



Analysis of Court Decisions and Regulations Regarding Nominee Agreements as a Form of Land Ownership in Indonesia based on John Rawls's Theory of Justice

Fitria Rahmawati¹; Albertus Sentot Sudarwanto²

¹Faculty of Law Students, Universitas Sebelas Maret, Surakarta, Indonesia

²Lecturer of Civil Law, Faculty of Law, Universitas Sebelas Maret, Surakarta, Indonesia

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Abstract

This article aimed to analyze the nominee agreement as a form of land ownership along with the suitability of good and ideal regulation related to the nominee agreement based on the theory of justice. This research was normative research that was prescriptive and applied. The types of legal materials used were primary and secondary legal materials. The collection of legal materials was carried out by Library Studies technique, then the legal material analysis technique used was the deductive syllogism method. The results of the research are in line with John Rawls's theory of justice, in deciding cases the Panel of Judges had considered the events and processes that occurred before and when the name loan agreement was made against SEMA Number 10 of 2020, although not in line with Rawls' justice, these regulations had accommodated legal certainty in the event of name loan agreement, so that it can be said to be a good regulation even though it is not ideal. Furthermore, the hope of writing this journal is that the notary can be more responsible in making a deed and the government will increase supervision of the nominee agreement phenomenon through the provision of socialization which is carried out periodically.

Keywords: *Legal Certainty; Nominee Agreement; Regulation; Theory of Justice*

Introduction

Property rights are a form of land ownership rights in a country (Sari, 2021). According to Article 20 paragraph (1) of the BAL, property rights are “hereditary, strongest and fullest rights that people can have over land”. In relation to property rights, the government imposes restrictions on land ownership in Indonesia. Article 21 paragraph (1) and (2) of the BAL stipulates that “only Indonesian citizens and legal entities determined by the government can own property rights” (Indrawan & Munandar, 2022). Legal entities that can have land ownership rights are further regulated in Government Regulation Number 38 of 1963 concerning the Appointment of Legal Entities that can Obtain Land Ownership Rights.

However, it is not uncommon for legal and non-legal entities and foreign nationals to want to own land with ownership rights, so they work around this by entering into a nominee agreement. The elements contained in the nominee agreement include: (Adam, 2020)

- a. There is a power of attorney agreement between 2 parties, namely the beneficial owner and the nominee based on the trust of the beneficial owner to the nominee.
- b. Special power of attorney for limited legal action. A nominee agreement should give power to another person for limited and not absolute legal action.
- c. Nominees before the law act as if they are representatives of the beneficial owner.

It can always be ascertained that the nominee is an Indonesian citizen because he is the only party whose name can be listed on the Certificate of Property Rights (hereinafter referred to as SHM) as proof of ownership of land in Indonesia with the status of property rights, while in general the beneficial owner is a citizen. Foreigners, legal and non-legal entities that are not determined by the government to be able to have their own rights (Saputri, 2015). Thus, *de jure* the land belongs to an Indonesian citizen as the nominee, while *de facto* the land belongs to the party who buys it with his assets (beneficial owner) (Anggreni & Dananjaya, 2022).

Basically, all agreements are said to be valid if they meet the legal requirements for an agreement in accordance with Article 1320 of the Civil Code (hereinafter referred to as KUHPerduta), but if one looks closely there is one element which states that the nominee before the law acts as if he is a representative of the beneficial owner (Utama, 2017). The word "as if" contained in this element indicates the existence of a false cause, so that the requirements for "lawful cause" contained in Article 1320 cannot be fulfilled. Because this agreement is a form of legal smuggling in Indonesia, during the course of the nominee agreement it is not uncommon to encounter various problems, especially if one of the parties defaults to control the object of the agreement as a whole and individually. This behavior creates a conflict which must then be resolved through the judiciary.

Based on the description above, even though it is clear that a nominee agreement is a form of agreement that is not valid based on Article 1320 of the Civil Code, because it is a form of legal smuggling, in fact, in Indonesia, in particular, there are still many practices of nominee agreements. As such, this study aims to analyze the legal consequences of nominee agreements on land ownership in court decisions and examine good and ideal regulations related to the consequences of nominee agreements based on the theory of justice.

