

CHAPTER I

INTRODUCTION

1.1 Background

Indonesia is a diverse country that is consist of thousands of islands and wide ocean. This vast territory needs to be protected so that it remains Indonesian territory. One of the most important property rights of the Republic of Indonesia is land. This land issue is very important because it concerns a place where Indonesian people could stand and fight for their survival. Before the enactment of Law No. 5 Year 1960 on Basic Agrarian Law (*Undang-Undang Pokok Agraria* or “**BAL 1960**”, Indonesian don't have the complete ownership over land because of the colonialism. As a result, an Agrarian Law, which is a national law that applies equally to all regions of Indonesia, must be enacted as soon as possible. Article 33 paragraph (3) of the 1945 Constitution serves as the foundation for the Agrarian Law, which states: "Earth, water, and natural resources included therein are owned by the State and used for the greatest prosperity of the people."¹ The system of land ownership and administration in Indonesia has changed dramatically since the Basic Agrarian Law was enacted. Where the usage of land is emphasized more for the sake of the Indonesian people's wealth and happiness.

¹ Article 33 (3) of the Indonesian 1945 Constitution

Land is no longer the exclusive possession of a few individuals, but rather the collective property of the Indonesian country.

Along with the population growth, the necessity for housing is rapidly increasing. This requires Indonesia to fulfill the basic needs of its people which is to provide a healthy and secured place for them to live. Problem arises because there is no more space in Indonesia where the availability of land is decreasing. Therefore, this serves as the basis for the Indonesian government to create policies in the real estate sector that focus on the efficient use of land by building *Rumah Susun*, hereinafter referred to as “**Strata Title**”. It is a vertical housing model which is made in the form of Strata Title to minimize the use of land.² Policies regarding Strata Title are governed by Law No. 20 of 2011 concerning Strata Title. The purpose of this law highlights the intention to ensure that every individual has the right to live in both physical and spiritual well-being, to have adequate housing, and to enjoy a healthy living environment.

Strata Title is defined as a multi-story building constructed in an environment, which has functionally structured parts both horizontally and vertically, and comprises units that can be owned and used separately, mainly for residential purposes, and is equipped with shared parts, shared objects, and

² Muhammad Yasin Lubis, Abdul Rahman Lubis, *Kepemilikan Property di Indonesia, Termasuk Kepemilikan Rumah Oleh Orang Asing*, (Bandung: Mandar Maju, 2013), p. 53.

shared land.³ This is commonly referred to as a "**Strata Title units**". From the definition, Strata Title are an alternative solution to problem in housing and settlements, in light of land limitation in urban areas where the population continues to grow. Strata Title can be constructed above a land with Right to Own, HGB or Right to Use above state land, and HGB or Right to Use above Right to Manage.⁴ Ownership of a Strata Title unit is established by holding the Certificate of Ownership for Strata Title (*Sertifikat Hak Milik Atas Satuan Rumah Susun*) or ("**SHMSRS**").⁵ This certificate serves as an official document that confirms the rights of the owner over the specific units within the building.

Furthermore, in relation to the ownership of Strata Title units, the rising number of foreigners working in Indonesia results in the needs of Indonesian Government to re-regulate the status of ownership right by foreigner of property in Indonesia. Accordingly, Indonesian Government enacted the Government Regulation No. 103 of 2015 on the Ownership of Houses or Housing by Foreigners Domiciled in Indonesia ("**GR 103/2015**") in replacement of the old regulation, Government Regulation No. 41 of 1996. Essentially, Law No. 5 Year 1960 regarding Basic Agrarian Law prohibits foreigners to hold Right of Ownership⁶ (*Hak Milik* or "**HM**"), Right to Build⁷ (*Hak Guna Bangunan* or

³ Article 1 of Law No. 20 Year 2011 on Strata Title

⁴ Article 17 of Law No. 20 Year 2011 on Strata Title

⁵ Article 47 para. 1 of Law No. 20 Year 2011 on Strata Title

⁶ Article 21 (1) of the BAL 1960

⁷ Article 36 (1) (a) of the BAL 1960

“HGB”) and Right to Cultivate⁸ (*Hak Guna Usaha* or “HGU”) over a land. According to R.Subekti, foreigner is defined as a person that resides within a country and not a citizen of that country.⁹ Furthermore, a foreigner is clearly defined as an individual who is not an Indonesian citizen and whose presence contributes benefits through business activities, employment, or investment in Indonesia.¹⁰

