

## Implications of Nominee Agreement between Foreign Nationals and Indonesian Citizens



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**ABSTRACT:** Control over land in Indonesia is positively regulated for Indonesian citizens and for foreign citizens, but only specifically in the form of usufructuary rights and lease rights, but there are still many foreigners who want to have ownership rights to land which is certainly contrary to positive law in Indonesia secretly, namely by using a nominee agreement or name borrowing agreement. So, this study aims to analyze how the validity of nominee agreements in Indonesia compares with other countries (Singapore, Thailand, the Philippines, Malaysia, England) and how to resolve cases of nominee agreements involving notaries with parties involved in Indonesia. The research method used in this research is a normative legal research method. The results of this discussion analysis are first, nominee agreements are completely unknown in the Indonesian legal system, especially in Indonesian contract law, so that it can be said to contain empty meanings/empty norms, because nominee agreements can be categorized as law smuggling. Second, the legal consequences for a Notary involved in making a nominee agreement to smuggle the law, the Notary is required to be held accountable for his actions before the law, namely by being legally annulled and punished to pay for losses made without revocation of the position of Notary. So that the government needs to make a regulation that regulates nominee agreements, especially related to land rights and the Indonesian government follows the steps of the Thai and Philippine governments which specifically prohibit all forms of nominee borrowing practices by adding provisions in the Basic Agrarian Law. There is also a need for more commensurate sanctions for Notaries involved in law smuggling.

**KEYWORDS:** Nominee Agreement; Foreign Nationals; Indonesian Citizens; Notary.

### A. INTRODUCTION

Indonesia as an archipelagic country whose natural wealth has been recognized by the international world is very attractive to many tourists (foreign nationals). Foreigners who come to Indonesia have diverse purposes and visit for a long time or visit for a short period of time. The various purposes of foreigners when carrying out their activities in Indonesia, encourage the desire of foreigners to have a place to live in Indonesia. Foreigners who choose to reside in Indonesia can have a positive impact on economic development in Indonesia, one of which is by investing in Indonesia. Foreign nationals who enter Indonesia, in addition to tourism purposes, also try to invest in business in various ways, one of which is by controlling land.

The acquisition of land is carried out by entering into a land sale and purchase agreement between foreign nationals and Indonesian citizens. Although the government has provided land tenure opportunities to foreign nationals in the form of right of use and lease rights, with various considerations foreign nationals who want to invest in Indonesia, especially in Bali, still want to own land with freehold status. The basis for why foreign nationals tend to want property rights is because property rights are hereditary, strongest, and fullest rights that a person can have over land. Regarding property rights over land by foreign nationals, it is clearly prohibited by the state, based on Article 21 paragraph (1) of the Basic Agrarian Law. Foreign nationals cannot have ownership rights over land in Indonesia, property rights can only be owned by Indonesian citizens and certain Indonesian legal entities even though it has been prohibited from controlling land rights in Indonesia by foreign nationals, but in fact many are found ownership of land rights by foreign nationals carried out through clandestine means. The way that certain parties who are not entitled to have ownership rights to land, is to use a nominee agreement or name loan agreement, which is usually an agreement made by an Indonesian citizen, but only as a formality and represents the interests of certain foreign parties so as not to violate and violate applicable laws.<sup>1</sup> Nominee itself comes from English which means "a person or company whose name is used for the purchase of one object such as shares, land and buildings, and another but is actually not the original owner of the object".<sup>2</sup>

<sup>1</sup> Simon Nahak, "Implikasi Hukum Pertanahan Terhadap Peminjaman Ibu Kota Negara Republik Indonesia Dari Jakarta Ke Kalimantan Timur," *Ganaya: Jurnal Ilmu Sosial Dan Humaniora* 2, no. 2-2 (30 Desember 2019): 31-40.

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That way, Foreign Nationals do not own land and/or buildings with ownership status. Foreign Nationals can only own land and/or buildings with the status of right to use, provided that the Foreign Citizen should be domiciled in Indonesia (Article 42 of the Basic Agrarian Law). The next nominee agreement exists as a facility to circumvent the provisions prohibiting the ownership of land rights for Foreign Nationals until Foreign Nationals can own land in Indonesia by borrowing the name of an Indonesian Citizen.<sup>3</sup> That way, this nominee agreement as a form of legal smuggling.<sup>4</sup> The structure of the nominee agreement that is not prohibited in law is in accordance with the Indonesian land law system, namely the nominee agreement in which there is no clause stating that foreign nationals can control freehold land juridically or indefinitely because only Indonesian citizens can own freehold land, in accordance with the provisions of Article 26 paragraph (2) of the Basic Agrarian Law.<sup>5</sup> Like agreements in general, *nominee agreements* are also made based on *good faith* from the parties without ignoring the legal conditions in the agreement as mentioned in Article 1320 of the Civil Code.<sup>6</sup>

There are specific prohibitions in the Civil Code and Law No. 5 of 1960 concerning Basic Regulations on Agrarian Principles, but this agreement continues to occur today until the occurrence of legal smuggling, which should be a right to use agreement only property rights. In practice, not a few foreign nationals control land that previously had the status of property rights, by conducting legal smuggling, where foreign nationals enter into agreements or agreements or sales and purchase agreements with Indonesian citizens holding ownership rights over the agreed land.<sup>7</sup>

