



## Legal construction to prevent nominee agreements for right of ownership land in special region of Yogyakarta

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### Abstract

This legal research aims to find legal construction to prevent nominee agreements for right of ownership land in Special Region of Yogyakarta. This legal research is a normative legal research with statute approach, conceptual approach, and case approach. The technique of collecting legal material used is literature study techniques. Research analysis techniques using the deductive syllogism method.

Based on the result of research and discussion, it concludes the legal construction to prevent nominee agreements for right of ownership land in Special Region of Yogyakarta Province refers to the legal system theory of Lawrence Friedman by constructing a legal system as follows: a) In the legal structure There is a need for cooperation to enforce the law from law enforcement officials with professional notary supervisors so that synergize in enforcing the law; b) It takes a norm that regulates the prohibition or limitation of the making of acts that contain legal smuggling and also requires the formulation of strict sanctions; c) Legal construction in the legal culture as a solution to prevent nominee agreements for right of ownership land in Special Region of Yogyakarta is to carry out the legal rules that are determined accordingly.

**Keywords:** land right, nominee agreements, legal construction, and special region of Yogyakarta

### Introduction

The study of the Special Region of Yogyakarta still leaves empty space regarding land ownership rights based on the existence of a nominee agreement. Yogyakarta is one of the provinces that has privileges in Indonesia. The arrangement of land for the Special Region of Yogyakarta is a long historical process which was originally intended to improve the welfare of the community so that there is no imbalance, so no one of the Regional Heads should preserve the provisions of their customary law, as well as the existence of the 1945 Constitution of the Republic of Indonesia Article 18 b paragraph (1) and (2) regarding special and special regions as well as customary law communities and their traditional rights and until the Law on the Privileges of the Special Region of Yogyakarta was born as a recognition. As a province that has privileges, the Special Region of Yogyakarta is given the authority to regulate land policies in its territory. Article 4 of Law Number 3 of 1950 concerning the Establishment of the Special Region of Yogyakarta mandates the Yogyakarta local government to take care of its own affairs, including agrarian affairs. Law of the Republic of Indonesia Number 3 of 1950 guarantees the rights and authorities of the Sultanate and Pakualaman in running the government and determining land policy in Yogyakarta.

For the community, land is a magical-religious relationship. Humans are willing to die in order to defend the land they own, even in Javanese society there is a saying: "*sedumuk batuk senyari bumi, den labuhi lutahing ludiro lan ditohi pati.*" which means that if someone else holds his forehead the same as if his land is confiscated, it will be defended at the risk of life (Mochtar, 2018).

Based on the Instruction of the Governor of the Special Region of Yogyakarta Number K 898 / I / A / 1975 dated

March 5, 1975 concerning Unification Policy for the Granting of Land Rights to Non-Native Indonesian Citizens, the practice of granting land ownership rights in Yogyakarta can not be given to the non-natives Indonesian citizens. The existence of this instruction give a limit that the non-native Indonesian citizens does not have permission to have land ownership rights in Special Region of Yogyakarta Province. The Instruction of the Governor of the Special Region of Yogyakarta Number K 898 / I / A / 1975 is basically addressed to the Regent / Mayor of the Region throughout the Special Region of Yogyakarta which contains instructions so that all regional heads of the Special Region of Yogyakarta give unification policies related to granting land rights to non-native Indonesian who have land right in order to relinquish his / her rights through the relinquishment of rights and then after releasing the land owned by the non-native Indonesian citizens, and they can submit an application to the regional head of the Special Region of Yogyakarta to obtain other rights.

The enforcement of these instructions is getting stronger because of the Law of the Republic of Indonesia Number 13 of 2012 concerning the Privileges of the Special Region of Yogyakarta. The Provincial Government of the Special Region of Yogyakarta-also maintains the Instruction Letter Number K.898 / I / A / 1975 which can be seen from the Letter of information dated May 8, 2012, No. 593/00 531 / RO.I / 2012 stating that the Letter of Instruction Number K.898 / I / A / 1975 remain in effect as an affirmative policy and aims to protect the existing lands in Special Region of Yogyakarta Province so that it is not fully controlled/owned by non-native Indonesian citizens.