This definition enables foreigners to have clearer and more detailed opportunities for property ownership in Indonesia compared to previous regulations, which permitted ownership only for those who had invested in the country. Previously, only foreigners who had invested in Indonesia that could own a property. But with this new regulation, foreigners who are permitted to own a property must be domiciled in Indonesia and hold a stay permit (*Izin Tinggal*). Foreigners are permitted to own only two types of properties in Indonesia. First, they can own individual houses built on land under the Right to Use or under a Right to Use agreement linked to the Right of Ownership. This arrangement must be formalized through a deed issued by a land official. Second, foreigners can own Strata Title units built on land that is also under the Right to Use.¹¹

⁸ Article 30 (1) (a) of the BAL 1960

⁹ R. Subekti, Tjitrosoedibio, *Kamus Hukum*, (Jakarta: Pradnya Paramita, 2012), p. 45.

¹⁰ Article 1 of the GR 103/2015 on the Ownership of Houses or Housing by Foreigners Domiciled in Indonesia

¹¹ Article 4 of the GR 103/2015 on the Ownership of Houses or Housing by Foreigners Domiciled in Indonesia

Nevertheless, the current practice of land ownership by foreigner is in fact not in alignment with the existing laws. In the current practice, foreigners usually can “own” a property in Indonesia illegally by several kind of agreements such as the nominee agreement and the indefinite lease agreement. According to the theory of justice as proposed by John Rawls who supposes two (2) forms of agreement which indirectly transfers land ownership rights to foreign nationals which includes Land Ownership Agreement (*Perjanjian Kepemilikan Tanah*) and Nominee Agreements in a land ownership agreement whereby Indonesian citizen admits that the land registered under his/her name does not belong to him/her, but to the foreign national who has provided funds to buy the land ownership rights including structures on it.¹²

According to the Black’s Law Dictionary, nominee means 1. a person who proposes for an office, membership, award or like title, or status. An individual seeking nomination, election or appointment is candidate. A candidate for election becomes a nominee after being formally nominated. 2. A person designated to act in place of another usually in a very limited way. 3. A party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefits of other.¹³ Additionally, the Indonesian Civil

¹² John Rawls, *Dasar-Dasar Filsafat Politik untuk Mewujudkan Kesejahteraan Sosial dalam Negara*, (trans: Uzair Fauzan dan Heru Prasetyo), (Yogyakarta: Pustaka Pelajar, 2006), p. 361.

¹³ Bryant A. Garner, *Black’s Law Dictionary*, Ed.8, (StPaul: West, 2004), p. 1076.

Code (“ICC”) defines an agreement as an act by which one or more individuals commit to one another.¹⁴ This code also recognizes the principle of freedom of contract, stating that all legally executed agreements are binding on the parties involved and can only be revoked by mutual consent or for legally sufficient reasons, requiring that they be executed in good faith. Together, these definitions and principles establish a framework for understanding property ownership and the relationships between parties involved in agreements.¹⁵

There are various types of agreements regulated by the ICC, such as sales and purchase agreements and work agreements. However, not all agreements fall under ICC regulation. Those that do not are known as innominate agreements, which arise, evolve, and develop within society. One specific type of innominate agreement is the nominee agreement. Although this type of agreement is not recognized by the ICC, it is commonly used by many people in their daily lives.

