



Control without Ownership: Nominee Agreements and the Restriction of Freehold Land Rights for Foreign Nationals in Indonesia

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ABSTRACT

This article examines the legal status, doctrinal coherence, and regulatory implications of nominee agreements used to facilitate foreign control over freehold land in Indonesia. Although Indonesian agrarian law formally prohibits foreign ownership of freehold title, nominee arrangements continue to operate through private contractual mechanisms that separate formal ownership from effective control. Using normative legal research grounded in statutory, conceptual, and analytical approaches, this study analyzes the interaction between agrarian law, civil law doctrine, and regulatory policy. The findings demonstrate that nominee agreements occupy a structurally ambiguous position: while formally inconsistent with the prohibition regime and the social function principle of land, their persistence reflects deeper tensions between title-based formalism and the absence of a transparent beneficial ownership framework. The article argues that the endurance of nominee practices is not solely a consequence of weak enforcement, but of regulatory design limitations that fail to address sophisticated forms of legal circumvention. It concludes that reconstructing the regulatory approach, from an absolute prohibition model toward a transparency- and accountability-based framework, offers a more coherent strategy to reconcile agrarian sovereignty, legal certainty, and foreign investment dynamics. This reconstruction strengthens doctrinal integrity while enhancing regulatory effectiveness within Indonesia's contemporary land law system.

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1. Introduction

Restrictions on foreign ownership of land are a common feature of post-colonial legal systems, where land is not merely treated as an economic commodity but as a symbol of sovereignty and an instrument of distributive justice.¹ In the context of intensifying cross-border capital mobility, states increasingly confront a structural tension between attracting foreign investment and preserving national control over strategic resources.² Within this regulatory landscape, various forms of legal circumvention emerge, including nominee arrangements and concealed beneficial ownership structures designed to bypass formal statutory prohibitions.³ Such practices are not unique to Indonesia; similar patterns have been observed in Thailand,⁴ Vietnam,⁵ and the Philippines,⁶ where formal restrictions coexist with complex economic realities. The phenomenon of nominee arrangements therefore raises a broader question concerning the relationship between state sovereignty, the formalism of property law, and transnational capital flows.

This structural tension is particularly pronounced in Indonesia, where land governance is not merely regulatory but constitutionally grounded and land occupies a constitutionally embedded position within the national legal order. Article 33(3) of the 1945 Constitution mandates state control over land and natural resources for the greatest prosperity of the people, a principle operationalized through Law No. 5 of 1960 concerning Basic Agrarian Principles (*Undang-Undang Pokok Agraria/UUPA*).⁷ This framework institutionalizes the nationality principle (*asas kebangsaan*), under which freehold title (*hak milik*) is reserved exclusively for Indonesian citizens.⁸ Article 21(1) of the Agrarian Law expressly prohibits foreign nationals from holding freehold rights, limiting them

¹ Muh Afif Mahfud et al., "LEGAL PERSPECTIVES ON FOREIGN LAND OWNERSHIP : BALANCING INVESTMENT , EQUITY , AND SOVEREIGNTY," *Corporate Law and Governance Review* 7, no. 3 (2025): 252–62, <https://doi.org/10.22495/clgrv7i3sip10>.

² Richard Ming and Kirk Tan, "Restrictions on the Foreign Ownership of Property Indonesia and Singapore Compared," *Journal of Property Investment & Finance* 22, no. 1 (2004): 101–11, <https://doi.org/10.1108/14635780410525162>.

³ Khairunnisa Khairunnisa and Mohamad Fajri Mekka Putra, "Akibat Hukum Perjanjian Nominee Hak Atas Tanah Berkaitan Dengan Kepemilikan Warga Negara Asing," *Al-Adalah: Jurnal Hukum Dan Politik Islam* 7, no. 2 (2022): 151–72, <https://doi.org/10.35673/ajmpi.v7i2.2655>.

⁴ N Teeranantawanich and W Fongsuwan, "Determinates of Foreign Real Estate Investment within Thailand's Special Autonomous Systems (SAS) of Bangkok and Pattaya City," *Research Journal of Business Management* 9, no. 1 (2015): 88–105, <https://doi.org/10.3923/rjbm.2015.88.105>.

⁵ N Phuong Le, "Land Tenure Security and Land Rent out Income: Case of Vietnam," in *International Multidisciplinary Scientific GeoConference Surveying Geology and Mining Ecology Management, SGEM*, vol. 18, 2018, 457–64, <https://doi.org/10.5593/sgem2018/5.4/S22.058>.

⁶ M Colchester, "Indigenous Peoples and Communal Tenures in Asia," *Land Reform, Land Settlement and Cooperatives*, no. 1 (2004): 28–29, <https://www.scopus.com/inward/record.uri?eid=2-s2.0-17744371849&partnerID=40&md5=26f86964e8407af79c2af0b3c5818d4a>.

⁷ E Agustina, "The Social Function of Land Rights in Indonesia: The Basic Agrarian Law and Customary Rights by the State," *Journal of Legal, Ethical and Regulatory Issues* 21, no. Special Issue (2018): 1–8, <https://www.scopus.com/inward/record.uri?eid=2-s2.0-85056090372&partnerID=40&md5=ebb30b6eda5b55d26a03abc3ebe522ba>.

⁸ Dewi Arnita Sari, "Sengketa Pendaftaran Hak Milik Atas Tanah," *Al Adalah: Jurnal Hukum Dan Politik Islam* 5, no. 2 (2020): 138–54, <https://doi.org/https://doi.org/10.35673/ajmpi.v5i2.816>.

instead to derivative and time-bound interests such as rights of use (*hak pakai*) or leasehold arrangements.⁹ The statutory design reflects an ideological commitment to agrarian sovereignty and the prevention of foreign concentration of land ownership.

