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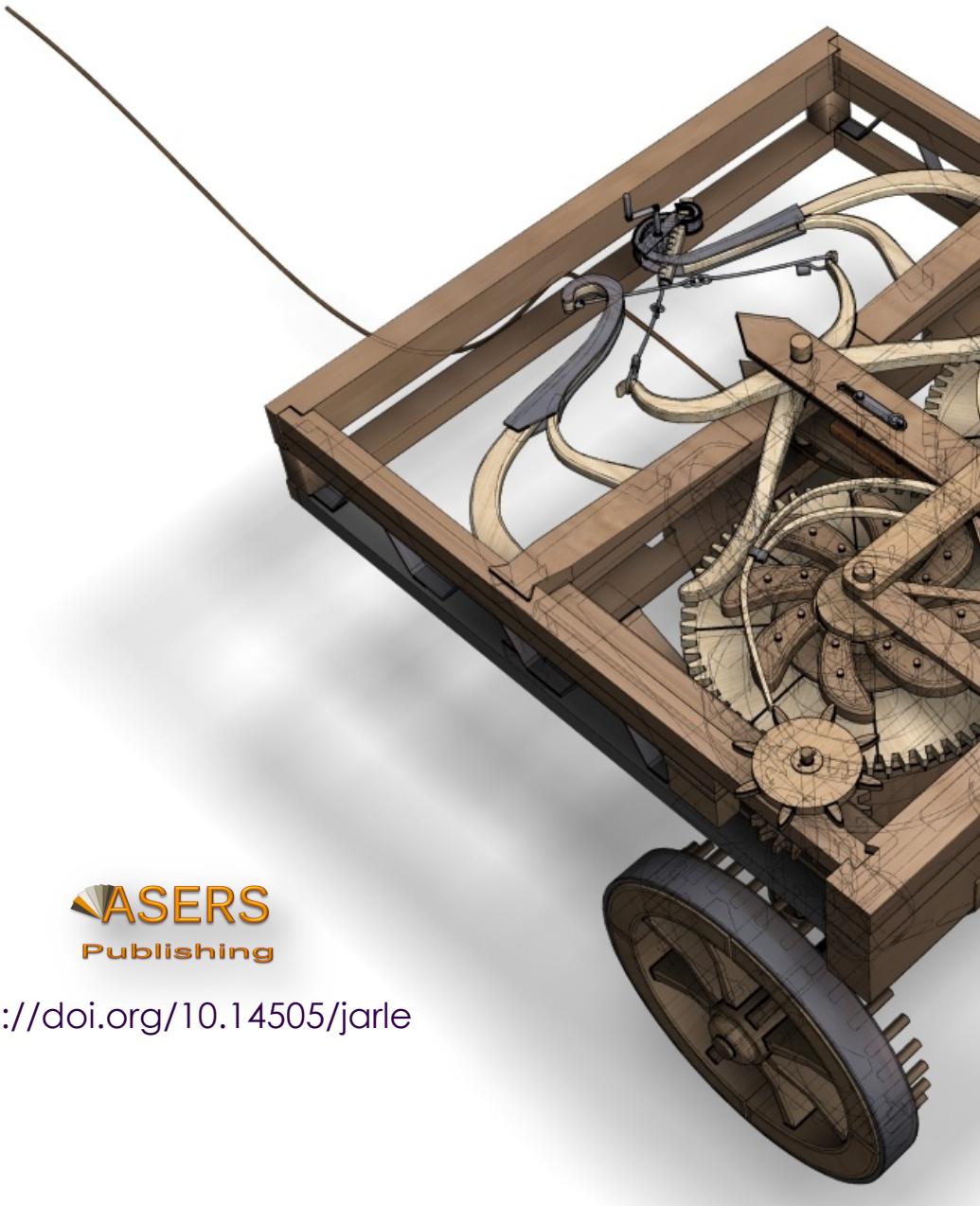

