

## CHAPTER I

### INTRODUCTION

#### 1.1 Background

The importance of land to humanity cannot be undermined. It serves as a cultural, honor, identity, and self-esteem role in addition to the economic and political functions. Land does not simply refer to physical objects, it also refers to the social space on which various connections are formed, rivalry happens, and the dominant and political rule is fought. As a result, it is true that land is an essential and natural resource for humanity's survival. The link between humans and land is more than just a place to live, and it is also a place where humans can grow. According to Ter Haar, land and humans have a tight relationship since land is a place to inhabit, one that gives life, and one where we are buried, and the link is mystical and holy.<sup>1</sup>

Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles (Undang-undang Pokok Agraria). This law is better known as the Basic Agrarian Law (BAL). The BAL implements the provisions of Article 33 paragraph 3 of the 1945 Constitution of the Republic of Indonesia, as stated in Article 2 paragraph 1 of the BAL, namely: "Based on the provisions in Article 33 paragraph 3 of the 1945 Constitution. As referred to in Article 1, the earth, water and natural resources contained therein are at the highest level controlled by the state, as an organization of power for the entire people. Therefore, based on the formulation of

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<sup>1</sup>Hilman Hadikusumah, Haji. *Pengantar Ilmu Hukum Adat Indonesia*, (Bandung: Mandar Maju, 2003), p. 194

Article 1 paragraph (2), it can be concluded that the important things, namely the earth, water and the wealth contained therein, are owned collectively by the Indonesian people. Land rights allow the holder to use and benefit from the land to which they are entitled. Land rights grant permission to utilize not only a certain portion of the earth's surface, known as "land," but also the earth's body beneath it, as well as the ocean and space above it.<sup>2</sup>

Therefore, the rights to own are only eligible to Indonesian citizens (WNI) while foreigners are not allowed to control the land as property rights as in BAL Number 5 of 1960 article 26 paragraph (2) where if a foreigner gets right to own then the land is controlled by the State. Furthermore, the National Land Law in the Basic Agrarian Law Article 21 paragraph 3, Article 26 paragraph 2, Article 30 paragraph 2, Article 36 paragraph 2 and Article 42. imposes limits on foreign citizens and legal entities owning land rights. This is to reduce the number of foreigners with land ownership rights. Because, in addition to preventing foreigners from controlling Indonesian residents' land, it also allows Indonesian citizens to use their land rights to maintain their life.<sup>3</sup>

For the rights and prohibition of land, and building rights for foreigners is regulated in the BAL, the status of land and building ownership that can be granted to foreigners living in Indonesia is only limited to use rights and rental rights. So, in addition to these two rights, land ownership rights held by an Indonesian citizen must be released if he/she becomes a foreigner. This provision is confirmed in

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<sup>2</sup> Urip Santoso, *Perolehan Hak Atas Tanah*, (Jakarta: Kencana, 2015), p. 21

<sup>3</sup> Urip Santoso, *Op. cit*, pg. 25

Article 21 of the UUPA,, Foreigners after the enactment of this law could obtain property rights under inheritance without a will or mixing of assets due to marriage, as well as Indonesian citizens who have property rights are obliged to relinquish that right within one year, after the acquisition of the right or the loss of citizenship. If after this period of time the right of ownership is relinquished, then the right is nullified by law, and the land falls to the state, provided that the rights of the other party that burdens it continue to exist.<sup>4</sup>

In addition, the mentioned provisions expressly stipulate that Indonesian citizens who have ownership rights to land then become foreigners are obliged to relinquish these rights within one year after the loss of their citizenship. As with the provisions for land ownership rights, the UUPA also stipulates that holders of cultivation rights (HGU) and building rights (HGB) who no longer meet the requirements within a period of 1 year or the rights will be nullified.

Legislation Number 16 of 1985 concerning Flats has controlled provisions affecting flats until now, but as the law has evolved, it is no longer in conformity with developments, the needs of everyone involved in the occupation, ownership, and usage of flats. Furthermore, the impact of globalization, culture, and people's lives, as well as the dynamics of society, have rendered the law become obsolete as a rule in governing the flats, which is prompting a modification by Law Number 20 of 2011 that is more current. This law establishes a solid legal foundation for the administration of flats based on the principles of welfare, justice, and equity,