So, the purpose of this study is to add analytical material related to legal issues about the implications of nominee agreements between foreign nationals and Indonesian citizens, which distinguishes this study from previous research is that no one has discussed the comparison of the validity of nominee agreements in Indonesia with other countries such as Singapore, Thailand, Philippines, Malaysia, and United Kingdom. As in the thesis written by Kesuma, discussing how the validity of the nominee agreement by foreign nationals in controlling land ownership rights in Indonesia and whether the nominee agreement is in accordance with positive law in Indonesia.<sup>8</sup> Another thesis that also raised the same theme from Danardana which discusses what is the basis for regulatory considerations related to the amount of Notary honorarium in the Notary Position Law and Notary Code of Ethics; how to formulate the amount of notary honorarium; and how to sanction Notaries who violate the minimum rate of Notary Honorarium.<sup>9</sup> So that the formulation of the problem in this study is how the validity of the nominee agreement in Indonesia compares with other countries (Singapore, Thailand, the Philippines, Malaysia, the United Kingdom) and how to resolve nominee agreement cases involving Notaries with parties involved in Indonesia.

## B. RESEARCH METHOD

This research uses a type of normative law research, which uses normative case studies in the form of legal behavior products.<sup>10</sup> The type of research used is also conflict norm. The nature of this research is descriptive, that is, research that describes certain objects and explains things related to or systematically describes the facts or characteristics of a particular population in a particular field factually and carefully.<sup>11</sup> The approach used is the statutory approach; comparative approach; and case approach.<sup>12</sup> So this study was analyzed to find out how the implications of the nominee agreement between foreign nationals and Indonesian citizens.

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<sup>2</sup> Nella Hasibuan, "Perjanjian Nominee yang Dibuat untuk Penguasaan Tanah Hak Milik Warga Negara Indonesia oleh Warga Negara Asing" (Disertasi, Malang, Universitas Brawijaya, 2012), <http://repository.ub.ac.id/id/eprint/160906/>.

<sup>3</sup> Adjeng Dian Andari, "Implikasi PMH Dalam Pembuatan Akta Perjanjian Nominee Oleh Notaris Dari Aspek Pertanggungjawaban Perdata Dan Pidana (Studi Kasus Putusan MA Nomor 3403 K/Pdt/2016)," *Otentik's: Jurnal Hukum Kenotariatan* 1, no. 2 (2019): 73–92.

<sup>4</sup> Cecilia Suwarno, "Implikasi Yuridis atas Kelalaian Pejabat Pembuat Akta Tanah yang Mengakibatkan Akta Hibah Tanah Hak Milik Kepada Warga Negara Asing Batal Demi Hukum (Studi Putusan Mahkamah Agung Nomor 547k/Pdt/2019)," *Indonesian Notary* 2, no. 2 (30 Juni 2020): 441–465.

<sup>5</sup> Imelda Agung dan Endang Sri Kawuryan, "Implikasi Akta Nominee Sebagai Dasar Permohonan Pengampunan Pajak," *Al-Daulah: Jurnal Hukum Dan Perundangan Islam* 7, no. 2 (2017): 488–510, <https://doi.org/10.15642/ad.2017.7.2.488-510>.

<sup>6</sup> Hasibuan, "Perjanjian Nominee yang Dibuat untuk Penguasaan Tanah Hak Milik Warga Negara Indonesia oleh Warga Negara Asing."

<sup>7</sup> Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia*, Cetakan Ketiga (Jakarta: Putra Abardin, 2001).

<sup>8</sup> Jaya Kesuma, "Perjanjian Nominee Antara Warga Negara Indonesia dengan Warga Negara Asing dalam Praktik Jual Beli Tanah Dihubungkan dengan Undang-Undang Pokok Agraria Nomor 5 Tahun 1960" (Disertasi, Bandung, Universitas Pasundan, 2016), <http://repository.unpas.ac.id/11877/>.

<sup>9</sup> Widya Ishwara Danardana, "Penetapan Tarif Minimal Honorarium Notaris untuk Menghindari Perang Antar Notaris" (Tesis, Semarang, Universitas Islam Sultan Agung, 2021).

<sup>10</sup> Mukti Fajar ND. dan Yulianto Achmad, *Dualisme Penelitian Hukum Normatif dan Hukum Empiris* (Yogyakarta: Pustaka Pelajar, 2010).

<sup>11</sup> Sarifuddin Azwar, *Metode Penelitian*, Cetakan Kesembilan (Yogyakarta: Pustaka Pelajar, 2009).

<sup>12</sup> Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2008).

### C. RESULT AND DISCUSSION

#### Comparison between Indonesia's Nominee Agreement with Other Countries (Singapore, Thailand, Philippines, Malaysia, and United Kingdom)

##### Legal Validity of Nominee Agreement in Indonesia

Basically, a nominee agreement is an agreement that specifies someone to act for another party as a representative for the things agreed.<sup>13</sup> The elements contained in the nominee agreement include the first element there is a power of attorney agreement between 2 (two) parties, namely the power of attorney (beneficial owner) and the power of attorney (nominee) which is based on the trust of the beneficial owner to the nominee.<sup>14</sup> In making a nominee agreement related to land rights, the foreigner enters into an agreement with the Indonesian citizen to then buy the property using funds from the foreigner.<sup>15</sup> Property purchases are made by including the name of the Indonesian citizen in the certificate of ownership of the land. Indonesian citizens get a certain amount of fees for borrowing their names for title certificates on land purchased using funds from foreigners. The making of this nominee agreement is only based on the trust of foreigners to Indonesian citizens that in the future, Indonesian citizens will not violate the provisions contained in the nominee agreement.<sup>16</sup> Because it is only based on the trust of the parties, *nominee* agreements related to land rights are very risky to make. Although the land was purchased using funds from foreigners, the name listed in the land certificate is the name of an Indonesian citizen who is only borrowed, so legally the one who has the right to the land is the Indonesian citizen.<sup>17</sup>

