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Policy, Law, Notary and Regulatory Issues
https://ojs.transpublika.com/index.php/POLRI
Online ISSN 2809-896X

https://doi.org/10.55047/polri.v4i1.1557

Original Article

The Legal Consequences of Nominee Arrangements under the Basic Agrarian Law and Supreme Court Circular Number 10 of 2020, along with the Roles of Notary in Minimizing the Creation of Nominee Arrangement Deeds

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Received : 20 November - 2024
Accepted : 26 December - 2024
Published online : 31 December - 2024

Abstract

This study examines the differences in the legal consequences of nominee arrangement in the Basic Law of Agaria and the Supreme Court Circular Number 10 of 2020 which will be viewed from the perspective of certainty and justice. The deed of nominee arrangement cannot be separated from the notary since only a notary can formulate it in the form of an authentic deed, so the author also examines the notary's role in minimizing the making of a deed of nominee arrangement. This research is normative and evaluative and uses primary and secondary legal materials. The technique of collecting legal materials uses the library study technique, and the technique of analyzing legal materials uses the deductive syllogism method. The study results show that the Basic Law of Agaria provides more justice and legal certainty than the Supreme Court Circular, so the rules on nominee arrangement in the Supreme Court Circular shouldn't be enforced. The role of notary in minimizing the rampant nominee arrangement cannot be separated from the support and role of the Notary Supervisory Board to guide a preventive and repressive effort to strengthen a notary's morals and integrity patterns. Furthermore, this writing hopes that the Supreme Court revokes the rules relating to nominee arrangement. Another hope is that notary can actively prioritize their moral integrity to provide legal counseling and reject the creation of deeds containing nominee arrangement.

Keywords: Legal Consequences, Nominee Arrangement, Notary.

1. Introduction

Nominee Arrangement is an attempt by foreign citizens and/or legal subjects not entitled to property rights in Indonesia to smuggle the law to obtain ownership rights to land in Indonesia (Febrina, Dwi Tiara and Amad Sudiro. 2024). They use the name of an Indonesian citizen when buying the land, so it looks as if an Indonesian citizen owns the land and does not break the regulations. After purchasing land, both parties will make a notarial agreement or an agreement before a notary. This agreement can be in the form of a "Deed of Actual Information," "Rental Agreement," "Grant of Power of Attorney," and others. The elements contained in an agreement containing a name loan include:

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a. There is a power of attorney agreement between 2 (two) parties, namely the power of attorney (beneficial owner) and the power of attorney (nominee), which is based on the trust of the beneficial owner in the nominee;
b. Power of attorney is specific for limited legal actions. A nominee agreement usually only grants power of attorney to another person for limited and non-absolute legal actions;
c. The nominee functions as the beneficial owner's representative in the context of the law.

If there is an agreement of nominee arrangement regarding land ownership made between an Indonesian citizen and a foreign citizen, then as de jure, the object of the agreement is owned by the Indonesian citizen. At the same time, as de facto, the opposite applies, namely, the object becomes the property of the foreign citizen. The agreement about the nominee arrangement is null and void because, in agreement, it contains a nominee arrangement. Therefore, it is not fulfilling the lawful causa aspect (violating the provision that only Indonesian citizens and designated legal entities can have ownership rights to Indonesian land), which is an objective requirement of an agreement as stated in Article 1320 of the Civil Code. Transferring land ownership rights through a nominee-arrangement agreement system does not always cause problems. Still, it is also not uncommon for problems to arise. It does not always cause problems because even though this agreement is prohibited by law, the facts on the field show that if the interests of both parties do not conflict or both parties always feel equally benefited, then there will be no mutual lawsuits and requests for compensation. It is not uncommon for problems to arise because, in some circumstances, one party no longer wants to continue the contents of the agreement for one reason or another.

