

CHAPTER I

INTRODUCTION

1.1 Background

People everywhere deserve the right to live and with that right to live, they require their basic needs of living to survive in this world. One of the biggest basic needs of living is to own or live inside a house. A house as explained in *Black's Law Dictionary*, is “a dwelling; a building designed for the habitation and residence of men. ‘House’ means, presumptively, a dwelling- house; a building divided into floors and apartments, with four walls, a roof, and doors and chimneys; but it does not necessarily mean precisely this.”¹ From this definition which has been given, it can be seen that a house is a habitat for a man, where a habitat is a place where a person and/or animals reside. The criteria for a house can be seen, however it is not specific as a house can be both a building of any size divided into floor(s) or it could also be an apartment, we can see here that a house is a place where a person is to live in. With a more specific definition, under Indonesia’s Law No. 1 of 2011 concerning Housing and Residential Areas, a house is described under Article 1 (7) as:

*“A house is a building that functions as a livable place to live, a means of fostering a family, a reflection of the dignity and worth of its occupants, as well as an asset for its owner.”*²

¹The Law Dictionary, “What Is HOUSE? Definition of HOUSE (Black's Law Dictionary).” thelawdictionary.org/house/, accessed on: 28 August 2021.

² Article 1 (7) of Law No. 1 of 2011 concerning Housing and Residential Areas

from the above definition it can be seen that a house is a place which is meant for living where a person can live with his/her family. A house is also an asset which means that it can be sold or even traded as it has worth. The buying and selling of houses falls under the category of Real Estate.

Land in Indonesia is regulated under Indonesia's Basic Agrarian Law (Law No. 5 of 1960). This Basic Agrarian Law serves as a replacement law for Book Two of the Indonesian Civil Code (hereinafter referred to as the "ICC") which contains provisions on several of its chapters. As the Basic Agrarian Law is a replacement law for Book Two of the ICC, it is more specific than Book Two as Book Two of the ICC covers assets which is a wider scope and can be any type of asset, the Basic Agrarian Law covers only land and agrarian affairs which is much more specific for the topic of land as opposed to assets only. As the Law No. 5 of 1960 is much more specific on the topic of land, it would be so that the provisions within the Law No. 5 of 1960 is to be used as opposed to that of the ICC. As the Basic Agrarian Law is considered as the replacement of Book Two of the ICC which is concerning land, water, and airspace along with other more special laws regarding the area of real estate, land, and property are present and are constantly being updated and made. The Basic Agrarian Law is considered as the umbrella law for any succeeding law and regulations concerning land, water, and airspace³, while other laws which are special for a specific topic are considered as the special law or *lex specialis*.

A house is made on land or in Indonesian is what is called as *tanah*. As stated in Article 4 of Law No. 5 of 1960, land is what is on the surface of the earth, where this land itself can be granted to or held by individual persons, or even jointly owned by several

³ Boedi Harsono, *Hukum Agraria Indonesia*, (Jakarta: Djambatan, 1997), pg. 48.

people in the form of legal entities. The land which is concerned here, is that of which covers the entirety of Indonesia where the land is that which is referred to in Article 1(4) which also includes the mass under the land. When speaking of land as a part of Indonesia's territory we must also consider both the water and airspace which is within Indonesia's territory as well as stated under Article 1(5) and Article 1(6) respectively.

To fully own land in Indonesia, a person must have a right of ownership or in Indonesian, *hak milik* as stipulated under Article 20 of Law No. 5 of 1960. This article states the *hak milik* as the strongest and fullest right on land, meaning that this right is the strongest out of all the other rights on land and is the one which states that said person is in fact the rightful owner of the land. This *hak milik* can also be transferred and inherited. In addition to fully own land, a person can also own land with two other land rights which are the right to use a structure or in Indonesian, *hak guna bangunan* (HGB), and the right to use or in Indonesian, *hak pakai*. These two land rights allow people to own land in Indonesia as with a *hak pakai* a person is able to use the land which is either state land or another person's land and also live on it for a certain amount of time. The HGB is a stronger right than a *hak pakai* which allows a person to build buildings or even own buildings on land which is not their own for a certain period which may also be extended. Such land rights as stated above could also be called as ownership of land but is not full ownership.⁴