Research Methods

The type of research that the author used was normative research that was applied prescriptive in nature (Nurhayati et al., 2021). The approach used was the statutory approach, the case approach and the conceptual approach. The data sources used were secondary data sources consisting of primary legal materials and secondary legal materials. Data collection techniques used library research. The law material analysis technique used was the deductive syllogism method.

Research Results and Discussion

1. Legal Consequences of Land Ownership Status Obtained Through Nominee Agreements in Court Decisions Based on the Theory of Justice

A nominee agreement is a form of agreement that is often used by foreign nationals, legal entities and non-legal entities together with Indonesian citizens (Sudharsana & Purwanto, 2022). The basic concept used in nominee agreements in Indonesia is the principle of freedom of contract as stipulated in Book III of the Civil Code. In the principle of freedom of contract (Article 1338 paragraph (1)) it is explained that "all agreements made legally apply as laws to those who make them". The principle of freedom of contract in making agreements must pay attention to certain norms, both morals, decency, courtesy, and public order. The restriction on the principle of freedom of contract is then linked to several

articles in the Civil Code, including Articles 1320, 1335 and 1337 of the Civil Code. Article 1320 states that one of the conditions for the validity of an agreement is a lawful cause/causa. Article 1335 prohibits making contracts based on false or prohibited causes with the consequence that the agreement has no legal force. Then Article 1337 stipulates that a forbidden cause is meant if it is prohibited by law, or if it is contrary to good morals or public order.

Nominee agreements made by foreign nationals, legal entities and non-legal entities are intended to get around the prohibition of land ownership in Indonesia with the status of property rights by non-Indonesian citizens and legal entities that have been determined. It can be seen that the reason for making a nominee agreement is to get around the rules, where this is prohibited by law, the condition for "lawful cause" contained in Article 1320 of the Civil Code is not fulfilled, even based on Article 1335 of the Civil Code the agreement has no power, which then results in agreement must be null and void. In order to be said to be null and void, a court decision is needed to state this.

Regarding nominee agreement, it was found that there was ownership of land rights through a nominee agreement which was carried out in 1992 and became a dispute in 2018. This loan agreement was carried out by a non-legal entity, namely the Indonesian National Construction Executors Association (hereinafter referred to as GAPENSI) branch Klaten should not be able to have land rights with Gito Suwiryo (an Indonesian citizen) who was the chairman of the professional organization during the 1989-1992 term. After Gito Suwiryo died on March 11, 2018, GAPENSI intended to transfer the name of the certificate that had previously borrowed the name of the deceased, but it was complicated by the heirs, especially the second wife and children of the deceased's second wife, so that in the end GAPENSI filed a lawsuit against the heirs of the late Gito Suwiryo.

In the trial process, the plaintiff succeeded in proving part of the truth of the argument in his lawsuit, while the evidence owned by the defendant was weak and was judged to have failed to prove the argument in his rebuttal. The Panel of Judges of the Klaten District Court concluded that the notarial deed drawn up and signed by both parties before the notary Sutjana S.H. Notary of the Klaten Regency was an authentic deed, adding based on the testimony of Expert Mulyoto, which explained that basically a corporation that is not a legal entity cannot have a certificate of ownership, so that a corporation can buy land and get a certificate of ownership by acting on someone's behalf.

With the truth of the existence of Notarial Deed Number 7, dated January 11, 1992 and expert testimony, the Panel of Judges determined as law that Notarial Deed Number 7 concerning joint information about the truth, dated January 11, 1992 is valid and binding for all heirs of the late Gito Suwiryo because it is in accordance with the actual facts and does not conflict with material truth, this is a form of legal certainty. The Panel of Judges also determined that the defendants, namely the heirs of the late Gito Suwiryo, did not have any rights over the object of land in dispute; as well as legally stipulating that the Klaten Regency National Land Agency can help expedite the process of transferring the name of the disputed object from being on behalf of Gito Suwiryo to being on behalf of the plaintiff, without having to ask the defendants for signatures again. In relation with the legal determination that the deed of the nominee agreement is a valid and binding deed for the parties as well as the stipulation regarding the BPN to assist the process of transferring the name to be on behalf of the plaintiff (GAPENSI representative), this does not necessarily make the nominee agreement on land ownership legal, but in this context, it is a form of legal certainty given by the Panel of Judges.