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Politics of Legal in Nominee Agreement and its Practice in Indonesia

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Abstract:

This study aims to examine the legal politics of nominee agreement in Indonesia. The research method used is normative juridical, which conceptualizes the law as what is written in the legislation or the law as a rule or norm that is a benchmark of human behavior that is considered appropriate. This type of legal research is carried out by examining secondary data in the field of law as library data using deductive thinking methods. The results stated that there are no specific rules that override or provide other possibilities related to the issue of absolute ownership of shares by shareholders registered in the register of shareholders of a limited liability company. The unauthorized nominee of agreement in Indonesia is prohibited. The prohibition on nominee agreement is clearly stated in Law No. 25 of 2007 concerning investment. In fact, nominee agreement has grown and developed in the community, due to community needs. Establishment of nominee agreements in practice can be categorized into the formation of direct nominee agreements, namely by directly making agreements between those who affirm that ownership of shares in a company is limited to and on behalf of others. Thus, the legal profession such as notary, legal consultant and lawyer in this case must provide legal counseling, and participate in supervisory duties. As a profession, it should keep the professional code of ethics instead of making unauthorized nominee by making a nominee agreement.

Keywords: politics of law; nominee agreement; investment practice; Indonesia.

JEL Classification: K20; K22; D25.

Introduction

The concept of nominees is called the concept of trust, known as the common law tradition. The implementation is carried out by solving the ownership of shares between those registered in the law as legal owner and ownership by the benefit or enjoyment of the beneficial owner. The practice of nominee agreement occurs in the implementation of investment (Harahap 1986). Basically, the purpose of investment is to increase the value of capital owned by a person or corporation, which can be in the form of cash, equipment, immovable assets, intellectual property (Sancaya, O'Leary 2019).

In 1970 – 1990s, Indonesian government obtained a large part of development capital through domestic and foreign aid and investment funds. This was done by way of Indonesia opening up to foreign investment efforts by issuing Law No. 1 of 1967 concerning Foreign Investment (Palmer 2018). The increase of foreign investment in the period 1967 – 1974, which was not followed by the participation of the role of the national party eventually led to several problems, such as the bankruptcy of national companies, the widening of the difference between rich and poor people and the occurrence of corruption. In order to overcome this problem, the Indonesian government issued a policy that requires foreign investment companies to form companies with a national capital of at least 20% at the time of establishment and within a period of 10 years from the time commercial production must continue to increase to a minimum of 51%.

The policy was issued by the government to protect the national economy and industry from foreign domination (Posner 1998). To supervise company management, foreign investors use several methods to protect their interests, one of which is to use a power of attorney that cannot be revoked. This causes differences in the ownership of shares, because the majority shareholding is owned by national investors, but in reality it is foreign investors who substantially own company shares. Hence, this study aims to investigate the politics of law nominee agreement in Indonesia. This study aims to examine the legal politics of nominee agreement in Indonesia.

1. Methods

The research method used is normative juridical, which conceptualizes the law as what is written in the legislation or the law as a rule or norm that is a benchmark of human behavior that is considered appropriate. This type of legal research is carried out by examining secondary data in the field of law as library data using deductive thinking methods. The approach used in addressing the problem is to use the statutory approach and conceptual approach (Ibrahim 2012).

The statutory approach is carried out by examining all laws and regulations relating to the legal issues under investigation. This law approach will open up opportunities for researchers to learn whether there is consistency and compatibility between one law and another (Soekanto 1985; Soekanto, Mamudji 2011). Conceptual approach is based on the views and doctrines that develop in the science of law, by studying the views and doctrines of doctrines in the science of law. Understanding these views and doctrines is the basis for researchers in constructing a legal argument in solving the issues at hand (Moleong 2002). The legal material collection procedure used in this study is the study of literature that is collecting data by reading legislation, official documents and literature that are closely related to the issues discussed. The legal materials are then analyzed and formulated as supporting legal materials in this study. The processing of legal material is done deductively, that is, drawing conclusions from a problem that is general in nature against the concrete problems faced (Marzuki 2005).

