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Legal Smuggling Regarding Land Ownership Between Indonesian Citizens and Foreign Citizens Through Name Borrowing Agreements

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ABSTRACT:
Land ownership is a prevalent investment choice in Indonesia. However, the regulation stated in Law Number 5 of 1960 concerning Basic Agrarian Principles, which restricts land ownership rights exclusively to Indonesian citizens, is increasingly circumvented through indirect foreign ownership. The "name lending" agreement has become a popular mechanism for foreign nationals to acquire land rights indirectly. This study aims to examine the emergence of name lending agreements as a form of legal smuggling and propose procedures to mitigate this practice to uphold the integrity of land ownership regulations. Using a doctrinal research method and secondary data analysis, this research identifies the root cause of name lending agreements as the disparity between the land ownership rights granted to Indonesian citizens versus foreign nationals. The findings suggest that addressing this issue requires specific legal provisions and the enforcement of strict sanctions against violators. The implications of this study emphasize the need for a robust legal framework to deter name lending agreements and protect the principles of land ownership in Indonesia.

Keywords: legal smuggling, land ownership, loan agreement.

INTRODUCTION

Land ownership is an inherent right of Indonesian society. This can be seen from the fact that every Indonesian citizen has the right to control land in Indonesia, especially with land ownership rights, which are the strongest rights that can be owned by an individual in Indonesia (Kolopaking & SH, 2021). This can be seen in Article 21 of Law Number 5 of 1960 concerning Basic Agrarian Principles (UUPA). The existence of land is important to fulfill the needs of the community both in terms of shelter and food and for this reason the existence of land rights will ensure that the needs of the community will be fulfilled. In addition to fulfilling shelter and food, ownership of land is also used as an investment vehicle for the community in the long term because there is no period of ownership and it is hereditary (Suwanjaya et al., 2020).

Land rights themselves are divided into several types. These rights are then divided into property rights, building rights, business rights, use rights, and others (Amsani, 2013). Each land right gives a person or entity the authority to use the land as needed. Among these rights, Indonesian citizens can have all types of rights, especially land ownership rights which are specifically for Indonesian citizens. For this reason, the existence of land ownership rights that are not limited in duration and can be passed on to descendants has led to the popularity of land ownership. The absence of a period of ownership of land rights has led to the emergence of various indirect ownership procedures for the land. This is done by parties who cannot own it, namely by foreign nationals.

Land ownership indefinitely will help people ensure that their investment will be profitable. Indefinitely, land can be utilized in various fields such as plantation, tourism, residence and others. As time goes by, many foreign nationals come to Indonesia and want to control land for one reason or another. Against this desire, foreign nationals actually have land rights in the form of usage rights and lease rights. However, the right of use and the right of lease have a limited period of ownership with their own requirements that are more complicated and at a higher cost due to the existence of the time period. Because of this, there is legal smuggling by entering into a name borrowing agreement. The name loan agreement itself arises due to the principle of freedom of contract contained in the Civil Code (KUHPer) (Achmad & Bambang Eko Turisno, 2016).

The principle of freedom of contract provides freedom for people to make agreements that will bind them as parties. However, in making an agreement there are still conditions that must be considered to ensure that the agreement can be considered valid. This is stated in Article 1320 of the KUHPer, namely:

1. Agreement between the parties;
2. Capacity of the parties;
3. A specific subject matter; and
4. A lawful cause.

These conditions are divided into two, namely subjective conditions and objective conditions. Subjective conditions are conditions attached to individuals, namely the parties agree and are capable of carrying out certain legal actions (Irawan et al., 2024). Meanwhile, objective conditions are conditions related to the contents of the agreement made, namely that there are things that are promised and these actions are in accordance with existing regulations (Widjaja & Muljadi, 2021). An agreement will be valid if all of these conditions have been met cumulatively, for subjective conditions that are not met, it can be canceled while for agreements that do not meet the objective conditions will be null and void (Salim, 2021).