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<sup>4</sup> Ardhiwisastra, Yudha Bhakti, *Hukum Internasional: Bunga Rampai*, (Bandung: Alumni, 2003), p.10

nationality, affordability and convenience, efficiency and benefit, independence and togetherness, partnership, harmony and balance, integration, health, sustainability, and sustainability. It is possible to own the apartment unit individually and separately from other portions of the building under the current Indonesian legal system, which is founded on the idea of horizontal separation (horizontal separation). It can be sold, inherited, swapped, given away, and saddled with mortgage rights (Hak Hipotik) like a separate property. According to our existing legal system, such apartment units are included in the definition of objects that can become objects of property rights.<sup>5</sup>

Following the enactment of Law No. 11 of 2020 on Job Creation, the government offers a variety of opportunities for foreign citizens (WNA), particularly foreign investors. The goal is to pique the attention of international investors in investing in Indonesia. The authorities passed the Job Creation Law with these goals and objectives in mind. The term "investment" is one that most people are already familiar with. Investment is the process of putting money or capital into something with the hopes of making a profit (return) in the future. Meanwhile, according to the Financial Services Authority (OJK), investment is defined as an investment made over a lengthy period of time for the purpose of acquiring entire assets or profitably purchasing shares and other securities. Stocks, deposits, bonds, savings, insurance, and mutual funds are all examples of investments. Buying **property**, gold, and jewellery, as well as establishing a

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<sup>5</sup> Sofwan Sri Soedewi Masjchun, *Hukum Bangunan: Perjanjian Pemborongan Bangunan*, (Yogyakarta: Lyberty, 1982), p. 109

business, are examples of other types of investments. Individuals or commercial entities, such as corporations, can make investments. Simply put, investment is the process of growing money or other assets in order to reap future rewards in order to attain specific objectives..<sup>6</sup>

It is stated that flat unit ownership rights may be granted to a. Indonesian residents; b. Indonesian legal entities; c. foreign individuals with a license issued in accordance with the legislation; and d. foreign legal entities. with representatives in Indonesia; or e. Representatives of foreign countries and international agencies who are placed or have representatives in Indonesia, according to Article 144 paragraph (1). Foreign residents with permission who meet the laws and rules' restrictions may be granted ownership rights to apartment units. Those flat units' property rights may be transferred and/or guaranteed under security rights (Hak Tanggungan). This law is unclear however on the types of land rights that a foreign national may own, although it is possible that there is a reference of ownership rights over flat units and building rights. Based on Article 145 of the Omnibus Law, it's far said that the flats are built on building use rights in order that it's as foreign residents will acquire the rights of ownership over flat units above the Building Use Rights. The provisions of the regulation on Job Creation may be a hassle thinking that it overlaps with the Basic Agrarian Law (UUPA) number five of 1960 and different legal guidelines regarding property rights to flat units.<sup>7</sup>

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<sup>6</sup> Kompas Cyber Media, "Investasi Adalah: Pengertian, Jenis, Contoh, Dan Manfaatnya.", [www.money.kompas.com/read/2021/04/01/111836026/investasi-adalah-pengertian-jenis-contoh-dan-manfaatnya?page=all](http://www.money.kompas.com/read/2021/04/01/111836026/investasi-adalah-pengertian-jenis-contoh-dan-manfaatnya?page=all), Accessed 26 Sep. 2021.

<sup>7</sup> Galang Fauzan, "Flats for Foreigner After the Issuance of the Omnibus Law in Indonesia", Vol.18, No. 1 (2021). p. 9

Recently the government enacted the Government Regulation No. 18 of 2021 concerning Management Rights, Land Rights, Flat Units, and Land Registration is an implementing regulation of Law No. 11 of 2020 concerning Job Creation which will become a national strategic policy and will regulate in detail the arrangements in the Law. Number 11 of 2020 concerning Job Creation. Policy directions in strengthening Management Rights, Land Rights, Flats Units, granting rights to Upper Land and Ground Spaces, including the acceleration of electronic-based Land Registration are to overcome various bureaucratic and regulatory obstacles and challenges that hinder economic and business growth in Indonesia. The government regulation was appointed by President Joko Widodo on February 2, 2021, in Jakarta. Government Regulation Number 18 of 2021 concerning Management Rights, Land Rights, Flat Units, and Land Registration promulgated by the Minister of Law and Human Rights Yasonna H. Laoly on February 2, 2021, in Jakarta

Furthermore, this law harmonizes, synchronizes, renews, and revokes provisions that are no longer relevant based on Law No. 11 of 2020 concerning Job Creation (Omnibus Law) includes Government Regulation Number 40 of 1996 concerning Business Use Rights, Building Use Rights and Land Use Rights, Government Regulation Number 24 of 1997 concerning Land Registration, and Government Regulation Number 103 of 2015 concerning Ownership of Residential Houses or Occupancy by Foreigners. Domiciled in Indonesia, as well as several regulations regarding strengthening Management Rights will also update the



provisions of Government Regulation Number 8 of 1953 concerning Control of State Lands.