Legal materials obtained in this study will be analyzed qualitatively using deductive methods, namely general data about the conception of legal materials in the form of legal principles, postulates and doctrines and expert opinions which are arranged systematically as a legal facts arrangement. The data analysis technique is done qualitatively by collecting data, qualifying and then linking theories related to the problem and drawing conclusions to determine results. Data analysis is carried out with the starting point of research on the principles or principles as regulated in primary legal materials, and then will be further discussed using the means of secondary legal materials.

2. Ownership of Limited Company Shares by Nominee

Nominee share ownership in a limited liability company is not regulated in Indonesian law. The term nominee in the Indonesian legal system is a fiduciary institution both *fiducia cum amico* and *fiducia cum creditore* (Tumbuan, 1990; Yani, Widjaja 2003). *Fiducia cum amico* and Fiducia *cum creditore* are two forms of fiducia. Both forms of fiduciary arising from the agreement called *patum fiduciae* which is then followed by the surrender of rights or insure cession (Melia 2007; Mangatchev 2009). In the form of fiduciary *cum creditore*, a debtor surrenders an item in the ownership of the creditor and the creditor as the owner of the obligation will return ownership of the item to the debtor if the debtor has fulfilled his obligations to the creditor (see also, Vladetić 2017). Thus, if it is related to the nature of each right holder, it is said that the debtor entrusts authority over an item to the interests of the creditor himself or as a guarantee of fulfillment of the agreement by the debtor (Soerodjo 2003).

The emergence of *fiducia cum creditore* is due to the community's need for bail law. *Fiducia cum amico* occurs when a person surrenders his authority to another party or surrenders his authority to another party or surrenders an item to another party to take care of. In this form, in contrast to *fiducia cum creditore*, authority is delegated to the recipient but the interest remains with the giver or the recipient exercises authority for the giver's benefit.

In the Company Law, it also did not recognize the concept of nominees. Article 52 Paragraph (4) states each share gives its owner an undivided right. Furthermore, Article 60 paragraph (4) states that the voting rights over shares pledged as collateral or fiduciary guarantee remain with the shareholders. Based on these provisions, the Company Law adheres to the concept of ownership of shares in a complete or complete manner (dominium plenum), so that there is no division between beneficial ownership of shares or registered share ownership by other parties (see also, Berge, Carlsson 2003). Therefore, the shares of a company are a unified whole including the rights attached to the shares themselves such as voting rights. Law Number 8 of 1995 concerning the Capital Market, provides the basis for absolute provisions through collective safekeeping institutions in custodial institutions. Collective custody agreements made by and between the issuer and the custodian institution, one of

which is the Depository and Settlement Institution (LPP) which in this case is represented by the Indonesian Central Securities Depository (KSEI). In the agreement will regulate clearly and clearly the rights and obligations related between the two parties, including the rights derived from the collective custody agreement, specifically related to the rights of account holders in collective custody at Depository and Settlement Institution and so on (Kauripan 2013).

Based on the collective custody agreement, what is recorded in the list of issuers' shareholders is the depository and settlement institution, while the party entitled to attend the issuer's GMS meeting is the holder of the 'sub' account in the Depository and Settlement Institution/LPP. Therefore, as long as and as long as it is recognized by law and clearly regulated in the agreement, the existence of nominee shareholders is not a problem.

Explicitly, there are no specific rules that override or provide other possibilities related to the issue of absolute ownership or dominium plenum shares by shareholders registered in the register of shareholders of a limited liability company. Based on the Capital Market Law carried out in the form of collective custody. The Law Number 8 of 1995 only knows one shareholder with all the rights, obligations, duties and responsibilities attached to it as an absolute shareholder/dominium plenum.