Yet this formal legal architecture coexists with practices that systematically undermine its intended effect. Despite this formal prohibition, empirical practice reveals the persistence of foreign control over land formally registered as freehold. One prominent mechanism is the nominee agreement: a contractual arrangement whereby an Indonesian citizen holds legal title, while a foreign national retains de facto control and economic benefit.¹⁰ These arrangements are often reinforced through a network of ancillary instruments, including irrevocable powers of attorney, fictitious loan agreements, or debt acknowledgment statements, effectively transferring control while maintaining formal compliance with registration requirements.¹¹ Conceptually, such structures may be characterized as sham transactions that create a deliberate divergence between legal title and beneficial ownership.¹² This disjunction exposes a fundamental tension within Indonesian property law between registered ownership as a formal indicator of rights and the substantive allocation of control and economic interest.

This structural tension extends beyond questions of regulatory compliance and enters the domain of private law doctrine, particularly contract validity. From a private law perspective, the validity of nominee agreements depends upon compliance with the general requirements of contract formation under Article 1320 of the Indonesian Civil Code, including the existence of a lawful cause.¹³ Given that the underlying objective of many nominee arrangements is to circumvent the statutory prohibition on foreign freehold ownership, they may be construed as involving an unlawful cause under Article 1337, rendering them null and void ab initio for contravening mandatory law and public policy. Yet judicial practice has not always provided doctrinal clarity.¹⁴ Disputes between

⁹ H Adjie, "Land Ownership in Indonesia for Foreign Citizens," *International Journal of Criminal Justice Sciences* 18, no. 2 (2023), <https://doi.org/10.5281/zenodo.4756301>.

¹⁰ Khairunnisa and Putra, "Akibat Hukum Perjanjian Nominee Hak Atas Tanah Berkaitan Dengan Kepemilikan Warga Negara Asing"; R Anggriani and A M Zandra, "Nominee Contract Practice on Ownership of Foreign National Land in Indonesia," *Jurnal Hukum Novelty* 12, no. 1 (2021): 96–108, <https://doi.org/10.26555/novelty.v12i01.a18124>.

¹¹ A Noor, "Case Settlement of Nominee Agreement as A Mode of Land Tenure for Foreign Nationals in Indonesia," *International Journal of Criminal Justice Sciences* 16, no. 2 (2021): 177–90, <https://www.scopus.com/inward/record.uri?eid=2-s2.0-85134525255&partnerID=40&md5=4ec45f39f173eddc325136ed45eb426>.

¹² J K Putra and A H Rada, "NATIONALITY PRINCIPLE IN THE NOMINEE AGREEMENT TO OBTAIN THE LAND RIGHT," *Jurnal IUS Kajian Hukum Dan Keadilan* 8, no. 2 (2020): 326–35, <https://doi.org/10.29303/ius.v8i2.723>.

¹³ N Y Sugiastuti and D Purnamasari, "IMPROVEMENT OF SUBSTANTIVE PROVISIONS OF THE VALIDITY OF AGREEMENT IN THE INDONESIAN CIVIL CODE," *Diponegoro Law Review* 8, no. 1 (2023): 124–40, <https://doi.org/10.14710/dilrev.8.1.2023.124-140>.

¹⁴ Khairunnisa and Putra, "Akibat Hukum Perjanjian Nominee Hak Atas Tanah Berkaitan Dengan Kepemilikan Warga Negara Asing."

nominees and foreign beneficiaries frequently reveal evidentiary difficulties and judicial ambivalence, particularly when courts are confronted with the gap between formal registration and substantive control. This ambiguity suggests that the issue cannot be resolved solely through formal invalidation doctrine.

The limitations of formal invalidation doctrine also become evident when considering the broader socio-economic consequences of nominee practices. Beyond questions of doctrinal validity, nominee arrangements generate significant structural effects on land distribution and access. In high-investment and tourism regions such as Bali and Lombok,¹⁵ nominee structures contribute to escalating land prices and the concentration of effective control in actors who remain legally invisible as owners. This dynamic risks undermining the social function of land recognized in Article 6 of the Agrarian Law and may reduce local communities' access to property.¹⁶ When regulatory prohibitions are systematically circumvented, the legitimacy and effectiveness of the prohibition-based regulatory model itself come into question.

This structural gap reflects a deeper tension within the land law regime of Indonesia, where formal ownership rules remain anchored in rigid nationality-based prohibitions, while economic globalization generates persistent pressures for functional access and control. In the absence of mechanisms such as beneficial ownership disclosure, mandatory reporting obligations, or institutionalized verification procedures within the land registry, regulatory authorities remain confined to formalistic indicators that do not capture the substantive realities of land control. As a result, enforcement becomes reactive and dispute-driven rather than preventive and systemic. This suggests that the central regulatory challenge is not merely to reaffirm the illegality of nominee arrangements, but to redesign the legal framework in a manner that integrates transparency, detectability, and institutional accountability. Without such structural recalibration, prohibition alone risks operating as a symbolic norm—formally authoritative yet functionally porous—thereby weakening both the integrity of land administration and the broader objectives of legal certainty, social justice, and the orderly governance of property relations.