Regarding the nominee agreement on land, there are examples of cases that will be the focus of the author's research. The case is a judicial review decision number 193/PDT/2015/PT. DPS. between Mrs. Karpika Wati (Indonesian citizen) against Mr. Alan Maurice Pons (foreigner) and Eddy Nyoman Winarta, S.H. (Notary). Mrs. Karpika Wati has purchased a piece of land in accordance with the Certificate of Ownership in Bali Province recorded in the name of Karpika Wati herself. Mrs. Karpika herself and Mr. Alan Maurice have known each other well since 2006. With persuasion and lure of promise that the land purchased by Mrs. Karpika will soon be built Villa and will be leased to other parties which then the proceeds obtained from the management of the Villa will be shared with Mr. Maurice, then ask Mrs. Karpika to make the land deeds at the Notary and PPAT office of Eddy Nyoman Winarta, with a deed of debt recognition, the Deed of Granting Rights, regarding the statement and power of attorney that clearly positions Mrs. Karpika as the Nominee. The deed is not in accordance with the fact of the actions of Mr. Maurice as a foreign national for the purpose of transferring property rights indirectly to himself with the aim of owning land/property assets, especially Bali.

Based on the case that I examined from this Supreme Court Decision letter, this piece of land in the name of Mrs. Karpika is clearly not in accordance with the rules of law, custom, appropriateness, and propriety in the lease agreement that has been in force in the Republic of Indonesia, from this case irregularities are seen in the lease period/lease period and the rent given by Mrs. Karpika to Mr. Maurice for a period of 100 years with rent for the entire lease period for 100 years is only Rp 50,000,000. It is stated that from the case it proves that the issuance of the lease deed is clearly based on not a lawful cause. From this case, the agreement made by Mr. Maurice was declared null and void and had no binding force. Based on the deed made by Eddy Nyoman Winarta as a Notary and Land Deed Making Officer who is supposed to maintain the enforcement of land law, participate in maintaining land assets in his jurisdiction so that they are not controlled either directly or indirectly by Foreign Nationals actually deliberately provide so that the wishes of Mr. Maurice as a Foreign Citizen can be carried out to have land rights directly by using a Notarial Deed/Notary Agreement that has been It is known that this is a form of deviation or smuggling of the law and violates the provisions of laws and regulations, both civil and land.

The *second* element is that power is specific to limited legal action. A nominee agreement should authorize others for legal action that is limited and not absolute.<sup>18</sup> However, in the nominee agreement related to land rights in Indonesia examined by the author, the nominee agreement contains a statement from the nominee that he has purchased freehold land with 59 using funds from foreigners. Nominee's statement that the land he bought will be controlled by foreigners. The Indonesian citizen (nominee)

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<sup>13</sup> Ega Permatadani dan Anang Dony Irawan, "Kepemilikan Tanah Bagi Warga Negara Asing Ditinjau Dari Hukum Tanah Indonesia," *Khatulistiwa Law Review* 2, no. 2 (31 Oktober 2021): 348–58, <https://doi.org/10.24260/klr.v2i2.356>.

<sup>14</sup> Ni Ketut Tri Srilaksmi, "Perjanjian Nominee dalam Perjanjian Penguasaan Hak Milik Atas Tanah Perspektif Administrasi Negara," *Pariksa: Jurnal Hukum Agama Hindu* 6, no. 2 (19 Februari 2023): 91–100, <https://doi.org/10.55115/pariksa.v6i2.2778>.

<sup>15</sup> Muhammad Taufiq Budiarto, "Sudut Pandang Perpajakan atas Pengalihan Hak Tanah dan Bangunan dengan mekanisme Perjanjian Nominee," *Simposium Nasional Keuangan Negara* 1, no. 1 (9 November 2018): 434–457.

<sup>16</sup> Ni Made Dinda Meisya Saraswati dan Anak Agung Sri Indrawati, "Kekuatan Hukum Perjanjian Nominee dalam Kepemilikan Tanah oleh Orang Asing Berdasarkan Peraturan di Indonesia," *Jurnal Kertha Wicara* 11, no. 3 (2022): 670–81.

<sup>17</sup> Abdulkadir Muhammad, *Hukum Perdata Indonesia*, Cetakan Ketiga (Bandung: PT. Citra Aditya Bakti, 2000).

<sup>18</sup> Putri Kusuma Sanjiwani, "Praktik Perjanjian Nominee di Sektor Pariwisata," *Jurnal Ilmiah Hospitality Management* 8, no. 1 (2017): 17–22, <https://doi.org/10.22334/jihm.v8i1.83>.