The agreement itself is divided into two types, namely obligatory and non-obligatory agreements, namely agreements that require delivery or payment and those that do not require it. In obligatoir agreements, named agreements and unnamed agreements appear, named agreements themselves are agreements that are specifically regulated in the law while unnamed agreements are agreements that are not regulated in the law. Apart from that, there are also mixed agreements which are a combination of two or more named agreements (Oktavira, 2024).

The agreement itself has different evidentiary powers, not in terms of the type of agreement named or not but on the form of the agreement. Written agreements can be made in the form of deeds under hand and authentic deeds to have evidentiary power. An authentic deed is a deed made in the form prescribed by law or before a public official authorized to do so. The authentic deed then provides perfect evidentiary power about what is contained in it. Meanwhile, a deed under the hand is a deed signed under the hand without the intermediary of a public official. The proof of a deed under the hand is not the same as an authentic deed made before a public official.

A public official who can make authentic deeds is a Notary. Notaries are public officials who are authorized to make authentic deeds. The authority of notaries in making authentic deeds is contained in Article 15 of Law Number 2 of 2014 concerning Amendments to Law Number 2 of 2004 concerning Notary Offices which states that notaries are authorized to make authentic deeds regarding all acts, agreements and stipulations required by laws and regulations and / or desired by those concerned to be stated in an authentic deed. So it can be said that the deed made by a notary is an authentic deed that has perfect evidentiary power (Sihaan & Hasanah, 2023).

The role of a notary relating to the making of authentic deeds that have perfect evidentiary power results in a situation where a name borrowing agreement is made by a notary or with the linkage of a notary. Some parties related to name borrowing cases will contact a notary to make a deed of statement. The emergence of the name borrowing agreement itself exists because of the principle of freedom of contract which frees the parties to make agreements relating to their wishes. The absence of rules regarding name borrowing agreements causes legal smuggling in the land domain (Saraswati & Westra, 2018).

A name borrowing agreement is an agreement used to borrow the name of an Indonesian citizen by a foreign citizen (Sekarmadji et al., 2022). The name borrowing agreement will contain an agreement between the parties regarding the desire of foreign citizens to buy a plot of land with the status of property rights by borrowing the name of an Indonesian citizen at the cost of purchasing land from foreign citizens (Ardiansyah & Solihah, 2020). However, the name borrowing agreement itself actually does not only occur between Indonesian citizens and foreign citizens, there is also the use of name borrowing agreements between fellow Indonesian citizens (Naiborhu, 2024). In these activities, all the necessary costs of purchasing land, making a deed of sale and purchase and others will be borne by Foreign Citizens. The land sale and purchase deed will then consist of the seller of the land and the Indonesian citizen whose name is borrowed. After the sale and purchase is completed, the certificate will be transferred to the Indonesian citizen.

The granting of power of attorney to a foreign national after these processes have been carried out can be done by means of a lease agreement with a long period of time, a lease agreement with an unreasonably cheap value, or by power of attorney. The making of the lease agreement can be made underhand with imperfect evidence and made with an authentic deed before a notary. It is usually aimed at land ownership through land ownership rights and land ownership with building use rights which actually cannot be owned by foreign nationals (Sumardjono, 2017).

The implementation of an ordinary name borrowing agreement consists of the main agreement and its implementation. The main agreement in question is a statement that the purchase is made with funds from foreigners using the name of an Indonesian citizen. Then the implementation agreement is made, namely by making a lease agreement or power of attorney. Name loan agreements are often used in areas that have great potential for investment or areas that are popular with foreign nationals. Many name loan agreement activities occur in Bali Province due to its high level of popularity among foreign nationals.

The name borrowing agreement itself is an unnamed agreement that arises due to the principle of freedom of contract. There are no specific rules governing its existence in the land sector while in the field of share ownership it is clearly prohibited in Article 33 paragraph (1) of Law Number 25 Year 2007 on Capital Investment (Capital Investment Law). There are no rules stating that the prohibition and sanctions against making such agreements in writing cause great losses to the state, especially in terms of land tenure by foreign nationals and loss of tax revenue in the event that the loan agreement is made by foreign nationals with underprivileged Indonesian citizens.

