

The Legal Smuggling Through Nominee Agreement & Its Implications for Coastal Beach Management

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Abstract. *This research aims to explore and analyze the impacts caused by legal smuggling through nominee agreements in the management of coastal areas in the Mentawai Islands Regency. As an agreement that is not permitted in Indonesian contract law, nominees certainly have implications, especially in terms of investment practices and land ownership in the Mentawai Islands Regency. Then the Constitution and the Basic Agrarian Law have regulated very strictly regarding land rights and ownership. Historical experience has led Indonesia to establish regulations on land rights and their management in Indonesia. However, the legal facts that occur are that not a few foreign citizens own land in Indonesia, such as in the Mentawai Islands Regency by smuggling the law, including through nominee agreements. The writing method uses an empirical legal research type and is oriented toward primary data sources obtained through interviews and document studies. The survey results show that out of 85 resorts registered with the Tourism, Youth and Sports Office, there are 11 resorts owned by foreign citizens by smuggling the law through nominee agreements which imply being null and void because they are not by the Civil Code. Furthermore, impunity for this legal smuggling means that residents will lose their identity as a customary law community because the land as their local cultural identity has been taken over by foreign countries.*

Keywords: *Foreign; Legal; Nominee; Smuggling.*

1. INTRODUCTION

The amendment to the 1945 Constitution is a reaction to realizing the development of a legal system that is based on the Philosophical Foundation and constitutional foundation. The second paragraph of the opening of the 1945 Constitution emphasizes the direction of the development of a just national legal system to achieve the prosperity of the people, the achievement of which is explicitly regulated in Article 33 Paragraph (3) of the 1945 Constitution which states that "the earth and water and the

natural resources contained therein are controlled by the State and are allocated as much as possible for the prosperity of the people.¹

One of the efforts to realize this prosperity is to utilize the land given by the Creator which is understood as one of the constitutive elements of the founding of the Nation.² Systematically, the legal utilization of land includes land rights and is expressly stated in Article 2 Paragraph (1) of Law Number 5 of 1960 concerning Agrarian Principles (UUPA), that the State has authority over land including.³ First, Regulating and organizing the allocation, use, supply, and maintenance of the earth, water, and space. Second, Determining and regulating legal relations between people and the earth, water, and space. Third, Determining and regulating legal relations between people and legal acts concerning the earth, water, and space.⁴

The State's right to land ownership in Indonesia is based on attributional authority to regulate and manage land for national development and control of land is not interpreted as the State owning the land. However, the State controls to regulate, manage, and maintain the sustainability of land rights and land ownership status in Indonesia.⁵ Furthermore, Article 9 paragraph (1) of the UUPA states that only Indonesian citizens can have full relations with the earth, water, and space. Article 21 of the UUPA explains that only Indonesian citizens can have ownership rights. Through the affirmation of the above Article, the UUPA has regulated that only Indonesian citizens can own land in Indonesia with ownership rights.⁶

The concept of land control is essentially factual, emphasizing the reality at a particular time. Normatively, the concept of control is temporary in the sense that it still requires further legal certainty regarding the relationship between the controlling party and the object controlled. Thus the issue of land control cannot be completely ignored by law. For the legality of land control actions by foreigners, legislation is needed that protects the land control actions in question. Legislation relating to land control by foreigners

¹ Anita Dewi Anggraeni Kolopaking, (2021). *Penyelundupan Hukum Kepemilikan Hak Milik Atas Tanah Di Indonesia*, Bandung: Penerbit Alumni.

² Yosia Hetharie, (2019). "Perjanjian Nominee Sebagai Sarana Penguasaan Hak Milik Atas Tanah Oleh Warga Negara Asing (WNA) Menurut Kitab Undang-Undang Hukum Perdata," *Sasi*, Vol. 25, No. 1. hlm. 27–38, <https://doi.org/doi.org/10.47268/sasi.v25i1.147>.