With all that being said, a nominee agreement can be defined as an agreement made between a person who by law cannot be subject to a particular title (property), in this case a foreigner with an Indonesian citizen, with the intention that the foreigner may possess possession of *de facto* title but legally (*de jure*) of the land of such property in the name of Indonesian citizen. In other words, a foreigners borrowed the name of the Indonesian citizen to act as

¹⁴ Article 1313 of the Indonesian Civil Code

¹⁵ Article 1338 of the Indonesian Civil Code

Nominee.¹⁶ Additionally, a nominee agreement can also be conducted by establishing an agreement between Indonesian citizens and foreigners that involves granting a power of attorney, other than merely borrowing a name to act as a nominee. This power of attorney provides irrevocable rights to the Indonesian citizen and authorizes the foreigner to perform all legal actions related to the ownership rights of the land.¹⁷

In essence, the practice of creating a nominee agreement for land ownership involves drafting an agreement that states the land is purchased with funds provided by the foreigner, using the name of the Indonesian citizen as the nominee to be included in the land certificate. All costs associated with the land purchase are borne by the foreigner. Subsequently, a lease agreement is made between the foreigner and the nominee, often without a time limit and at a manipulated lease cost, to create the illusion of compliance with existing regulations. Additionally, the foreigner requires the nominee to grant irrevocable powers, allowing the nominee to sell or lease the land to anyone. This practice is common in Bali¹⁸, where foreigners buy land for residence or business purposes.

¹⁶ Rosyani Ada, Akhmad Safik, “Analisis Yuridis Kepemilikan Hak Atas Tanah Melalui Perjanjian Nominee Oleh Warga Negara Asing Di Indonesia (Studi Putusan Pekarara Nomor: 2959 K/Pdt/2022)”, *Unnes Law Review*, Vol. 6, No.2, (2023), p. 7631. DOI: <https://doi.org/10.31933/unnesrev.v6i2>

¹⁷ Maria S.W. Sumardjono, *Kebijakan Pertanahan: Antara Regulasi Dan Implementasi*, (Jakarta: Kompas, 2006), p. 17.

¹⁸ Eri Abadi Putra, I Wayan; Agung, I Gusti Nyoman, “Akibat Hukum Terhadap Kepemilikan Tanah Di Bali Oleh Orang Asing Dengan Perjanjian Nominee”, *Kertha Semaya : Journal Ilmu Hukum*, Vol. 4, No. 3, Feb 2016, p. 3. DOI: <https://ojs.unud.ac.id/index.php/kerthasemaya/article/view/18936>

Nominee agreement is clearly illegal since it is a form of legal smuggling to avoid the rules that has been stipulated by Indonesian government where foreigner is unable and unqualified to hold an ownership right over a land in Indonesia.¹⁹ Article 9 (1) on Indonesian Basic Agrarian Law of 1960 clearly states that only citizens that can own property in Indonesia. The foregoing law contains the principle of nationality which is a fundamental principle in Indonesian Agrarian law where only Indonesian citizen that may have an ownership right on land. This principle clearly prohibits foreigner to own a property in Indonesia. Nevertheless, foreigner still make use of nominee agreement to illegally own a land in Indonesia for the benefit of themselves. This has become a very serious legal issue in Indonesia as it could adversely affect the Indonesian people who inherently has the right to a land in Indonesia's territory.

In addition to nominee agreements, foreigners often use indefinite lease agreements to bypass legal restrictions, as these leases do not specify a fixed term for the land.²⁰ These leasing arrangements between foreign nationals and Indonesians can lead to legal complications, particularly when the lease terms exceed what is generally accepted in Indonesia. Although the BAL 1960 does

¹⁹ Surat Edaran Mahkamah Agung No.10 Tahun 2020 tentang Pemberlakuan Rumusan Hasil Rapat Pleno Kamar Mahkamah Agung Tahun 2020 Sebagai Pedoman Pelaksanaan Tugas Bagi Pengadilan

²⁰ Reffa Rafelya, Lina Jamilah, "Perjanjian Sewa Menyewa Tanah Hak Milik Tanpa Batas Waktu Antara WNI dengan WNA menurut Hukum Positif Indonesia", Bandung Conference Series: Law Studies, Vol. 2, No. 2, (2022), p. 1226. DOI: <https://doi.org/10.29313/bcsls.v2i2.3208>

not specify the duration of such leases, Article 1548 of the ICC defines leases as being "for a certain period." This ambiguous wording leads to various interpretations, enabling foreigners to circumvent legal regulations.