By situating nominee arrangements within the conceptual framework of legal simulation and regulatory circumvention, this article moves beyond a purely descriptive account of statutory prohibition and instead interrogates the structural coherence of a legal regime that prioritizes formal title over substantive control. The persistence of nominee structures reveals that the formal allocation of ownership rights does not necessarily

¹⁵ M Adrian Majiid et al., "Land Conversion Analysis in Buleleng District, Bali: An Outlook for Sustainable Tourism Development," in *E3S Web of Conferences*, vol. 468, 2023, <https://doi.org/10.1051/e3sconf/202346810004>; I Ridwansyah et al., "Impact of Land Use Change on Hydrological Responses in the Jongkok-Meninring-Babar (JMB) Watershed, Lombok Island, Indonesia," in *BIO Web of Conferences*, vol. 196, 2025, <https://doi.org/10.1051/bioconf/202519606001>.

¹⁶ A P Yurista and N Ismail, "Tracing the Idea of the Social Function in Several Countries," *Yuridika* 40, no. 3 (2025): 297–318, <https://doi.org/10.20473/ydk.v40i3.60446>.

correspond with the distribution of economic power, thereby exposing the limitations of a title-centric model of land governance. In this context, the absence of legal recognition or disclosure of beneficial ownership does not eliminate foreign control but merely displaces it into informal and legally opaque arrangements. A comparative and theoretical perspective therefore becomes essential to evaluate whether the Indonesian land law framework possesses adequate doctrinal and institutional tools to address this divergence between formal ownership and effective control. This inquiry ultimately reframes nominee agreements not simply as isolated contractual anomalies, but as indicators of a deeper structural tension between prohibition-based sovereignty over land and the functional realities of transnational property relations in a globalized economy of Indonesia.

This article advances three central questions. First, what is the legal status of nominee agreements within the interaction between Indonesian agrarian law and civil law doctrine? Second, does the formal prohibition of foreign freehold ownership possess sufficient doctrinal coherence to invalidate nominee structures in practice? Third, is an absolute prohibition model an effective regulatory strategy for addressing sophisticated forms of legal circumvention in contemporary property relations? This article argues that the persistence of nominee arrangements cannot be understood solely as a problem of weak enforcement, but rather as the manifestation of a structural tension between a title-based formalist conception of ownership and the absence of a transparent and enforceable beneficial ownership framework. As a consequence, the prohibition model operates more effectively at the level of formal legality than at the level of substantive control. Accordingly, this article contends that reconstructing Indonesia's regulatory approach, from an exclusive reliance on prohibition toward a model grounded in transparency, disclosure, and accountability offers a more coherent means of reconciling agrarian sovereignty, legal certainty, and the realities of transnational capital flows within Indonesia's land law regime.

2. Legal Material and Methods

This study employs normative doctrinal legal research with doctrinal, conceptual, and functional comparative approaches to examine the normative coherence of Indonesia's prohibition on foreign freehold land ownership and its implications for nominee arrangements. A doctrinal methodology is appropriate because the central issues concern the interpretation, interaction, and internal consistency of legal norms governing land ownership, contractual validity, and the relationship between mandatory public law restrictions and private law autonomy. Rather than merely describing statutory provisions, this study reconstructs the legal reasoning underlying foreign ownership restrictions and evaluates whether nominee arrangements can be sustained within Indonesia's positive law framework.

The unit of analysis consists of authoritative legal materials governing land ownership and contractual validity. Primary legal materials include Article 33(3) of the 1945 Constitution of the Republic of Indonesia, Law No. 5 of 1960 concerning Basic Agrarian Principles, relevant provisions of the Indonesian Civil Code, particularly Articles 1320 and 1337 concerning lawful cause and contractual validity and Government Regulation No. 103 of 2015 concerning foreign ownership of residential property.¹⁷ Judicial decisions involving disputes arising from nominee arrangements are examined to identify patterns of judicial reasoning, assess doctrinal consistency, and evaluate how courts address the divergence between formally registered ownership and substantive control. Secondary legal materials, including peer-reviewed scholarship on the nationality principle, the social function of land, sham transactions, beneficial ownership, and regulatory circumvention, are used to situate Indonesia's legal framework within broader theoretical and comparative debates.

Analytically, this study applies doctrinal coherence analysis to evaluate whether the prohibition of foreign freehold ownership under Article 21 of the Agrarian Law aligns with the Civil Code's doctrine of lawful cause and the broader structure of Indonesian private law. This analysis employs systematic and teleological interpretation to assess the legal validity of nominee agreements in light of mandatory statutory prohibitions and public policy considerations. Through this interpretive framework, the study examines whether nominee arrangements constitute contracts with an unlawful cause and whether their persistence reflects isolated instances of contractual illegality or reveals structural limitations within the regulatory design of land law.

To complement the doctrinal analysis, the study incorporates a functional comparative perspective by examining selected jurisdictions that impose restrictions on foreign land ownership while adopting different regulatory strategies. This comparison contrasts absolute prohibition models with transparency-based regulatory frameworks that incorporate beneficial ownership disclosure and institutional verification mechanisms. The purpose of this comparison is not to transplant foreign legal solutions, but to evaluate the structural effectiveness and doctrinal coherence of Indonesia's prohibition-based model in addressing sophisticated forms of legal circumvention.

By combining doctrinal reconstruction, interpretive coherence analysis, and functional comparison, this methodological framework enables a dual assessment of both the formal legality of nominee arrangements and the structural efficacy of the prohibition model within Indonesia's land law regime. This approach provides a systematic basis for evaluating whether the existing legal framework possesses sufficient doctrinal clarity and institutional capacity to reconcile agrarian sovereignty, legal certainty, and the realities of transnational property relations.