³ Yosia Hetharie, (2022). "Kepemilikan Tanah Oleh Warga Negara Asing Melalui Perjanjian Pinjam Nama Sebagai Bentuk Penyelundupan Hukum Dalam Hukum Perdata Internasional Kepada Makhluk Hidup Di Bumi Termasuk Manusia Sebagai Tempat Berpijak Dan," *Balobe Law Journal*. Vol. 2, No. 2, Fakultas Hukum Universitas Patimura. hlm: 12–20, <https://doi.org/10.47268/balobe.v2i1.822>.

⁴ Mukmin Zakie, (2022). "Reforma Agraria, Jaminan Perlindungan Hak Atas Tanah," Universitas Islam Indonesia, <https://www.uui.ac.id/reforma-agraria-jaminan-perlindungan-hak-atas-tanah/>.

⁵ Hardianto Djanggih; Salle, (2017). "Aspek Hukum Pengadaan Tanah Bagi Pelaksanaan Pembangunan Untuk Kepentingan Umum," *Pandecta Research Law Journal*. vol 2. No. 7: Universitas Negeri Semarang. hlm. 165–72.

⁶ Dwi Tiara Febrina and Amad Sudiro, (2024). "Kepastian Hukum Kepemilikan Hak Atas Tanah Pasca Perjanjian Pinjam Nama (Nominee Arrangement) Dianggap Batal Demi Hukum," *Unes Law Review*. Vol 6, No. 4. Universitas Eka Sakti: 9898–9903, <https://doi.org/https://doi.org/10.31933/unesrev.v6i4>.

and foreign legal entities that have representatives in Indonesia are regulated in Article 41 and 42 UUPA.⁷

Regulations regarding land rights for foreign citizens in Indonesia are regulated in Republic of Indonesia Government Regulation No. 41 of 1996 concerning Ownership of Residential Homes or Residences by Foreigners domiciled in Indonesia. PP No. 41 of 1996 regulates that use rights for foreigners can occur on state land, freehold land and management rights land. For example, in the provisions of Article 2 Numbers 1 and 2 of PP Number 41/1996, it is stipulated that a residence or residence that can be owned by a foreigner is a stand-alone house built on a plot of land with the right to use state land which can be controlled based on an agreement. with land rights holders and apartment units built on plots of use rights on State land. PP No. 41 of 1996 intends to provide legal certainty for foreigners regarding the possibility of owning a residence or residence domiciled in Indonesia, however in its implementation it has not been able to provide clear laws for foreign citizens regarding property investment in Indonesia, in addition to the emergence of smuggling- smuggling of land laws by foreigners which has not been resolved due to the absence of supervision and follow-up sanctions. Foreign citizens in Indonesia can only have rights to land with the status of usage rights and rental rights. The right to use according to Article 41 UUPA is the right to use and/or collect results from land directly controlled by the State or land owned by another person, which gives the authority and obligations specified in the decision to grant it by the official who has the authority to grant it or in the rental agreement or agreement. lease or land management agreement, as long as it does not conflict with the provisions of this Law.⁸

This shows that foreign citizens do not have the right to own or have ownership rights to land in Indonesia. In this agreement, foreign citizens only have the right to use an agreement, they are not allowed to control and have rights to the land, therefore foreign citizens only have the right to use the building (HGB), even though there is a period that must be obeyed, which is around 20 years, which can be extended to 25 years and so on if foreign citizens violate the period and want to own it forever, it is called legal smuggling.⁹

Legal Smuggling is an act of setting aside the law that should apply to a legal act. Legal smuggling must be accompanied by deliberate intent and the act of setting aside the law that should apply is carried out unusually, resulting in the cancellation of the

⁷ Hidayati Fitri; Ulya Atsani; Nurhikma, (2022). "Ekspansi Kepemilikan Warga Negara Asing Melalui Perjanjian Nominee Dalam Pengelolaan Kawasan Pesisir Di Kabupaten Kepulauan Mentawai" Batusangkar, https://litapdimas.kemenag.go.id/old/file_penelitian/laporan_harian/lapantara-210726-57253.pdf.

⁸ Andina Damayanti Saputri, (2015). "Perjanjian Nominee Dalam Kepemilikan Tanah Bagi Warga Negara Asing Yang Berkedudukan Di Indonesia (Studi Putusan Pengadilan Tinggi Nomor: 12/PDT/2014/PT.DPS)," *Jurnal Repertorium*. Vol. II, No. 2. Universitas Sriwijaya. hlm. 96–104, <https://media.neliti.com/media/publications/213115-perjanjian-nominee-dalam-kepemilikan-tan.pdf>.