However, the issue of legal smuggling discussed above is not the problem that want to be discussed by the Author. It is only used to provide context on how the Indonesian law regime has not provided any comprehend regulations in regards to land ownership by foreigner. Furthermore, in this thesis the Author wants to bring the attention of the reader to the issue of conflicting regulations between BAL 1960 with the recently promulgated Job Creation Law, which causes more serious legal uncertainty towards foreigner. The Ownership of Strata Title by foreigner in Indonesia must abide the obligation of BAL 1960 which sets out the nationality principle. The nationality principle is embraced in the National Agrarian Law system which grounds the construction of houses as well as the management of Strata Title. The nationality principle is regulated under Article 9 of BAL 1960 where only Indonesian is allowed to possess the Right of Ownership on land as well as other proprietary rights such as HGB and Right to Cultivate, since Indonesian territory is a unitary territorial area, therefore the land rights holder is solely Indonesian citizen.

The recently promulgated Law No. 6 Year 2023 on the Stipulation of Government Regulation No. 2 of 2022 in Lieu of Law No. 11 of 2020 on Job Creation ("**Job Creation Law**") *jo.* Government Regulation No. 18 Year 2021 on Right to Manage, Land Right, Strata Title, and Land Registration ("**GR**

18/2021”) was aimed to increase the investment of foreigner within the country specifically in the property sector. Pandemic era has been making the property sector in Indonesia descending year by year starting from 2020 which was the beginning of COVID-19. To support the process of increasing foreign investment, foreign investors will prefer to choose to stay temporarily or settle in Indonesia. With the Job Creation Law, foreigner is now able to possess a Certificate of Ownership for Strata Title (“SHMSRS”) that is constructed on a plot of land under HGB which have never been granted by any law previously.

According to Article 144 of the Job Creation Law, foreigner that holds the stay permit is included as the legal subject that can be given the Ownership Right on Strata Title in Indonesia. Furthermore, Article 145 allows Strata Title to be constructed on a plot of land under HGB or Right to Use on state land; or HGB or Right to Use above the Right on Land under Right to Cultivate. To implement the Job Creation Law, the government issued several implementing regulations including the Government Regulation No. 18 2021 on Right to Manage, Land Rights, Multi-story Housing Units, and Land Registration. The ownership of Strata Title by foreigner is further regulated under Article 71, whereby foreigner can own Strata Title constructed on a plot of land under:²¹

1. Right to use or HGB on State Land;
2. Right to use or HGB on Land under Right to Cultivate; or

²¹ Article 71 of GR 18/2021 on Right to Manage, Land Right, Strata Title, and Land Registration

3. Right to use or HGB on Land under the Right of Ownership.

After the enactment of Job Creation Law, the regulations on Strata Title ownership by foreigner has received several changes, namely in Article 144 and 145 which extends the scope of Strata Title ownership by foreigner. After the changes, foreigner is able to own the Certificate of Ownership for Strata Title that is constructed on a plot of land under HGB, which is further elaborated under Article 71 of GR 18/2021. These new promulgated laws are clearly not in alignment with the nationality principle set in the BAL 1960 and Law No. 20 Year 2011. Furthermore, looking into the definition of Strata Title under Article 1 of Law No. 20 Year 2011, whereby when a foreigner owns a Strata Title in Indonesia it automatically allows them to also own the plot of land under the Strata Title units which is collectively owned with the other Strata Title unit's owner. Accordingly, foreigner that holds SHMSRS will also own the land under HGB. This is clearly a violation of the nationality principle in BAL 1960 where Article 31 (1) stated that only Indonesian citizen can hold the HGB.

Hence, when there is a conflict between one legislation to another, further investigation must be carried out on the related legislation of a higher position. Applying the principle of *lex specialis derogat legi generali* (special rules take precedence over general ones), the UUPA prevails as it is more specific compared to the Job Creation Law, which covers various regulatory sectors. Additionally, the UUPA serves as an umbrella for the subsequent laws

governing agrarian resources. Consequently, this creates legal uncertainty for foreigners wishing to buy a Strata Title in Indonesia.