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authorizes foreigners to take all legal actions, including to release and transfer the land to other parties.<sup>19</sup> The grant of power gives power for foreigners to be able to act like a landowner whose actual property right according to law cannot be owned or owned. The granting of such power results in the transfer of all use or control of the land to foreigners.<sup>20</sup>

Nominee is an act where an Indonesian citizen as a person entitled to have land rights with property rights lends his name to a party who is not entitled to land ownership rights or foreign nationals so that the foreign national can own land by freehold. Indonesian citizens in carrying out the name loan agreement as representatives for foreign parties in land ownership. The nominee agreement is made to appear legal and in accordance with applicable legal rules, so a package of agreements is made between foreign nationals as power of attorney and Indonesian citizens as power of attorney who authorize foreign nationals to control land rights and carry out all legal actions against the land.<sup>21</sup>

### Comparison of the Validity of *Nominee* Agreements in Asian Countries

Asian countries such as Thailand and the Philippines prohibit land ownership by foreigners. One of them is in Thailand where Thailand expressly prohibits foreigners from being able to own land in Thailand where Thailand expressly prohibits foreigners from being able to own land in their country. Not only does it prohibit foreigners from owning land, but the Thai government also prohibits its citizens from acting as nominees on land owned by foreigners. One of them is in Thailand where Thailand strictly prohibits foreigners from being able to own land in their country. Not only does it prohibit foreigners from owning land, but the Thai government also prohibits its citizens from acting as nominees on land owned by foreigners. This is reflected in section 96 of the Land Code Promulgating Act, B.E. 2497 (1954) which reads:

“When it appears that any person (including a juristic person) has acquired land as the owner in place of an alien or juristic person under the provisions of Section 97 and 98, the Director-General shall have the authority to dispose of such land and the provisions of Section 94 shall apply *mutatis mutandis*.”

In addition, Thai law also stipulates sanctions in the form of fines or imprisonment for every citizen who acts as a nominee, as contained in Section 113 Land Code Promulgating Act, B.E. 2497 (1954), which reads:

“Any person who acquires land as an agent of an alien or juristic person under the provisions of Section 97 or 98 shall be punished with a fine not exceeding twenty thousand baht or an imprisonment not exceeding two years, or both.”

As stated in the discussion above, making nominee agreements related to land ownership rights cannot be legally justified and is an attempt at legal smuggling. Making a nominee agreement has a very big risk because the agreement emphasizes the trust of the parties and does not rule out the possibility of disputes in the future if the relationship between the parties is not well maintained. In addition, nominee agreements have a very big risk because there are no regulations that specifically regulate them and until now there are still differences of opinion about their validity.<sup>22</sup> The Philippines also strictly prohibits foreign nationals from owning land in its territory. Nominee making is also expressly prohibited by the Philippine government through Commonwealth Act No. 108, which section 1 clearly states that in any case where the constitution or statutory provisions require Philippine citizenship or other citizenship as a condition for exercising or enjoying a privilege, a Filipino citizen who permits his name or identity to be used for the purpose of circumventing the provisions and for the benefit of another person or foreign national, shall be punished with imprisonment of at least five years to 15 (fifteen) years and a maximum fine of five thousand Philippine pesos. While Malaysia and Singapore allow foreigners to be able to own land in their countries with several conditions. Malaysia sets the minimum purchase value for property purchases by foreigners at around RM400,000 (US\$100,000) in Sarawak and around RM2,000,000 (US\$500,000) in Penang Island. In addition, in Malaysia, there are restrictions on the location and type of buildings that can be owned by foreigners. Cultural buildings or heritage properties in Malaysia can only be purchased by Malaysian citizens. Singapore also allows the purchase of land by foreigners. To be able to own land in Singapore, foreigners have to go through several expensive bureaucratic processes. A foreigner may own land after making an economic contribution to the state of Singapore of at least S\$20,000,000 (twenty million Singapore dollars) or have a professional qualification/valuable experience in Singapore and have obtained approval from the Singapore state authority in this case the Singapore Minister of Law.<sup>23</sup>

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<sup>19</sup> Paulinah Paulinah, Yulia Qamariyanti, dan Achmad Faishal, “Penguasaan Tanah Oleh Warga Negara Asing Melalui Perjanjian Nominee di Indonesia,” *Banua Law Review* 4, no. 1 (31 Mei 2022): 59–74, <https://doi.org/10.32801/balrev.v4i1.36>.

<sup>20</sup> Natalia Christine Purba, “Keabsahan Perjanjian Innominaat Dalam Bentuk Nominee Agreement (Analisis Kepemilikan Tanah Oleh Warga Negara Asing)” (Tesis, Depok, Universitas Indonesia, 2006), <https://lib.ui.ac.id>.

<sup>21</sup> Maria Sumardjono, *Alternatif Kebijakan Pengaturan Hak atas Tanah Beserta Bangunan Bagi Warga Negara Asing dan Badan Hukum Asing* (Jakarta: Kompas, 2007).

<sup>22</sup> Jovita Sonia Prianto, “Perlindungan Hukum Bagi Para Pihak Dan Notaris Dalam Praktik Perjanjian Pinjam Nama (Nominee) Di Indonesia” (Tesis, Malang, Universitas Brawijaya, 2018), <http://repository.ub.ac.id/id/eprint/178364/>.

<sup>23</sup> Prianto.

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### Comparison of Nominee Agreements in European Countries (UK)

The author tries to compare the rules regarding nominee agreements in different countries. In the British state, nominee agreements have long been used in various objects of agreement. Nominees are:

- a) An individual or entity, which acts on behalf of a beneficial owner. Most often the nominee pretends to be the owner of an entity, asset, or 70 transactions to provide a veil of secrecy as to the beneficial owner's involvement. Many offshore entities provide nominee services whereby they will provide a nominee to act as owner of your arrangement but generally will not act unless instructed to by the beneficial owner.
- b) A person designated to act in place of another, usually in a very limited way.
- c) A party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others.