3. Nominee Formation in Practices

The formation of a nominee can be done through two mechanisms, namely: first, the Direct Nominee. This mechanism is formed by making and signing a nominee agreement between the beneficiary and the nominee. The agreement clearly and clearly stipulates the granting of trust and authority from the beneficiary to the nominee to carry out certain activities or business on the orders and interests of the beneficiary.

In the ownership of shares by foreign parties who use the nominee concept, in general the names and identities of those registered as legal owners in the register of company shareholders are only the names and identities of nominees. The name and identity of the beneficiary does not appear in any form whatsoever on the list of company shareholders. By using the name and identity of the nominee as a legally registered party, the beneficiary provides compensation in the form of nominee fees. The amount of the nominee fee is based on mutual agreement between the nominee and the beneficiary. After reaching a mutual agreement, the amount and procedure for payment of the nominee fee will be stated in the form of a written agreement signed by the nominee and beneficiary as a form of agreement. Characteristics of the use of the stock nominee concept include:

(1) there are 2 (two) types of ownership, namely legal and beneficial ownership;
(2) nominee name and identity will be registered as the owner of shares in the register of shareholders of the company in nominee share ownership;
(3) nominees receive a fee in a certain amount as compensation for the use of their name and identity for the benefit of beneficiaries.

The structure used in the nominee concept is the existence of agreements made by and between nominees and beneficiaries, known as nominee agreements. Nominee and beneficiary will determine what matters will be stated in the nominee agreement. In the agreement, aside from regulating the amount and procedure for payment of nominee fees, it will also regulate the provisions that require and/or prohibit nominees from doing anything related to the use of the nominee concept.

Second, Indirect Nominees. This nominee is not formed from a nominee agreement that expressly and clearly gives trust and authority from the beneficiary to the nominee. Indirect nominees do not consist of only one agreement, but rather consist of several agreements which, if linked together, will produce a shareholder nominee. To enable the beneficiary to control nominees to carry out certain business actions or activities on the orders and interests of the beneficiary.

4. Nominee Agreement Position in Legal Rules in Indonesia

The concept of nominees does not get recognition in the legal system in Indonesia, especially in nominee shareholders in limited liability companies. The concept of sham ownership in the Company Law is absolute share ownership (*dominium plenum*). But in practice, shareholder nominees remain the first choice for investors to invest directly by making nominee agreements. As time goes by, its formation has experienced developments ranging from nominees made directly to nominee agreements made indirectly in order to hide or disguise the nominee agreement. The practice of forming an indirect nominee itself began to be used when promulgated Law on Limited Liability Companies which prohibits investing in the form of a limited liability company is prohibited from making agreements and/or statements that confirm that ownership of shares in a limited liability company is for and on behalf of others (Prasetya 1996; Widjaja 2008).

The implementation of shareholder nominees in Indonesia as explained above, encountered several obstacles, including violating the objective conditions in article 1320 of the Civil Code regarding the causes and the elaboration on legal reasons in article 1337 of the Civil Code (Subekti 1995). In addition, it contradicts Article 52 Paragraph 4 of the Company Law regarding the concept of dominium plenum ownership. In the meantime, it does not meet the conditions for the establishment of a limited liability company, because it must consist of two or more people, meaning that there are 2 (two) or more shareholders. Furthermore, it also contradicts Article 7 paragraph (1) of the Company Law, if the desired performance of the parties in the nominee agreement to own shares in the company is 100%.

The implementation of share pledges in order to support the practice of nominee shareholders has also experienced obstacles where this is contrary to the principle of transferring benefits in the pledge. In the Law Number 8 of 1995, the doctrine of shares is as a unit that teaches that the shares of a limited liability company are a unified whole. This doctrine is firmly contained in article 52 paragraph (4) of the Company Law which states that each share gives rights to the owner of the rights which cannot be divided. That is why in the share pledge agreement, with the determined voting rights remain with the shareholders, not the recipient of the pledge as stipulated in article 60 paragraph (4) of the Company Law (Admadjaja 2012).

