sup>5</sup>David Kirupan, *Legal Aspects of Foreign Investment in Indonesia* (Jakarta: Kencana Prenada Media Group, 2013), 43.

*Nominee*, and the *Nominee* is in charge of acting in the beneficiary's best interests in line with the terms of the agreement and the beneficiary's instructions.<sup>6</sup>

In land ownership, the *Nominee agreement* is stated in an agreement using such power of attorney, using an Indonesian citizen as *the Nominee* constitutes legal smuggling because its substance is contrary to the Basic Agrarian Law (UUPA).<sup>7</sup> In land ownership, the *Nominee agreement* is stated in an agreement using such power of attorney, using an Indonesian citizen as *the Nominee* constitutes legal smuggling because its substance is contrary to the Basic Agrarian Law (UUPA). Land is a gift from God as the creator that is given to living creatures on earth, including humans as a place to stand and carry out various life necessities.<sup>8</sup> *Nominee* To circumvent the regulations outlined in Article 21 paragraph (1) and Article 26 paragraph (2) of the UUPA, agreements like these are sometimes referred to as representations or borrowing names that are mutually agreed upon. In certain cases, they are even called legal smuggling.<sup>9</sup>

One of the cases that occurred regarding the *Nominee practice* is the case in the Denpasar High Court Decision No. 68/Pdt/2021/PT.DPS, which the researcher used as the basis for this study. The beginning of the case was in 2011, when an Indonesian citizen named BIW, as the Plaintiff, bought part of a 790 m<sup>2</sup> plot of land with a Certificate of Ownership Number 6196/Canggu. Then at one time two of BIW's friends, namely AM and MC (foreign nationals), as Defendants I and II, persuaded BIW with the promise that a villa would be built on the land and would be rented to another party and then the income from managing the villa would be shared between the three parties. Departing from this incident, AM and MC asked BIW to make deeds relating to the Freehold land belonging to BIW before NS, a Bachelor of Law, Notary/PPAT in Badung Regency, Bali, as Co-Defendant. The deeds referred to are as follows:

1. Notarial Deed Number 84 regarding the statement that BIW has sold, dated 14 October 2011;
2. Notarial Deed Number 85 regarding the statement that AW and MC have purchased, dated 14 October 2011;
3. Notarial Deed Number 86 concerning Land Lease, dated 14 October 2011;
4. Notarial Deed Number 87 concerning Extension of Lease, dated 14 October 2011;
5. Notarial Deed Number 88 concerning Sale and Purchase Agreement/Contract, dated 14 October 2011.

The lease was signed for a 25-year term with a 25-year extension for Rp. 500,000,000 (five hundred million Rupiah) at the same time. The terms and rent were not renegotiated. As the land rights holder of Certificate of Ownership Number 6196/Canggu, BIW asked in 2020 that the pertinent Notary

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<sup>6</sup>Paul Michael Gilmour, "Lifting the Veil on Beneficial Ownership: Challenges of Implementing the UK's Registers of Beneficial Owners," *Journal of Money Laundering Control* 23, no. 4 (2020): 717–34, <https://doi.org/10.1108/JMLC-02-2020-0014>.

<sup>7</sup> Andina Damayanti Saputri, "Nominee Agreement in Land Ownership for Foreign Citizens Domiciled in Indonesia," *Journal of Repertorium* 2, no. 2 (2015): 97, <https://www.neliti.com/id/publications/213115/perjanjian-nominee-dalam-kepemilikan-tanah-bagi-warga-negara-asing-yang-berkedud>.

<sup>8</sup>Yosia Hetharie, "Nominee Agreement as a Means of Controlling Land Ownership Rights by Foreign Citizens (WNA) According to the Civil Code," *SASI* 25, no. 1 (August 24, 2019): 27–38, <https://doi.org/10.47268/sasi.v25i1.147>.

<sup>9</sup>Wayan Werasmana Sancaya, "The Binding Power of Nominee Agreements in the Control of Land Ownership Rights," *Udayana Master of Law Journal* 2, no. 3 (November 26, 2013): 174, <https://doi.org/10.24843/JMHU.2013.v02.i03.p10>.

documents be canceled. The contested land's Certificate of Ownership Number 6196/Canggu was owned and controlled by AM and MC from 2011 until the case was filed in 2020.