Since the consequences are null and void, a court decision is required regarding the nullity; then, a lawsuit must be filed by the party interested in the deed, who is the relevant party, or a third party who feels aggrieved by the existence of the deed. The question that arises is, what is the land ownership status after a nominee arrangement agreement is declared null and void? There are 2 (two) different legal regulations that regulate the consequences of a nominee arrangement: (1) Law Number 5 of 1960 concerning Basic Agrarian Principles and (2) Circular Letter of the Supreme Court Number 10 of 2020. Therefore, the background of this study is to examine which rules are valid and can be enforced when a nominee arrangement occurs.

2. Methods

The author uses normative legal research, which is prescriptive evaluative. The approaches are legislative and conceptual (Soekanto & Mamudji, 2016). The data sources are secondary data sources consisting of primary and secondary legal materials. The data collection technique is a literature study. The legal material analysis technique is the deductive syllogism method.

3. Results and Discussion

3.1. Legal Consequences of Nominee Arrangement in the Basic Agrarian Law and Supreme Court Circular Number 10 of 2020

From a positive legal standpoint, the Indonesian government has restricted land ownership with freehold status, as stated in Article 9, paragraph (1) and Article 21, paragraphs (1) and (2). Theoretically, only Indonesian citizens and legal entities determined by the

Government can own land with freehold status. The existence of these regulations aims to prevent harm to the public interest. Then, regarding the legal consequences of every action or deed that directly or indirectly transfers ownership rights to an unentitled legal subject, it is regulated in Article 26 paragraph (2) that the land falls to the state (Maria, 2020). Indeed, it is not explained explicitly and/or further regarding what "action" means, but it should be kept in mind that it is a system used to cover up the transfer of land to an unentitled party. Thus, it is sufficient to be called an act of indirectly transferring ownership rights to an unentitled legal subject, so based on the Basic Agrarian Law, the legal consequence of nominee arrangement is that the land belongs to the state. Article 6 of the Basic Agrarian Law states that land rights have a social function because they contain an element of cooperation, so the entitled party must and/or is obliged to release their land when a land acquisition process occurs for the public interest (Amasta, Andrea Winda Amasta and Rekky Sean Paulus. 2024). In summary, the Basic Agrarian Law's land ownership rights are related to social functions because they place a high value on the idea that, despite their absoluteness—the owner has complete control over the land—they must still be implemented while taking the state's and the community's interests into account.

A regulation was issued in 2020 that explicitly mentions the term “nominee-arrangement”. The regulation is in the form of Supreme Court Circular Number 10 of 2020. Its emergence was motivated by the variety of judges' decisions in resolving land disputes due to nominee arrangement, so the purpose of the Supreme Court Circular is to be a reference so that judges are consistent in deciding cases. In principle, Supreme Court Circular is a policy regulation (*beleidsregel*) or shadow law of the Law, which is often referred to as (*pseudo wetgeving*) or shadow/mirror law (*spigelrecht*). The formulation of the civil chamber point 4 in Supreme Court Circular Number 10 of 2020 regulates the use of nominee arrangement, stating that "*the owner of a plot of land is the party whose name is listed on the certificate, even though the land was purchased using money/property/assets belonging to another party or a Foreign Citizen*."

This provision explains that if there is a nominee arrangement agreement, the land ownership status will belong to the party whose name is listed on the certificate regardless of who bought it. Nominee arrangements involving Indonesian citizens ensure that the Indonesian citizen's name appears on the certificate, there by guaranteeing that in any land ownership dispute, the property rights will default to the Indonesian citizen whose name was used as the nominee (Sudharsana & Purwanto, 2022). This is indeed in accordance with Article 21 paragraph (1) of the Basic Agrarian Law, which states that only Indonesian citizens can have ownership rights to land, but it becomes inappropriate because Article 26 of the Basic Agrarian Law regulates that as a result of the transfer of ownership rights to unauthorized parties, the land falls to the state.

Supreme Court Circular, as a legal regulation, should provide certainty and justice. Supreme Court Circular is one of the authorities of the Supreme Court to regulate technical matters related to judicial procedures and legal interpretation, the purpose of which is to create uniformity in the application of law throughout Indonesia. However, Supreme Court Circular must not clash with higher laws since Supreme Court Circular, as an internal instrument of the Supreme Court, regulates the implementation of judicial procedures, not create or change laws.