¹⁷ Republik Indonesia, "Peraturan Pemerintah Republik Indonesia Nomor 103 Tahun 2015 Tentang Pemilikan Rumah Tempat Tinggal Atau Hunian Oleh Orang Asing Yang Berkedudukan Di Indonesia," *Lembaran Negara Republik Indonesia Tahun 2015 Nomor 325*, 2015.

3. Results and Discussion

3.1. Doctrinal Legality and Normative Structure of Nominee Arrangements in Indonesian Land Law: A Perspective of Normative Hierarchy, Causa Illicita, and the Integrity of the Agrarian Legal System

The prohibition of foreign freehold ownership in Indonesia constitutes a direct manifestation of the hierarchical normative structure governing the national agrarian legal system, whose legitimacy is derived from the constitutional principle of state sovereignty over agrarian resources. Article 33(3) of the 1945 Constitution of the Republic of Indonesia provides that land, water, and natural resources are controlled by the state and utilized for the greatest prosperity of the people.¹⁸ From the perspective of normative hierarchy theory, this provision functions as a sectoral foundational norm that confers legal validity and normative direction upon the entire agrarian legal regime. Law No. 5 of 1960 concerning Basic Agrarian Principles (UUPA), as the organic statute implementing the constitutional mandate, operationalizes this principle through Article 21(1), which explicitly restricts freehold ownership (*hak milik*) exclusively to Indonesian citizens.¹⁹ This restriction reflects a deliberate legal policy designed to preserve national sovereignty, prevent foreign domination over strategic agrarian assets, and ensure that the most comprehensive form of land ownership remains under the control of Indonesian nationals.

The imperative character of this prohibition is further reinforced by Article 26(2) of the UUPA, which stipulates that any legal act intended to transfer freehold ownership to a foreign national is null and void ab initio.²⁰ The formulation of nullity demonstrates that this prohibition constitutes a mandatory norm that cannot be derogated from through private agreement. Within the framework of legal validity theory, private legal arrangements derive their legitimacy only insofar as they remain consistent with superior public norms within the normative hierarchy. Accordingly, any contractual construction that substantively enables foreign nationals to exercise ownership or effective control over freehold land lacks normative validity, regardless of its formal compliance with civil law requirements. The legal validity of land relations is determined by their substantive legal reality, rather than by the formal appearance of ownership reflected in legal documentation.

¹⁸ Putusan Mahkamah Konstitusi Nomor 185/PUU-XXII/2024 Perihal Permohonan Pengujian Undang-Undang Nomor 21 Tahun 2023 tentang Perubahan Atas Undang-Undang Nomor 3 Tahun 2022 tentang Ibu Kota Negara terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun (2024).

¹⁹ S M Surya et al., "Legal Aspects of Granting Land Rights for the Bajo Tribe in the Coastal Areas of Indonesia," *Coastal Management* 52, no. 1–2 (2024): 1–16, <https://doi.org/10.1080/08920753.2024.2335131>.

²⁰ M M Annas, T Kamello, and H Purba, "Legal Validity of Transfer of Land Rights Based on a Deed of Sale and Purchase Agreement That Has Been Canceled According to Indonesian Positive Law," *Journal of Ecohumanism* 4, no. 1 (2025): 2042–47, <https://doi.org/10.62754/joe.v4i1.6027>.

At the same time, the Indonesian agrarian legal framework does not entirely exclude foreign nationals from accessing land, but instead regulates such access through legally distinct tenure structures that are normatively differentiated from freehold ownership. Government Regulation No. 103 of 2015 concerning Residential Ownership by Foreign Nationals provides lawful mechanisms through which foreign nationals may utilize land, specifically through rights of use (*hak pakai*) and leasehold rights (*hak sewa*).²¹ The existence of this regulatory framework demonstrates that Indonesian agrarian law possesses a coherent and comprehensive normative structure that systematically distinguishes between prohibited ownership and permitted use.²² By providing lawful alternative tenure arrangements, the legal system does not merely impose prohibitions but also positively defines the permissible legal relationships between foreign nationals and land. Consequently, nominee arrangements cannot be justified as a legal necessity arising from regulatory gaps, but instead represent deliberate attempts to circumvent explicitly established normative limitations.

This normative coherence is further reinforced by administrative practice and institutional policies of the National Land Agency (Badan Pertanahan Nasional/BPN), which have consistently affirmed that foreign control over freehold land, whether direct or indirect contravenes the foundational principles of Indonesian agrarian law. Although administrative instruments such as circular letters do not possess the same hierarchical status as statutes, they function as interpretive and operational mechanisms that ensure administrative implementation remains consistent with legislative intent. As such, the prohibition of nominee arrangements is not merely an abstract doctrinal construct but a norm reinforced institutionally through administrative interpretation and regulatory practice.

Within this framework, the invalidity of nominee arrangements may be fundamentally explained through the civil law doctrine of *causa illicita*. Article 1337 of the Indonesian Civil Code provides that an agreement is invalid if its cause is contrary to law, public order, or morality.²³ The validity of a contract depends not only on its formal compliance with contractual formation requirements but also on the normative legitimacy

²¹ M.S.P.D. Salain, I D G Palguna, and I.G.N.P. Widiatedja, "THE REGULATION OF THE OWNERSHIP OF FLATS BY FOREIGNERS AFTER THE ENACTMENT OF THE JOB CREATION LAW," *Indonesia Law Review* 12, no. 1 (2022): 1–16, <https://doi.org/10.15742/ilrev.v12n1.1>; N Carona, A Rifai, and A N Shebubakar, "HAK SEWA TANAH UNTUK BANGUNAN OLEH WNA SEBAGAI ALTERNATIF PENGUASAAN HAK ATAS TANAH DI INDONESIA," *Jurnal Litigasi* 25, no. 1 (2024): 1–20, <https://doi.org/10.23969/litigasi.v25i1.10632>.