⁹ I Komang Gede Suwanjaya; I Nyoman Sumardika; Ni Made Puspasutari Ujianti, (2020). "Perjanjian Pinjam Nama Sebagai Bentuk Kepemilikan Tanah Oleh Warga Negara Asing Di Bali," *Jurnal Konstruksi Hukum*. Vol 1. No. 2. Universitas Marmadewa. hlm. 384–87, <https://doi.org/https://doi.org/10.22225/jkh.1.2.2544.384-387>.

legal act in question.¹⁰ This practice of legal smuggling is rampant in terms of land ownership in Indonesia through a nominee agreement mechanism, in the field of land ownership it means that legally the business uses the name of an Indonesian, but it is a foreign citizen who controls the land.¹¹

Legal smuggling in the agrarian sector through nominee agreements is rampant in the Mentawai Islands Regency. This cannot be separated from the role of the Regional Government and the Role of Notaries/Land Deed Making Officials (PPAT). Because in reality, the majority of foreign nationals and Indonesian citizens use the services of Notaries or Land Deed Making Officials (PPAT) to validate nominee agreements and form the deeds desired by the parties. The deeds that have been made by the Notary/PPAT are adjusted to the mutual agreement on the analyses described by the Notary/PPAT to strengthen and bind the parties.¹² In Mentawai Islands Regency, 85 resorts function as accommodation for tourists, with 47 surfing facilities and 38 other facilities. The resorts are partly owned by Indonesian citizens, but there are also foreign nationals who are registered as owners.¹³

Such practices certainly violate the basic provisions of land ownership in Indonesia which causes anxiety for all elements, including the Regional Government because each permit submitted has met all the requirements, but behind these requirements, there are interests of certain parties for land ownership in the Mentawai Islands Regency which should not be possible. Second, the local community of the Mentawai Islands Regency is worried that they will lose their identity as a local community if, in the next few years, their land is controlled by foreign citizens. Meanwhile, the anxiety for academics is the practice of legal smuggling which has an impact on legal rape and is not in line with basic legal values. So this problem requires researchers to research to find the root of the problem and solutions so that there are no deviations in investment practices that contain elements of legal smuggling through nominee agreements.

2. RESEARCH METHODS

This research is a type of empirical legal research, namely research that aims to examine the principles of law, legal systematics, legal synchronization, legal history, and comparison. Empirical legal research is to identify and conceptualize law as a real and functional social institution in a life system that patterns.¹⁴ Contextually, this

¹⁰ Kevin Johanes, (2021). "Forms of Evasion of Law and Its Legal Consequences In Nominee Agreement Practice (Case Study Supreme Court Decision Number 302 PK/PDT/2011)" Universitas Pelita Harapan.

¹¹ Siti Maryam ; Andri Brawijaya, (2023). "Penyelundupan Hukum Investasi Asing Langsung Di Indonesia," *Jurnal Ilmiah Living Law*. Vol 15, No. 2. Universitas Djuanda. hlm. 157–65.

¹² Ulya Atsani; Roni Efendi; Hidayati Fitri; Nurhikma; Heby Rahmatul Utamy, (2023). "Perjanjian Nominee Dalam Pemanfaatan Kawasan Pesisir Pantai Di Kabupaten Kepulauan Mentawai," *Jurnal Masyarakat Indonesia*. Vol 49, No. 1. Lembaga Ilmu Pengetahuan Indonesia. hlm. 25–34.

¹³ Hidayati Fitri; Ulya Atsani; Nurhikma, (2022) "Ekspansi Kepemilikan Warga Negara Asing Melalui Perjanjian Nominee Dalam Pengelolaan Kawasan Pesisir Di Kabupaten Kepulauan Mentawai."