The name borrowing agreement will actually be null and void if brought to court because basically the name borrowing agreement does not fulfill the element of the halal cause clause (Saleh, 2020). This is because the act of granting indirect ownership or control rights to foreigners is not in accordance with the UUPA. Even ownership of freehold land cannot be owned by Indonesian citizens who marry foreigners without making a marriage agreement.

One of the cases related to the use of a name borrowing agreement is Decision Number 274/Pdt.G/2020/PN Dps which occurred between Bella Isa Widyalaksita as the Plaintiff against Andrew Michael Lech Krzywniak as the 1st Defendant, Matthew Charles John Tablot as the 2nd Defendant, and Njoman Sutjining, S.H. as the 3rd Defendant (Rosa & Cahyono, 2023). In the case, several deeds were made in relation to the implementation of the name loan agreement. Some of these agreements were a deed of declaration, a deed of lease and a deed of binding agreement for sale and purchase. In these deeds, a statement was made that the Plaintiff purchased the land with funds from Defendant I and Defendant II. Then to carry out the act of indirect ownership, Defendant I and Defendant II made a deed of lease with the Plaintiff for a period of 25 years and immediately followed up with a deed of lease extension for 25 years even though the term in the first deed had not yet expired, The act of making a deed of declaration stating that the land was purchased with money from a foreign national and on the same date a lease deed was immediately made between the two parties could give rise to indications that there was a possibility of a loan agreement between the parties. In this decision, the Plaintiff felt that he had been deceived and felt forced to sign the agreement. The practice of leasing land for an excessively long period of time or by extending the lease on the same day the lease is executed is an indication of improper utilization of land rights and is one of the mechanisms used to grant foreign nationals land rights.

Based on the above background, the purpose of this research is to analyze in depth the factors causing the emergence of name lending agreements as a form of legal smuggling in land ownership in Indonesia. The benefits of this research are expected to contribute to the development of agrarian policy in Indonesia by providing applicable and law-based recommendations in handling name borrowing agreements. This research is also expected to serve as a reference for policy makers, academics and legal practitioners to understand the legal implications and appropriate mechanisms in preventing and handling legal smuggling related to land ownership by foreign national.

RESEARCH METHODS

To conduct this research, the research method used is a doctrinal research method that uses secondary data. Secondary data that will be used consists of laws, decisions, books, and others. The technique used is a literature study. The material collection technique is carried out by studying and exploring primary, secondary, and tertiary legal materials related to this research. In this case, the decision was obtained from the Supreme Court website and other book sources were obtained from books around the author.

RESULTS AND DISCUSSION

The Presence of 'Borrowed Name' Agreements as a Means of Legal Smuggling Regarding Land Ownership by Foreign Nationals

Indonesia's growing tourism has led to the desire for land ownership by Indonesian Citizens, Indonesian Legal Entities, and even for Foreign Citizens. With the ownership of land by these parties, business can be carried out both with the construction of hotels, villas and attractions related to the increasing presence of tourists. However, ownership of land rights cannot be owned by everyone but only some rights can be owned by each party. In the case of Indonesian citizens, they have an advantage in that they can own various types of land rights without thinking about the period of land ownership. However, this privilege does not apply to legal entities and foreign nationals.

Ownership of land in Indonesia is also prioritized to the state, Indonesian citizens, and Indonesian legal entities (Febrina & Sudiro, 2024). Foreign nationals are granted land rights in the form of the right of use and the right to lease land. Hak Pakai is the right to use and/or collect products from land directly controlled by the State or land owned by others, which gives the authority and obligations specified in the decision to grant it by the official authorized to grant it or in an agreement with the owner of the land which is not a lease agreement or land processing agreement. The right of use itself is granted for a certain period of time or as long as the land is used for certain purposes or for free with payment or provision of services. The object of the right of use is state land, managed land and freehold land (Wahyuni, 2024).