Prohibition of land ownership by foreigners in the Indonesian legal system, land law, has resulted in some foreigners looking for ways or ways to be able to own and control land in Indonesia. One way that is often practiced is to make a package of agreements between foreigners as recipients of power of attorney and Indonesian citizens, which authorizes foreigners to control land rights and carry out all legal actions against the land known as Nominee Agreement. In general, foreign nationals buy land with the Right to own (Hak Milik) status by borrowing the name of someone who is an Indonesian citizen. Thus, Indonesian citizens (WNI) here are only people whose names are borrowed and included in the land certificate for the Ownership Rights, but the control and utilization are owned by foreign citizens (WNA). Consequently, the statement contains a legal relationship between Indonesian citizens and foreigners, stating that the ownership of the land rights basically belongs to the Indonesian citizen and the foreigner concerned who can constitute various legal actions against the rights "owned" by a trusted foreigner. To take care of it (nominee). This has caused a series of unwanted events, according to news in the media, Hotman Paris Hutapea, a famous lawyer who once said that many landowners of foreigners are avoiding taxes by using the nominee agreement scheme for the purpose of filling the gaps of administration. This condition also actually happened in NTB. Based on information from the Department of Culture and Tourism (Disbudpar) of West Nusa Tenggara (NTB) province, it was found that many foreign nationals (WNA) bought land in tourism locations in NTB, to is

used as a place of business, with the method of marrying a local person as another scheme to obtain the land.<sup>8</sup>

However, according to this opinion, the legal consequence if there is a nominee agreement is that the agreement becomes invalid because it violates the provisions of the legislation, then the nomination agreement is null and void. The validity of the nominee property sale and purchase agreement clearly cannot be justified. This agreement is no longer considered to exist because it violates the law, the principle of agreement, and the principle of nationality in the Basic Agrarian Law. According to Article 1320 paragraph (4) of the Civil Code regarding the conditions for a valid agreement, that there is a lawful cause, something that causes someone to make an agreement is not meant by a lawful cause, and the law ignores something that causes someone to make an agreement. The law pays attention to the actions of people in society. By the facts stated, the lawful cause is regarding the object or content and achievement goals contained in the agreement itself, not regarding the reasons behind the making of an agreement.<sup>9</sup>

The conditions for the validity of the agreement referred to in Article 1320 of the Civil Code are that there is an agreement between the parties to create the agreement (consensus), there is the ability as the parties to make an agreement (capacity), there is a certain thing (a certain subject matter), there is a lawful legal

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<sup>8</sup> Republika Online, "Banyak WNA Miliki Lahan Di Lokasi Pariwisata Di NTB", <https://www.republika.co.id/berita/nasional/daerah/14/12/30/nhe7j5-banyak-wna-miliki-lahan-di-lokasi-pariwisata-di-ntb>, Accessed 27 Sep 2021.

<sup>9</sup> Achsan Fariz, "Kepemilikan Hak Atas Tanah Oleh Warga Negara Asing Melalui Perjanjian Nominee" <https://kumparan.com/ferriz-achsan/kepemilikan-hak-atas-tanah-oleh-warga-negara-asing-melalui-perjanjian-nominee/>, Accessed 28 Sep. 2021



cause that can not have the substance which violates the law. Foreigners in obtaining land rights cannot be separated from the aspect of the agreement, where the agreement must be made in the form of a deed of Land Deed Official (PPAT). The deed of sale and purchase is legal evidence of the transfer of ownership rights to land, both in the buying and selling process and in other processes of transfer ownership. The validity of the sale and purchase deed is critical, considering that if there is a lawsuit or rejection from one party, the sale and purchase deed is proof that a transition has taken place. The PPAT who makes the deed of sale and purchase has a significant position because the PPAT is the official who makes and certifies the sale and purchase and other transfer of land. According to the provisions of Article 1313 BW, the agreement is an act by one or more people who bind themselves to one or more other people. The subject of the agreement is the parties, in this case, are foreigners and Indonesian citizens with objects of land and/or buildings on it that require applicable statutory regulations.<sup>10</sup>