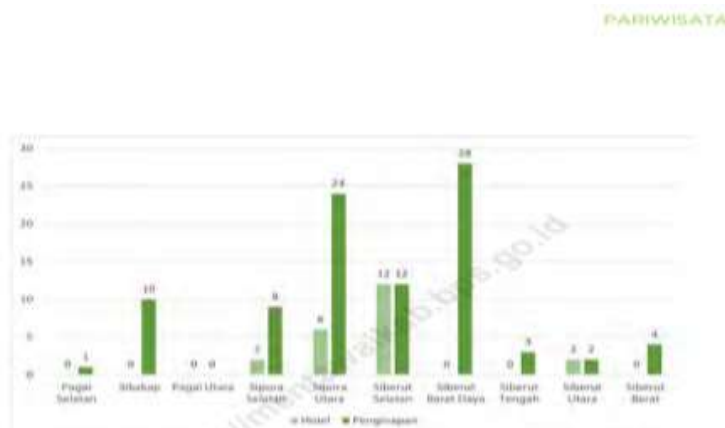
¹⁴ Soejono Soekanto dan Sri Mamudji, (2011). *Penelitian Hukum Normatif*, Jakarta: Rajawali Pers. hlm. 11.

research was chosen to identify the implications of legal smuggling practices through nominee agreements on coastal area management in the Mentawai Islands Regency. This research uses qualitative typology.¹⁵ namely, data obtained from primary data sources, the Head of the National Land Agency, the Head of the Legal Section, the Head of Licensing and Investment Service and One-Stop Integrated Services, the Head of The Department of Tourism, Youth and Sports of the Mentawai Islands Regency, Notaries and Foreign Investors are narrated qualitatively to obtain holistic and comprehensive results.

3. RESULT AND DISCUSSION

The Mentawai Islands are one of the tourist destinations, both for domestic and foreign tourists, especially for surfers. The Mentawai Islands are often referred to as a paradise for surfers because the waves are suitable for surfing. The Mentawai Islands Regency has several types of tourist attractions, including 22 natural panorama tours, 150 marine tours, 9 water source tours, and 13 cultural tours.¹⁶

Meanwhile, based on data from the Central Statistics Agency of the Mentawai Islands Regency in 2022, the number of accommodations including resorts can be seen in the table below.¹⁷



Sumber/Source: BPS, Pendataan Potensi Desa (Podes)/ BPS – Statistics Indonesia, Village Potential Data Collection

Gambar Figures 7.1 Jumlah Hotel dan Penginapan menurut Kecamatan di Kabupaten Kepulauan Mentawai, 2019-2021
Number of Hotels and Inns by District in Kepulauan Mentawai Regency, 2019-2021

The graph above explains the amount of investment related to hotels and lodgings in the Mentawai Islands Regency which is managed, among other things, with a legal smuggling approach through nominee agreements. In detail, these figures can be seen in the following table.¹⁸

¹⁵ Dkk Ulya Atsani, (2021). "Perlindungan Hak Keperdataan Penghayat Sabulungan Sebagai Penganut Kepercayaan Di Luar Agama Resmi Di Kabupaten Kepulauan Mentawai".

¹⁶ BPS Kabupaten Kepulauan Mentawai, (2021). "Statistik Daerah Kabupaten Kepulauan Mentawai Tahun 2021," Mentawai.

¹⁷ Badan Pusat Statistik Kabupaten Kepulauan Mentawai, (2024). "Kepulauan Mentawai Dalam Angka 2024," vol. XX. Mentawai.

¹⁸ Badan Pusat Statistik, (2022). "Kepulauan Mentawai Dalam Angka 2022," Mentawai.

<i>Subdistrict</i>	<i>Hotel</i>			<i>In</i>		
	2019	2020	2021	2019	2020	2021
(1)	(2)	(3)	(4)	(5)	(6)	(7)
South Pagai attitude	-	-	-	-	-	1
North Pagai	-	-	-	-	-	-
South Sipora	1	1	2	9	9	9
North Sipora	2	6	6	24	24	24
South Siberut	8	12	12	12	12	12
Southwest Siberut	-	-	-	28	28	28
Central Siberut	-	1	-	2	2	3
North Siberut	-	3	2	2	2	2
West Siberut	-	-	-	4	4	4
Mentawai Islands	11	23	22	91	91	92

