

## CHAPTER ONE

### INTRODUCTION

#### A. Background of Research

Indonesia as an archipelagic country whose natural wealth has been recognized by the international community is very attractive to many foreign tourists. The Foreigner who comes to Indonesia has a variety of purposes and visits for a long period of time or visiting in a short period of time. Foreigners who choose to live in Indonesia can have a positive impact on economic development in Indonesia, which is by investing in Indonesia.<sup>1</sup>

Indonesia is a country that consists of various ethnic groups and cultures that unite themselves in a unitary state of the Republic of Indonesia. In the case of land, the differences in characteristics and culture lead to various patterns of ownership, control and use of lands that develop from one region to another. The Benefits of land are means to achieve the welfare of the Indonesian people, therefore it is necessary for State intervention in regulating and controlling the land as stated in Article 33 point (3) of the 1945 Constitution of the Republic of Indonesia, hereinafter referred to as the 1945 Constitution of the Republic of Indonesia, which states that: "Earth, water and natural resources contained therein are controlled by the state and used as much as possible for the prosperity of the people". Therefore, it's clear that the government represents the State to be

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<sup>1</sup> Made Utami Jayanti, "Pengaturan Perjanjian Pengikatan Jual Beli atas Rumah Tempat Tinggal oleh Warga Negara Asing dengan Berlakunya Peraturan Menteri Agraria dan Tata Ruang Nomor 29 Tahun 2016", *Arta Comitas, Jurnal Hukum, Jurnal Kenotariatan*, Vol. 3, No.1 (2018), p. 353.

responsible for managing and guaranteeing all these natural resources and organizing general welfare for all its citizens, including protecting the rights of citizens over the land, because the land is one of the most important things for Indonesian citizens, it involves a place to stand and fight for the survival of the community. Hence, the Constitution mandates the State to protect it.<sup>2</sup> In this regard, the provision, designation, control, use and maintenance need to be regulated in order to ensure legal certainty in control and utilization and also the implementation of legal protection for the people, especially for Indonesian citizens and farmers in Indonesia.<sup>3</sup>

Law Number 12 of 2006 concerning Citizenship of the Republic of Indonesia, only recognizes the differences between Indonesian Citizens (WNI) and Foreigners (WNA). These differences result in the legal standing of every legal relationship that arises between foreigners with land or between foreigners and Indonesian citizens towards the land, because the land has a very important role in human life and it can determine the existence and continuity of relationships and legal actions, both in terms of individuals and impacts with others.

The laws and regulations specifically regulate land in Indonesia are under Law No. 5 of 1960 on Basic Agrarian Law (hereinafter as UUPA/BAL). The BAL regulates the differences in the granting of land rights for Indonesian citizens and foreigners, especially on land ownership

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<sup>2</sup> Anna Triningsih and Zaka Firma Aditya, "Pembaharuan Penguasaan Hak Atas Tanah Dalam Perspektif Konstitusi", *Rechtsvinding*, Vol. 8, No. 3 (2019), p. 330.

<sup>3</sup> Boedi Harsono, 2017, *Menuju Penyempurnaan Hukum Tanah Nasional*, Jakarta, Universitas Trisakti, p.3.

rights.<sup>4</sup> Foreigners under this law are prohibited to own land with holding rights of ownership, this is a reflection of the principle of nationality as regulated in Article 21 point (1) of the BAL, which stipulates that "*only Indonesian citizens can have rights of ownership*". The principle of nationality is an attitude of the Indonesian nation that places the national interests above the interests of everything, towards there is no compromise to sacrifice the interest of other countries.<sup>5</sup> The application of the principle of nationality in the BAL, especially in terms of land rights, there is the consequence of different treatment between Indonesian citizens and foreigners. The difference treatment is considered reasonable, especially related to the position of land for Indonesian citizens who have an important position.<sup>6</sup> The position of the principle of nationality is very important in Agrarian Laws and regulations in Indonesia, because it involves the interests of the Indonesian citizens to host their own land.<sup>7</sup>

Based on Article 26 point (2) of the BAL, other acts intended to directly or indirectly transfer the ownership rights to foreigners are prohibited.<sup>8</sup> However, the enactment of the BAL still provides opportunities

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<sup>4</sup> Ni Ketut Tri Srilaksmi and I Wayan Asta Apriadi, "Penguasaan Hak Milik atas Tanah Oleh Warga Negara Asing Melalui Perjanjian Pinjam Nama (Nominee)", *Pariksa*, Vol. 2, No. 1 (2020), p. 19.

<sup>5</sup> Putu Rosa Paramitha Dewi, and I. Nyoman Budiana, "Regulation of Land Lease Rights Period for Foreign Citizens in Indonesia", *Jurnal Hukum Prasada*, Vol. 8, No. 1 (2021), p. 45.

<sup>6</sup> Rokilah and Mia Mukaromah, "Pemilikan Hak Atas Tanah Bagi Warga Negara Asing", *Jurnal Ilmu Hukum*, Vol. 2, No. 2 (2018), p. 140.

<sup>7</sup> Jum Anggriani, "Penerapan Asas Nasionalitas dalam Perundang-undangan Agraria Indonesia (Studi Kasus PP No. 40 Tahun 1996)", *Jurnal Dinamika Hukum*, Vol.12, No.1 (2012), p. 185.