The judges at the Denpasar District Court level declared that AM, MC, and the Notary/PPAT had undertaken an illegal act and that the Notary's Notarial Deed was void and lacked binding legal effect. The courts, however, refused to allow the collateral to be seized in relation to the contested item. At the Denpasar High Court level, the judge's ruling from the Denpasar District Court was deemed appropriate. As a result, the High Court's ruling upheld the Denpasar District Court's earlier ruling, except for the Notary/PPAT NS status, which was originally Defendant III but was later changed to Co-Defendant. It felt like legal chaos and uncertainty were created by the creation of Notarial Deed Number 84 dated October 14, 2011, Notarial Deed Number 85 dated October 14, 2011, Notarial Deed Number 86 dated October 14, 2011, Notarial Practice Deed Number 87 dated October 14, 2011, and Notarial Deed Number 88 dated October 14, 2011.

The interesting thing here is: first, that renting between Indonesian citizens and foreign nationals is permitted in practice. Referring to Article 45 Letter B of the UUPA, it is stipulated that foreign nationals are permitted as holders of Lease Rights in Indonesia. However, if examined in more detail, the renting in this case is carried out on land with Ownership Rights status, which is not intended for foreign nationals. Second, the practice of the *Nominee* that emerges in this case is derived from the opinion of legal expert Maria SW Sumardjono, who stated that the manifestation of this *Nominee* is found in the agreement letter made by the parties, specifically the Indonesian citizen as the grantor of power (*Nominee*), which is created through a package of agreements that essentially intends to give the foreign national as the recipient of the power to act as the actual owner of a plot of land that is not legally intended for him (Ownership Rights). A contract that uses such a power of attorney is illegal since it violates the Basic Agrarian Law (UUPA).<sup>10</sup>

According to Ridwan Mutaqin and Deny Haspada's study, the *Nominee* agreement is implemented in a way that allows foreigners to acquire land in Indonesia, which is against Law Number 5 of 1960's main agricultural rules. The *Nominee* agreement is null and invalid from the start because it was created unlawfully and so lacks binding legal power. As a result, foreign nationals can utilize the *Nominee* agreement to circumvent the requirements of the UUPA, specifically Article 21 paragraph (1) and Article 26 paragraph (2), to acquire land in Indonesia. Their investigation's findings demonstrate that this *Nominee* agreement is a legally defective product. *Because it does not meet the provisions in force in Indonesia, and this Nominee agreement is an attempt to smuggle the law, therefore this Nominee agreement is not binding and is void by law for both parties.*<sup>11</sup>

Based on this, we can identify the problem, the first is what is the impact *Nominee* agreement on land ownership rights that are legally prohibited in Indonesia? Second, How is the validity of a land lease agreement as a legal smuggling of the practice of borrowing the name of land sale and purchase by foreign nationals?

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<sup>10</sup> S W Maria and Sumardjono, *Alternative Policies for Regulating Land Rights and Buildings for Foreign Citizens and Foreign Legal Entities* (Jakarta: Kompas, 2007), 16.

<sup>11</sup> Deny Haspada, "Nominee Agreement Between Foreign Citizens and Indonesian Citizens in the Practice of Sale and Purchase of Freehold Land Linked to Article 1313 of the Civil Code," *Wacana Paramarta: Jurnal Ilmu Hukum* 17, no. 2 (2018): 115–24, <https://doi.org/10.32816/paramarta.v17i2.77>.