Thus, the implementation of a nominee agreement formed directly with a nominee agreement is null and void by law, because it contradicts the legislation, specifically Article 33 paragraph (1) and (2) of Law No. 25 of 2007 concerning Investment which states that domestic investors and foreign investors who make investments in the form of limited liability companies are prohibited from making agreements and/or statements confirming that the ownership of shares in the company is limited to and on behalf of others. In the case of domestic investors and foreign investors making agreements and/or statements as referred to in paragraph (1), the agreement and/or statement shall be declared null and void.

In the formation of indirect nominees, none of the deeds or documents stated that the ownership of shares in the company was limited to and on behalf of others. Formally these agreements do not violate Article 33 paragraph (1) and (2) of the Capital Market Law and do not violate the objective conditions of the agreement, but there is a material will that is not in accordance with the statements in the agreements.

An agreement that regulates everything that is different from the actual situation for a particular purpose is known as simulation derived from simulation, simulated contract, *ostensible action* (English) or *schijnhandeling* (Dutch), *simulatio* (Latin). Hadikusuma (1982) defines a simulation agreement as an agreement is said to be a pseudo agreement or a simulation if the agreement made is different from the implementation. Another different skin contents, another explicit letter also implied, like a mask with a beautiful face while the face is actually bad. The agreement that was explained to the general public or written stated a good agreement while the actual agreement was not in accordance with the reality announced or written (Freeman 2001).

Meanwhile, Patrik (1994) defines simulation as actions where two or more people that they come out show as if there is an agreement between them, but in fact they secretly agree that the agreement that appears out is not valid, this can happen in the case of a legal relationship between them and there is no change in anything or that with an agreement pretending that something else will apply.

Simulations can be carried out in various laws, for example, in debt agreements covered by leases, grants that are covered by buying and selling, or debt receivables covered by buying and selling and so forth. The formation of an indirect nominee itself can also be said to be an absolute simulation agreement (see, Visser, 1985). The simulation agreement was carried out intentionally to be able to help provide a way out for foreign nationals in controlling the ownership of shares of limited liability companies which is actually prohibited. The simulation agreement is carried out to achieve a goal which is not permitted by national legislation. Therefore, the agreement has carried out unauthorized nominee (Purba 2006).

According to Purbacaraka and Brotosusilo (1983), it can be said that unauthorized nominee agreement has taken place if there is a person or party who has conducted an unauthorized method with the aim of avoiding the enactment of national law and obtaining the enactment of foreign law. Unauthorized nominee according to Sudargo Gautama (1999) is a separate teaching part of the theory of International Civil Law. Unauthorized nominee agreement is also known as *wetsonduiking*. Unauthorized nominee agreement is an act that aims to avoid the entry into force of national law, so that the person obtains certain benefits in accordance with what he wants, because it applies to him foreign law.

Indirect nominee agreements or simulation agreements as mentioned above, normatively these agreements are null and void, because the objective conditions are in accordance with Article 1320 of the Civil Code, namely the causes. The interpretation in this matter is broadly interpreted not only in view of the substance of the

agreement, but also the motivation or intent and purpose of making a treaty that is prohibited by the law, in this case article 33 paragraph (1) and (2) of the Capital Market Law.

The obstacle that becomes difficult is to identify and prove whether an agreement is a simulation or not. Because in the formation of nominee agreements are not direct, the agreements used are agreements that do not violate the laws and regulations. So that in terms of nominees, losses incurred as a result of decisions made by beneficiaries in the management of shares or voting in the GMS or other legal consequences arising from the decision.