Accommodation data based on the type of tourism business in the Mentawai Islands Regency in 2021, which the author processed based on data from the Tourism, Youth and Sports Service.¹⁹ There are 85 resort business units (hotels and inns). From the 85 data, the author analyzed and several businesses used nominee agreements, namely:

No	Location	Number of Resorts	Information
1	Southwest Siberut	8	<i>Nominees</i>
		11	<i>Illegal</i>
2	South Siberut	0	<i>Nominees</i>
		6	<i>Illegal</i>
3	West Siberut	0	<i>Nominees</i>
		2	<i>Illegal</i>
4	North Siberut	0	<i>Nominees</i>
		4	<i>Illegal</i>
5	South Sipora	1	<i>Nominees</i>
		7	<i>Illegal</i>
6	North Sipora	2	<i>Nominees</i>
		19	<i>Illegal</i>
7	South Pagai	0	<i>Nominees</i>
		4	<i>Illegal</i>
8	attitude	0	<i>Nominees</i>
		5	<i>Illegal</i>
Amount		<i>Nominees: 11</i>	<i>Illegal: 58</i>

From the table above, it can be seen that legal compliance in terms of investment and capital investment is still very low, in 2022, out of 85 resorts in the Mentawai Islands Regency, only 16 resorts were managed based on legal investment mechanisms. Meanwhile, 11 resorts were indicated to have carried out legal smuggling through nominee agreements and 58 illegal resorts. The forms of nominee agreements can be identified among the forms of unwritten nominee agreements and written nominee

¹⁹ Dinas Pariwisata Pemuda dan Olahraga Kabupaten Kepulauan Mentawai, (2022). "Akomodasi Berdasarkan Jenis Usaha Wisata Di Kabupaten Kepulauan Mentawai" Mentawai.

agreements. In addition, legal smuggling also occurs in land ownership by foreign citizens in the Mentawai Islands Regency through foreign investment, mixed marriages, and work agreements.²⁰

The provisions regarding agreements are regulated in Article 1313 of the Civil Code, an agreement is an act by which one or more people bind themselves to one or more other people.²¹ This event certainly gives rise to a legal relationship between the two parties which is called an agreement. Where there is a relationship between an agreement and an obligation, the agreement will issue an obligation.²² Agreements are the source of obligations because obligations are mostly issued by an agreement. Agreements are also a source of national land law in addition to statutory regulations and customary law and customary law.

The requirements for a valid agreement are regulated in Article 1320 of the Civil Code, namely: The agreement of those who bind themselves, the capacity to make an agreement, a certain thing, a lawful cause. Of the 4 requirements, they can be distinguished into subjective requirements, if these requirements are violated, the agreement can be canceled.²³

Agree those who bind themselves, this agreement is regulated in Article 1320 paragraph (1) of the Civil Code. The agreement of the statement of will between a foreign citizen and an Indonesian citizen in the Mentawai Islands Regency is marked by the making of a written agreement, either with an agreement made before an official who makes the deed or an underhand agreement made only by the parties. Among the existing agreements are nominee agreements, rental agreements sales agreements, and work agreements.

Ability to make a contract, every human being, both Indonesian and foreign nationals, is a bearer of rights (legal subjects) who has the rights and obligations to carry out legal acts. Foreign nationals residing in the Mentawai Islands Regency generally have a residence permit. Limited residence permits and permanent residence permits are one of the requirements for foreign nationals to be able to carry out legal acts in the Mentawai Islands Regency. This is by Article 1 Numbers 28 and 29 of the Mentawai Islands Regency Regional Regulation Number 3 of 2012 concerning the implementation of Population Administration and Article 23 paragraph 3 of the Republic of Indonesia Law Number 25 of 2007 concerning Investment.

²⁰ Hidayati Fitri; Ulya Atsani; Nurhikma, (2022). "Ekspansi Kepemilikan Warga Negara Asing Melalui Perjanjian Nominee Dalam Pengelolaan Kawasan Pesisir Di Kabupaten Kepulauan Mentawai."

²¹ Hebby Rahmatul Roni Efendi, (2020). "Perspektif Ius Naturale Terhadap Upaya Penyelesaian Wanprestasi Pada Lembaga Pembiayaan Konsumen," in *Perspektif Ius Naturale Terhadap Upaya Penyelesaian Wanprestasi Pada Lembaga Pembiayaan Konsumen*, ed. Serina Untar. Fakultas Hukum Universitas Tarumanegara, hlm. 1–17.