<sup>8</sup> Furthermore, according to article 26 (2) of Law no. 5 of 1960 concerning Basic Agrarian Law (BAL): "*Each sale and purchase, exchange, gift, bequest by will and other acts which are meant to transfer the right of ownership directly or indirectly to a foreigner, to a national possessing a foreignness in addition to his/her Indonesian nationality in addition to his/her Indonesian nationality, or to a corporation, except those which have been by the Government as meant in Article*

for foreigners to own land in Indonesia rights, in this case, the law limits the land rights for foreigners with only holding the right of use and leasehold rights for buildings. By imposing limits on land for foreigners, this absence of BAL has the potential to lead to smuggling of law carried out by foreigners. This acts clearly ignores the principles of good faith and nationality contained in the Basic Agrarian Law (BAL). This activity is carried out in various ways, using a *nominee* agreement or a name-borrowing agreement. Generally, the agreement is carried out using the name of an Indonesian citizen, but only as a formality and to represent the interests of certain foreign parties in order not to violate the applicable laws and regulations.<sup>9</sup> In fact, the Supreme Court (MA) of the Republic of Indonesia does not recognize the *nominee* agreement in the efforts to own land rights. The reason is, this is a form of smuggling of law (*wetsontduiking / fraus legis*) and also wants to protect the interests of Indonesian citizens and the interests of the Indonesian economy in general.<sup>10</sup>

The possibility for foreigners and foreign legal entities to be able to control the land belonging to Indonesian citizens for their own interests, will not be fully justified and carried out, because in addition to contradicting the national principle of our National Land Law, it will also trigger the

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21, clause (2) are not valid by law the provision that rights of another party incumbent therein remain valid and that all payments which have been received by the owner may not be reclaimed.”

<sup>9</sup> I Dewa Agung Dharma Jastrawan and I Nyoman Suyatna, "Keabsahan Perjanjian Pinjam Nama (Nominee) oleh Warga Negara Asing dalam Penguasaan Hak Milik Atas Tanah di Indonesia", *Jurnal Kertha Semaya*, Vol. 17, No.12 (2019), p. 4.

<sup>10</sup>Kompas, 2020, "MA Tak Akui Praktik Pinjam Nama WNA atas Kepemilikan Tanah", taken from <https://properti.kompas.com/read/2020/02/18/195049521/ma-tak-akui-praktik-pinjam-nama-wna-atas-kepemilikan-tanah>, (accessed on 9<sup>th</sup> September 2021 at 10.15 pm)

protection of national interests, which in fact now it is not strong enough to face foreign powers. Land tenure gives the powers, obligations and/or prohibitions for the holder of the land rights to do something about the land under his control, but in case of prohibition for controlling land by foreigners are considered as smuggling of law and land tenure still needs to be limited by rights that have a limited period of time.<sup>11</sup> Therefore, it also helps Indonesian citizens to be able to use their rightful land to support their lives.<sup>12</sup> Hence, it becomes clear that the interests of Indonesian citizens are above everything.

Based on the explanation above, the author will discuss what are the land rights that can be given to foreigners, as well as the Government efforts to protect the interest of Indonesian citizens, also concerning the smuggling of law conducted by foreigners in the effort of controlling land in Indonesia. There is a previous study conducted regarding land rights for foreigners in Indonesia which is “ Hak Atas Tanah Bagi Orang Asing di Indonesia Terkait dengan Undang-Undang No. 5 Tahun 1960” by Kadek Rita Listyanti and Ni Made Ari Yuliantini Griadhi. The previous study conducted, focus on the regulation of land rights holder under the BAL and the exception for Foreigners, meanwhile this research not only focuses on the regulation of land rights for foreigners but also illegal acts that commit by foreigners towards the land in Indonesia.

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<sup>11</sup> Michael Wisnoe, 2012, “Kepemilikan Hak Atas Tanah bagi Warga Negara Asing dan Kewargangaraan Ganda”, (Thesis Ilmu Hukum, Fakultas Hukum Universitas Indonesia), p. 7.

<sup>12</sup> Urip Santoso, 2015, *Perolehan Hak Atas Tanah*, Jakarta, Kencana Prenadamedia, p. 25.

## **B. Problem Formulations**

Based on the background of the problem above, it can be formulated that the main problem of this research is as follows:

1. What are the status and regulations on land rights for foreigners in Indonesia?
2. What are the legal consequences of smuggling of law by foreigners?
3. How does the State protect the National Interests of Indonesian citizens in Issuing the Land Rights for foreigners?

## **C. Objective of Research**

1. To understand and analyze status and regulations on land rights for Foreigners in Indonesia, and the problem arises with the restrictions on land rights imposed on foreigners, as well as the legal consequences of smuggling of law carried out by foreigners.
2. To analyze the State protect the national interests of Indonesian citizens in issuing the land rights for foreigners.

## **D. Benefits of Research**

This research is expected to provide benefits both in terms of theoretical and practical:

### **1. Theoretical Aspects**

The research gives benefits to understand deeply about Status and regulation on Land Ownership Rights for Foreigners in Indonesia, the problems arises with the restrictions on land rights imposed on foreigners and the legal consequence, as well as how

the State protect the National Interests in Issuing the Land Rights for Foreigners. The results of this research are expected to contribute knowledge to all Indonesian people, especially students who are looking for data on this research and can be used as material in the development of science, especially in issue relating to this research.

## 2. Practical Aspects

The Practical aspects give a better suggestion for the government and as guidance for Indonesian society towards the issue of Land Rights for Foreigners.