As full ownership of land means that the land is fully owned and a person can do whatever they please on the land itself as it is theirs fully with a *hak milik* (strongest land right), the two other rights above are just temporary as a person may not own the land for an indefinite amount of time, but can be extended long enough after the expired period of

⁴ Article 20 of Law No. 5 of 1960 concerning Basic Agrarian Regulations

the land right for it to be considered as ownership. Other land rights include the right to cultivate or in Indonesian, *hak guna usaha* (HGU), the right of lease for buildings or in Indonesian, *hak sewa untuk bangunan*, and other land rights. Such land rights are explained in the Theoretical Framework of Chapter II of this Thesis.

According to *Black's Law Dictionary*, Real Property or Real Estate is a term which is applied to land and any immovable property on the land itself.⁵ Immovable property here can be meant to say anything which is “attached” to the land itself so it could include a house as a house is an immovable property on the land itself where a house could be having single or multiple floors in it. Real estate however is not only a house, as an apartment could be considered real estate as well as it is also immovable property in the form of a building or buildings where each building has several units inside it. One unit is equal to one apartment unit where the whole building itself is considered as an apartment. As the house or the apartment is an immovable property on the land, it would mean that the land is first needed in order to build the apartment and/or house, which is why land itself is a part of the real estate. Land and all the immovable property on it are considered as assets which could be used as an investment for the coming years when buying the real estate at a low price and sold to the market at a higher price in the following years. Investments in Indonesia is regulated under Law No. 25 of 2007 concerning Capital Investment, which is known as Indonesia's Investment Law.

A foreigner or in Indonesian, *orang asing*, is a person who is not a citizen of Indonesia, where he/she is having citizenship in another country and is in Indonesia. A foreigner needs a VISA based on the specific need of what the foreigner is doing in

⁵ The Law Dictionary, “What Is REAL PROPERTY? Definition of REAL PROPERTY (Black's Law Dictionary).”. thelawdictionary.org/real-property/, accessed on: 28 August 2021.

Indonesia. In order to live in Indonesia, a foreigner needs what is known as a KITAS (*Kartu Izin Tinggal Terbatas*) which is a temporary residence in Indonesia which must be extended after the period has ended and a KITAP (*Kartu Izin Tinggal Tetap*) is needed in order for a foreigner to have a permanent residency within Indonesia. When speaking of foreigners one topic which comes to mind is the limited benefits of foreigners within Indonesia, where foreigners have certain restrictions which are able to be done/executed by a citizen of Indonesia. One of these is on certain investments, more particularly, real estate.

When looking into foreign investments within Indonesia, we have to look at Presidential Regulation No. 44 of 2016, which is known as the Negative List. The Negative List is a list of the different businesses which are open or closed for investing by both foreign and domestic individuals living in Indonesia. It covers a variety of different business sectors with descriptions of each businesses within the different sectors which may or may not be eligible for foreign ownership. Within the Negative List, specifically according to the Part H of LIST OF BUSINESS FIELDS THAT ARE OPEN UNDER SPECIFIC CONDITIONS or the Trade Sector No. 195 of the Negative List (KBLI 68200), it can be seen that real estate is a 100% domestic capital or domestically owned which is seeing that it is not available for foreign ownership. Article 21 (1) of Law No. 5 of 1960 also states that only an Indonesian citizen is able to acquire a *hak milik*. Indonesia has many 'grey-areas' within its legal system, and one comes to mind by foreigners in order to obtain land as an investment or even to own land to house themselves, these include the marriage of a foreigner with an Indonesian citizen who is holding a *hak milik* which results in a joint ownership of the real estate as stated under Article 21 (3) of Law No. 5 of 1960 or by using an act which is debatable on whether it is legal, illegal or even put in the category of being

in the ‘grey-area’, the use of nominee agreements however it has been invalidated by law as of the year 2016 in Denpasar District Court Decision No. 4/Pid.Prap/2016/PN.Dps or by using a marriage agreement between a foreigner and an Indonesian citizen which will later be stated in this thesis.