Some of the objects that can be the object of nominee agreements in the UK such as land, include all types of land rights (short or long term leases and without property rights); house, including the right to a building over an apartment owned by an individual for a certain time; position or position within the company; shares of the company; moving objects such as yachts and motor vehicles. The definition of land according to English law is whoever owns the soil owns everything up to the heavens and down to the earth. From this definition it can be concluded that land in the UK can be owned by British citizens as well as foreign nationals. There is no provision that determines foreigners cannot own land in the UK. In relation to the land or real estate business, nominees in the UK are used for the purpose of concealing the developer's identity; to avoid state usury statutes, which often exempt corporate borrowers; to avoid personal liability on the loan by the developer; to participate in certain government-subsidized housing programs; to conceal information from the beneficial owner's creditors; to make transfers without the knowledge of or consent of the beneficial owner's spouse; to avoid probate proceedings; to avoid probate proceedings. Nominee agreements are commonly used in countries with common law systems including the United Kingdom. The content of the nominee agreement is made transparently and accompanied by good faith.

### Comparison of Land Rights for Foreigners in Asian Countries

<b>Singapore</b>	Singapore is one of the most expensive countries in the world. With limited area, property prices and taxes in Singapore are higher when compared to other Southeast Asian countries. A foreigner can buy a condominium unit in his name with property rights. Foreigners have the same rights as Singaporeans in relation to buying non-landed property such as apartments or condominiums. Foreigners can buy houses, bungalows, or properties that are under 6 floors but with approval from the government. To be able to obtain approval from the government, foreigners must be able to prove that their ownership can benefit Singapore in terms of nominal purchase price. Foreigners will be charged a higher tax fee than Singapore Permanent Residents.
<b>Malaysia</b>	Based on The Land National Code of 1965, the types of land rights in Malaysia are Freehold Title and Leasehold Title. A foreigner is allowed to obtain both types of land rights. Malaysia allows foreigners to buy houses in their country with some restrictions. Each state in Malaysia sets a minimum price limit in purchasing foreign property. The minimum price limit starts from RM400,000 in Serawak state to RM2,000,000 in Penang Island. Some states also restrict the location of land ownership for foreigners. For example, in the state of Selangor, foreigners can only own land in certain areas. Foreigners also cannot own cultural buildings (Heritage properties) in Malaysia. Heritage properties such as ancient shops can only be owned by Malaysian citizens.
<b>Thailand</b>	Thailand prohibits foreigners from owning land in their country. However, Thailand allows foreigners to own properties such as condominium units with a note that in 1 condominium building, the ownership of foreigners is not more than 50% of the total number of units. Foreigners can lease land for 30 years with the option of extending for 30 years.
<b>Philippines</b>	Philippine law prohibits foreigners from owning land in their country. Foreigners can only buy property such as condominiums. Land ownership rights can only be owned by Filipino citizens or corporations whose 60% shares are owned by Filipino citizens.

### Nominee rules

<b>Singapore</b>	<b>Malaysia</b>	<b>Thailand</b>	<b>Philippines</b>
Nominees related to land rights are not commonly used in this country because basically both land laws allow foreigners to own property in the territory of the country.		Nominees related to land rights are prohibited by the government through the provisions of Section 96 & 113 of the Land Code Promulgating Act, B.E. 2497.	The Philippines issued the provisions of the Commonwealth Act no. 108 which basically prohibits all forms of borrowing or using the

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	<p>When a foreigner owns land through a Thai citizen acting as an agent or the Philippines issues the provisions of the <i>Commonwealth Act</i> no. 108 which basically prohibits all forms of borrowing or using the identity of his citizen to be used by the foreigner so that the foreigner can obtain rights that can only be obtained by 78 owners (the name of the Thai citizen is recorded as the owner of the land), then the agreement is declared void and the foreigner must transfer his land rights within the period set by the Director General of Land Department</p>	<p>identity of its citizens for use by foreigners so that foreigners can obtain rights that can only be obtained by Filipino citizens, one of which is related to property rights to land.</p>
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*Source: Primary and Tertiary Legal Materials, Processed 2023*

### SETTLEMENT OF *NOMINEE* AGREEMENT CASES INVOLVING NOTARIES WITH PARTIES INVOLVED IN INDONESIA

#### Settlement of Legal Smuggling Cases based on the Decision of the District Court, High Court, Supreme Court regarding the Nominee Agreement

Review decision number 193/PDT/2015/PT. DPS. between Mrs. Karpika Wati (Indonesian citizen) against Mr. Alan Maurice Pons (foreigner) and Eddy Nyoman Winarta, S.H. (notary). Mrs. Karpika Wati has purchased a piece of land in accordance with the Certificate of Ownership in Bali Province registered in Karpika Wati's own name. Mrs. Karpika herself and Mr. Alan Maurice have known each other well since 2006. With persuasion and lure of promise that the land purchased by Mrs. Karpika will soon be built Villa and will be leased to other parties which then the proceeds obtained from the management of the Villa will be shared with Mr. Maurice, then ask Mrs. Karpika to make the land deeds at the Notary and PPAT office of Eddy Nyoman Winarta, with a deed of debt recognition, Deed of Granting Rights of Dependents, about a statement and power of attorney that clearly positions Mrs. Karpika as the Nominee. The deed is not in accordance with the fact of the actions of Mr. Maurice as a foreign national for the purpose of transferring property rights indirectly to himself with the aim of owning land/property assets, especially Bali.