Based on the author's analysis of court decisions that have been committed to being connected with John Rawls's theory of justice as fairness which presents the idea of justice as fairness or what he calls pure procedural justice, where the main subject of justice is the way the main social institutions distribute rights and fundamental obligations (Sulistiyowati, 2020). In the theory of pure procedural justice, Rawls emphasizes the importance of fair/impartial proceduralism, which then allows political decisions to be made capable of guaranteeing the interests of everyone. In pure procedural justice there is

no standard for determining what is called “fair” apart from the procedure itself, so that justice is not only seen from the results, but from the system or process itself, so that if there is a case, it must be decided based on logical considerations and in accordance with legal facts. In his theory, Rawls adopts two principles of justice, namely (Rawls, 2004):

- a. The principle of Greatest Equal Liberty, this principle adheres to the maximum freedom for a person's person like human rights.
- b. The principle of inequality is divided into two parts: the principle of difference and the principle of fair equality of opportunity. The principle of difference says that in order to achieve benefit and justice, it must provide the most benefit to the less fortunate, while the principle of fair equality of opportunity says that inequality must be arranged in such a way that people get equal opportunities without first comparing the level of one's position in the social order of society.

In line with Rawls's theory of justice, the Panel of Judges in deciding the land dispute case between GAPENSI and the heirs of the late Gito Suwiryo has considered the events and processes that occurred before and when the nominee agreement was made based on the evidence submitted by both the plaintiff and the defendant. In relation with the principle of greatest equal liberty, it can be seen from the Panel of Judges who legally stipulate that the agreement made by the parties is valid and binding, apart from being a form of legal certainty, this means that the Panel of Judges recognizes the freedom of every person in making agreements and their contents. In relation with the principle of inequality which includes the principle of the difference and the principle of fair equality of opportunity, which in essence is to achieve benefits and justice, it must be regulated in such a way as to give the most to disadvantaged people. In the case of the nominee agreement discussed in this journal, the party borrowing the name is not a weak party, so there is no urgency to give him the greatest advantage. Thus, the Panel of Judges has fulfilled the aspect of justice in accordance with Rawls's statement that justice is not only seen from the results, but from the system or process by remembering the concrete events that happened before.

2. SEMA Number 10 of 2020 as a Result of Land Ownership Made through Name Borrowing Agreements

At the end of 2020, the Supreme Court Circular Number 10 of 2020 was issued in which there were points governing the consequences of using nominees, namely point 4 in the civil chamber formula which states that “the owner of a plot of land is the party whose name is listed in the certificate, even though the land purchased using money/property/assets owned by foreigners/other parties”. The SEMA is being reviewed in accordance with the principles of good and ideal regulation. Ahmad Supardji, a legal observer from Al-Azhar Indonesia University, said that there are three conditions for a regulation to be good and ideal, including: predictability, stability, and fairness.

Predictability, the law has the ability to provide a definite picture in the future about the conditions or relationships that are carried out in the present, the law must also bring certainty to interested parties, so that the parties will know with certainty what the consequences will be if the step/action is carried out. The increasing use of nominee agreements in Indonesia is inseparable from the high mobilization of foreign nationals in Indonesia, not only for the purpose of traveling but also for working and living in Indonesia. The residency of foreign nationals in Indonesia will raise problems if they wish to own land with ownership rights, whether used as a residence or as a business property such as a villa. On the other hand, legal and non-legal entities that are not allowed to have property rights also often enter into nominee agreements to protect their assets. With the increasing use of nominee agreement, it is predicted that legal problems, especially land disputes, will continue to increase.

In its course there is no certainty regarding the legal consequences if the nominee agreement raises legal issues such as land disputes, one of the causes is the difference in the considerations of each panel of judges in the judicial process, where several judges recognize the nominee agreement deed as a

valid deed and vice versa. Supreme Court Circular Letter Number 10 of 2020, especially in point 4 of the section on the use of nominee agreement, explains that if a nominee agreement occurs, it will result in the land becoming the property of the party whose name is listed in the certificate, regardless of who bought it. Seeing that the borrowing of names on land ownership is mostly carried out between foreigners and Indonesian citizens, SEMA Number 10 of 2020 is in accordance with Article 9 in conjunction with Article 21 paragraph (1) of Law Number 5 of 1960 concerning Basic Agrarian Law (BAL), which says that only Indonesian citizens and designated legal entities can own land in Indonesia. The issuance of the SEMA has provided answers and legal certainty regarding the legal consequences of carrying out a nominee agreement for the parties. Against bad faith committed by foreigners, legal entities and non-legal entities in the context of controlling land with ownership rights in Indonesia through the nominee method, their rights will be lost, while for SHM in which the name of the Indonesian citizen is written, then he is the legal owner of the related land.