The Supreme Court can provide a more transparent legal interpretation in matters requiring instructions or guidance. Still, the interpretation must also be based on applicable law, namely higher Legislation. Suppose the Supreme Court Circular regulates something contrary to the Law. In that case, it does not provide valid legal certainty. Legal certainty must

follow the hierarchy of Legislation, where the Law has a higher position and must be followed in every legal decision. Therefore, when there are provisions in the Supreme Court Circular that are contrary to the Law and/or change a law, it can be said that the Supreme Court has exceeded its authority. Changing a law that the author means is that in the Basic Agrarian Law, it has been regulated that the legal consequences of nominee arrangement (unlawful land transfer) are that the land falls to the state. In contrast, in the Supreme Court Circular, it is stated that the legal consequences of nominee arrangement are that the land becomes the property of the party whose name is listed on the certificate.

From the perspective of the validity and enforceability of legal rules, Hans Kelsen describes that a legal order is a system of interrelated legal norms that will culminate in the highest norm. According to Kelsen, its validity can no longer be questioned when it reaches the highest norm. The nominee-arrangement rule in the Supreme Court Circular is inconsistent as a subsystem following the Indonesian agrarian legal system. It is true that, as a discretion, the contents of the Supreme Court Circular Letter do not have to be based on Laws and Regulations. However, this does not mean that discretion can conflict with and/or override Laws and Regulations.

The nominee-arrangement rule in the Supreme Court Circular Number 10 of 2020 prioritizes ownership based on certificates without considering the transaction's validity, which risks violating the basic principles of the Basic Agrarian Law, which focuses on legitimate procedures and legitimate ownership de jure and de facto. Article 32 paragraph (1) of the Government Regulation on Land Registration states that a certificate is a valid proof of rights as a potent means of evidence regarding the physical data and legal data contained therein so that when a person's name is listed on a certificate, he is recognized as the legitimate owner and has the right to control the land, which does seem to be by what is stated in the Circular of the Supreme Court, whereas, in the Government Regulation on Land Registration, land certificates issued by the National Land Agency should reflect the actual legal situation, namely who has the rights to the land-based on legitimate evidence, and who controls or uses the land.

Furthermore, if we look at it from the perspective of justice put forward by John Rawls, namely justice as fairness, which is then linked to justice based on the Basic Agrarian Law, against a nominee arrangement agreement that violates Article 21 paragraph (1) and (2) of the Basic Agrarian Law, consequences must be given, namely that the agreement is null and void by law and as a result of the nominee arrangement, the land falls to the state. Still, the nominee arrangement regulation in Supreme Court Circular Number 10 of 2020 provides different legal consequences, where the regulation prioritizes the rights of Indonesian citizens by granting land ownership rights to the party whose name is listed on the certificate, which is none other than the Indonesian citizen himself.

The rules for nominee arrangement in Supreme Court Circular focus on recognizing land ownership rights based on the name recorded on the certificate, which means that anyone whose name is recorded on the certificate will be deemed to have rights to the land even though there is a possibility that someone else has material rights to the land. Hence, the principle of freedom can be threatened in this context. In the case of a nominee arrangement, the parties involved are both aware and understand that what they agree to use unlimited freedom is contrary to legal norms. The beneficial owner and the nominee (the party whose name is used) are making mistakes.

Based on the principle of inequality, which, in essence, explains that to achieve benefits and justice, they must be regulated in such a way as to provide the most to the less fortunate. In the case of nominee arrangement, as de facto, the beneficial owner is the party who buys

the land using their assets, and the certificate is always controlled or under their control so that when the land object of the nominee arrangement is given to the nominee party, the principle of inequality is not reflected. There associated with justice based on the Basic Agrarian Law, then the beneficial owner cannot benefit because he/she does not have the right to land with ownership status. Thus, it can be concluded that the rules on nominee-arrangement in the Circular of the Supreme Court Number 10 of 2020 do not reflect justice; even if the ownership status of the land object of the nominee-arrangement becomes the property of the beneficial owner, it does not reflect justice based on the Basic Agrarian Law.