The first way which a foreigner may own land as stated is by means of marriage with an Indonesian citizen. By marrying a citizen, a foreigner under Article 21 (3) of Law No. 5 of 1960 is eligible to rightfully own land by means of joint ownership. With joint ownership, the assets of both the foreigner and the Indonesian citizen become one which also includes the land rights. This is most prominently seen when expats are seen to be owning houses in areas around Indonesia when they have an Indonesian spouse. When in a marriage without a marriage agreement, the Indonesian citizen is considered as a subject of law which is only eligible for a right to use (*hak pakai*) and a right of lease for buildings (*hak sewa untuk bangunan*).⁶

When divorced, the intermarried couple has its assets separated as per the marriage agreement. The land, due to it belonging to the Indonesian spouse, would be given to the Indonesian spouse as the rightful owner of the *hak milik* is owned by the spouse. This would leave the foreigner to have lost its real estate asset and thus, lose his/her investment. When using the method of marriage as a means to own land, a foreigner should always remember that the best way would be through the long-never-ending marriage, as a divorce would strip him/her off all assets.

⁶ Hilda Yuwafih Nikmah and Pranoto Pranoto, “Pembagian Harta Bersama Akibat Perceraian Dari Perkawinan Campuran Berdasarkan Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan Dan Kaidah Hukum Perdata Internasional”, *Private Law*, Vol 2, No. 6, (2014), pg. 77.

Previously, an intermarried couple would lose their ability to own land under the status of *hak milik*, when married due to the status of the foreign partner which would make the land invalid and not able to own as a foreigner owning land under *hak milik* would be a violation of Article 21 of the UUPA which states. A foreigner who owns land has to have the land given up or sold to an eligible party within one year, and if the right is a joint ownership, it would make the Indonesian citizen have his/her *hak milik* title revoked and must also sell or give up the land within one year to an eligible party or if the time has elapsed, the land shall be handed over to the state.⁷ After the enactment of Government Regulation No. 103 of 2015 concerning Ownership of Residential or Occupancy by Foreigners Domiciled in Indonesia, an Indonesian citizen is allowed to own land under the *hak milik* if he/she does not have the *hak milik* be in joint ownership (*harta Bersama*) with the foreign spouse.⁸ However, this regulation has since been removed and updated under the new Government Regulation No. 18 of 2021 concerning Right to Control, Land Rights, Strata Titles, and Land Registration. Previously, when an Indonesian citizen marries a foreigner, he/she is only allowed to use the land rights which the foreigner is allowed to have, however, since the enactment of the Government Regulation, the land rights with which the Indonesian citizen is allowed to have is the same as any other Indonesian citizen which means that the *hak milik* is allowed to be kept by the Indonesian citizen. This, however, only works when joint ownership is not there as based on Article 3 (2), therefore a prenuptial agreement must be made between both parties. Regardless of this, the land can

⁷ Latief, “Agar Anda Tak Kehilangan Tanah Akibat Menikahi WNA Halaman All.” properti.kompas.com/read/2016/09/05/180300821/agar.anda.tak.kehilangan.tanah.akibat.menikahi.wna?page=all, 5 September 2016, accessed on: 2 September 2021.

⁸ Article 3 of Government Regulation No. 103 of 2015 concerning Ownership of Residential or Occupancy by Foreigners Domiciled in Indonesia

still be controlled by the foreigner as if he/she is owning the land which shall be explained in CHAPTER IV of this thesis.

When speaking of nominee agreements, it is one of the most commonly used ways of owning property in Indonesia by a foreigner. A part of Indonesia where this is commonly used would be in Bali, where there are many foreign owned restaurants, houses, clubs, etc. Bali practices the usage of nominee agreements between the foreigner and the Indonesian citizen. When speaking of nominee agreements, first, nominee must be defined first, where the nominee in this term is said to be an Indonesian citizen, whose name is borrowed by a foreign party in order for the foreigner to act as a beneficial owner of the asset.⁹ Nominee is recognized to be based on trust¹⁰. It allows the foreigner to act on the land as if he/she is the owner of the land even if on paper, the owner of the land is the Indonesian citizen.