## METHOD

This research made use of normative juridical theory, which encompasses not only the rules and regulations imposed by the state but also many other socially relevant standards.<sup>12</sup> Data derived from secondary sources, specifically legal literature, forms the backbone of this study's normative juridical foundation.<sup>13</sup> This study makes use of three distinct methodologies: the conceptual approach, the statutory approach, and the case method.<sup>14</sup>

## RESULT AND DISCUSSION

### 1. Impact Nominee Agreements in Land Ownership Rights That Are Legally Prohibited in Indonesia

Although there are no specific rules governing nominee agreements in Indonesia, they are generally not considered to be a type of agreement that violates the terms of the law of agreements. But there can be problems with the law if the thing the parties agreed upon doesn't follow the rules of positive law in Indonesia. An agreement is considered valid if it meets the criteria set out in Article 1320 of the Civil Code. The consent of those who commit themselves is necessary.<sup>15</sup> The agreement or will of each party must be expressed in a statement. There may be a discrepancy between the will and the statement, for example, there is an error in writing numbers in an order letter, a delivery error, or a misunderstanding of the parties. Such a situation occurs in three cases, as follows:<sup>16</sup>

- a. Intentional statement;
- b. Intentional statement that is not understood or felt by the other party;
- c. Intentional statement that is intended to be in line with the intention of the other party but does not want legal consequences.

Implicitly, a *Nominee* agreement has the following elements:<sup>17</sup>

- a. The agreement between the two parties is founded on the beneficial owner's faith in the nominee, and it involves the beneficial owner as the first party and the nominee as the second party.
- b. Unique, involving only a small number of legal proceedings.
- c. In legal matters, the nominee assumes the role of the beneficial owner's representative.

*Nominee* agreements are structured similarly to reciprocal agreements in that both parties are obligated to carry out the tasks specified by the other. The reason is, that the *Nominee* agreement is more definitive and places greater emphasis on transferring responsibility for the agreed performance to the other party.<sup>18</sup>

One type of discrepancy between will and statement is the *Nominee* agreement, which is defined as a declaration that is sought by the other party's intentions but does not want the legal ramifications.

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<sup>12</sup> Jonaedi Efendi and Johnny Ibrahim, *Legal Research Methods: Normative and Empirical* (Jakarta: Kencana, 2018), 13.

<sup>13</sup> Soerjono Soekanto and Sri Mamudji, *Normative Legal Research: A Brief Review* (Jakarta: Raja Grafindo Persada, 2015), 13.

<sup>14</sup> Peter Mahmud Marzuki, *Legal Research* (Jakarta: Kencana Prenada Media Group, 2013), 56.

<sup>15</sup> Mariam Darus Badruzaman, *The Principle of Freedom of Contract and Its Relation to Standard Agreements* (Bandung: Alumni, 1994), 43.

<sup>16</sup> Herlien Budiono, *General Teachings of Contract Law and Its Application in the Notary Sector* (Bandung: Citra Aditya Bakti, 2014), 76.

<sup>17</sup> Urip Santoso, *Agrarian Law and Land Rights* (Jakarta: Kencana, 2008), 78.

<sup>18</sup> Ulfia Hasanah, "Land Ownership Status Resulting from Conversion of Western Rights Based on Law No. 5 of 1960 Concerning Basic Agrarian Principles Linked to PP No. 24 of 1997 Concerning Registration," *Journal of Legal Studies* 3, no. 1 (March 8, 2013): 109, <https://doi.org/10.30652/jih.v3i01.1030>.



The parties who carry out this *Nominee practice* use the legal structure known in the legal system in Indonesia to hide an act that intentionally ignores laws and regulations to fulfill the interests of the parties as if it were legally appropriate and valid in the eyes of the law. So, in essence, the *Nominee Agreement* is a pretend or simulation agreement.

In Dutch, "schijnhandeling" refers to a fictitious act or an agreement that is created for an illegal or fraudulent purpose or without a valid justification. Simulation agreements can be classified into two categories based on the legal conditions of the legal conduct whose legal repercussions are to be hidden from other parties. These categories are as follows:<sup>19</sup>

- a. A relative simulation agreement is when the parties make an agreement that is intended to have legal ramifications. An absolute simulation agreement is when the binding parties demonstrate and give the impression to a third party that a specific legal act has occurred, even though it has been secretly agreed that nothing has changed from the initial circumstances.
- b. Nevertheless, the agreement was not created in accordance with the proper format and was made in a different way.

Article 1873 of the Civil Code provides more regulations regarding the legal implications of forming a simulation agreement. The terms of this article read as follows:

"Further agreements, which are made in a separate deed, which is contrary to the original deed, only provide evidence between the participating parties and their heirs or people who obtain rights from them, but cannot apply to other people, third party person."