Based on the case, the notarial deeds are Notarial Deed No. 89 dated March 24, 2008 concerning Land Lease between Mrs. Karpika Wati as the First Party to lease and Mr. Alan Maurice Pons as the Second Party as the Renter; Notarial Deed Number 90 dated March 24, 2008 concerning Debt Recognition Using Collateral between Mr. Alan Maurice Pons as the First Party to Debt and Mrs. Karpika as the Second Party as the Debtor; Notarial Deed Number 91 dated March 24, 2008 concerning Statement and Power of Attorney between Mrs. Karpika Wati as the Declaring and the Power of Attorney and Mr. Alan Maurice Pons as the recipient of the statement and the recipient of the power of attorney; Notarial Deed Number 108 dated April 1, 2008 concerning the Deed of Granting Dependent Rights (APHT) on behalf of; Alain, Maurice Pons is located at 10, rue Jean Vidaihet 31800 St. Gaudens, France.

#### Basis of Judge's Consideration in the Dispute Decision between Karpika Wati and Alan Maurice Pons

Judicial Levels	Verdict Number	Basis for Judge's Consideration
District Court	787/Pdt.G/2014/PN.DPS.	The judge's legal considerations are listed in the Supreme Court Decision Number: 787/Pdt.G/2014/PN. DPS, in essence, is that the nominee agreement in this case is a form of legal smuggling so that it results in the validity of the agreement which is null and void.
High Court	193/PDT/2015/PT.DPS	Upholding the Denpasar District Court Decision. The Deed of Sale and

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		Purchase Agreement is null and void and has no binding legal force. Declaring the legal act of Defendant I Mr. Alan Maurice Pons, and Defendant II Mr. Eddy Nyoman Winarta, S.H., forcing to extend the lease of the Plaintiff's house is unlawful. An agreement using such a power, using an Indonesian citizen as a Nominee is legal smuggling because its substance is contrary to the Basic Agrarian Law is void because the law and land fall to the State.
Supreme Court	3403 K/Pdt/2016	Rejecting the cassation application of Mr. Alan Maurice Pons and Mr. Eddy Nyoman Winarta, S.H. The judge held that based on these considerations, the objective condition of the validity of the Agreement is regarding a lawful cause contrary to the Law, decency, or public order, then the agreement is null and void, this is in line with Article 1335 of the Civil Code which reads: an agreement without cause or that has been made due to false or prohibited causes is not have power."

It can be seen from the table above that the existence of such a nominee agreement has no legal force and cannot provide legal protection, especially for foreigners in land rights disputes. In addition to the parties, nominee agreements that cause disputes in the future can also harm the notary. A notary in carrying out the duties of his office requires special education and qualified abilities. A notary must comply with the provisions of Notary Law and requires accuracy, accuracy, and accuracy not only in the technique of making deeds but also in applying the legal rules contained in the deeds he makes. Notaries must have the ability to master the sciences in the field of notaries and law in general. Notaries in exercising their authority have the right to make evidence that has perfect evidentiary power in civil cases, namely Notarial Deeds. That based on Article 1365 of the Civil Code, the element of Unlawful Acts is the existence of unlawful acts/*onrechtmatigedaad*; the existence of losses (*schadel*), between actions and losses there must be a causal relationship (*causaliteitverband*); losses caused by error (*schuld*).

The basis for the rejection of the appeal is firstly *the existence of an unlawful act (onrechtmatige daad)*, not only contrary to the Law, but also if it does or does not act in accordance with one of the elements that is contrary to the rights of others; contrary to its own legal obligations; contrary to decency; contrary to the necessity (prudence, propriety, propriety) that must be transferred in association society about other people or things. *The presence of an element of error (schuldment)*. Notary to indirectly give the right to be able to control land and buildings by issuing a Notary Deed/Notary Agreement which is clearly a form of legal smuggling and violates the provisions of the Basic Agrarian Law and Civil Code, so that Mr. Alan Maurice Pons's action has no justification. *The existence of material losses*, losses due to Mrs. Karpika Wati feeling that she had been deceived and was only used by Mr. Eddy Nyoman Winarta, S.H. (notary) to smooth the desire of Mr. Alan Maurice Pons to control the land indirectly, also always felt afraid to live in the Villa currently occupied by Mrs. Karpika Wati where Mr. Alan Maurice Pons could have evicted from the Villa because of the Notarial Deed / notarial agreement made in Mr. Pak's office Eddy Nyoman Winarta, S.H. (notary). It was proven that on September 20, 2013, Mr. Alan Maurice Pons had ordered irresponsible persons to force control of the land and building currently occupied by Mrs Karpika Wati and how to vandalize the front door. In addition, Mrs. Karpika Wati also felt cheated because Mr. Eddy Nyoman Winarta, S.H. (notary) tended to be more partial to Mr. Alan Maurice Pons and did not protect the rights of Mrs. Karpika Wati as an Indonesian citizen, so that because of this, Mrs. Karpika Wati had suffered material losses of Rp 10,000,000,000,000,000 (Ten billion rupiah).

Therefore, based on the above, Mrs. Karpika Wati should be declared and determined as the holder of rights to a piece of land and buildings and all the successions that stand on it to be known as a piece of land building Villa Emmanuelle and all the successions that stand on it according to the Certificate of Property Number: 1022/Pererenan Village, NIB: 22.03.05.18.01103, Measuring Letter Number: 1216/Pererenan/2008.