Stability, that a regulation must be able to create potential that can balance and accommodate the interests of the parties. According to the author opinion, SEMA Number 10 of 2020 does not accommodate the interests of the parties. This can be seen from the words “the owner of a plot of land is the party whose name is listed in the certificate, even though it was purchased using the property of a foreigner or another party”. When a nominee agreement occurs, it can be ascertained that the name listed on the certificate is the name of an Indonesian citizen because he is the only individual who can own land rights in Indonesia, so the SEMA only accommodates the interests of Indonesian citizens, while the interests of foreigners/other parties are not accommodated at all.

Fairness, regulations must contain elements of justice because the essence of law is justice. In this criterion, the author takes the theory of justice put forward by John Rawls, namely justice as fairness. For nominees' agreement who violate the Civil Code, consequences must be given, namely the agreement is null and void, but SEMA Number 10 of 2020 provides different legal consequences, SEMA prioritizes Indonesian citizens' rights by imposing land ownership rights to parties whose names are listed in the certificate, which are none other than the Indonesian citizens themselves. Basically, in a nominee agreement, the parties involved are both aware and understand that this is against legal norms. Both the borrower and the borrower made mistakes. It would be unfair if then SEMA Number 10 of 2020 is applied as a form of legal consequence for the nominee agreement. It was as if the SEMA did not see and consider what events occurred prior to the nomination. The party whose name is borrowed is not always the weak party, so there is no urgency to give him the greatest advantage. In addition, SEMA will be very detrimental to the name borrower who is the party that de facto has power over the related land because he bought it using his own assets.

Based on the description above, it can be seen that SEMA Number 10 of 2020 prioritizes legal certainty over justice. Even though it is not in accordance with Rawls's theory of justice, this is in accordance with the implementation of the provisions of laws and regulations in Indonesia which states that if you are faced with a choice of justice or legal certainty, then you should prefer legal certainty because according to Remaja (2014), "the purpose of law is to create order through legal certainty. However, regarding the principles of good and ideal regulations, SEMA Number 10 of 2020 only meets the predictability criteria, so that it can only be said to be a good regulation but not ideal from the point of view of a legal observer from Al-Azhar University Indonesia, Ahmad Supardji (Suparji, 2020).

Conclusion

1. Conclusion

- 1) The nominee agreement is an invalid agreement and has no binding force because it does not meet the objective requirements of an agreement, so as a result of the law the status of land ownership

rights obtained through the nominee agreement is null and void. In addition to providing legal certainty, in line with Rawls's theory of justice, the Panel of Judges in deciding the nominee agreement case which is the focus of this journal has considered the events and processes that occurred before and when the nominee agreement was made.

- 2) Regarding SEMA Number 10 of 2020, although it is not in line with Rawls's justice and does not accommodate the interests of the parties, this regulation has provided legal certainty in the event of a nominee agreement, so it can be said to be a good regulation even though it is not ideal.

2. Suggestion

- 1) Notaries and Land Deed Official need to provide advice and advice to parties who wish to draw up a nominee agreement deed. Both parties are given the understanding that a nominee agreement is an act that is prohibited and allows for legal problems to arise in the future, to avoid this, foreign nationals, legal entities and non-legal entities can use usufructuary rights and or lease rights over a land.
- 2) The government, in this case the National Land Agency, needs to coordinate with the Ministry of Law and Human Rights (Immigration) to tighten supervision through periodic outreach to Indonesian citizens and foreigners who enter Indonesia regarding the prohibition of land ownership through nominee agreements. This is an effort to protect the law that is preventive in nature and is expected to provide a good understanding so that there is no more misuse or misunderstanding of the nominee agreement.

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