Nominee agreements are bounded by what is known as a power of attorney or also known in Indonesian as *surat kuasa mutlak*. This power of attorney is what is used by the locals who are buying the said land/property and is used as a means to transfer the title to the foreigners by giving the power of attorney to them. This power is regulated within the Ministry of Home Affairs Instructions No. 14 of 1982 concerning Prohibition Of The Use Of Absolute Power Of Attorney As A Transfer Of Land Rights where there are elements of what is considered to be a power of attorney. This includes, (1) That the object of the power of attorney must be land, (2) The power of attorney which is prohibited must contain elements that it cannot be withdrawn by the person who has given the power of attorney, and (3) it gives the authority to the person who has accepted the power of attorney to use

⁹ Alfian Nunung Pradana, "Beneficial Owner Rights in Nominee Agreement", *International Journal of Business and Social Science* Vol. 10, No. 8, (2019), pg. 123.

¹⁰ Anita D.A Kolopaking, *Penyelundupan Hukum Kepemilikan Hak Milik Atas Tanah di Indonesia*, (Bandung: PT Penerbit Alumni, 2013), pg. 140.

and control the land as well as take legal action on the land where based on the law, can only be done so by holder of the land rights.¹¹

When giving a power of attorney to a foreigner, it is done so in practice by having the foreigner do a sale and purchase agreement or in Indonesian, *perjanjian pengikatan jual beli* (PPJB) with the Indonesian citizen. Where within this sale and purchase agreement contains a clause for the use of the power of attorney where the Indonesian citizen gives the power to the foreigner to act upon the land. When a clause is not used within an agreement, it is not having no legal force as it is not stated within the agreement. However, once a clause is stated which gives the power to the foreigner, then the agreement becomes binding and thus in practice has the land to be at the ownership of the foreigner. This would only work if the land was paid in full, as no more obligations or interests left for the seller (Indonesian citizen). As all payments have been made and the existence of a clause for the power of attorney within the PPJB exists, then the buyer (foreigner) is protected. This is due to Article 1457 of the Indonesian Civil Code which states,

“A sale and purchase is an agreement, by which one party is bound to deliver a certain matter, for which the other party shall pay a stipulated price.”¹²

This means that after the stipulated/agreed price has been paid, then the selling party is bounded to deliver the product which is the land. This would not work if the price were to be paid in instalments, which would need the help of the Notary or PPAT. Such help would include holding the power of attorney until the foreigner has paid for in full as according to Article 1457 of the Indonesian Civil Code. However, nominee agreements are found to

¹¹ Ministry of Home Affairs Instructions No. 14 of 1982 regarding Prohibition Of The Use Of Absolute Power Of Attorney As A Transfer Of Land Rights

¹² Article 1457 of the Indonesian Civil Code

be in violation of the law as stated in Denpasar District Court Decision No. 4/Pid.Prap/2016/PN.Dp where it is stated by a legal expert by the name of I Ketut Westra, SH., MH. that a nominee agreement is an agreement which violates the law and is therefore illegal as it is against the law or “*melarang undang-undang*”.¹³

Foreigners, due to Government Regulation No. 18 of 2021. This law has allowed foreigners to ‘own’ land based on the *hak pakai*. It allows a limited period of ownership for the foreigner which allows him/her to invest the land before the *hak pakai* has expired. This law as stated by Arie S. Hutagalung, who is an expert in agriculture and defense law, is similar to the old government regulation (Government Regulation No. 41 of 1996). Where the new regulation is there to prolong the time of ownership and make the process of ownership easier for foreign people.¹⁴ The section of the law which speaks on this prolonged foreign ownership, is under Article 52 of Government Regulation No. 18 of 2021, where this ownership of the Indonesian property is under the *hak pakai*. This right is granted to the foreigner for a period of 30 years, where if the 30-year period of the right has expired, it could be extended for a period of 20 years and if that extended period has expired, then it can be extended for a final 30 years. This gives the foreigner the right to ‘own’ the land for a total of 80 years. If this period of 80 years has expired, then the foreigner must hand over the property to an eligible heir or party which meets the requirements to acquire the land within a period of one year as stated under Article 50 (1) of the Government Regulation. Even with such limitations, under Ministry of Agrarian Affairs Regulation No. 29 of 2016, which allows the foreigner who owns the *hak pakai* to

¹³ Denpasar District Court Decision Number: 04/Pid.Prap/2016/PN.Dp, pg. 39.

