



## Nominee Contract Practice on Ownership of Foreign National Land in Indonesia

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### Abstract

**Introduction:** The nominee agreement in practice is done as legal smuggling against land control for foreigners based in Indonesia, which the Agrarian Principal Law limits. Such restrictions result in foreigners finding a way to obtain property rights under the Nominee Agreement and b the basis of Article 21 paragraph (1) of the fundamental agrarian law of land ownership by foreign nationals with proprietary status contrary to the principle of nationality.

**Purpose/Objective Study:** This research aims to find out how the practice of nominee agreements in land ownership for foreign nationals in Indonesia and the legal consequences of nominee agreements in the application of transfer of property rights to land in Indonesia.

**Design/Methodology/Approach:** This study is normative juridical research beginning on a legal event and then looking for references to a norm system. This legal research is conducted by examining primary and secondary legal materials and non-legal materials relating to nominee contract practice on ownership of foreign national land in Indonesia. In this study, the approach was the statute approach by examining all laws and regulations relating to legal issues and case approach by examining several cases that have a relationship with the legal issues to be discussed.

**Findings:** The result of this study is that the nominee agreement made to transfer ownership of property rights to Foreign Nationals contrary to Article 26 paragraph (2) of the Agrarian Principal Law, based on Article 1320 of the Civil Code, does not meet the objective requirement that lawful clause. The agreement becomes null and void and has no binding power and cannot be used for the basis of rights in obtaining ownership of land for Foreign Nationals in Indonesia.

**Paper Type:** Research article

**Keywords:** Nominee Agreement; Land Ownership for Foreign Nationals; Legal Smuggling Against Land Ownership

### Introduction

The Republic of Indonesia is an agrarian country. The land is a basic necessity for the life of Indonesians. All daily activities require land as a place to live and a place to



make a living, and the word “use” means that the right to land is used for the benefit of the building, while the word “benefit” means that the land can be used for the benefit of its needs rather than related to buildings such as farmland farms and plantations that can be benefited. The land that opened for the first time in a single transaction was carried out by people who open it and become their property, which belongs to the community's descendants or their ancestors from a long time ago. The growth of the community continues to increase, but the area of land never increases over time. This results in the land ownership of the community increasingly reduced in size ([Santoso, 2012](#)).

According to Maria S.W. Sumardjono ([Sumardjono, 2005](#)), land problems due to their rare and limited nature and are the basic needs of every human being are essentially a matter of great touch to justice. The land is a vital human need that can be used to achieve the welfare of life and fulfil its life needs. Based on Article 33 paragraph (3) of the Indonesian Constitution 1945, “the earth, water and natural wealth contained therein are controlled by the State and used as much as possible for the prosperity of the people” is a form of human legal relationship with the land constitutionally ([Sumardjono, 2005](#)).

Aspects of life (political, economic, social, cultural, including law) have changed rapidly due to globalisation. On the one hand, globalisation is characterised by the open flow of foreign investment that enters a country, no exception Indonesia. On the other hand, investment from abroad negatively impacts the ownership of the land of Indonesian people or citizens ([Sumarja, 2015](#)).

Under Sections 42 and 45 of Law No. 5 of 1960 on the Agrarian Fundamentals Regulation (hence UUPA), it's regulated that the government has granted land ownership restrictions to Foreign Nationals in the form of property rights and lease rights for buildings that have been set out in the “time limit provisions of the right to use and lease rights for buildings”. This provision resulting in foreigners finding a way to obtain property rights because property is the highest right a person has to land ([Fitria, 2018](#)).

Based on Article 9 paragraph (1) jo Article 21 paragraph (1) of the Law No. 5 of 1960, on agrarian principles, Foreign Nationals who have interests in Indonesia are prohibited from controlling land with property rights ([Suparji, 2020](#)). The prohibition is following the principle of nationality to achieve the most prosperity of the people, but the practice is that many foreigners use various means to obtain property rights.