The Instruction Letter as referred to above results in differences in treatment for native Indonesian citizens and non-native Indonesian citizens living in the Special Region

of Yogyakarta (Lestairini, 2018) [15].

The limitations and difficulty of the requirements set by the government for non-native Indonesian citizens to own land rights in the Special Region of Yogyakarta have resulted in a breakthrough in the legal field in the form of an agreement which is commonly referred to as a nominee agreement (Saputri, 2015) [12]. According to Endah Pertiwi, the method that was then used to meet the needs of non-native Indonesians was to use the name of another person who was a native citizen to be appointed as a nominee and registered as owner of the land (Endah, 2018) [13].

Examples of nominee practices in the Special Region of Yogyakarta are the case in the Sleman District Court Decision Number: 228 / Pdt.G / 2018 / PN.Smn. In this case, it shows that there is a nominee agreement to cheat the Instruction Letter Number K.898 / I / A / 1975. The late OH, a non-native Indonesian citizen who was of Chinese descent, was forbidden from this instruction to practice a nominee agreement with a native Indonesian citizens, namely PK.

The nominee agreement in the case in the Sleman District Court Decision Number: 228 / Pdt. G / 2018 / PN.Smn is drawn up with a Joint Deed of Information on the Real Thing drawn up before a notary. The deed describes the nominee practice in which the deed states that the original owner of land ownership rights is OH (non-native Indonesian citizens) however in certificate of land ownership rights is legally registered in the name of OH (non-native Indonesian citizens). Formally, because nominee agreements, the ownership of the land ownership right does not deviate from Instruction of the Governor of the Special Region of Yogyakarta Number K 898 / I / A / 1975 dated March 5, 1975 concerning Unification Policy for the Granting of Land Rights to non-native Indonesian citizens even though it is an act against the law.

The description shows a case of legal smuggling to have property rights on land in the Special Region of Yogyakarta by making a nominee agreement. In order to focus the study of the existence of the nominee agreement ownership of land rights that target the Special Region of Yogyakarta there is a formulation of the problem that will be appointed, namely legal construction to prevent nominee agreements for right of ownership land in special region of Yogyakarta.

### Research Method

The research method is a way or process to solve the existing problems by collecting, or testing the truth of a knowledge. Legal research is a process to find legal rules, legal principles, and legal doctrines to answer the legal issues faced. Legal research is carried out to produce arguments, theories, new concepts as prescriptions in solving the problems faced. To assess the above problems, the author uses the normative legal research method.

To assess the above problems, the author uses the normative legal research method. This research uses 3 approaches, namely: Study Approach by conducting a study of cases related to the issue faced that have become a court ruling that has a fixed power (*inkracht*), Statute Approach is the approach carried out by examining all laws and regulations involving in the legal issues that are being handled, and conceptual approach by using legal doctrine as a reference in research (Marzuki, 2019) [8].

This legal research is prescriptive as stated by Peter Mahmud Marzuki that "Law science has characteristics as a

prescriptive and applied science. As a prescriptive science, law studies the aims of law, the values of justice, the validity of legal rules, legal concepts, and legal norms. As an applied science, law determines standard procedures, provisions, guidelines for implementing legal rules." (Marzuki, 2019) [8] Legal research sources can be divided into research sources in the form of primary legal materials and secondary legal materials with the legal material collection technique used in this research is using library research.

The whole legal material obtained from primary and secondary materials is analyzed using the deductive syllogism method, namely by thinking on basic principles, then the research presents the object to be studied in order to draw conclusions on specific facts.