The granting of the right of use to foreign nationals is done for a certain period of time. The term of the right of use itself ranges from 25 years to 30 years based on the type of land on which the right of use is imposed. State land and managed land can be charged with the right of use for a period of 30 years and extended for 20 years. Then, if necessary, it will be renewed again. For hak pakai on freehold land, it can only be imposed for 30 years and cannot be extended, only renewed.

In addition to the right of use, the right of lease is a right that can be owned by foreign nationals to control a land. The right to lease has its own period of time for its use and for foreign nationals who want to have the right to lease, then they must make a payment to the landowner with the nominal and period specified in their agreement. The act of leasing land is carried out between the landowner in the form of an individual Indonesian citizen and the tenant, who is a foreign citizen in this case. This is because the state cannot lease land and only landowners can, namely Indonesian Citizens. However, in terms of law, there are no specific rules stating the term of the lease agreement.

The two land rights granted to foreign nationals both have a period of time and must be extended or renewed. These rights appear to be different from ownership rights which do not have a period of ownership. Due to the difference between these rights, many foreign nationals want to have land rights that do not need to be extended, namely land ownership rights. To obtain this right, a name loan agreement is made. By using the name of an Indonesian citizen, he can ensure that the land he owns will not lose its rights due to a certain period of time.

The implementation of a name loan agreement is carried out in various procedures, some of which are land ownership and power of attorney agreements, option agreements, lease agreements, power of sale, and testamentary grants (Arsela & Nelson, 2021). One of the documents commonly used in a name loan agreement is to make a statement before a notary or make a statement under the hand. The statement will contain a statement that the purchase of land was made by an Indonesian citizen with funds from a foreign citizen and for this action the Indonesian citizen acknowledges that the purchase of the land is actually not for himself but for a foreign citizen and the land is actually the property of the foreign citizen (Haspada, 2018).

The existence of a time period causes the emergence of legal smuggling with the name borrowing agreement. However, apart from the time period, the cause of the name borrowing agreement can also be the ease of the process of applying for rights and certainty of land ownership. As mentioned for land rights owned by foreigners that can be obtained with the right of use and the right of lease, there is a possibility that the extension or renewal of the right cannot be done for one reason or another either from the government or from the individual who leases or grants the right of use.

The application process and requirements that need to be met to obtain a right of use on government land are also more difficult due to the need that the party who wants to obtain the right of use must cultivate and utilize the land. In the event that the land is not utilized, the possibility of extension is not possible. Granting the right of use on state land also requires a more complicated process due to the need for a decision to grant the right by the Minister. The first step a foreigner must take to obtain a right of use on state land is to fulfill Article 1 of Government Regulation No. 18 of 2021 on Management Rights, Land Rights, Flat Units, and Land Registration which states that his/her presence provides benefits, conducts business, works, or invests in Indonesia. If he does not fulfill that explanation, then he cannot be granted the right of use on state land.

The reasons mentioned above are the causes of the emergence of name borrowing agreements. There is no specific regulation on name lending agreements in the land domain itself. However, the government or at least the Supreme Court is aware of the existence of name borrowing agreements. This can be seen from Supreme Court Circular Letter Number 10 of 2020 concerning the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber in 2020 as Guidelines for the Implementation of Tasks for the Court (SEMA 10/2020). In SEMA 10/2020, it is stated that in order to use name borrowing, the party whose name is listed on the certificate is the owner of the land, no matter whose assets the purchase was made with.

The existence of SEMA 10/2020 is continuous with the validity requirements of the agreement relating to the halal cause clause. In the case of a name loan agreement, the use of a name loan agreement which is an act of legal smuggling is an act that is not in accordance with the law and has indirectly violated Article 9 and Article 21 of the UUPA (Hetharie, 2022). Therefore, by not fulfilling the lawful cause clause, the name borrowing agreement will be null and void and deemed to have never existed. Therefore, the statement made in the name borrowing agreement cannot bind any party in it. Therefore, the name borrowing agreement is invalid after being brought to court, as in the case of Denpasar District Court Decision Number 274/Pdt.G/2020/PN Dps.