In Indonesia, nominee agreements are not new and become a public secret, namely the agreement by borrowing the name of an Indonesian citizen to buy land ([Cahyani & Witasari, 2018](#); [Haspada, 2018](#)). The designated nominee is an Indonesian citizen who is allowed to own land in Indonesia with proprietary status in the view of Indonesian law. Furthermore, to protect the interests of foreigners, a package of agreements whose substance indirectly transfers property rights to foreigners so that



it is legally formal does not violate UUPA rules. Any attempt to directly or indirectly transfer property rights to foreigners is prohibited by law (Kolopaking, 2013).

Article 26 paragraph (2) of the UUPA regulate that:

“Any trade, exchange, giving, giving with a will and other acts intended to directly or indirectly transfer property rights to a foreigner, is void because the law and its land switch to the State”.

Unlawful ownership of the land will not be a problem if the parties do not dispute the nominee agreement, but this agreement will cause problems if the relations of the parties are not as good as before. According to Maria S.W. Sumardjono (Sumardjono, 2005), in principle, UUPA expressly prohibits the ownership of property rights on land by foreigners as a reflection and implementation of the principle of nationality contained therein it.

Agreement nominee is found in the agreements made by Foreign Nationals with Indonesian Citizens. As the subject of land rights owners, Indonesian Citizens is not allowed give authority to foreigners to act as a juridical owner (Dini, 2017). Mastery of rights indirectly by positioning Indonesian citizens as intermediaries in their substance is very contrary to Article 26 paragraph (2) UUPA so that it can be referred to as smuggling law. In the Republic of Indonesia, the practice of borrowing names is common. Is this practice legally justifiable? This research was conducted to answer and explain these questions.

### **Methodology**

The type of research used in this writing is normative legal research. In this study, the approach was the statute approach, and the case approach is carried out by examining all laws and regulations relating to legal issues. Meanwhile, the case approach is carried out by examining several cases with a relationship with the legal issues to be discussed. Normative legal research is a study conducted to produce an argument, theory, or a new concept as descriptive analysis in solving a problem faced (Taekema, 2018). This normative legal research uses a statute approach and case approach. The statutory approach aims to review all laws and regulations relating to legal issues to be examined. While the case approach in normative legal research aims to study the norms or rules of law carried out in legal practice (Taekema, 2021).

The investigating informant was expected to complete the legal material and complete the weakness in this study. Research informants are regarded or eligible as parties who can explain the legal issues under investigation. The research informant is the notary/office of the land deed maker in making the nominee agreement and deed of sale and sale. This research used legal material in primary legal sources, secondary legal materials, and non-legal material. In this study, legal material collection techniques were carried out in two ways: 1) The interview is a question and answer that is carried out directly to the speaker or the subject of the research related to legal issues as the material under study. In conducting interviews, structured

guidelines and semi-structured guidelines need to be used. In interviews, several questions that have been managed in a structured manner were delivered to the speakers. Therefore, some questions are deepened to get more information, then complete and in-depth answers can be obtained. 2) Document studies use various kinds of literature or relevant documents that view the acquisition of legal materials to complete the research process.

In this study, the legal material analysis methodology was conducted using a descriptive qualitative approach, i.e. gathering and searching for relevant legal materials related to the problems under review to be systematically organised to obtain a consistent and thorough overview of the research.

## **Analysis and Results**

### **Definition of Loan Agreement Name (Nominee)**

Name loan agreements or nominees in the Indonesian legal system are part of an innominate agreement and are not expressly regulated in the Civil Code. The loan agreement is allowed as long as it does not conflict with the law and fulfil all the legal terms of the agreement in article 1320 of the Civil Code. These provisions are intended to not cause legal problems in the future (Sidik, 2008).

The term Nominee is often also called trustee, guise, representative or borrowed name. Nominee, according to the Black's Law Dictionary, are:

“One designated to act for another as his representative in a rather limited sense. It is used sometimes to signify an agent or trustee. It has no connotation, however, other than that of acting for another, in the representation of another, or as the grantee of another (Sidauruk et al., 2019).”