In light of the foregoing explanations, BAL 1960 as the foundation of the subsequent land law has indeed regulated on how foreigner could own a land in Indonesia, which limits foreigner to only Right to Use and Right to Lease. However, the Ownership to Strata Title by foreigner has been recently extended by the changes of provisions under the Job Creation Law. Accordingly, in this thesis the author feels the urgency to discuss about the conflicting regulations between BAL 1960 and Job Creation Law in regards to the violation of the nationality principle. Moreover, the author aimed to provide the best possible recommendations through this research to address practical problems arising from legal uncertainty due to conflicting regulations. The recommendations highlight the need for the government to strike a balance between attracting foreign investment and providing legal certainty by harmonizing the applicable laws.

1.2 Formulation of Issues

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

1. How does Indonesian Law regulate the ownership of Strata Title units by foreigner after the enactment of Law No. 6 Year 2023 on Job Creation?

2. How is the legal status of the conflicting provisions regarding foreign ownership of Strata Title built on HGB land?

1.3 Research Purposes

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

1. To explore how the Ownership to Strata Title by foreigner is being regulated under the Indonesian legal system after the enactment of Job Creation Law.
2. To analyze whether the Job Creation Law conflicts with the BAL 1960 and other related regulations concerning foreign ownership of Strata Title on HGB land.

1.4 Research Benefits

1.4.1 Theoretical benefits

Theoretically, the Author hopes that this research will give an insight on the conflicting regulations regarding the Ownership to Strata Title by foreigner according to Basic Agrarian Law 1960 and Job Creation Law. From the conflicting regulations, the Author hopes that this research will successfully point out the violation of nationality principle which is a normative principle set out in the Basic Agrarian Law 1960, that was initially aimed to protect the right to land exclusively for Indonesian citizen. All in all, the Author hopes that this research will provide further knowledge on Indonesian law, especially in the field of Agrarian Law,

along with the proprietary rights of land under Law No. 6 Year 2023 on Job Creation.

1.4.2 Practical benefits

Practically, the Author hopes that this research can provide an input for the government to examine and closely look into Job Creation Law *jo*. GR 18/2021 in granting the Certificate of Ownership for Strata Title to foreigners on HGB land. The Author realizes that there is a need to harmonize the recently promulgated law with the BAL 1960 so that it would tackle the issue of legal uncertainty caused by the conflicting regulations.

In addition, the Author also hope that this research can be useful for the general public, notary, property developers, foreigners and other officials who directly and/or indirectly have a relation in the field of real estate especially that concerns with proprietary right on land. Furthermore, the Author hopes that this research can increase foreign investment in Indonesia by providing a transparent information regarding foreigner rights in having a Strata Title unit in Indonesia.

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 chapter consist 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, there are theoretical framework and conceptual framework. The theoretical framework is divided into Legal Certainty Theory and Hierarchical Legal Theory, which are used as the analytical tools to discuss the formulation of the problems. The conceptual framework consists of concepts, definitions, terms, used in the overall discussion and analysis of the issue,

CHAPTER III: RESEARCH METHODOLOGY

This chapter will discuss in general about the type of research, the type of data, data analysis technique and the type of research approach. Followed by the types of research, data, data analysis technique and research approach that the Author use to discuss the issues in this thesis.

CHAPTER IV: DISCUSSION AND ANALYSIS

The fourth chapter will discuss the research problem along with its solution. This chapter will be divided into

two further sub-chapters and each sub-chapter will answer the respective research question as stipulated in chapter one of this thesis. The first sub-chapter will discuss about how the foreign ownership on Strata Title is regulated under the Indonesian law. The second sub-chapter will analyze about the conflicting provisions between Job Creation Law, BAL 1960, & Strata Title Law concerning foreign ownership of Strata Title on HGB land.

CHAPTER V: CONCLUSION AND RECOMMENDATION

In this last chapter, the Author will explain the conclusion as an answer to the issues that have been analyzed in chapter four. Aside from giving a conclusion, the Author will also give suggestions and recommendations towards these issues and the probable regulation that could be drafted and implemented in the future to ease the public in understanding the newest policy in regards to the Ownership to Strata Title by foreigner, thus providing legal certainty for all.