

Legal Certainty Of Nominee Agreements In The Transfer Of Ownership Rights To Land Based On An Absolute Letter Of Power

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Abstract.

Article 21 of Law Number 5 of 1960 concerning Basic Agrarian Regulations (UUPA) also states that those entitled to Property Rights are Indonesian Citizens and Legal Entities appointed by the Government. However, in fact, there are still many practices of Nominee agreements based on absolute power of attorney to avoid these legal restrictions in order to disguise ownership of land. The urgency of this research is the importance of studying the legal certainty of nominee agreements based on absolute power of attorney. In this legal research, the normative and prescriptive legal research methods are used. In this legal research, the author uses a statutory regulatory approach, a conceptual approach and a case approach. The author utilizes primary and secondary legal materials. Data collection techniques in this research are carried out through literature studies. In this legal research, the Legal Material Analysis Technique is used with the Syllogism Method, which is a deductive way of thinking that applies logical principles to reach conclusions based on general and specific premises. Nominee agreements based on absolute power of attorney, based on the valid conditions of the agreement in Article 1320 of the Civil Code, have violated the lawful purpose because they disguise the original ownership of the land object and constitute legal smuggling. Instruction of the Minister of Home Affairs Number 14 of 1982 concerning the Prohibition of the Use of Absolute Power of Attorney as a Transfer of Land Rights expressly prohibits the use of absolute power of attorney to transfer or disguise ownership of land rights. In this case, a name borrowing agreement in the transfer of land ownership rights based on an absolute power of attorney, which does not comply with the rules or laws, does not provide legal certainty for the holder of the letter.

Keywords: Legal Certainty, Nominee Agreement and Absolute Power of Attorney.

I. INTRODUCTION

Agreement is one of the fundamental aspects of Indonesian civil law that plays an important role in regulating between individuals. Agreement is regulated in the Civil Code article 1313, which states that "an agreement is an act by which one or more persons bind themselves to one or more persons" (Rabbani et al., 2021). In this case, the agreement creates an obligation or right for each party involved. In Indonesian contract law, agreements can be divided into two types, namely named agreements (*nominaat*) and unnamed agreements (*innominat*) (Sumarsih, 2024). Named agreements are agreements that are specifically regulated in laws and regulations, especially in the Civil Code, for example, sale and purchase agreements, leases, and grants. While unnamed agreements are agreements that are not explicitly regulated in law, but are made and recognized by the parties based on the principle of freedom of contract as regulated in Article 1338 of the Civil Code (Suparji, 2020). Article 1320 of the Civil Code regulates the requirements for the validity of an agreement, which consists of four main elements: agreement of the parties, capacity to act, clear object, and lawful purpose (Miru & Pati, 2020). Agreement of the parties is the core of an agreement, which requires all parties to have the same intention in making the agreement. In addition, capacity to act indicates that the parties must have the legal capacity to make the agreement, namely having reached adulthood and not being under pressure or disturbance (Subekti, 2002). With these two requirements, the agreement can be considered valid and legally binding. The object of the agreement also plays an important role in determining the validity of the agreement (Rahim, 2022).

The object must be clear, meaning it must be in accordance with applicable legal provisions. In addition, the purpose of the agreement must be lawful, meaning it must not conflict with the law, public interest, or morality. If one of these four requirements is not met, the agreement can be considered void or

invalid (Arifin, 2020). *Nominee* agreements regulated by reference to Article 1320 of the Civil Code provide a clear legal framework to ensure that the agreement is valid and binding (Yanuar, 2021). This agreement includes the appointment of a nominee party who will represent the landowner, where the rights and obligations of each party must be clearly regulated. The capacity to act ensures that all parties involved in the agreement have the legal capacity to carry out the action, while the object clearly explains the land that is the subject of the nominee agreement (Najlalinka et al., 2024). In addition, the purpose of the nominee agreement must meet the criteria of halal, which means it must not conflict with the law, public interest, or morality (Yuanitasari & Kusmayanti, 2020). In the context of land ownership rights in Indonesia, legal subjects who can legally own land rights are Indonesian citizens (WNI) and legal entities that have been appointed by the Indonesian government (Fitriadi & Tolo, 2024). This is in line with the provisions of Law Number 5 of 1960 concerning Basic Agrarian Principles Article 21 which emphasizes that land ownership rights can only be granted to individuals or legal entities that meet certain requirements set by the government (Diva Sukmawati, 2022).