By the above definition, a nominee is appointed to act for another person as a representative in a sense limited to the promised power, to indicate that person is an agent or trusted person. The nominee agreement is based on the trust of an authorised person and a nominee as the recipient of that power of attorney.

According to Maria SW Sumardjono (Sumardjono, 2005), the nominee agreement is an agreement made by law that cannot be the subject of certain land rights (property rights). In this case, a foreigner with an Indonesian citizen, to control (own) the land of *de facto* property, but legal-formally (*de jure*) the property on behalf of an Indonesian citizen.

### **The History of the Nominee Agreement**

The term nominee based on a trustee comes from an Anglo Saxon System known as the dual ownership system on ownership of objects against legal owners and beneficiary owners (Kolopaking, 2013). Dual ownership is not known in Indonesia, which adheres to the Continental European System (civil law). Property rights (*eigendom*) in the civil code applies for sole ownership as the right of ownership of a person as applies to property rights on land in the UUPA.



Book III of the civil code governing the agreement, meaning that everyone can make any agreement stipulated by both the law and the agreement whose name is not yet known in the law so that the concept of the nominee can be entered and applied in Indonesia. The implementation of the principle of freedom of contract makes the parties free to make agreements with whomever they wish and free to determine the content, terms, implementation and form of the agreement on a mutual agreement (Sidik, 2008). The open system embraced by Book III of the civil code is limited by the provisions of *causa* or the legal cause that an agreement does not conflict with the law, does not conflict with decency and public order.

### **Elements of the Nominee Agreement**

There are several elements of the nominee agreement:

1. There is a power of attorney agreement between the two parties, namely the authorised person as the beneficiary or beneficiary owner and the beneficiary as a representative (Nominee), which is based on the trust of the authorised person to a nominee.
2. The power stipulated is special, with a limited type of legal action limited to what has been promised.
3. Nominees act as if representatives or agents of the authority before the law.

Elements of the nominee or trustee agreement, based on the trust, may also be seen from the parties involved in the agreement. Usually in the nominee agreement involves the existence of three parties, namely (Kolopaking, 2013):

1. The trustor (settlor/trustor)
2. The manager or beneficiary of a trustor based on mutual trust
3. Beneficiary

### **The Embodiment of the Nominee Agreement**

The acquisition of property on land is often taken in various unauthorised ways by foreigners by carrying out legal smuggling. Smuggling laws, in this case, are intended to avoid prohibition stipulated by the laws and regulations in Indonesia. The embodiment of the nominee agreement in practice, packaged in a package of underlying master agreements to transfer ownership of land rights indirectly, looks as if it is not in violation of the rules in law.

According to Martin Roestamy, the agreement was made notarially as if it did not violate the prevailing laws and regulations because it was not in the form of a direct and blatant transfer of property rights. Broad agreements intended to transfer proprietary land to the foreigners generally consist of (Roestamy, 2016):

1. Land Owning Agreement and Granting

This agreement recognises that the property registered in his name is not his property but belongs to the foreigners who have provided funds to purchase the property and the building. Furthermore, the agreement of granting power of attorney contains that



the Indonesian government grants irrevocable power to the foreigners to do all legal action against the property and building land.

#### 2. Option Agreement

The Indonesian government gives the option to buy property to the Foreigners because the foreigners provide the funds for the purchase of the property.

#### 3. Lease agreement

In principle, this agreement is governed by the lease term and the options for its extension, along with the rights and obligations of the Indonesian government as a leasing party and the foreigners as the tenant. Usually in this lease agreement contains an indefinite time, so it is not uncommon according to the lease term in law.

#### 4. Power to Sell

This Agreement contains the granting of power of attorney from the Indonesian government with the right of substitution to the foreigners as the beneficiary of the power to do all legal deeds of selling, transferring or transferring the property and building rights.

#### 5. Wills

This agreement states that the Indonesian government granted the property on its behalf to foreigners. This grant is intended that the Indonesian government grants the land of property to the foreigners.

#### 6. Heir's Affidavit

This agreement usually applies in the event of a mixed marriage. The wife (as foreigners) and her child state that her husband (Indonesian) is not the actual owner of the property and building rights registered in her husband's name.