¹⁴ Hilda B. Alexander, “PP 103/2015 Diskriminatif Dan Terlalu Memanjakan Orang Asing Halaman All.” properti.kompas.com/read/2016/01/22/145129521/PP.103.2015.Diskriminatif.dan.Terlalu.Memanjakan.Orang.Asing?page=all, accessed on: 12 August 2021.

construct residential property under land which is owned under a *hak milik* title. A foreigner who purchases land in Indonesia is acting on the *hak pakai* under the *hak milik* by the original owner of the land. This *hak pakai* title can also be sold to anyone else who is eligible to own land in Indonesia.¹⁵

The investment rules with this *hak pakai*, would allow the foreigner to be able to invest into real estate as the land is still not their land as it is not a *hak milik* but instead is a *hak pakai*. The foreigner is buying the land with a *hak pakai*, where he/she is only eligible to own this land for a certain period of time. The land is still technically 100% owned by an Indonesian national. With the *hak pakai*, the foreigner is able to hold this land for a period of 80 years where he can either keep the land for a period of time until he decides to sell it, where it is in accordance with the regulation. The foreigner here can also decide to give the land to an eligible heir as stipulated under the regulation. However, this still has the foreigner at a limited ownership of the land, as the land is only having 80 years of ownership for the foreigner. It serves as a good investment if the foreigner does plan on selling the land within the 80-year period or the foreigner is able to have the land inherited to a rightful heir as regulated under the law.

A better approach is for foreigners to own apartments. Foreigners are able to fully own apartments due to the enactment of the newly made regulation Law No. 11 of 2020 or what is known as the ‘Omnibus Law’. This law has a specific article, Article 144 (1) under paragraph C of the article, it states that an apartment is able to be given a *hak milik atas satuan rumah susun* (HMSRS) where this specific right is able to be given to a foreigner.

¹⁵ Andy, “Purchasing Land and Property in Indonesia as a Foreigner.” <https://www.gapurabali.com/blog/siti-purba-harcourts-purba-jimbaran/purchasing-land-and-property-indonesia-foreigner/buying>, accessed on: 8 September 2021.

This is a big step as previous laws have only given full ownership to Indonesian citizens, however this new law has allowed foreigners the ability to fully own an apartment in Indonesia, as they are holding the HMSRS which is giving them full ownership on an apartment. Previous laws only granted limited ownership a *hak pakai* as opposed to this HMSRS which has allowed the foreigner to only have the land/apartment for a maximum of 80 years as previously stated in this thesis. The new HMSRS right for the foreigner, however, has its drawbacks. Its drawback is that foreigners are only able to own apartments, to own a house or land a foreigner must still be able to be bound by the old law which is a *hak pakai*. Apartments are, however, fairly good investments as they are constantly rising in prices.

Indonesia has had a constant increase in prices of property where in Jakarta the prices of strata titles itself have increased by 3% in 2019, this brings the price of a strata title at an average of US \$2,130 or IDR 34.8 Million per square metre. Residential property sales itself have also risen where in Q4 of 2019, the sales rate have risen by 1.19% as most of this have come from the sales of big houses which have seen an increase in demand. The sales of big houses saw an increase in sales by 81.6% y-o-y in Q4 of 2019.¹⁶

1.2 Formulation of Issues

In regard to the topic of this thesis, the Author discusses the following formulation of issues:

¹⁶ Global Property Guide. "Indonesia's Housing Market Is a Picture of Stability." www.globalpropertyguide.com/Asia/Indonesia/Price-History., accessed on: 12 September August 2021.