However, the presence of SEMA 10/2020 still does not stop the existence of this name borrowing agreement activity. Instead, there is still an act of name borrowing agreement. This is due to the desire of foreign nationals to have land rights that cannot be owned by them. Foreigners are not satisfied with the right to use and the right to rent that they can have because of the time period, long process and larger funds. Therefore, the name borrowing agreement emerged among the community.

Handling Mechanisms for the Emergence of 'Borrowed Name' Agreements as a Means of Legal Smuggling in Indonesia.

The rise of the desire to control land causes various procedures for smuggling the law of indirect control of land by foreign nationals to emerge. Various ways are used by foreign nationals to control land in Indonesia, both from leases and powers of attorney. The absence of a special regulation that is useful to give fear to the perpetrators and the lack of public knowledge of the wrongness of this action causes the loan agreement to be rampant among the public.

The absence of a special regulation causes parties to look for loopholes to obtain land titles in Indonesia even though they cannot own them. This act of legal smuggling occurs because the implementation of the name borrowing agreement is carried out by granting land rights indirectly to foreign nationals with several documents. The documents will simultaneously show an indirect transfer of rights because the Indonesian citizen is only borrowed to own land by a foreign citizen.

To deal with the phenomenon of name borrowing agreements that have emerged in the community, various procedures are needed. So far, many name borrowing agreements have appeared in the courts and the courts have canceled the agreements related to name borrowing. However, there is no negative impact imposed on the parties involved or the party facilitating the action.

In 2020, the Supreme Court issued SEMA 10/2020 in which there are guidelines for the panel of judges if they find the phenomenon of name borrowing agreements in the lawsuit received. In SEMA 10/2020, it is stated that in the event that a name borrowing agreement occurs, the legal owner of the land plot that is the object of the dispute is the party whose name is listed in the land certificate. For this reason, SEMA 10/2020 states that no matter where the funds used to purchase the land come from, the original owner is still the name listed on the certificate so that in the phenomenon of name borrowing agreements, the legal owner is an Indonesian citizen.

With the existence of SEMA 10/2020, it can be said that it is a step to deal with name borrowing agreements among the community. This is if the name borrowing agreement is brought to the court. The name borrowing agreement brought to the court will be null and void because basically the name borrowing agreement does not comply with the validity of the agreement, especially in terms of objective requirements. For this reason, the name loan agreement will be considered to have never existed and not binding on the parties, so that the foreign national will suffer losses. However, there is no other regulation regarding the act of name borrowing agreement in the land domain.

When viewed in the realm of share ownership, it can be seen that the prohibition of name borrowing agreements already exists as stated in Article 33 of the Investment Law. The Investment Law states that domestic investors and foreign investors are prohibited from making a statement confirming that the ownership of shares in a limited liability company belongs to another party. Therefore, in terms of share ownership, there is no name borrowing agreement allowed. This is different from the case of name borrowing agreements in land cases.

The use of name borrowing agreements in the land domain has occurred for a long time. There are several cases regarding name borrowing agreements that have occurred as long ago as 2001. One of these cases is the case in Tanjung Pinang District Court Decision Number 45/Pdt.G/2020/PN Tpg. In that case, there was an act of name borrowing agreement that began in 2001 through a Statement Letter and Power of Attorney. In that case, the Plaintiff as an Indonesian citizen stated that he was only borrowed by the Defendant I, a foreign citizen. The name borrowing agreement was still valid at the time of the lawsuit, because in order to cancel the letters, the Plaintiff filed a lawsuit against the Defendants as evident in the Decision.

The court's decision invalidated the declaration and power of attorney made for the purpose of executing the name borrowing agreement. This was because the affidavit and power of attorney demonstrated the borrowing of the name by giving Defendant I the power to take possession of the freehold land. Many other cases have arisen relating to the use of name borrowing agreements in the land domain. However, to date there are no specific rules prohibiting the existence of name borrowing agreements in the land domain in Indonesia.