In practice, foreign nationals who intend to control land rights that are prohibited for them, especially Ownership Rights, borrow the name of Indonesian citizens as *Nominees* and then make this simulation agreement (*Nominee Agreement*).<sup>20</sup> However, the simulation agreement cannot be categorized as legal smuggling, because as is known, the form of the simulation agreement itself is divided into 2 (two), namely an absolute simulation agreement and a relative simulation agreement. Therefore, it is necessary to first examine the elements of the legal act that are stated in a simulation agreement to be able to find out whether it is a form of legal smuggling or not.

*Nominee* agreements in terms of residential ownership or simply land rights by foreign nationals are most often found in Bali, because Bali is one of the main destinations for foreign tourists when visiting Indonesia. Through legal loopholes in the legal regulations in Indonesia, they then use *Nominee* agreements as a way to own and control property and land rights, thus creating a negative image of this *Nominee* agreement which is known as a form of legal smuggling. According to Maria Sumardjono, the primary agreement and subsequent agreements relating to foreign nationals' control over their land rights through notarial deeds demonstrate that there has been indirect legal smuggling.<sup>21</sup>

The manifestation of this *Nominee* is found in the agreement between the WNA and WNI, the grantor of power of attorney (*Nominee*), which is accomplished through a set of agreements that seek to grant the foreigner, the one receiving the power of attorney, all the authority that could transpire in a

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<sup>19</sup> Mika Anabelle, "Notary/PPAT's Responsibility Regarding the Simulation Deed They Made Reviewed from the Statutory Regulations," *Jurnal Kertha Semaya* 9, no. 11 (2021): 4, <https://doi.org/10.24843/KS.2021.v09.i11.p15>.

<sup>20</sup> Maria S W Sumardjono, *Land Policy Between Regulation and Implementation* (Jakarta: Kompas, 2001), 17.

<sup>21</sup> Yosia Hetharie, "Land Ownership by Foreign Citizens Through Name Borrowing Agreements as a Form of Legal Smuggling in International Civil Law," *Balobe Law Journal* 2, no. 1 (2022): 12, <https://doi.org/10.47268/balobe.v2i1.822>.

person's legal relationship with their land, specifically the Ownership Rights, to act as the true owner of a piece of land that is not owned according to Indonesian law. A power of attorney is an arrangement wherein one individual grants another individual the ability to act on his behalf in carrying out certain tasks.<sup>22</sup>

According to the agreement, the land is owned by an Indonesian citizen, but the foreign national is providing the financing. The Indonesian citizen then asserts that the foreign national is the true owner of the land. First, the foreign national will give the necessary funds, and then an Indonesian citizen will be appointed to spend those funds to purchase a piece of property. This is the basic process of the nominee practice. Afterward, a Deed of Sale and Purchase is executed between candidates, who are fellow Indonesian nationals, as the purchasers and sellers. Then, the Indonesian citizen (Nominee) can utilize the deed as a foundation to apply to the Land Office for the registration of their land ownership rights. After the necessary land registration procedures are completed, the local Land Office will issue a Certificate of Ownership Rights for the property. The right to own the land is designated to an Indonesian citizen (the nominee) according to the deed. The foreigner has real power over the land as he is utilizing the identity of an Indonesian citizen.

The *Nominee* agreement often consists of a master agreement that includes a will grant, heirs' statement, option agreement, lease agreement, power of attorney to sell, and land ownership agreement and power of attorney. Since it essentially does not directly transfer ownership rights, such an arrangement is feasible. It does, however, convey institutional land rights, such as building use and ownership rights. Attempts to give foreign nationals authority over their land ownership rights include:<sup>23</sup>

a. Land Ownership Agreement (PPT) and Grant of Power of Attorney

The Indonesian citizen admits in the PowerPoint that the foreign national who has contributed money to the acquisition of the freehold property and buildings is the rightful owner of the freehold land registered in his name. Additionally, the Indonesian citizen gives the foreign national an irreversible power of attorney to pursue any legal action against the freehold buildings and land.

b. Option Agreement

Since the foreign national provides the funds for the acquisition of freehold land and buildings, the Indonesian citizen allows the foreign national to do so.