So that agreements involving the transfer of land ownership rights must involve parties who have the status of legitimate legal subjects. However, there are still many foreign citizens and legal entities who have not obtained official permission to obtain land ownership rights. In an effort to overcome these legal limitations, a nominee agreement with an absolute power of attorney is used (Pamungkas, 2021). Nominee agreements made using absolute power of attorney are one method often used in the practice of transferring land rights, especially when the party wishing to own the land does not meet the requirements as a legitimate legal subject (Yanti & Trisaka, 2023). The use of absolute power of attorney is often chosen as a tool to avoid legal restrictions, for example to disguise the actual ownership of the land. In this context, individuals or legal entities who cannot directly own land rights can appoint someone as a nominee to represent them in land ownership (Aprilia et al., 2024). This absolute power of attorney gives full authority to the nominee to act on behalf of the party granting the power of attorney, including in terms of management and utilization of the land (Wiramansyah et al., 2024). However, the use of an absolute power of attorney in a nominee agreement often poses legal risks, especially if there is no clear cause in terms of the transfer of land rights in the future. The urgency of this research is the importance of studying the legality and legal certainty of *nominee agreements* based on absolute power of attorney. In the context of land, legal certainty is very important to protect the rights of land owners and prevent conflicts or legal disputes in the future. This research is expected to provide an important contribution to the development of agrarian law policies and provide better legal certainty for the parties involved in the transfer of land ownership rights.

II. METHODS

In this legal research, a normative legal research method is used. This research is prescriptive, prescriptive legal research does not focus on collecting empirical data or testing hypotheses, but aims to provide legal views or arguments based on applicable legal principles and norms. In this legal research, the author uses a statutory regulatory approach, a conceptual approach and a case approach. The author utilizes primary and secondary legal materials. Statutory regulations, official records or treatises on the process of drafting laws, and judges' decisions are primary materials. Secondary materials include research results and scientific works related to the topic of this research, such as journals, theses, and various books related to law related to the problems discussed by the researcher. The data collection technique in this research is carried out through literature studies, where data is obtained from various legal materials. In this legal research, the Legal Material Analysis Technique is used with the Syllogism Method. The Syllogism Method in legal research is a deductive way of thinking that applies logical principles to reach conclusions based on general and specific premises (Hehanussa et al., 2023).

III. RESULTS AND DISCUSSION

Land is a basic human need and plays an important role in shaping the nation's personality. In this case, it should be realized that land is a primary need for every human being besides the need for clothing and food (Mappasessu, 2022). Therefore, the fulfillment of the availability of land for every citizen is an

obligation of the state or in this case the government. Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia states that "the earth, water, and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people" (Rahmi et al., 2023). This provision emphasizes the importance of managing natural resources for the benefit of the wider community, not just for the benefit of certain individuals or groups. In the context of land, although the state has the right to regulate and manage these resources, land rights and ownership by the community remain the main priority. Law Number 5 of 1960 concerning Basic Agrarian Regulations (UUPA) as the implementing law of Article 33 of the 1945 Constitution provides a clear legal framework regarding land rights. Article 9 paragraph 1 of the UUPA states that "Only Indonesian citizens can have a full relationship with the earth, water and space" (Abdullah et al., 2023). This aims to protect national interests and ensure that natural resources are managed for the prosperity of the Indonesian people.