### Research Result and Discussion

#### Legal Construction to Prevent Nominee Agreements for Right of Ownership Land in Special Region of Yogyakarta

Ideality so that illegal acts in making nominee agreements in Yogyakarta can be prevented, the author will use Lawrence Friedman's Law System Theory of Legal System. In order to find law (*rechtsvinding* theory), need to know about the law that you aspire to and applicable laws. Literature relating to the legal system generally refers to Lawrence Friedman's theory of the legal system (Luluhima, 2007) [6]. Lawrence Friedman constructs the legal system in the following structure:

##### a. Legal Structure

The legal structure is the apparatus that has the authority to enforce law enforcement, including institutions that work in implementing law enforcement.

##### b. Legal Substance

The substance of the law emphasizes the aspects of legal rules and the content of the legal rules, which are none other than legal norms or rules.

##### c. Legal Culture

The legal culture of society that responds to the existence of law is an ideal that must be obeyed.

These three aspects must be able to synergize with one another in realizing law as a system. If the synergy of these three things cannot be realized, then the law as a system does not work in harmony, making it possible that the law cannot operate according to the expected goals (Sale, 2020). Lawrence Friedman's Law System Theory determines that law enforcement will be effective or not depending on three elements of the legal system, namely the legal structure, legal substance and legal culture. The legal structure is related to law enforcement officers, the substance of the law is related to statutory regulations, and legal culture is the law that lives and is followed in society (Ali, 2002) [3].

Guided by the theory of legal substance from Lawrence Friedman, the legal construction to prevent nominee agreements for right of ownership land in Special Region of Yogyakarta is as follows:

##### a. Legal Structure

Structure is a pattern that shows how the law is carried out according to its formal provisions. This structure shows how the courts, lawmakers and agencies as well as the legal

process is running and the law was implemented.

In Indonesia, if we talk about the structure of the Indonesian legal system, it includes the structure of law enforcement institutions such as the police, prosecutors, and courts. In this theory the structural system determines whether or not the law can be properly implemented. In Indonesia, the legal structure is regulated in Law of the Republic of Indonesia Number 8 of 1981, which consists of the Police, Prosecutors, Courts, and Criminal Implementing Body.

Regarding the nominee agreement that exists in the Special Region of Yogyakarta to construct the structure in this agreement, the arrangements for the affirmation and imposition of sanctions must be formulated by law enforcement officials.

Notary as an official in carrying out his profession must comply with the code of ethics. In the case of the nominee agreement contained in the Sleman District Court Decision Number: 228 / Pdt. G / 2018 / PN.Smn involves notary as seen from the existence of a Joint Deed of Information on the Real Thing made in front of a notary, even though the notary must provide legal advice to the person against it. If there is an applicant who makes a deed that is not in accordance with the existing legal provisions, the notary should not only provide legal advice but also reject the creation of the deed.

There is a need for cooperation to enforce the law from law enforcement officials with notary supervisory board so that they work together. The position of Notary is a special position so that in carrying out its duties, it must be fostered, supervised by 3 (three) different ones, namely:

- a. Majelis Pengawas Notaris (MPN) - (Article 67 paragraph (2) Law of the Republic of Indonesia Number 30 of 2004 concerning Notary Position)
- b. Majelis Kehormatan Notaris (MKN) – (Article 66 A of the Law of the Republic of Indonesia Number 2 of 2014 concerning Amendments to the Law of the Republic of Indonesia Number 30 of 2004)
- c. Dewan Kehormatan Notaris (DKN) - (Articles 10 and 12 of the Articles of Association of the Indonesian Notary Association).

The three institutions have different functions, duties, and authorities but their ends are on the same goal so that the Notary in carrying out his / her job duties remains obedient and obedient to the existing legal corridors so that the deed made and before a Notary has perfect and complete evidentiary power (Adjie, 2017). In the legal structure, there is a need for cooperation to enforce the law from law enforcement officials with notary supervisory board so that synergize in enforcing the law.