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The nominee agreement involves three parties are: 1) There is an ordering party (Settlor/Trustor), someone who gives orders to others to do deeds in this case borrowing names; 2) The name of the manager or trustee of a trustee based on mutual trust, in this case, the recipient of the order is an Indonesian citizen who is trusted to borrow his/her name; and 3) Beneficiaries, in the case of those receiving benefits are Foreign Nationals who borrow the name of an Indonesian Citizen to acquire land property rights.

The concept of ownership of property ownership on land by Foreign Nationals in the name loan agreement (nominee) can be seen in the following table ([Kolopaking, 2013](#)):



Ownership of land rights by the foreigner through the nominee agreement	Trustor	Trustee	Beneficiary
	Foreigners	Nominee as Legal Owner: Indonesian citizens	Foreigners as Beneficiary Owner

Article 9 paragraph (1) UUPA governs the principle of nationality regulated “only Indonesian citizens can have a full relationship with the earth, water and space” jo Article 21 paragraph (1) of Law No. 5 of 1960 which states that “only Indonesian citizens can have property rights”.

A package of agreements made as the basis of a nominee agreement under Article 26 paragraph (2) of UUPA on the indirect transfer of property rights to foreigners carries the consequence that the agreement is considered never there or null and void and constitutes legal smuggling. Forms of legal smuggling are essentially treaties made to avoid the provisions of Indonesian law so that legal agreements that indirectly or blatantly transfer ownership of property rights in Indonesia to such foreigners do not violate the rules.

Nominee agreements are classified in innominate agreements or nameless treaties, which are born because of the principle of freedom of contract, as they are not stipulated in the Civil Code. The principle of freedom of contract embraced by the Indonesian legal system is not separated from the open system embraced by Book III of the Civil Code. With this principle, one can create a new type of contract previously unknown in the named agreement (Khairandy, 2014). Nominee agreements are born based on freedom of contract-free agreements made by anyone, and the parties are free to determine their contents but still have to pay attention to the provisions in the legislation.

Article 1320 of the Civil Code governs the legality of the Agreement. There are two conditions for the validity of the agreement, namely subjective terms and objective terms.

Subjective Terms:

1. The Deal

The nominee agreement struck between the order giver and the one receiving the order is made based on the parties' agreement. Contracts are made based on the agreement of the parties. The person who gives the order with who receives the order knows the agreement's contents (Anggriani et al., 2019) and agrees to bind them in the deeds made before the authorised official.

2. The prowess of the parties

The prowess of the parties is a condition of the agreement's validity, as stipulated in Article 1320 of the Criminal Code. It regulates whether the parties can take legal action in this case implementing a name loan agreement. The name of the loan agreement in this article is an agreement to borrow a person's name to purchase



land, where the buyer, in this case, is a foreign citizen can not own the rights to land in Indonesia, so he borrowed the name of an Indonesian citizen to obtain the land. Based on the provisions of maturity or randomness, both parties, in this case, are legally capable, to be able to perform legal acts. Still, in terms of the validity of the agreement under Article 1320 of the Civil Code, there are other conditions to be able to say the agreement is legally valid in addition to prowess.

#### Objective Terms:

##### 1. Specific Objects

An agreement must have a clear objective to promise. The land is the object in the nominee agreement made between the giver of the command and the one receiving the order. Land law prohibits the transfer of property ownership to foreigners, so the land that is the object of this agreement is unlawful in violation of the nationality principle of Article 21 paragraph (1) of UUPA.

The object of the agreement in the form of property can become a prohibited object if its ownership is transferred to a foreigner directly or indirectly. Therefore, it can be said that the nominee agreement also violates the objective terms of a particular object (Hetharie, 2019).

##### 2. Halal Reasons

An agreement can be said to be valid and has the force of law when it meets the requirements of *halal* cause/*halal* reason, not contrary to the laws, decency, and public order. When viewed from this award, the reasons in the nominee agreement are contrary to the law relating to the transfer of ownership of the property to foreigners.