²² Carona, Rifai, and Shebubakar, "HAK SEWA TANAH UNTUK BANGUNAN OLEH WNA SEBAGAI ALTERNATIF PENGUASAAN HAK ATAS TANAH DI INDONESIA."

²³ Á Auer, "Illegal Contract as a General Clause - European Trends and New Hungarian Judicial Practice," *Juridical Tribune* 13, no. 4 (2023): 588–601, <https://doi.org/10.24818/TBJ/2023/13/4.06>.

of its underlying purpose.²⁴ In nominee arrangements, the substantive objective of the parties is to confer effective control over freehold land upon a foreign national through a formal legal structure that conceals this reality. Because this objective directly contravenes the mandatory provisions of Articles 21 and 26 of the UUPA, the contractual cause is unlawful.²⁵ The invalidity of nominee arrangements is therefore structural and inherent, arising from the illegality of their normative purpose rather than from procedural defects in their formation.²⁶

Furthermore, nominee arrangements may be characterized as forms of legal simulation (*simulatio*) and circumvention of law (*fraus legis*), whereby formally lawful legal instruments are employed to achieve substantively prohibited outcomes.²⁷ In such arrangements, the nominal owner formally registered as the legal title holder lacks genuine substantive ownership, while the foreign beneficiary exercises effective control over the property. This configuration creates a divergence between legal form and substantive reality, which, within civil law doctrine, undermines the integrity of the legal system by producing legally inaccurate representations of ownership. *Fraus legis* occurs when private legal instruments are used to neutralize the effectiveness of mandatory public norms, resulting in formal compliance that conceals substantive legal violations.²⁸

More fundamentally, nominee arrangements create a separation between formal legal ownership and substantive beneficial control that is conceptually incompatible with the structural principles of Indonesian land law. The Indonesian land registration system is designed to reflect the unity between formal title and substantive ownership, thereby ensuring legal certainty, transparency, and public accountability.²⁹ Unlike common law systems, which recognize a doctrinal separation between legal and beneficial ownership through trust institutions,³⁰ Indonesian agrarian law does not provide a legitimate

²⁴ M C Nugraheni and A Hernawan, "Good Faith Principle in Indonesian Contract Law: How to Set the Definition and Its Benchmarks," *Journal of Infrastructure, Policy and Development* 8, no. 10 (2024), <https://doi.org/10.24294/jipd.v8i10.7358>.

²⁵ N Y Sugiastuti and D Purnamasari, "IMPROVEMENT OF SUBSTANTIVE PROVISIONS OF THE VALIDITY OF AGREEMENT IN THE INDONESIAN CIVIL CODE," *Diponegoro Law Review* 8, no. 1 (2023): 124–40, <https://doi.org/10.14710/dilrev.8.1.2023.124-140>.

²⁶ Khairunnisa and Putra, "Akibat Hukum Perjanjian Nominee Hak Atas Tanah Berkaitan Dengan Kepemilikan Warga Negara Asing."

²⁷ Anggriani and Zandra, "Nominee Contract Practice on Ownership of Foreign National Land in Indonesia."

²⁸ M van Staden, "Fraus Legis in Constitutional Law: The Case of Expropriation 'without' or for 'Nil' Compensation," *Potchefstroom Electronic Law Journal* 24 (2021), <https://doi.org/10.17159/1727-3781/2021/V24I0A10406>.

²⁹ W Erwiningsih, "Legal Arrangements and Implementation of State Ownership Rights Over Land in Indonesian Constitution," *Academic Journal of Interdisciplinary Studies* 12, no. 3 (2023): 143–51, <https://doi.org/10.36941/ajis-2023-0067>.

³⁰ L Ho and R Lee, "Emerging Principles of Asian Trust Law," in *Trust Law in Asian Civil Law Jurisdictions: A Comparative Analysis*, 2011, 259–78, <https://doi.org/10.1017/CBO9781139149945.018>.

normative framework for such bifurcation.³¹ As a result, nominee arrangements constitute legal constructions lacking systemic integration within the national agrarian legal order and undermine the epistemic function of land registration as an accurate representation of ownership relations.

A teleological interpretation further reinforces this conclusion. The restriction on foreign freehold ownership serves to preserve national sovereignty over land, prevent excessive concentration of agrarian control by foreign interests, and ensure that land as a strategic resource fulfills its social and economic function for the benefit of the Indonesian people.³² By providing lawful alternative tenure arrangements such as rights of use and leasehold rights, the legal system deliberately balances economic openness with the preservation of agrarian sovereignty. Nominee arrangements disrupt this balance by enabling substantive transfers of control without formal transfers of ownership, thereby weakening the regulatory effectiveness of agrarian law and creating dissonance between normative structure and empirical reality.