On the other hand, when the legal consequences of nominee arrangement in Supreme Court Circular are enforced, it may be exploited by Indonesian citizens themselves. Indonesian citizens can persuade foreigners nearby to purchase land through a nominee-arrangement system because they know that the land can become a problem in the future. Ownership status will belong to them since no clauses preclude the possibility that the party lending the name will continue to profit from the land in question without bearing full responsibility. Therefore, regulations are needed at the level of Laws or Government Regulations that explicitly, in detail, and/or specifically regulate nominee arrangement for land ownership so it will not create various multi-interpretations. Thus, before there are regulations at the level of Laws and Government Regulations, the status of land ownership due to nominee arrangement must follow the provisions in the Basic Agrarian Law, which states that the land belongs to the state.

3.2. The Role of Notary in Minimizing the Making of Nominee Arrangement Deeds

The Nominee Arrangement is primarily stated in the form of party deeds made before a notary, so the role and contribution of notary are greatly needed to minimize the increasing number of nominee-arrangement. The role of notary is to reduce the growing number of nominee arrangements, which is indirectly stated in the provisions of Article 15 paragraph (2) letter e of the Notary Law, where Notary are authorized to provide legal counseling in connection with the making of deeds by the parties. The authority of notary in legal counseling in practice, one of which can be interpreted as providing further understanding regarding the law and/or the right or wrong of legal acts to be carried out by the parties (Sari, Siti Fauziah Dian Novita, 2018). In the making of a deed that accommodates the nominee arrangement, the notary is obliged to provide a legal understanding that the nominee arrangement about land ownership is carried out by a legal subject who has the rights and a legal subject who does not have the rights is an act that is contrary to the Basic Agrarian Law. Suppose the parties still insist on carrying out the legal act of nominee arrangement. In that case, the notary concerned must firmly reject the deed's making. In addition to that, if that is done correctly and consistently by all notary, there will be no authentic deeds containing nominee arrangement, or there will be less use of nominee arrangement because it is unlikely that legal subjects who are not entitled to take risks by making private agreements which can be easily denied and/or denied by legal subjects who are entitled when compared to authentic deeds.

In addition to the role of the notary, the role of the Notary Supervisory Board is also needed as a supporter. The Notary Supervisory Board is an institution formed by the Indonesian Notary Association which has a supervisory function, ensuring that notary carry out their duties and tasks in accordance with applicable laws and professional ethics and evaluate the implementation of notary duties. In the supervisory function, there is a coaching function, which means that supervision is a symbol of a series of activities, so it is not only limited to observing or monitoring activities but also covers essential steps in ensuring compliance with the rules and standards set. This supervision involves several interrelated stages, including:

a. Preventive initial coaching is carried out periodically, with the main audience being notary who are relatively new in carrying out their duties. By activating coaching, the Notary Supervisory Board automatically must pass on ideal values based on the Notary Law and ethical provisions per the Notary Code of Ethics to instill, strengthen, and maintain the morals and integrity patterns of each Notary.
b. Supervision ensures that each notary carries out his/her duties in accordance with the established work standards stated in the Notary Law and the Notary Code of Ethics. It is carried out by monitoring, examining, and evaluating the notary's performance through routine examinations at least once a year.
c. When a violation is discovered during a regular inspection, the notary may issue warnings and/or sanctions. In the meantime, if a notary reports an alleged breach, the Notary Supervisory Board will issue a warning and/or punishment following an inspection and confirmation that the notary has violated the law.
d. Repressive coaching carried out periodically with the primary target being notary who have committed violations of the Notary Law and the Notary Code of Ethics, is intended to increase awareness of the importance of integrity and morals so as not to repeat the same mistakes.

The author wishes to express the role of notary in reducing the prevalence of deeds with nominee arrangement and its efficacy of the Notary Supervisory Board and the Notary Honorary Council. Every notary should uphold good morals, integrity, and adherence to the Notary Law and Code of Ethics. These qualities must be continuously developed and reinforced by the notary and the Notary Supervisory Board, which the author has previously identified as one of its supporters. As a result, a mentality will be developed to avoid breaking current laws, including refraining from actions that go against the law.