Based on the explanation above, this thesis will further analyze the Agrarian law and mainly the new enactment of Law No. 11 of 2020 on Job Creation (Omnibus law) with the implementation of Government Regulation No. 18 of 2021 concerning Management Rights, Land Rights, Flat Units, and Land Registration. The law must be reviewed because of the need to understand what rights are now regulated or given in a new law and how it is structured in the hope to push foreign

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<sup>10</sup> Kaseger Euginie Vita Paulina, *PEMILIKAN HUNIAN OLEH WARGA NEGARA ASING DI INDONESIA*, (Manado: Sam Ratulangi University, 2014), p. 7

investors to the sector of property in Indonesia and reduce the use of nominee agreements.

## **1.2 Formulation of Issue**

The enactment of law no 11 the year 2020 on job creation has released an implementing regulation regarding the foreigner ownership of land and the rights for condominium (strata title) issued in February 2021. However, these new provisions regarding the foreigner rights of land and flats under Omnibus law need to be further analyzed to know how it is regulated. This thesis aims at analyzing the foreign land rights and flat rights in relation to the omnibus law. The thesis poses the following two major research questions:

1. How are the provisions of foreigner ownership of land and flats regulated under omnibus law?
2. What are the impacts of the enactment of the Omnibus law regarding foreigner ownership of land and flats?

## **1.3 Research Purpose**

The purpose of the Author on this thesis is to fill the formulation of issues mentioned above, namely:

1. To describe the provisions of the foreigner ownership of land and condominium under omnibus law.
2. To analyze what are the impact of the enactment of the Omnibus law regarding foreign ownership of land and condominiums

## **1.4 Research Benefit**

### **1.4.1 Theoretical Benefit**

Theoretically, the Author hopes that this thesis will give a better understanding for Indonesian and mainly foreign citizens to have a higher level of legal understanding about land and condominium rights that Indonesia provides. Also, it is to have a better recommendation input for the rules and regulations that can be more specific and clearer which should be able to give legal knowledge for foreigners that want to invest in Indonesia's property.

### **1.4.2 Practical Benefit**

Practically, the Author hopes that this research can provide a beneficial input for the government to strengthen its foreign ownership of land and condominium in Indonesia. As for the Foreign citizens, it is aimed for them to better realize the importance of understanding the basis of the law to ensure legal benefits for them. This movement can be an act of prevention for future misunderstanding/interpretation about the law of foreign ownership of land and condominium based on the new regulation.

## **1.5 Framework of Writing**

In this thesis, the writing structure is divided into five parts/chapters arranged accordingly for reader to better understand about the discussion of the thesis

## **CHAPTER I: INTRODUCTION**

This chapter consists of the introduction which then will have subsections of five parts, that includes background, research question, research purpose and research benefits.

## **CHAPTER II: LITERATURE REVIEW**

In the literature review chapter, the Author will discuss this chapter into 4 partitions. First, the Author will gather definitions regarding land ownership and apartments/condominiums from the regulations and scholarly papers that have discussed this particular topic. Second, the Author will determine the understanding and classification of what will be classified as a foreign citizen and the rights given to them. Third, the Author will lay out the arising consequences to the concept of nominee agreement for foreigners as an example. Lastly, followed by what are the important methods or traits in statute regulations that will be seen as effective in the eyes of an expert who has a deep understanding about this topic.

## **CHAPTER III: RESEARCH METHODS**

This chapter will discuss in general about the approach method of research from the type of collecting data, the type of research and to process and using an analyzing technique to output the best result of data that will be used to conduct accurately. To conduct the data of research, type of data, and the approach to research that the author will conduct in this paper.

## **CHAPTER IV: DISCUSSION AND ANALYSIS**

In Chapter Four, the author analyses the solutions that may arise from the research problems. The first sub-chapter will consist of how the provisions of foreigner ownership of land and apartments/condominium are regulated under omnibus law. The second is what are the impacts of the enactment of the Omnibus law regarding foreigner ownership of land and condominiums?

#### **CHAPTER V: CLOSING**

In the final chapter, the answer that the Author has compiled in Chapter four will be laid out in the conclusion. Furthermore, the Author will also give input and recommendations toward the issue of the topic. Hopefully that this thesis could provide information to raise legal awareness and could create a positive input for Legal Certainty.