Judicial practice in Indonesia has consistently upheld the supremacy of formally registered ownership and declined to recognize beneficial ownership claims arising from nominee arrangements.³³ This judicial approach reflects the institutional commitment to preserving the internal coherence of the legal system and ensuring that private contractual arrangements cannot undermine mandatory agrarian norms. Nevertheless, the persistence of nominee practices in empirical reality reveals a structural gap between normative validity and regulatory effectiveness. Nominee arrangements may continue to function *de facto* within private relationships despite their doctrinal invalidity, and their legal ineffectiveness typically becomes apparent only when disputes arise and judicial intervention restores normative coherence.³⁴

Taken together, this analysis demonstrates that nominee arrangements lack legitimacy within the normative structure of Indonesian land law. Their invalidity arises from an inherent conflict between private contractual objectives and mandatory agrarian norms rooted in constitutional principles of state sovereignty over land. The existence of a comprehensive regulatory framework providing lawful alternatives for foreign land use further confirms that nominee arrangements do not arise from legal necessity but constitute deliberate forms of legal circumvention. However, the continued prevalence of nominee

³¹ F Muntaqo and A D Pratama, "Adat Law as a Foundation for Advancing Indonesian Agrarian Law to Maximise Societal Welfare," *Sriwijaya Law Review* 8, no. 2 (2024): 376–92, <https://doi.org/10.28946/slrev.Vol8.Iss2.3710.pp376-392>.

³² Agustina, "The Social Function of Land Rights in Indonesia: The Basic Agrarian Law and Customary Rights by the State."

³³ Khairunnisa and Putra, "Akibat Hukum Perjanjian Nominee Hak Atas Tanah Berkaitan Dengan Kepemilikan Warga Negara Asing."

³⁴ Noor, "Case Settlement of Nominee Agreement as A Mode of Land Tenure for Foreign Nationals in Indonesia."

practices indicates that the issue extends beyond doctrinal invalidity and reflects structural limitations in regulatory effectiveness and institutional enforcement. This condition reveals a structural gap between normative design and institutional implementation, necessitating further analysis of regulatory transparency, institutional capacity, and enforcement mechanisms within the Indonesian land governance system.

3.2. Structural Gap Between Doctrinal Invalidity and Regulatory Effectiveness

The doctrinal invalidity of nominee agreements under Indonesian agrarian law presents a paradox when examined through the lens of regulatory effectiveness. From a strictly doctrinal standpoint, nominee arrangements designed to circumvent restrictions on foreign ownership of freehold land (*hak milik*) are unequivocally void. This invalidity derives from the combined operation of Article 21(1) and Article 26(2) of the Basic Agrarian Law (UUPA), which limit *hak milik* exclusively to Indonesian citizens and nullify any legal act intended to transfer such rights to foreign nationals, whether directly or indirectly.³⁵ However, the persistence and operational effectiveness of nominee arrangements in practice reveal a structural gap between doctrinal prohibition and regulatory enforcement. This gap reflects not a failure of legal doctrine, but a deeper disjunction between formal legal invalidity and the institutional capacity of the regulatory system to detect, prevent, and remedy concealed violations.³⁶

At its core, this structural gap arises from the inherent limits of doctrinal invalidity as a regulatory mechanism. Doctrinal invalidity operates primarily as a normative principle: it establishes that certain legal acts lack legitimacy and cannot be recognized by the legal system. However, doctrinal invalidity does not automatically translate into empirical ineffectiveness. The legal system depends on institutional processes: registration, verification, adjudication, and enforcement to transform normative invalidity into practical nullification. Where these processes rely on formal documentation rather than substantive economic reality, nominee arrangements can remain operationally effective despite their doctrinal illegitimacy.

This phenomenon is particularly evident within Indonesia's land registration system, which is administered by the National Land Agency (Badan Pertanahan Nasional/BPN). The land registration regime is fundamentally premised on formal legal ownership rather than beneficial ownership. The system recognizes the individual whose name appears on the land certificate as the legal rights holder, and it does not systematically investigate underlying private agreements that may alter the economic substance of ownership. As a result, nominee arrangements exploit the structural distinction between formal title and beneficial control. While the nominee holds legal title in compliance with the formal requirements of the registration system, the foreign

³⁵ Salain, Palguna, and Widiatedja, "THE REGULATION OF THE OWNERSHIP OF FLATS BY FOREIGNERS AFTER THE ENACTMENT OF THE JOB CREATION LAW."

³⁶ I Sumarsih, "CHALLENGING NOMINEE AGREEMENTS IN THE MINING INDUSTRY: BETWEEN CONSTITUTIONAL MANDATES AND LEGAL EVASION," *Indonesia Law Review* 15, no. 1 (2025), <https://doi.org/10.15742/ilrev.v15n1.5>.

beneficiary exercises de facto control through contractual arrangements that remain invisible to the administrative apparatus.

The resulting gap between doctrinal invalidity and regulatory effectiveness reflects a broader theoretical distinction between formal legality and regulatory capacity. Legal invalidity is a normative determination, but regulatory effectiveness depends on institutional capability. In regulatory theory, this distinction underscores the difference between rule existence and rule enforcement. A legal prohibition may be normatively clear yet empirically ineffective if enforcement mechanisms lack the informational access or institutional coordination necessary to identify violations.³⁷ In the context of nominee arrangements, the regulatory system is structurally dependent on voluntary disclosure or ex post disputes to reveal concealed foreign control.³⁸ Absent such disclosure, the prohibition remains symbolically powerful but operationally limited.³⁹

This structural limitation is further compounded by the fragmented institutional landscape governing land transactions. Multiple actors including notaries, land deed officials (PPAT), and administrative authorities participate in the formalization and registration of land rights. Each actor operates within a defined institutional mandate, and none bears comprehensive responsibility for investigating the underlying economic substance of ownership.⁴⁰ This fragmentation creates a regulatory environment in which formal compliance can be achieved without substantive compliance. The system ensures procedural legality but cannot fully guarantee substantive conformity with the normative objectives of agrarian law.