## b. Legal Substance

In Lawrence Friedman's theory, the substance is the rules, norms, and patterns of real human behavior in the system. The substance relates to the prevailing laws and regulations which have binding force and serve as guidelines for law enforcement officers. The substance also includes the prevailing law or living law as well as existing laws in the formal provisions or law in the books (Rahardjo, 1986) <sup>[9]</sup>.

## 1. Civil Code

Nominee agreements are included in the category of anonymous agreements (innominate) or agreements that have not been regulated in the Civil Code. This agreement

arises and exists over time (Triwis, 2016) <sup>[16]</sup>. In accordance with Article 1319 of the Civil Code, this agreement must still be in accordance with the general regulations contained in Book III of the Civil Code. Also the principles in the Civil Code shall still apply to the innominate agreement (Salim, 2008) <sup>[4]</sup>.

This nominee agreement comes from the existence of the principle of freedom of contract and can be valid if the agreement meets the legal requirements of the agreement as stipulated in Article 1320 of the Civil Code. Regarding the binding power of the parties, if an agreement has met the validity of the agreement (including agreed upon by the parties), then as long as the other conditions are met (if any), the agreement must have binding legal force (beginzel dercontract vrijheid). Likewise, the agreement is binding as and constitutes law (pacta sun servanda) for those who make it.

The legal substance of the Civil Code is clear and it can be concluded that the agreement must be in accordance with the rules and principles of the Civil Code. The nominee agreement for land ownership in Yogyakarta is not in accordance with the provisions in the Civil Code because of smuggling on the subject of land ownership rights.

## 2. Law Number 5 of 1960 concerning Basic Agrarian Regulations

In Indonesia, the Basic Agrarian Law adheres to the principle that only Indonesian citizens can have ownership rights over land as contained in Article 9 paragraph (1) and Article 21 paragraph (1).

Nominee agreements is used to smuggle this law indirectly violates the principle that only Indonesian citizens can have ownership rights over Indonesia's land. The existence of a nominee agreement in Indonesia that can harm Indonesian citizens and also the state, it is necessary to make arrangements regarding prohibitions and limitation in making agreements. Strict sanctions also need to be given to parties involved in legal smuggling by making a nominee agreement.

As in the Law of the Republic of Indonesia Number 25 of 2007 concerning Investment regulates which Article 33 paragraph (1) and paragraph (2) states that: (1) domestic investors and foreign investors who make investments in the form of a limited liability company is prohibited from entering into agreements and / or statements confirming that share ownership in a limited liability company is for and on behalf of other people. Then in paragraph (2) it is stated that in the event that domestic investment and foreign investment make agreements and / or statements as referred to in paragraph (1), the agreement and / or statement is declared null and void by law (Pahlevi, 2017).

The Capital Investment Law regulates the prohibition of nominee agreements in share ownership and also provides for sanctions for violating these provisions. The Basic Agrarian Law also needs to determine the existence of sanctions as regulation and sanctions as contained in the Investment Law, this is certainly a good example because there is an explanation of the prohibition on making nominee agreements in capital ownership.

### 3. Law of the Republic of Indonesia Number 2 of 2014 concerning Amendments to Law of the Republic of Indonesia Number 30 of 2004 about the Position of Notary Public

This nominee agreement comes from the existence of the principle of freedom of contract and can be valid if the agreement fulfills the legal requirements of the agreement as stipulated in Article 1320 of the Civil Code. Regarding the binding power of the parties if an agreement has met the legal requirements of the agreement (including agreed upon by the parties), then as long as the other conditions are met (if any), the agreement must have binding legal force (*beginzel dercontract vrijheid*). Likewise, the agreement is binding as law (*pacta sun servanda*) for those who make it (Salim, 2015)<sup>[5]</sup>.

Reviewing Article 1320 of the Civil Code there are subjective conditions which, if not fulfilled, then the agreement can be null and void. Regarding the prohibition, it is also regulated in the notarial position law Article 52 paragraph (1) and Article 53 about the Position of Notary Public which prohibits any actions that are not in accordance with the legal subject.