²² Farhana Yahya Abdullah and Noor Lailatul Izza, (2024). "The Effectiveness of Cyber Notary Development Using Barcodes on Notarial Deeds in Indonesia," *Jurnal Akta* Vol. 11, No. 3. Fakultas Hukum Universitas Sultas Angung. hlm. 651–61, <https://doi.org/10.30659/akta.v11i3.39749>.

²³ Endah Pertiwi, (2018). "Tanggung Jawab Notaris Akibat Akta Nominee Yang Mengandung Perbuatan Melawan Hukum Oleh Para Pihak," *Jurnal IUS*. Vol VI, No. 2, Universitas Mataram. hlm. 246–58.

Objective conditions, if these conditions are violated then the agreement is null and void, include: A certain thing, The object of the agreement is the performance (the main point of the agreement). Performance is what is the debtor's obligation and what is the creditor's right. This performance consists of positive and negative actions. Performance consists of giving something, doing something, and not doing something (Article 1234 of the Civil Code). A lawful cause, cause or causa is interpreted as the content of the agreement, regarding the content of the agreement must be halal meaning not contrary to the law, moral norms, and public order, referring to the practice of Nominee agreements related to the control of assets that are not reasonable by Foreigners such as borrowing a name by giving a fee to residents whose names are rented, therefore this name borrowing agreement is a form of legal smuggling. A nominee agreement meets the subjective requirements of an agreement but violates the objective requirements of an agreement because the cause or reason is false or prohibited because the agreement results in a violation of the UUPA. Furthermore, in Article 1335 of the Civil Code (KUHPerdota), it is formulated that an agreement made with a false or prohibited cause has no legal force.

In Indonesian legislation (Civil Code) there is no specific regulation regarding this name borrowing agreement because this name borrowing agreement is an agreement made by a foreign citizen with an Indonesian citizen. This name borrowing agreement is included in a special agreement in the Civil Code, namely an anonymous agreement often referred to as an innominate agreement.

The binding power of land ownership in Law Number 5 of 1960 concerning Basic Agrarian Principles. Nominee agreements in the land sector allow foreign nationals to own land, this is prohibited by Law Number 5 of 1960. However, when further analyzed regarding Article 26 paragraph (2) of the UUPA which states that: "Every sale, exchange, grant, gift with a will and other acts intended to directly or indirectly transfer ownership rights to a foreigner, to a citizen who in addition to Indonesian citizenship has foreign citizenship or to a legal entity, except as determined by the Government referred to in Article 21 paragraph (2), is void by law and the land falls to the State, with the provision that the rights of other parties that burden it continue and all payments that have been received by the owner cannot be claimed back". So the agreement agreed to by both parties is automatically void by law and by the provisions of Article 26 of the UUPA, the land falls into the hands of the state.

Thus it can be said that the name borrowing agreement (Nominee) was made based on bad faith and is a form of legal smuggling where substantively the provisions in Article 9, Article 21, and Article 26 paragraph (2) of the UUPA cannot be deviated from.

Because a nominee agreement is an agreement that is invalid because it violates the provisions of statutory regulations, in particular in this case the provisions of Article 21 paragraph (1) and the provisions of Article 26 paragraph (2) of the UUPA, a nominee agreement is an agreement that is void from the start, because the nominee agreement was made invalidly, so it does not have binding legal force.

4. CONCLUSION

The provisions on nominee agreements are not regulated in the Civil Code and UUPA, but this nominee agreement is included in a special agreement in the Civil Code with the terminology innominate. Innominate cannot be enforced because it does not meet the lawful cause in Article 1320 of the Civil Code, so the implication is that because it is contrary to the Law, all forms of agreements based on nominees are invalid and null and void. Thus, all aspects of civil law including the management of coastal areas in the Mentawai Islands Regency which use the nominee mechanism are illegal, and tolerating the practice of legal smuggling through nominee agreements will have an impact on the loss of the identity of the customary law community in the Mentawai Islands Regency.

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