There are several rights granted by the state to the Indonesian people, one of which is the Right to Ownership. Article 20 of the UUPA states that the Right to Ownership is the strongest and most complete right that can be inherited or passed down that can be owned by people over land. However, in the concept of control of land ownership rights in Indonesia, based on Article 21 of the UUPA, it is stated that only Indonesian citizens and legal entities determined by the government. However, in fact in Indonesia, to overcome these limitations, there are still many practices of nominee agreements. A nominee agreement is a form of innominate agreement, namely an agreement that is not explicitly regulated in the Civil Code, but is made and recognized by the parties based on the principle of freedom of contract as regulated in Article 1338 of the Civil Code. In the context of a nominee agreement, the four conditions listed in Article 1320 are crucial, namely an agreement between the parties, capacity to act, a clear object, and a lawful purpose. This agreement includes the appointment of a nominee party who will represent the landowner, where the rights and obligations of each party must be clearly regulated. Capacity to act ensures that all parties involved in the agreement have the legal capacity to carry out the action, while a clear object explains the land that is the subject of the nominee agreement. In addition, the purpose of the nominee agreement must meet the criteria of halal, which means it must not conflict with the law, public interest, or morality. By paying attention to the requirements in Article 1320, the parties can protect their respective interests and minimize the risk of disputes in the future. The use of Article 1320 of the Civil Code in the context of a nominee agreement not only provides a strong legal basis, but also ensures legal certainty for the parties and implements the agreement (Subekti, 2002).

Nominee agreements made using absolute power of attorney are one method often used in the practice of transferring land rights, especially when the party wishing to own the land does not meet the requirements as a legitimate legal subject. In this context, individuals or legal entities who cannot directly own land can appoint someone as a nominee to represent them in land ownership (Gde et al., 2022). This absolute power of attorney gives full authority to the nominee to act on behalf of the party granting the power of attorney, including in terms of management and utilization of the land. In this case, the use of an absolute power of attorney is often chosen as a tool to avoid legal restrictions, for example to disguise the actual ownership of the land (Wiryani et al., 2018). In the context of civil law, a power of attorney is regulated by Article 1792 of the Civil Code, which states that a power of attorney is an agreement in which one party grants power to another party to and on behalf of the grantor to carry out a legal action. However, an absolute power of attorney has the specificity of being a form of power that grants absolute authority and is often used in the transfer of land rights. Instruction of the Minister of Home Affairs Number 14 of 1982 concerning the Prohibition of the Use of Absolute Power of Attorney as a Transfer of Land Rights expressly prohibits the use of an absolute power of attorney to transfer or disguise ownership of land rights. The instruction states that an absolute power of attorney cannot be used as a basis for the transfer of land ownership rights because it is contrary to the principle of transparency and the principle of legal certainty as regulated in the Basic Agrarian Law (UUPA).

This prohibition aims to prevent misuse or land disputes in the future. In the Supreme Court decision number 144/PDT/2021/PT.DPS, Nominee Agreements for land are prohibited because they constitute "legal smuggling" which violates Article 9 paragraph I in conjunction with Article 21 paragraph 1 in conjunction

with Article 26 paragraph 2 of Law Number 5 of 1960 concerning Basic Agrarian Principles (UUPA). In this case, Ann Elizabeth Sihombing, is an Australian citizen who seeks to own land in Denpasar Bali with an Indonesian citizen who is the holder of the rights based on a name borrowing agreement with a notarial deed and absolute power of attorney. That in the Court's Decision, in essence, the nominee agreement in this case is a form of legal smuggling which results in the validity of the agreement being null and void. Based on positive Indonesian law, the validity of an agreement is based on the provisions of Article 1320 of the Civil Code as follows:

1. Agreement.
2. Legal Competence or Skill.
3. A certain thing.
4. Because it is halal.

From the description of the notarial deeds in the case, it is known that the agreement does not fulfill the elements of a lawful cause, because an agreement and/or the contents of the agreement must be based on a cause required by law, not contrary to public order and morality. This is based on the provisions of Article 1337 of the Civil Code, namely "a cause is prohibited, if the cause is prohibited by law or if the cause is contrary to morality or public order"(Amalia & Ma'ruf, 2021). So, if an agreement is made because of something that is contrary to law, then the agreement does not have legal force in accordance with the provisions of Article 1335 of the Civil Code on legal force(Perwitasari & Fairina, 2021). That as is known, the purpose of making a nominee agreement in the Supreme Court Decision Number: 144/PDT/2021/PT.DPS is to smuggle the law where foreign citizens who do not have land ownership rights in Indonesia as stated in the provisions of Article 21 paragraph (1) of Law No. 5 of 1960, then the foreign citizen takes action, namely borrowing the name of an Indonesian citizen by binding it with notarial deeds in order to obtain these rights, then avoiding the consequences of the provisions of Article 26 paragraph (2) where everything regarding land that directly or indirectly intends to transfer land rights to foreign citizens is null and void and the land falls to the state(Masum et al., 2023).

Of course, this is contrary to the provisions of Article 1337 of the Civil Code where this nominee agreement was made for reasons that are contrary to the law. So based on article 1320 of the Civil Code, we can see that the nominee agreement in the Supreme Court Decision Number: 144/PDT/2021/PT.DPS does not fulfill the objective elements of the validity of the agreement, namely the element of "a lawful cause". So that the nominee agreement in this case is an agreement that is not in accordance with the positive law in force in Indonesia, because the purpose of the agreement does not fulfill the principle of good faith, thus the agreement is null and void. In addition, in the Supreme Court Decision number 28/Pdt.G/2014/ PN.Skh involving a Legal Entity that is not yet entitled to own land but uses the chairman of the foundation as the holder of land rights based on an absolute power of attorney. This then causes a dispute or problem when the rights holder has died, because the land object is included in the inheritance rights. Then a lawsuit arose from the heirs to the foundation regarding the land, but in the decision the panel of judges emphasized that the legal owner of the land rights is the heir of the chairman of the foundation even though there is an absolute power of attorney and the source of funds for the purchase is from the foundation. This is in line with the Circular of the Supreme Court of the Republic of Indonesia Number 10 of 2020 concerning the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber in 2020 as a Guideline for the Implementation of Duties for the Court, in the Attachment to the Legal Formulation of the Plenary Meeting of the Supreme Court Chamber in 2020, Point B.

The Legal Formulation of the Civil Chamber, number 3 states 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 or property or assets belonging to a Foreign Citizen or other party". In analyzing the legal certainty of nominee agreements in the transfer of land ownership rights based on absolute power of attorney, the author uses the theory of legal certainty by Gustav Radbruch. In his theory, Gustav states that the law must fulfill three basic values: justice, benefit, and legal certainty. In terms of legal certainty, there are four fundamental aspects, namely:

1. Law is something positive, which means positive law refers to legislation.
2. Law is based on facts, which means that law is made based on existing reality.

3. The facts stated in the law must be formulated clearly to avoid errors in interpretation and facilitate implementation.
4. Positive law should not be easily changed.

Radbruch's view shows that legal certainty is the essence of the law itself and is the result of legislation. According to him, law is something positive that regulates the interests of every individual in society and must be obeyed, although sometimes positive law is considered unfair. Furthermore, legal certainty is a clear state, including existing provisions and provisions (Tanya et al., 2010). Nominee agreements based on absolute power of attorney in the transfer of land ownership rights raise complex legal problems, especially in relation to legal certainty as stated by Gustav Radbruch. In terms of legal certainty, there are four fundamental principles: the law must be positive, fact-based, clearly formulated, and not easily changed. However, in practice, nominee agreements made by legal subjects who are not entitled to land ownership rights based on Law Number 5 of 1960 concerning Basic Agrarian Principles (UUPA) and which violate the halal causation in the Civil Code create uncertainty in the application of the law. Therefore, an in-depth analysis is needed to determine whether the practice of this nominee agreement can be considered to have legal certainty based on these four aspects. First, the law must be positive, meaning that legal regulations must refer to applicable laws. In the context of land ownership rights, Law Number 5 of 1960 concerning Basic Agrarian Regulations (UUPA) Article 21 has clearly stated that only Indonesian citizens (WNI) and certain legal entities recognized by the government can own land rights. This prohibition aims to maintain the principle of nationality in land ownership and avoid abuse of rights by unauthorized parties. In addition, various derivative regulations and court decisions, such as Supreme Court Decision No. 144/PDT/2021/PT.DPS, strengthen the prohibition on nominee agreements.