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### Legal Effects for Notary in Making Nominee Agreements

In accordance with the author's analysis regarding the validity of the nominee agreement above, the nominee agreement related to land ownership rights is impossible to apply in Indonesia. However, unlike Thailand and the Philippines which have expressly regulated the nominee agreement related to land, but in Indonesia there is no provision that specifically regulates the nominee agreement. In the author's opinion, to provide legal protection for parties and notaries, in this case the Indonesian government needs to follow the steps of the Thai and Philippine governments which have strictly prohibited nominee agreements related to land rights. The existence of regulations related to the nominee agreement is an effort to prevent future disputes related to the nominee agreement. This is in accordance with the theory of legal protection from Phillipus M. Hadjon which states that legal protection in addition to being repressive, can also be preventive. Preventive legal protection in the form of making regulations governing nominee agreements can provide protection for all parties, both Indonesian citizens, foreigners, and notaries. Regarding the object of title to land, making a *nominee* agreement must be prohibited to guarantee the use of Indonesian land for the prosperity of the Indonesian people themselves. Basically, the nominee agreement is an agreement that is not expressly and specifically regulated. But the nominee agreement is used as an agreement by borrowing a name or on behalf. In this nominee agreement, where foreigners borrow the name of an Indonesian to have land rights.<sup>24</sup>

The legal consequences of a notarial deed *that* violates the prohibition in Article 26 paragraph (2) of the Basic Agrarian Law are legal consequences that can be born, in addition to the existence of legal acts contained therein in the form of how the status of freehold land as the object of the nominee agreement. The land falls to the State and the legal consequences that can occur on the notary who makes the nominee deed only by law considered to have never existed even though it existed, which is important to be further examined to comply with the provisions of Article 26 paragraph (2) which in the subsentence determines that:

"It is void because the law and the land fall to the State, provided that the rights of others encumbering it continue and all payments that have been received by the owner cannot be reclaimed."

Based on the above case, it is concluded that the nominee agreement is completely unknown in the Indonesian legal system, especially in Indonesian treaty law, and there is no specific and firm arrangement, so it can be said to contain an empty understanding/empty norm, because the nominee agreement can be categorized as Legal Smuggling. That there is legal smuggling as an act against the law. The result of legal smuggling itself is that if it has succeeded in determining that a certain act is legal smuggling, there are 2 (two) systems that declare that the legal acts concerned (for whole or partially void and valid. The latter will certainly be the handle of the new country where the smuggling act has been carried out. Since it is not the law of the new country that is smuggled, it is understandable that this final state certainly also has no reason or interest whatsoever to view the act of law as illegitimate.<sup>25</sup>

Against the reasons put forward for accepting the enactment of this legal smuggling there are also opposing reasons. Especially it is argued that legal smuggling cannot be justified in terms of the general conceptions accepted in the civil law system applicable here. Understanding of good faith which is one of the basic foundations of the entire applicable civil law system, understanding of acts violating decency that have been accepted into unlawful acts (*onrechtmatigedaad*). Definitions of abuse of rights (*e.g., van recht*) etc., all these notions are not "*favorable*" for acceptance rather than the enactment of legal smuggling. This legal smuggling agency cannot be given a suitable place within the framework of these legal principles (*rechtsbeginselen*). It would be considered odd if it was acceptable for the smuggling of the law. Even this legal smuggling in certain cases can constitute an unlawful act known in article 1365 BW and which requires the offending party to pay damages.<sup>26</sup>

In this way of thinking, legal smuggling can also be viewed as an offense rather than a law. True "*letter der wet*" may not be violated, but his soul (*geest*) is violated. And this soul of mana stands on the "*letter der wet*". Therefore, legal smuggling can properly be considered also an offense against "*wet*". Thus, may the mind be adapted to the tendency to use the German term, *Gesetzesumgehung*. Says Schnitzer in this connection: "*Die fraus legis ist eine besondere Art betrugerischen Handelns. Nicht eine Person, sondern sozusagen das Gesetz wird betrogen*". Legal smuggling can be seen as one of the special ways of "fraud". It is not a person who is deceived or lied to but the law. So, from the above it is clear that it is important. In this series of legal smuggling to find out whether there is bad intent, the tactic is deceptive to circumvent the law of this crew. It is not always easy to establish. Whether there really are bad intentions should be inferred rather than facts. Surely no one would openly admit that he was doing legal smuggling.<sup>27</sup>

In this case, it was found that there was bad faith on the part of Mr. Alan Maurice, a foreign national of the defendant, or Mr. Eddy Nyoman Winarta, S.H. (notary). In the Supreme Court Decision stated that the purpose of making the Deeds was to secure and bind what was the absolute right of Mr. Alan Maurice who was not an Indonesian citizen. So, it is very clear from the

<sup>24</sup> Koeswadji, *Tanggung Jawab Notaris Selaku Pejabat Umum* (Yogyakarta: Centre of Documentation and Studies of Business Law, 2003).

<sup>25</sup> Sudargo Gautama, *Hukum Perdata Internasional Indonesia Buku ke-4* (Bandung: Alumni, 2007).

<sup>26</sup> Gautama.

<sup>27</sup> Gautama.



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aspect of the purpose of making these deeds aimed to make Mr. Alan Maurice as a Foreign Citizen have rights to the land object of dispute and this is clearly contrary to article 26 paragraph (2) of Law number 5 of 1960 concerning Basic Regulations on Agrarian Principles. That in making the Deeds not only Mr. Alan Maurice had bad faith, but the comparison Mr. Eddy Nyoman Winarta, S.H. as a Notary official also did not have bad faith. Mr. Eddy Nyoman Winarta, S.H. as a Notary official should act impartially on both sides but instead provide opportunities for Mr. Alan Maurice to have land rights which are prohibited by law and the method by making deeds that are clearly proven to also be contrary to the laws on land.