1. What are the various practices that a foreigner can do to own land in Indonesia?
2. How can a foreigner hold a more secure property in Indonesia?

1.3 Research Purposes

The Author's purpose of writing this thesis is to answer the formulation of issues stipulated above, namely:

1. To know the different ways in which foreigners can own land in Indonesia, such ways include practices of loopholes and grey-areas within the law.
2. As loopholes and grey-areas are still questionable on its legality, the author is researching on more legal and concrete ways in which a foreigner is able to own land in Indonesia, such methods are those which are guaranteed to be secure for them.

1.4 Research Benefit

1.4.1 Theoretical Benefit

Theoretically, the Author wishes that this research will be able to give readers an insight on limited abilities of foreigners within Indonesia. As Indonesia has various limitations for foreigners, especially in investments more specifically, real estate. This

thesis will aim to look at the ability of how foreigners are in theory as stipulated by the law are able to own land and/or property within Indonesia. This thesis will also look at the legality of various ‘grey areas’ or ‘loopholes’ within the law to see how acts such as using contractual marriages for purposes of acquiring property are legal in the eyes of the law. This thesis will lastly, aim to help readers of this theory understand Indonesia’s real estate law and the provisions which are surrounding the area of real estate.

1.4.2 Practical Benefit

Practically, the Author wishes that this research can help foreigners in legally owning property without any potential risk. As such loopholes are to be based on trust and not having particular legal strength, the Author wishes to show in practice, how foreigners have been able to make such agreements based on trust to be a legal matter which is to their advantage. The Author wishes that such loopholes in the law are recognized for more people to be aware.

1.5 Framework of Writing

This thesis is arranged into five main chapters that will ease the readers to understand the discussion of this thesis.

CHAPTER I: INTRODUCTION

This is the first chapter of this thesis and is the chapter which consists of the introduction, which is further divided into five parts, which are background, research question, research purpose and research benefits.

CHAPTER II: LITERATURE REVIEW

In this chapter, the Author will divide the literature review into four different sub-chapter. The first sub-chapter will have the Author determine the different laws, regulations, and policies which are regulating real estate law in Indonesia. The second sub-chapter will have the Author elaborate on the definition of real estate in accordance with legal requirements and consequences towards any problem which may arise from foreign ownership. The third sub-chapter will then include the definitions and regulations on foreign real estate ownership as stipulated under Law No. 11 of 2020, Government Regulation No. 18 of 2021 and Law No. 5 of 1960. The fourth sub-chapter will elaborate the authority of the PPAT in allowing a foreigner to acquire a real estate property. And lastly, the fifth sub-chapter will discuss the different agreements related to real estate and foreign ownership such as nominee agreements and marriage agreements made by foreigners in order to own property in Indonesia.

CHAPTER III: RESEARCH METHODS

This chapter of the thesis will have the Author discuss in general about the type of research, data, data analysis technique and also the type of research approach. Followed by

the types of research, data, data analysis technique and research approach that the Author will use to discuss the issues inside this thesis.

CHAPTER IV: ANALYSIS AND DISCUSSION

This chapter will discuss the research problems and also the solutions to these problems. This fourth chapter of the thesis will be divided into two different sub-chapters. Each of these sub chapters will answer the questions which have been put forward in CHAPTER TWO of this Thesis. The first sub-chapter will consist of an analysis on the first problem which will analyse whether foreign ownership of real estate by means of a contractual marriage is legal under Indonesia's laws. The second sub-chapter will analyse on the different land rights and how a foreigner is able to stretch the land rights to the point that they technically "own" the land and/or property.

CHAPTER V: CONCLUSION AND RECOMMENDATION

In this last and final chapter, the Author will explain the conclusion of this thesis as an answer to the issues which the Author has analyzed in CHAPTER FOUR. Apart from the conclusion itself, the Author will also give suggestions and recommendations towards issues which have been stated and the law that could be drafted and implemented in the

future in order to give ease to the public in understanding the newest policy in regard to foreign investment to real estate, thus providing legal certainty and protection for all people whether it be Indonesian citizens or foreigners.