4. Conclusion

A nominee arrangement agreement is one that, by Article 1320, is legally void because it fails to satisfy the objective standards for an agreement's validity. Land ownership status is questioned once it has been declared legally void. According to the Basic Agrarian Law, the state will legally own the land due to a nominee arrangement. In line with Supreme Court Circular Letter Number 10 of 2020, the land becomes the property of the party whose name appears on the certificate as a result of a nominee arrangement. Regarding the Supreme Court's power, the Supreme Court Circular's nominee arrangement rules demonstrate the Court's overreaching power since they alter the legal ramifications of nominee arrangement, which the Basic Agrarian Law governs. Even if the Supreme Court Circular's penalties for nominee arrangements are implemented, it's still possible that Indonesian people will take advantage of the situation and that the nominee arrangement will keep expanding. Therefore, a government regulation that precisely and/or in detail governs the nominee arrangement on property ownership is required to prevent various interpretations. Consequently, it is appropriate that the status of land ownership adhere to the provisions of Article 26 paragraph (2) of the Basic Agrarian Law, which states that land belongs to the state as long as the nominee arrangement on land ownership has not been more firmly and regulated explicitly in regulations that can become lex specialis of the Basic Agrarian Law.

A notary is crucial in reducing the nominee arrangement since he is the first to decide whether or not the parties' intentions will be expressed in a deed. The notary's role is inseparable from the support and role of the Notary Supervisory Board, which guides a preventive and repressive effort to strengthen the notary's morals and integrity patterns.

5. References

Aldyna, Elvita Puspa, Albertus Sentot Sudarwanto, & Muhammad Rustamaji. (2021). Legal Construction to Prevent Nominee Agreements for Right of Ownership Land in Special Region of Yogyakarta. International Journal of Law. Volume 7, Issue 2.

Amasta, Andrea Winda Amasta and Rekky Sean Paulus. (2024). Application of the Principle of Social Function of Land Rights in Decision Number 28/G/PU/2019/PTUN.PBR. Journal of Legal Studies "THE JURIS" Volume VIII, Number 1.

Febrina, Dwi Tiara and Amad Sudiro. (2024). Legal Certainty of Land Ownership Rights After the Nominee Arrangement is Considered Null and Void by Law. Unes Law Review Volume 6, Number 4.

Indrawan, N. L., Arba, & Munandar, A. (2021). Juridicial Review Implementation of Land Registration According to Government Regulation Number 18 of 2021 Concerning Management Rights, Land Rights, Flat Units and Land Registration. Policy, Law, Notary and Regulatory Issues (POLRI). Volume 1 Number 1 https://doi.org/https://doi.org/10.55047/polri.v1i1.27

Kelsen, Hans. (2011). General Theory of Law and State. Bandung: Nusa Media.

Maria, J. (2020). Pembatalan Akta Notariil Oleh Notaris. JISIP. Volume 4, Number 4. https://doi.org/10.58258/jisip.v4i4.1547

Soekanto, S., & Mamudji, S. (2016). Normative Legal Research A Brief Review. Rajawali Press.

Sudharsana, T. G. R. Y. A., & Purwanto, I. W. N. (2022). Nominee Agreement: A Solution For Foreigners To Control Land In Bali. Policy, Law, Notary and Regulatory Issues (POLRI), Volume 1, Number 4.

Sunaryo. (2022). John Rawls' Fairness Concept, Criticism and Relevance. Constitutional Journal. Volume 19, Number 1.

Sari, Siti Fauziah Dian Novita. (2018). The Authority and Responsibility of Notary to Provide Legal Counseling to the Founders of Limited Liability Companies. Master's Thesis in Notary, Faculty of Law, Islamic University of Indonesia.

Civil Code.

Law Number 5 of 1960 Concerning Basic Agrarian Principles.

Circular Letter of the Supreme Court Number 10 of 2020 Concerning the Implementation of the Formulation of the Results of the 2020 Chamber Plenary Meeting as a Guideline for the Implementation of Duties for the Court.