c. Lease agreement

This agreement, in theory, governs the rights and responsibilities of the lessor (an Indonesian native) and the lessee (a foreign national), as well as the rental time and opportunities for extension.

d. Power To Sell

Includes both the rights and duties of the lessor (an Indonesian citizen) and the lessee (an Indonesian citizen), as well as the granting of power of attorney with the right of substitution from the Indonesian citizen (grantor) to the foreign national (receiver of the power of attorney) for its renewal.

e. Testamentary Grant the Indonesian citizen grants the Freehold land and building in his name to the foreign national.

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<sup>22</sup> Subekti, *Various Agreements* (Bandung: Citra Aditya Bakti, 2014), 140.

<sup>23</sup> Ayura Monica Zandra and Reni Anggriani, "Efforts to Obtain Ownership Rights to Land for Foreign Nationals in Indonesia Through Nominee Agreements," in *UMY Grace Proceedings*, 2020, 147.

- f. A Statement from the Heirs A wife and child of an Indonesian national assert that their husband is not the rightful owner of the freehold land and building, even though the property is registered in his name.

The forms of agreement in a *Nominee* practice are usually made in the form of an agreement and Absolute Power of Attorney made in writing, in order to provide foreigners legal certainty. After that, the *Nominee* Agreement is notarized or formed in the form of an authentic deed, which obviously entails a notary's involvement. *Nominee* land ownership practices, particularly in Bali, are undoubtedly closely related to economic concerns, namely the desire to maximize profits in the real estate and tourism industries. Due to the payment made by foreigners for the use of their names that are registered as owners at the Land Office, the *Nominee* practice attempts to raise the level of life for Indonesian natives. As a reflection and application of the nationality concept embodied in UUPA, it is strictly forbidden for foreigners to control land ownership rights.

Maria SW Sumardjono claims that agreements between foreigners and Indonesians, in which the Indonesian national, as the subject of the land rights owner, grants the foreign national the authority to act as the owner of something illegal is an example of the *Nominee* agreement. It can be considered legal smuggling as it violates Article 26 paragraph (2) of the UUPA by effectively using Indonesian nationals as middlemen to indirectly manage land rights.<sup>24</sup>

## 2. The Validity of Land Lease Agreements as Legal Smuggling of Land Sale and Purchase Name Borrowing Practices by Foreign Nationals

In essence, land rights may be held by anyone, regardless of citizenship, therefore foreigners can also have land rights in Indonesia. The UUPA's Article 4 paragraph (1) reflects this idea; the only distinction is in the kinds of land rights that an individual may own. The use and usage of land to achieve wealth are inextricably linked to land rights that incorporate elements of fairness and legal clarity. Without usage and utilization, success cannot be achieved by certainty and fairness alone. On the other hand, the ideal of independence just and secure prosperity cannot be achieved by usage and use without certainty and justice.<sup>25</sup>

The UUPA stipulates that foreigners are not allowed to acquire ownership, cultivation, or building rights on the property. However, two rights to land can be owned by foreigners, namely Usage Rights and Lease Rights. Although they have been given certain rights, many foreign nationals are still dissatisfied so legal loopholes are sought to control stronger and unlimited land status, one of which is by using a *Nominee* Agreement after purchasing land by appointing a *Nominee*.<sup>26</sup>

Article 42 of the UUPA contains information on the Rights of Use that may be given to foreign nationals. The Right of Use of State land is given for a maximum of 30 (thirty) years, after which it may be renewed for an additional 30 (thirty) years or extended for a maximum of 20 (twenty) years. The Right of Use land will revert to being either Management Rights land or land under direct state control

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<sup>24</sup> Maria Magdalena and Ali Abdullah, "Legal Analysis of Land Lease Agreements Sourced from Nominees (Case Study of Gianyar District Court Decision Number 112/Pdt. G/2016/PN Gin)," *Imanot: Journal of Law & Notary Student Affairs* 1, no. 1 (2021): 142–61, <https://journal.univpancasila.ac.id/index.php/imanot/article/view/2820>.