In the Yogyakarta Province, the Governor's Instruction Number: K.898 / I / A / 1975 concerning Unification Policy for Granting Land Rights to a Non-Native Indonesian Citizen also applies, which stipulates that non-native Indonesian citizens cannot own land ownership rights in Special Region of Yogyakarta Province.

The nominee agreement in Yogyakarta is an attempt to smuggle the law into ownership of land rights that are inconsistent with the subject. So seen from this the substance of the Law on the Position of Notary Public clearly prohibits the making of a nominee agreement in Yogyakarta, which is an attempt to smuggle the law for ownership of land rights that are not in accordance with the subject. This law clearly regulates the prohibition of making agreements that are not in accordance with the subject.

### 4. Instruction of the Governor of the Special Region of Yogyakarta Number: K.898 / I / A / 1975 concerning Unification Policy for Granting Land Rights to a Non-Native Indonesian Citizens

In 1975 the Governor of the Special Region of Yogyakarta, who was represented by his representative Paku Alaman VIII, issued an instruction regulating the designation of land rights for non-native Indonesian citizens, namely Instruction Number K.898 / I / A / 1975 concerning Unification of Policy Granting Rights to Land to a Non-Native Indonesian Citizen who regulates that:

"The purpose of unification policy granting land rights within the Special Region of Yogyakarta to a Non-Native Indonesian citizens, is hereby requested: If a non-Native Indonesian citizen purchases land owned by the people, it should be processed as usual through release. rights, so that the land returns to State land which is directly controlled by the Government of the Special Region of Yogyakarta and then those interested in releasing should submit an application to the Head of the Special Region of Yogyakarta to obtain a right "

This regulation stipulates that non-indigenous Indonesians cannot obtain land with ownership rights in Yogyakarta. The Government of the Special Region of Yogyakarta

argues that the existence of this regulation is intended to protect the interests of the people in Yogyakarta.

The enactment of the Instruction Letter for the Head of the Special Region of Yogyakarta Province Number K. 898 / I / A / 1975 even though it deviates from the Basic Agrarian Law, it continues and even gets strengthened by the enactment of the Privileges Law in Yogyakarta. The Privileges Law regulates the special powers granted to regional governments as contained in the provisions of Article 7. The provisions regarding special powers referred to are *lex specialist* provisions of the provisions of Regional Government authority as stipulated in the Regional Government Law. So it is not a *lex specialist* from the Basic Agrarian Law.

The special authority to manage land on their own in the Special Region of Yogyakarta is interpreted as a moment to make changes to the land tenure structure based on the spirit of reviving the *Rijksblad* in 1918. This policy was implemented as an affirmative policy which aims to protect lands from being controlled by Non-Native Indonesian citizens (Lestarini, 2018).

The Capital Investment Law regulates the prohibition of nominee agreements in share ownership and also provides for sanctions for violating these provisions. The Basic Agrarian Law also needs to determine the existence of sanctions as regulation and sanctions as contained in the Investment Law, this is certainly a good example because there is an explanation of the prohibition on making nominee agreements in capital ownership.

Regarding the substance of this, it is quite clear that a new instruction has been issued to state the validity of the instruction along with the philosophy that underlies the issuance of the instruction, but the sanctions against violators are not confirmed. Either in this instruction or in further regulations concerning the In substance, it can be concluded that norms are still needed clearly regulating prohibitions or limitations on the making of deeds that contain legal smuggling. Also, regulations must be made regarding the granting and use of power in the land sector, which contain matters concerning the granting of power of attorney prohibited, also the granting of permitted power accompanied by the terms and period of the validity. In addition, there is also a need for regulations regarding the control of the granting of prohibited powers, mechanisms and procedures and also regarding sanctions against violators. Imposition of sanctions so that it can provide a deterrent effect.