Moreover, nominee arrangements are sustained by structural economic incentives that operate beyond the immediate reach of legal doctrine.⁴¹ Restrictions on foreign ownership create asymmetrical access to valuable land resources, particularly in regions experiencing rapid tourism and investment growth. These restrictions generate demand for legal mechanisms that can reconcile formal compliance with economic objectives. Nominee arrangements emerge as a functional response to this regulatory asymmetry, allowing foreign capital to participate in the land market while preserving the formal structure of national ownership. In this sense, nominee arrangements are not merely legal anomalies but structural adaptations to the tension between sovereign control and global capital mobility.

³⁷ Nivia, "DUALISME PENGATURAN BENEFICIAL OWNERSHIP DI INDONESIA," *Mimbar Hukum* 35, no. 1 (2023): 29–58, <https://doi.org/10.22146/mh.v35i1.5155>.

³⁸ Noor, "Case Settlement of Nominee Agreement as A Mode of Land Tenure for Foreign Nationals in Indonesia."

³⁹ Putra and Rada, "NATIONALITY PRINCIPLE IN THE NOMINEE AGREEMENT TO OBTAIN THE LAND RIGHT."

⁴⁰ F T Haridhy and I Ismail, "LEGAL PROTECTION FOR BUYERS DUE TO NEGLIGENCE CARRIED OUT BY PPAT," *Jurnal IUS Kajian Hukum Dan Keadilan* 7, no. 2 (2019): 319–29, <https://doi.org/10.29303/ius.v7i2.652>.

⁴¹ Sumarsih, "CHALLENGING NOMINEE AGREEMENTS IN THE MINING INDUSTRY: BETWEEN CONSTITUTIONAL MANDATES AND LEGAL EVASION."

This dynamic illustrates a broader insight from socio-legal theory: legal invalidity does not necessarily eliminate social practice. As Eugen Ehrlich's concept of "living law" suggests, the effectiveness of law depends not only on its formal content but also on its alignment with social and economic realities.⁴² Where legal restrictions diverge from underlying economic incentives, informal or concealed legal practices may emerge to bridge the gap. Nominee arrangements represent such a bridging mechanism, operating in the interstitial space between formal prohibition and economic demand.

Importantly, this structural gap does not undermine the normative authority of the UUPA. On the contrary, the doctrinal invalidity of nominee arrangements remains legally decisive when such arrangements are subjected to judicial scrutiny. Courts retain the authority to nullify nominee agreements and invalidate derivative legal claims, reaffirming the exclusivity of Indonesian citizenship as a prerequisite for hak milik ownership.⁴³ However, the effectiveness of this doctrinal safeguard depends on the occurrence of institutional activation litigation, administrative review, or regulatory investigation. Until such activation occurs, nominee arrangements can continue to function as de facto ownership structures

This analysis demonstrates that the persistence of nominee arrangements should not be interpreted as a failure of legal doctrine, but rather as evidence of a structural gap between normative prohibition and regulatory effectiveness. The legal system clearly articulates the invalidity of foreign ownership through nominee structures, yet the institutional mechanisms required to operationalize this invalidity remain constrained by formalistic administrative procedures, informational asymmetries, and fragmented regulatory authority.

Ultimately, the structural gap between doctrinal invalidity and regulatory effectiveness reveals a deeper tension within Indonesia's agrarian legal regime: the tension between sovereign control over land and the practical realities of global economic integration. The UUPA establishes a normative framework designed to preserve national control over land resources, but its effectiveness depends on regulatory institutions capable of translating normative prohibition into empirical enforcement. Without mechanisms capable of identifying and addressing concealed beneficial ownership, doctrinal invalidity remains a necessary but insufficient condition for regulatory effectiveness. This structural analysis provides the conceptual foundation for understanding nominee arrangements not merely as individual legal violations, but as systemic phenomena emerging from the interaction between legal doctrine, institutional capacity, and economic structure.

⁴² P Osina, "Eugen Ehrlich – Founder of Legal Sociology," *Pravnik* 161, no. 5 (2022): 414–25, <https://www.scopus.com/inward/record.uri?eid=2-s2.0-85136215296&partnerID=40&md5=e334491b8de399f7aea70bb3ee629418>; M Hertogh, "Sociology of the Living Law: Exploring the Other Hemisphere of the Legal World," in *Research Handbook on the Sociology of Law*, 2020, 124–35, <https://doi.org/10.4337/9781789905182.00018>.

⁴³ Normand Edwin Elnizar, "Tenang! Pembeli Tanah Dari Nominee Tak Akan Dirugikan Asalkan...," 2020.

3.3. Reconceptualizing Nominee Agreements: Beyond Contractual Illegality toward Structural Challenges to Agrarian Sovereignty and Legal System Integrity

The persistence of nominee arrangements within Indonesian land relations necessitates a reconceptualization that transcends their conventional characterization as merely invalid private contracts. As established in the preceding sections, nominee agreements lack doctrinal validity within the normative structure of Indonesian agrarian law and persist due to structural limitations in regulatory detection and enforcement. However, their broader legal significance lies not solely in their contractual illegality or enforcement deficit, but in their capacity to expose deeper structural tensions between the normative design of agrarian sovereignty and the functional dynamics of contemporary property relations. Nominee arrangements therefore must be understood as structural legal phenomena that operate at the intersection of formal prohibition, institutional constraint, and transnational economic pressures.