<sup>25</sup> Boedi Harsono, *History of the Formation of the Basic Agrarian Law, Contents and Implementation* (Jakarta: Trisakti University, 2015), 288.

<sup>26</sup> A A Ratih Saraswati and I Ketut Westra, "Nominee Agreement Based on Indonesian Positive Law," *Kertha Semaya: Journal of Legal Science* 4, no. 2 (2018): 3, <https://ojs.unud.ac.id/index.php/kerthasemaya/article/view/43678>.



after the term. In the meantime, a deed providing the right of use on freehold land might extend the grant's duration, which can be up to 30 (thirty) years.

From the provisions of these regulations, it is clear that the State allows foreigners to own land rights for a fairly long period and this opportunity should be considered sufficient. Although it has been determined for the Right of Use as such, considering that the Right of Ownership is the strongest and most complete right, foreigners still seek loopholes to control the Right of Ownership, namely the implementation of the *Nominee* practice which is essentially a form of unlawful act. Next, regarding the Right of Lease, it is determined that foreigners domiciled in Indonesia are allowed to become holders of the Right of Lease.

Since the relevant laws and regulations do not provide a detailed description of the length of ownership of the leasehold rights, it may be assumed that the term is an agreement between the parties that will be spelled out in the lease agreement. A *Nominee* agreement is a contract between individuals who, by law, are not entitled to certain land rights, such as foreigners and Indonesian nationals, to grant the foreigner de facto ownership over the land.<sup>27</sup> The sale and purchase of land with the status of freehold rights between Indonesian nationals (henceforth referred to as WNI) is often the *Nominee* practice in Indonesia, but the buyer is only the party whose name the WNA borrows or the beneficiary owner.

A *nominee* agreement is an agreement where one party (*the Nominee*) is officially registered as the owner of an asset or right but acts on behalf of the other party. others who are the actual owners.<sup>28</sup> In the concept of *Nominee*, the term beneficiary is known, where the beneficiary is intended as the actual owner of the land in question. Until the ownership of the land rights is transferred, the Beneficiary designates a *Nominee* to act on his behalf throughout the sale and purchase transaction. Since the designated *Nominee*'s primary responsibility is to represent the beneficiary's interests, the *Nominee* must act in line with the terms of the agreement and the beneficiary's directives.<sup>29</sup>

From the practice of the *Nominee*, a situation is created where Indonesian citizens are de jure the owners of land rights, while the de facto owners of land rights are foreign nationals. The prohibition on the control of land with the status of Ownership Rights by foreigners has been expressly stated in the UUPA and several other laws and regulations, because the concept of *Nominee* is indeed not in accordance with land law in Indonesia. However, what if an Indonesian citizen and a foreign national are agreed to a Lease Agreement for a land with a Freehold Certificate? Since the lease period is not expressly restricted by laws and regulations, it may create a new legal loophole in *Nominee* practice. It should be understood that this practice extends beyond the sale and purchase of freehold land.

Legally, the implementation of a lease does not violate applicable legal regulations, because the Right to Lease is actually one of the rights that is intended for foreign nationals who want to control and obtain benefits from land in Indonesia. The Civil Code's Article 1548, which defines a lease as an arrangement wherein one party commits to allow another party to enjoy an object for a specific amount of time in exchange for a sum that the other party agrees to pay, provides insight into leases.

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<sup>27</sup> M. Edwin Azhari, Ali Murtadho, and Djauhari Djauhari, "Notary's Responsibility in Making Nominee Deeds of Agreement in Relation to Land Ownership by Foreign Citizens in Lombok," *Journal of Deeds* 5, no. 1 (2018): 43–50, <https://doi.org/10.30659/akta.v5i1.2530>.

<sup>28</sup> Reza Adikara, Rachmadi Usman, and Lena Hanifah, "Legal Consequences of Share Ownership in Hotel Companies Owned by Foreign Citizens in Indonesia," *JIM: Scientific Journal of History Education Students* 8, no. 4 (2023): 75, <https://doi.org/10.24815/jimps.v8i4.28515>.

<sup>29</sup> Rahmi Jened, *Direct Investment Legal Theory and Policy* (Jakarta: Kencana, 2016), 176.