SEMA 10/2020 does state that in the case of a name borrowing agreement, the original owner is the party whose name is listed in the land title certificate. For this reason, with the existence of SEMA 10/2020, it indirectly invalidates the name borrowing agreement and gives rights to Indonesian citizens and will certainly harm foreign citizens. With the existence of SEMA 10/2020, it may be expected that foreign nationals will hesitate to enter into name borrowing agreements because they will not be protected from the law and suffer losses if brought to court. However, it should be noted that the indirect annulment action will only apply if the case is brought to court.

The number of incidents of name borrowing agreements that occur in Indonesia that are brought to the court realm has indeed made many name borrowing agreements canceled. However, it cannot be denied that there are still many cases of name borrowing agreements that are not brought to court, so there are still many cases scattered in Indonesia. Indonesia itself is a country that has a lot of land and is vast. The vastness of Indonesia shows that there are also many tourism areas and land that can be designated as the object of a name loan agreement.

For this reason, there should be other rules that will give fear to the perpetrators. Indeed, the case will only appear before the general public because of a lawsuit. But if there is a rule that states other sanctions for the perpetrators. There is a possibility that the perpetrators will think again before committing. The sanctions in question can be civil sanctions in the form of fines or even criminal sanctions. That is because actually the name borrowing agreement itself has indirectly harmed the state.

In addition to the perpetrators in the framework of Indonesian citizens whose names are borrowed and foreign citizens who borrow names. It must be remembered that there are still other parties that can be involved in the case of a name borrowing agreement. One of them is a Notary. This is due to the making of letters related to the name borrowing agreement. Letters made in the form of authentic deeds are expected to have stronger evidence and will bind both parties, making it difficult for Indonesian citizens whose names are borrowed to deny the existence of the name borrowing agreement.

Actually, the Notary in exercising his authority in making a deed has the authority to refuse. These reasons include the existence of a blood relationship, one of the parties does not have the ability to act to perform actions or other actions that are not permitted by law. The act of borrowing the name agreement itself has indirectly violated the rules in the UUPA. Article 21 of the UUPA states that ownership of freehold land can only be owned by Indonesian citizens. Ownership of freehold land by foreign nationals either from inheritance or marriage must be relinquished immediately.

Article 26 of the LoGA states that the transfer of land rights either directly or indirectly to foreigners is not allowed and will become null and void. For this reason, the act of borrowing a name agreement to a foreign citizen is an act that is not in accordance with the LoGA and the Notary has the right to refuse to make a deed relating to a borrowing agreement. A Notary in making a deed that has elements or shows indications of a name borrowing agreement should have rejected it and not continued making the deed. Thus, supervision and other measures are needed to ensure that no Notary intervenes in the making of such deeds.

Overall, a special regulation is needed that gives fear to the perpetrators so that they are afraid to borrow names in the land domain. The sanctions can be in the form of civil sanctions such as fines and also criminal sanctions. Because it can be said that SEMA 10/2020 still does not bring fear to the parties which causes them not to want to take action to borrow names.

CONCLUSION

Based on the analysis above, it can be concluded that the emergence of name borrowing agreements in the community is primarily driven by the dissatisfaction of foreign nationals who are restricted to land usage and lease rights, while Indonesian citizens enjoy perpetual property rights. The disparity in rights, coupled with the more complex and expensive procedures associated with land rights for foreign nationals, fuels their desire to obtain property rights illegally. This situation has led to the prevalence of name borrowing agreements, highlighting the urgent need for regulatory measures to address this issue and ensure that land ownership aligns with Indonesia's legal framework and national interests.

Future research should focus on evaluating the effectiveness of potential regulations and sanctions in curbing the practice of name borrowing agreements. Additionally, studies could explore alternative mechanisms to balance land ownership rights while accommodating foreign investment in ways that align with the nation's laws and sovereignty. Such research would contribute to the formulation of policies that uphold Indonesia's agrarian principles and prevent further exploitation of legal loopholes.

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