In a legal perspective, the nominee is the responsible party, because the nominee is the legal owner according to the shares. The responsibility of the beneficiary to bear the losses suffered by the nominee cannot be forced before the law. Likewise, for the beneficiary, if the nominee does not want to surrender the shares held by it to the beneficiary, the beneficiary must take legal action by making a civil suit in court. In such a case, the nominee agreement itself, especially for indirect nominees, causes uncertainty of law, because normatively the nominee agreements are null and void but before the law the agreements are still recognized and have difficulties in terms of proof in court. The obstacle of proof is because these agreements are made with authentic deeds so that they become perfect evidence, and in the civil justice system the judge sees formal truth rather than material truth. So that even though the judge has confidence that the series of agreements is a simulation agreement or nominee agreement, the judge cannot immediately override the deed and cancel the agreement unless it can be proven that there are prohibited causes in the agreements.

Legal uncertainty also arises when the legal substance in this case the Company Law does not explicitly regulate the share nominee, giving rise to a legal loophole to carry out the share nominee. The Capital Market Law has explicitly regulated nominee violations in companies in the form of domestic investment or foreign investment. This right is to prevent violations from negative list investment which regulates holding businesses that allow foreign parties to enter with restrictions on the percentage of shares, and businesses that are not allowed at all for foreign parties.

In practice, even with the consequences of no legal certainty, nominee shares still occur in the community. The regulation regarding the violation of nominee shareholders is not in line with social needs in the community. In this case, according to Pound, the legal function as a tool of social engineering has failed to change society, and has failed to meet social needs in the community.

This is caused by the inability of law enforcement institutions to find out the existence of nominees in limited liability companies. Agreements as described above, cannot be known as a share nominee agreement if they are not united as a whole (Ginting 2014). In addition to the absence of beneficiaries listed in the company's shares list and the agreements not disclosed in the articles of association of the company as well as financial statements and any documents, it is difficult to monitor from law enforcement to find out the number of shares in the company.

The legal culture in society to obey the existing regulations is very difficult to happen, this is due to the level of community obedience will be reduced if faced with the profits obtained by the nominee of shares both as the nominees themselves receive payments for their achievements and the sole control of the company for the beneficiary.

Unclear arrangements in the Company Law regarding violations of nominee shareholders are the cause of the continued development of nominee shareholders in the community. So, it can be seen that the regulation of nominee shareholders in Indonesia is very ineffective both in terms of law enforcement, culture, and the Company Law itself.

The regulation regarding the banning of nominee shareholders in the Capital Market Law becomes inefficient, this is because the policies issued in the form of legislation concerning the prohibition of nominee shares are in the scope of a narrower arrangement namely in the field of investment. Considering the nominee agreement is still practiced, the legal profession such as notary, legal consultant and lawyer in this case must provide legal counseling, and participate in supervisory duties. As a profession, it should keep the professional code of ethics instead of making unauthorized nominee in making a nominee agreement (Keraf, Dua 2001).

Conclusions

This study found that the position of nominee agreement in the rule of law in Indonesia has actually been banned from existence, namely in Article 33 paragraph (1) and (2) of the Capital Market Law. However, the absence of a strict prohibition in the Company Law regarding the banning of nominee shareholders makes the practice of nominee agreements still occur. The practice is carried out with indirect nominees or simulation agreements which make the nominees difficult to know and prove.

In fact, nominee agreement has grown and developed in the community, due to community needs. Establishment of nominee agreements in practice can be categorized into the formation of direct nominee agreements, namely by directly making agreements between those who affirm that ownership of shares in a company is limited to and on behalf of others. In addition, it is also formed through indirect nominees, namely by making several agreements in layers with the aim that the beneficiary can control, receive benefits and indirectly own the shares.

Considering the nominee agreement is still practiced, the legal profession such as notary, legal consultant and lawyer in this case must provide legal counseling, and participate in supervisory duties. As a profession, it should keep the professional code of ethics instead of making unauthorized nominee agreement in making a nominee agreement.

The ban on the practice of nominee agreements has become ineffective due to difficulties in its supervision. Nominees still live in the community because of community needs. Therefore, it is necessary to do further research on nominee shareholders someday it is permissible to adopt the concept of trust in countries that adhere to the common law with some adjustments to our legal system.

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