Therefore, in terms of positive law, the rules regarding land ownership are quite clear and firm, so that the first aspect of legal certainty can be said to be unfulfilled. Second, the law must be based on facts or realities that exist in society. In practice, although nominee agreements are legally prohibited, there are still many deviations in the field. Many parties, especially foreign legal entities or individuals who are not entitled to own land, still use nominee agreements as a strategy to avoid the prohibition in Law Number 5 of 1960 concerning Basic Agrarian Regulations (UUPA). The mode that is often used is to appoint an Indonesian citizen as the formal owner, while real ownership remains in the hands of the party who is not entitled. This phenomenon shows a gap between normative law and the law that applies in society. Because good law should be in accordance with existing reality, in this aspect, legal certainty is not optimally fulfilled. Third, the law must be formulated clearly so as not to cause multiple interpretations and to facilitate its implementation. The Civil Code regulates freedom of contract in Article 1338, which allows individuals to make agreements according to their wishes. However, on the other hand, Article 1320 of the Civil Code also states that an agreement must have a lawful cause in order to be legally valid. Because the nominee agreement aims to hide the actual ownership and avoid legal prohibitions, this agreement is considered to have an unlawful cause, so it is null and void. So that the third aspect of legal certainty is not fully fulfilled. Fourth, positive law should not be easily changed so that legal stability is maintained. In the context of land ownership, the principle of nationality in Law Number 5 of 1960 concerning Basic Agrarian Regulations (UUPA) has been in effect since 1960 and has not undergone significant changes to date. This principle remains the basis for various land regulations in Indonesia.

However, although the legal rules have not changed, their implementation often experiences dynamics. Differences in interpretation in court decisions and weak supervision of nominee practices show that although the legal rules remain consistent, their application is not always so. This causes uncertainty for the parties involved in the nominee agreement. Based on the analysis of the four aspects of legal certainty, it can be concluded that nominee agreements based on absolute power of attorney do not have strong legal certainty. Legal uncertainty in nominee agreements also has an impact on the protection of land rights. In some cases, nominee owners who initially only act as intermediaries can unilaterally claim land rights, causing prolonged disputes. In addition, in situations where the nominee agreement is null and void, the party who actually has an interest in the land can lose their rights without adequate legal protection. This shows that nominee agreements not only create legal uncertainty but also have the potential to harm the

parties involved. So in this case, a name-borrowing agreement in the transfer of land ownership rights based on an absolute power of attorney, which does not comply with the rules or laws, does not provide legal certainty for the holder of the letter.

IV. CONCLUSION

Article 21 of Law Number 5 of 1960 concerning Basic Agrarian Regulations (UUPA) also states that those entitled to Ownership Rights are Indonesian Citizens and Legal Entities appointed by the Government. Nominee agreements in the transfer of land ownership rights based on absolute power of attorney are often chosen as a tool to avoid these legal restrictions, for example to disguise the actual ownership of the land. In this case, a nominee agreement based on an absolute power of attorney, based on the valid conditions of the agreement in Article 1320 of the Civil Code, has violated the lawful purpose because it disguises the original ownership of the object of the land and constitutes legal smuggling. And the Instruction of the Minister of Home Affairs Number 14 of 1982 concerning the Prohibition of the Use of Absolute Power of Attorney as a Transfer of Land Rights expressly prohibits the use of absolute power of attorney to transfer or disguise ownership of land rights. In this case, a name-borrowing agreement in the transfer of land ownership rights based on an absolute power of attorney, which does not comply with the rules or laws, does not provide legal certainty for the holder of the letter.

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