According to the mentioned clauses, leasing is not intended to transfer ownership of an item; Rather, the owner just grants the party renting the enjoyment of the item for a predetermined amount of time. To put it another way, the owner of the thing does not actually own it; they only temporarily transfer authority over it. Similar to the example mentioned by the researcher in this thesis study, which is Denpasar High Court Decision Number 68/Pdt/2021/PT.Dps, a number of notarial agreements were established simultaneously between BIW (Indonesian citizen) and AM and MC (foreigner ), including: Deed of Statement that the Indonesian citizen has sold the land; Deed of Statement that the foreign citizen has purchased the land; Land Lease Deed; Lease Extension Deed; and Sale and Purchase Agreement/Commitment for a plot of Freehold Land Number 6196/Canggu.

In the core of the case, in the case a lease agreement was agreed for 25 (twenty-five) years and an extension for the next 25 (twenty-five) years. Looking at the Lease Agreement separately, before looking at the series of other agreements, the legal act of lease carried out between BIW with AM and MC through a Notary/PPAT deed is not an act of legal abuse. Because if referring to the provisions of the Right of Use period, it allows foreign nationals to control the Right of Use for a very long period, namely 70 (seventy) years for State land and Management Rights land, and a maximum of 50 (fifty) years for Freehold land. However, if observed, the series of legal acts actually cause chaos and legal uncertainty which actually has the potential to cause problems that can harm both parties. That a series of legal acts through the deeds of Notary/PPAT NS is a covert effort to transfer Ownership Rights to land by AM and MC as foreign nationals by requesting legal protection from Notary/PPAT, and the Lease Agreement is a guise to cover up the real reality behind the legal acts that in the eyes of the law are considered “legitimate” to be carried out. Examining the series of legal acts, several things need to be considered.

In this case, the Lease Agreement was made on a plot of Freehold land. Then there is the existence of a Deed of Statement that BIW has sold and a Deed of Statement that AM and MC have purchased. Both deeds were made when the disputed land still had the status of Freehold. This certainly violates the land law system in Indonesia that Freehold in any way is prohibited for foreigners to own. Absolutely only Indonesian citizens can have Freehold, as stated in Article 21 in conjunction with Article 9 paragraph (1) of the UUPA. Then if in good faith a lease agreement has been agreed between BIW and AM and MC, there is no need to make a follow-up agreement in the form of a Statement of Sale and a Statement of Purchase. The Lease Right is not intended to transfer ownership of the land, then the making of these Statement deeds is very unsustainable and contradicts the essence of the Lease Agreement.

Additionally, it was discovered that JN, a foreign person who was not a party to the case, had contributed money to the construction of the villa on the contested property, rather than BIW alone. The Panel of Judges then looked at the evidence of Notarial Deed Number 85 regarding the Statement of AM and MC that they had bought the land. They discovered facts that essentially explained that AM and MC had paid their own money for the Freehold land object, each of them owning 50% (fifty percent) of the share. Thus, it is evident that a *Nominee* procedure has been used between the two parties throughout the covert transfer of the freehold land even before the lease. So, in this case, BIW's name is listed in the certificate for the Freehold land object and the villa building as the *Nominee*, even though behind that an act had been carried out that violated the law, namely the transfer of Ownership Rights to a foreign national, and there was an intake of funds from the foreign national.

Then, in this case, a deed of Sale and Purchase Agreement (hereinafter referred to as PPJB) was also made for a Freehold land between BIW AM and MC. The concept of this PPJB itself is as an initial

agreement between prospective sellers and prospective buyers who agree that a sale and purchase transaction of a plot of land will be carried out, which in this case is land with Freehold status.

In addition to requiring the potential buyer to purchase the property that has been agreed upon by both parties, the PPJB serves to bind the prospective seller to sell his property to the buyer at a certain period. Therefore, the legal and physical transition has not yet taken place, despite the PPJB having been signed.