As a Notary Officer and Land Deed Making Officer take action by giving legal way/opportunity to Mr. Alan Maurice as a foreign national by issuing a Notary Deed/Notary agreement to indirectly control land in his jurisdiction, where the Notary's action has been known to be an act of irregularity and a form of legal smuggling and an act that cannot be justified by the provisions of the Basic Agrarian Law, so that the Notary's action is very contrary to legal obligations. Mr. Eddy Nyoman Winarta, S.H. as a Notary Officer and Land Deed Making Officer who should be obliged to maintain the enforcement of laws and regulations in Indonesia, especially the provisions of land and civil laws and regulations and should also as a notary be obliged to maintain land assets where they are their jurisdiction so that they are not controlled by Foreign Nationals. Mr. Eddy Nyoman Winarta, S.H. deliberately as a Notary Officer and PPAT (Land Deed Making Officer) ignored the principles of Notary Officials as stipulated in and Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning Notary Positions in issuing Notary Deeds/Notary Agreements relating to land rights in which there are elements of foreigners (Foreign Nationals) who should prioritize prudence in Issuing a Deed.

Mr. Eddy Nyoman Winarta, S.H. deliberately as a Notary Officer and Land Deed Making Officer ignores the principles of Notary Officials as stipulated in and Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning Notary Positions in issuing Notary Deeds/Notary Agreements relating to land rights in which there are elements of foreigners (Foreign Nationals) who should prioritize prudence in issue a deed. In essence in carrying out duties, a Notary must be careful in making deeds and a Notary Public must have an awareness of law, morals and ethics. A notary must know the applicable rules regarding the deed made in order to anticipate legal risks that may occur. In addition, the parties who want to express their will in an authentic deed must have good faith and honesty so that the deed becomes perfect and does not harm any party.

The notary form of liability adheres to the principle of responsibility based on fault of liability. If in the future the deed is proven to violate certain provisions, then the evidentiary power of the deed will descend into a deed under hand or even null and void. A notarial deed can be annulled, null and void or decrease its evidentiary power. The existence of defects in the notary deed can cause various losses to the notary itself, these losses include imposing sanctions in accordance with the provisions of Notary Law or notary code of ethics, prosecution of aggrieved parties. Article 48 of the Notary Law provides that "any violation committed by a notary public of the provisions regulated which results in the deed made by him decreasing its evidentiary power to become a deed under hand or even the deed becoming null and void may be used as grounds for the aggrieved parties to claim damages, reimbursement of costs and interest."<sup>28</sup>

According to the author, the government still needs to make a regulation that specifically prohibits making *nominee* agreements related to land rights in Indonesia to close loopholes in legal smuggling efforts that may occur in the future. With the addition of articles in the Basic Agrarian Law which contains prohibitions on making nominee agreements related to land rights in Indonesia and with the provision of housing with right of use for foreigners, it is hoped that it can create preventive legal protection for foreigners, Indonesian citizens and Notaries against risks in the practice of name lending agreements (nominees) related to land rights that have adverse effects on parties and notaries in Indonesia.

The responsibilities of the Notary Public related to the *nominee* agreement are 3 (three) forms, namely civil, criminal and administrative. In civil terms, Notaries can be responsible by indemnifying losses due to unlawful actions, this compensation can be in the form of money. In addition to the money determined by the plaintiff and deemed appropriate by the judge, compensation in other forms may also be awarded. Regarding other forms of compensation other than money, seeing from *Hoge Raad's* statement, that the equation "The perpetrator of an unlawful act can be punished to pay a sum of money in lieu of the loss caused to the injured party, but if the aggrieved party demands compensation in another form and the judge considers it an appropriate form of compensation, then the perpetrator can be punished to perform another feat for the benefit of the aggrieved party who is suitable to write off the losses suffered."<sup>29</sup> On the criminal side, notaries are obliged to be responsible for fraud and forgery clauses in the Criminal Code against notary acts. Administratively, it is considered invalid for a notary to make a *nominee* deed, so the notary will be subject to sanctions, namely dishonorable dismissal.

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<sup>28</sup> Abdul Ghofur Anshor, *Lembaga Kenotariatan, Prespektif Hukum dan Etika* (Yogyakarta: UII Press, 2009).

<sup>29</sup> M. Edwin Azhari, Ali Murtadho, dan Djauhari, "Tanggung Jawab Notaris Dalam Pembuatan Akta Perjanjian Nominee Dalam Kaitannya Dengan Kepemilikan Tanah Oleh Warga Negara Asing Di Lombok," *Jurnal Akta* 5, no. 1 (5 Maret 2018): 43–50, <https://doi.org/10.30659/akta.v5i1.2530>.

### D. CONCLUSION

It is concluded that the nominee agreement is completely unknown in the Indonesian legal system, especially in Indonesian treaty law, and there is no specific and firm arrangement, so it can be said to contain an empty definition / empty norm, because the nominee agreement can be categorized as legal smuggling. A *nominee* loan agreement is a form of legal smuggling and violates the legal terms of the agreement, namely *halal* causes, which conditions are objective conditions for the validity of an agreement as stipulated in article 1320 of the Civil Code. Violation of the objective requirements of validity of an agreement results in a *nominee* agreement regarding land rights null and void.

Legal Effects for Notaries involved in making nominee agreements in legal smuggling efforts, Notaries are required to account for their actions before the law, namely by being legally canceled and punished to pay losses made without revocation of the position of Notary. So the government needs to make a regulation that regulates nominee agreements, *especially related to land rights, in order to close the loopholes of legal smuggling efforts that may occur in the future and so that the Indonesian government follows the steps of the Thai and Philippine governments which specifically prohibit all forms of nominee lending practices*) by adding provisions in the Basic Agrarian Law. There is also a need for more commensurate sanctions for Notaries involved in legal smuggling.

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