#### c. Legal Culture

Legal culture concerns the legal culture, which is humans' attitude (including the legal culture of law enforcers) towards the law and the legal system. No matter how good the legal structure is to carry out the stipulated legal rules and no matter how good the quality of the legal substance made without legal culture support by people involved in the system and society, law enforcement will not run effectively (Rahardjo, 1986)<sup>[9]</sup>.

This nominee agreement is an agreement that is not regulated in the Civil Code or is an *innominaat* agreement, so it can also be concluded that this agreement is developing and arising from the existence of culture in society. In the Special Region of Yogyakarta there is an Instruction from the Governor of the Special Region of Yogyakarta Number: K.898 / I / A / 1975 concerning the Unification Policy for the Granting of Land Rights to a Non-Native Indonesian

Citizens, which with this instruction Non-Native Indonesians cannot have ownership rights over land in the Special Region of Yogyakarta.

These restrictions create a legal culture, namely committing acts against the law by smuggling laws in the land sector using a nominee agreement.

Seeing the case of the nominee agreement contained in the case in the Sleman District Court Decision Number: 228 / Pdt.G / 2018 / PN.Smn, it can be seen that there is the involvement of a Notary as an official who makes land deeds and the involvement of Native Indonesians who live in the Special Region of Yogyakarta. Law arising from the Legal Culture of law enforcement officers (notaries) and also the community.

Legal construction in the legal culture as a solution to preventing nominee agreement on land ownership in Indonesia is to carry out the legal rules set accordingly, so that:

#### a. Law Enforcement Officials

Officials should carry out their duties and professions in accordance with the code of ethics of their positions. Article 1320 of the Civil Code has subjective conditions in which if the subjective conditions are not fulfilled, the agreement can be null and void. Regarding the prohibition, it is also regulated in the notarial position law Article 52 paragraph (1) and Article 53 of the Notary Office Law, which prohibits any actions that are not in accordance with the legal subject. Making a nominee deed (borrow name) is a smuggling method where the parties are then used to meet the needs of non-native citizens, namely by using the name of another person who is an indigenous Indonesian to be appointed as a Nominee and registered as owner of the land. Therefore, it is a deed that is not in accordance with the legal subject.

The notary should provide legal advice to clients who come to him in order to make deeds that are in accordance with legal provisions. That is, it must be in accordance with the legal subject. If the legal subject is not a subject who can own land ownership rights in the Special Region of Yogyakarta, the notary must refuse the making of the deed.

#### b. Community

Seeing the existence of such a legal culture, there must be awareness in the community or even there must be socialization to the community not to participate in committing illegal acts by smuggling laws through nominee agreements. Non-Native Indonesian citizens should obey the provisions of the law. If Non-Native Indonesian Citizens want to own land in the Special Region of Yogyakarta, then the status of land rights in the Yogyakarta Special Region that allows Non-Native Indonesian Citizens as subjects is Building Rights because Non-Native Indonesian citizens can have land Building Rights title.

The Province of Special Region of Yogyakarta prohibits Non-Native Indonesian Citizens from being the subject of land ownership rights, so Non-Native Indonesian Citizens can choose to own land in other provinces where the province allows Non-Native Indonesian Citizens to own land in the other province or own land in the Special Region of Yogyakarta but with the status of land that is not a land ownership rights.

#### Conclusion

The legal construction to prevent nominee agreements for right of ownership land in Special Region of Yogyakarta Province refers to the legal system theory of Lawrence

Friedman by constructing a legal system as follows: a) In the legal structure There is a need for cooperation to enforce the law from law enforcement officials with professional notary supervisors so that synergize in enforcing the law; b) It takes a norm that regulates the prohibition or limitation of the making of acts that contain legal smuggling and also requires the formulation of strict sanctions; c) Legal construction in the legal culture as a solution to prevent nominee agreements for right of ownership land in Special Region of Yogyakarta is to carry out the legal rules that are determined accordingly.

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