The content of the *Nominee* Agreement differs from the legitimate requirements of the agreement; in this instance, the fourth requirement—the need for a legitimate cause or reason—is where the *Nominee* feature is most prominent. Articles 1335 and 1337 of the Civil Code, which state that "An agreement without a cause, or which has been made for a false or prohibited motive, has no force," further regulates this. "A justification is forbidden if it is against the law, public order, or good morals." According to Articles 1335 and 1337 of the Civil Code, "a false or prohibited reason" refers to the aim and purpose expressed in a number of legal acts that are specified in the corresponding notarial deeds. Since a plot of land with a Freehold Certificate was the object agreed upon by BIW, AM, and MC in the case that served as the study's basis, it goes without saying that the material or object in the notarial deeds made between them violated Indonesian land law.

The first criterion, namely the consent of the parties who are bound, is the next legitimate requirement of an agreement that may be connected to this situation. If an agreement or will is to be expressed in a statement, it must take the form of a notarial deed; otherwise, there may be a disagreement between the statement and the will. Although the parties wish for the *Nominee* Agreement to be presented as a statement, the legal ramifications are not wanted.

The fact that the foreign national has bought the land area with the Ownership Rights strengthens the parties' intention to (indirectly) transfer the Ownership Rights to the foreign national in this situation. However, the parties' notarial deeds declare a lease agreement, giving the impression that the legal conduct is legitimate from a normative legal standpoint to prevent unintended legal repercussions. Therefore, it is evident that the parties to the case purposefully violate the rules and regulations, and their interactions are a façade.

*Nominee* practices fall into the form of relative simulation agreements, where the parties make an agreement that is intended to have legal consequences, but the agreement is made in another form and does not follow the provisions of what should have been made. The parties in the case deliberately made a Lease Agreement as a cover to have legal consequences that are considered "Legal", because, as is known, foreign nationals are allowed to become holders of Lease Rights, so it is expected that it will not cause legal problems. What is hidden behind it is the desire of the foreign national to control the Freehold land area. According to the consequences of creating a simulation agreement as outlined in Article 1873 of the Civil Code, subsequent agreements made in a different deed that contradict the original deed only serve as evidence between the parties involved and their heirs or other recipients of their rights; they do not apply to third parties. As a result, several notarial agreements between BIW and AM, and MC only apply to them and are not admissible as evidence beyond the parameters of the *Nominee* Agreement.

The item agreed upon by BIW, AM, and MC is land with a Freehold certificate, despite the fact that it is categorized as a relative simulation agreement. Therefore, it does not satisfy the objective criteria for an agreement's validity, namely a justifiable cause, as stated in Article 1320 of the Civil

Code.<sup>30</sup> As a result, certain legal actions mentioned in the case's notarial deed are declared void and lose their enforceability.

## CONCLUSION

Impact nominee agreements in land ownership rights that are legally prohibited in Indonesia, that the lease between Indonesian citizens and foreign nationals in essence, does not violate the laws and regulations, because the Right to Lease is one of the rights granted by the Government to foreign nationals who wish to control land in Indonesia. Foreign nationals are allowed to become holders of the Right to Lease because the essence of the Right to Lease itself is not to directly transfer ownership of a land plot. However, it cannot be justified if foreign nationals use the opportunity of this Right to Lease as a cover to cover up the real purpose behind the legal act which is carried out covertly, namely none other than control of the Right to Ownership of land which is prohibited by law.

Validity of land lease agreements as legal smuggling of land sale and purchase name borrowing practices by foreign nationals in the Denpasar High Court's decision Number 68/Pdt/2021/PT. DPS, which includes a deed of Statement that the Indonesian citizen has sold, a deed of Statement that the foreign national has purchased, a deed of Lease Extension, and a Deed of Sale and Purchase Binding Agreement, establishes the legitimacy of the land lease agreement as a legal smuggling of the practice of borrowing the name of the sale and purchase of land by foreign nationals. The creation of these documents, which are not consecutive, clearly demonstrates the traits of *Nominee* practice, which is to subtly attempt to give foreign persons ownership rights over the land. The land with Freehold Certificate Number 6196/Canggu that is the subject of the case should belong to the State and become State land since the legal status and certainty of the Lease Agreement deeded and other accompanying agreements made before the Notary can be classified as legal smuggling. As a result, it is appropriate that the Notary's deeds be declared null and void and have no binding legal force.

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