The nominee agreement to indirectly transfer ownership and ownership of property rights to a foreigner through a package of agreements contradicts Article 26 paragraph (2) of the UUPA, which reads:

Every sale-purchase, exchange, gift, gift by will and other actions intended to directly or indirectly transfer property rights to a foreigner, to a citizen of which apart from Indonesian citizenship has foreign citizenship or to a legal entity, except those stipulated by the Government as meant in Article 21 paragraph (2), is null and void because the law and the land turned in to the State, provided that the rights of other parties who impose it continue and that all payments that the owner has received cannot be prosecuted back.

The agreement that does not meet the objective requirements resulting in a null and void agreement. *Halal* cause/*halal* reason is closely related to Article 1335 of the Civil Code, which states that: "an agreement or which has been made for a false or prohibited cause has no legal force." According to Subekti, nominee agreements made between foreign and Indonesian citizens in possession of property rights in Indonesia are based on non-*halal* reasons. In the agreement, the nominee is made to acquire property rights on land in Indonesia indirectly by foreigners who are not legally allowed (Kindangen, 2019).





Nominee agreements, in practice, provide the possibility for foreigners to be able to control or own property in Indonesia but are not legally permitted. Nominee agreements are made by the parties with the help of authorised officials regardless of the consequences. Such agreements may harm the granting party if the relationship with the recipient of the order is not good. Because in the civility of the owner of the order whose name is listed in the property title is the legally valid owner, legal certainty and legal protection are only given to the holder of the right to the land whose name is listed in the certificate.

The nominee is a prohibited agreement because of the purpose and purpose of deliberately avoiding provisions in the laws and regulations in Indonesia, especially the UUPA (Yusa et al., 2016). The existence of nominee agreements in Indonesia does not have a strong legal basis and does not guarantee legal protection for the parties concerned. According to Maria S.W. Sumardjono, the position of foreigners in the nominee agreement is very risky and weak for two reasons (Winardi & Sulistyono, 2017): First, even though the nominee agreement meets the subjective requirements set out in Article 1320 of the Civil Code, which is based on the agreement of both parties who are already capable, but the promised cause is prohibited because it violates the provisions of Article 26 paragraph (2) of the UUPA resulting in a null and void nominee agreement. Second, not all agreements apply as binding as laws to the parties that make them, only legally made agreements that bind their makers as law, so the principle of *pacta sunt servanda* as the principle of legal certainty in the nominee agreement cannot be realised. Thus, nominee agreements made based on good faith have no legal force.

When viewed from some rulings related to other nominee agreements, the question that often arises is why the property rights on the land often fall to Indonesian citizens as legal owners instead of falling to the state as stipulated in Article 26 paragraph (2) of the UUPA?

According to Sagung Bunga Mayasaputri Antara, a Judge of Sleman District Court, Certificate is perfect evidence as long as it is not proven otherwise. Hence, the land ownership belongs to Indonesian citizens because it can prove ownership of the land. The land belongs to Indonesian citizens even though the money obtained to buy the land comes from foreigners. The provisions of the law on "land turned in to the state" may occur if the ownership status of an Indonesian citizen as the subject of property rights and the status of the land is legally unclear. For example, the land purchased is disputed land or still state land, then the land can be returned to the state. As long as the requirements as a property holder are fulfilled and the land status is legally clear, then the property rights on the land will be recognised and legally owned by the Citizens of Indonesia.



### **Notary Role in Making Nominee Agreements**

The practice of nominee agreements as ownership of property rights in Indonesia is always made in an authentic deed to obtain legal certainty. It can be used as a perfect proof tool in the event of a dispute in the future. The nominee agreement aimed at transferring property ownership to a foreigner contradicts Article 26 paragraph (2) of the UUPA. The existence of an authentic deed of nominee agreement as a means of proof is null and void (Wijayani, 2018).

Notary/PPAT, in this case, has a strategic role in making a trade agreement and one package of another deed to transfer ownership indirectly from a nominee whose name is listed in the property rights to a foreigner as the real owner as well as as the beneficiary owner. From the point of view of a Notary, Edwin Rusdi, there is still a lot of transfer of land ownership through nominee agreements that occur in major cities with promising investment levels such as Bali and Yogyakarta. The loophole is not only utilised by foreigners. In Yogyakarta, Indonesian citizens of Chinese descent still widely use the nominee agreement to acquire property rights on the land. Several foreigners have come to him to make nominee agreements. Still, by Notary, it is advisable to use the right of use or lease because if the property is made, it will be risky for the parties and the Notary in the event of a dispute that leads to a lawsuit in the Court. In response to the many nominee practices in Indonesia, especially in areas with good investment values such as Bali, Lombok and Yogyakarta, Notary/PPAT Edwin Rusdi argues that:

“... In fact, it is easy if the Indonesian citizen wants to own a property in Indonesia with the right to use or lease rights. The Indonesian citizen can buy the property of an Indonesian citizen, who then the property will be relegated to a right of use and may change the status from property rights to property rights if resold to an Indonesian citizen. Should be a law enforcers such as a notary, lawyer, the consultant should be firm in providing clarity of information that foreigners do not have to worry about owning property in Indonesia because property rights, rental rights, and use rights have the same social function, the difference in use rights and rental rights need to extend so that within many years there is income into the Country such as PNB (Non-Tax State Income)...”

According to FX Sumarja, Indonesians who cannot own property rights to land, business rights, or building use rights are still allowed to purchase rights to the land with the act of sale and sale before the land titles registrar. They are only required to apply for a change in land rights status along with the registration of their transfer of rights. Through the application, the property rights, business rights or the right to use buildings purchased by the foreigners will be relegated to the right of use by the National Land Agency (Sumarja, 2015).

The government and notaries need good cooperation between the public not to facilitate foreigners who want to acquire property rights on land in Indonesia because it violates the laws and regulations and avoids any foreign control over property rights in Indonesia.



In practice, it was found that against the agreement to borrow the name for land ownership by the Indonesian citizens with the court's decision that adjudicates and states that the agreement made is null and void Verdict No. 787/Pdt.G/2014/Pn.Dps and the land turned in to state land. The Basic Agrarian Law in principle expressly prohibits the ownership of property rights to land by foreigners as a reflection and implementation of the nationality principle (Roestamy, 2016).

The nominee is a prohibited agreement because its purpose is deliberately to avoid provisions in the laws and regulations in Indonesia, especially the UUPA (Yusa et al., 2016). This name loan agreement is categorised as the special agreement in Civil Code that is an agreement not named or often referred to as an innominate agreement. This name loan agreement is valid if the agreement meets the agreement's validity, good faith and *halal* cause and does not conflict with existing legislation (Suwanjaya et al., 2020).

### Conclusion

The nominee agreement is contrary to the fourth requirement of Article 1320 of the Civil Code concerning a lawful cause. For the *halal* cause is a cause that is not contrary to the law, not contrary to decency and public order. Because the agreed thing in the nominee agreement is contrary to the UUPA related to the transfer of ownership of land rights to foreigners, the agreement is null and void. Nominee agreements used by people to obtain land with property status in Indonesia are essentially a form of legal smuggling. The embodiment of the nominee agreement through a package of agreements made indirectly transferring ownership to foreigners contrary to Article 26 paragraph (2) of the UUPA, which prohibits any transfer of property rights directly or indirectly to foreigners, resulting in a null and void nominee agreement. It does not meet the objective requirements of the legality of the agreement stipulated in Article 1320 of the Civil Code, and is deemed to never be an agreement, in other words, the giver of the order on the nominee agreement is not protected by law.

The land purchase is the basis for the transfer of land ownership signed by the recipient of the order, in which case the National Land Agency will process the borrowed name. Ownership of the land will be switched based on the transition deed, and the National Land Agency will process the transfer of the name of ownership on the land following the existing transfer deed, i. e. the recipient of the order is an Indonesian Citizen, as stated in the transition deed, although the real money of the land purchase is not money from the landlord.

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