At the most fundamental level, nominee arrangements challenge the epistemic function of the land registration system as a mechanism for producing legally reliable representations of ownership. The Indonesian land registration regime is premised on the principle that formally registered title reflects legally recognized ownership, thereby ensuring certainty, transparency, and enforceability. This system depends on the assumption that formal title corresponds to genuine legal control. Nominee arrangements disrupt this correspondence by introducing concealed control structures that exist outside the formal legal framework while remaining dependent upon its procedural validity.⁴⁴ The result is not merely an isolated contractual irregularity, but a structural distortion in the informational integrity of the legal system itself.⁴⁵ When formally valid ownership documentation masks substantively unauthorized control, the registration system continues to operate procedurally while its underlying epistemic reliability is compromised. This condition transforms nominee arrangements from private legal anomalies into systemic challenges that undermine the informational foundations upon which legal certainty depends.

More significantly, nominee arrangements reveal a structural contradiction between the territorial logic of agrarian sovereignty and the deterritorialized character of modern capital mobility. Indonesian agrarian law is grounded in the principle that land constitutes a sovereign national resource subject to public regulation in accordance with collective welfare objectives.⁴⁶ This principle presumes that legal control over land can be effectively structured through territorially bounded legal norms enforced through formal institutions. However, nominee arrangements demonstrate that beneficial control over land may be functionally transferred without formal recognition, allowing economic actors to reorganize control relationships in ways that circumvent territorially defined legal

⁴⁴ Putra and Rada, "NATIONALITY PRINCIPLE IN THE NOMINEE AGREEMENT TO OBTAIN THE LAND RIGHT."

⁴⁵ Anggriani and Zandra, "Nominee Contract Practice on Ownership of Foreign National Land in Indonesia."

⁴⁶ A McWilliam, "Historical Reflections on Customary Land Rights in Indonesia," *Asia Pacific Journal of Anthropology* 7, no. 1 (2006): 45–64, <https://doi.org/10.1080/14442210600551859>.

restrictions. In this sense, nominee arrangements do not formally violate the procedural mechanisms of land registration, but instead neutralize the substantive regulatory objectives of agrarian law by separating control from legally recognized ownership. This phenomenon reveals an inherent structural limitation in regulatory systems that rely primarily on formal ownership classification as the central mechanism of control.

The structural significance of nominee arrangements also lies in their capacity to transform the relationship between public law sovereignty and private law autonomy. Agrarian law operates as a public regulatory framework that defines the permissible boundaries of private property relations in accordance with constitutional and social objectives. Within this framework, private contractual autonomy is not absolute but exists within limits defined by mandatory public norms. Nominee arrangements represent attempts to reconstitute prohibited property relationships through formally permissible contractual instruments, thereby reconfiguring public law limitations into privately constructed control mechanisms.⁴⁷ This does not merely constitute individual non-compliance, but reflects the ability of private legal ordering to function adaptively in response to regulatory constraint. Such adaptive contractual behavior exposes the structural permeability of legal boundaries when enforcement depends on formal classification rather than substantive control analysis.

From a legal system perspective, nominee arrangements illustrate the limits of formal legality as a sufficient condition for regulatory effectiveness. Legal systems maintain authority not only through the validity of their normative rules but through their capacity to ensure that social and economic reality remains structurally aligned with those rules. When formally invalid arrangements continue to operate functionally without immediate legal consequence, a distinction emerges between normative authority and empirical effectiveness. This distinction does not negate the validity of the legal norm but reveals that the operational reach of legal regulation is mediated by institutional capacity, informational visibility, and enforcement structure. Nominee arrangements thus expose a structural condition in which the legal system retains formal supremacy while experiencing practical limitations in its ability to fully internalize social behavior within its normative framework.

This structural condition also carries implications for the conceptual integrity of state sovereignty over land. Sovereignty in agrarian law is not expressed solely through formal declarations of regulatory authority, but through the effective alignment between legal norms and actual patterns of control. When control over land can be reorganized through private arrangements that remain invisible to formal regulatory mechanisms, sovereignty continues to exist normatively but becomes partially attenuated in its practical expression. Nominee arrangements therefore do not invalidate the principle of state sovereignty, but reveal the conditions under which sovereignty must operate within

⁴⁷ Noor, "Case Settlement of Nominee Agreement as A Mode of Land Tenure for Foreign Nationals in Indonesia."

increasingly complex legal and economic environments characterized by asymmetries between formal ownership and functional control.

Accordingly, nominee arrangements should be understood not merely as unlawful contractual devices, but as structural indicators of the evolving relationship between law, property, and regulatory authority. Their persistence reflects the adaptive capacity of private actors to reorganize legal relationships within the interstices of formal regulatory systems, while simultaneously demonstrating the continued normative authority of agrarian law to define the legal limits of ownership. This dual character underscores that nominee arrangements exist in a condition of structural illegality: they remain doctrinally invalid and legally unenforceable, yet capable of producing de facto control relationships within private spheres until subjected to formal legal scrutiny.

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4. Conclusion

This article has demonstrated that nominee arrangements lack doctrinal legitimacy within the structure of Indonesian land law. Such agreements contravene the nationality principle enshrined in Law No. 5 of 1960 on Basic Agrarian Principles, violate the civil law requirement of a lawful cause, and introduce a separation between formal title and beneficial control that is incompatible with the conceptual foundations of Indonesia's agrarian regime. From a strictly doctrinal perspective, nominee agreements are null and void and incapable of producing legally enforceable rights for foreign beneficiaries. However, their continued prevalence indicates that the issue cannot be explained solely in terms of legal validity. Rather, the persistence of nominee arrangements reflects a structural tension between a prohibition-based ownership regime and a regulatory system that prioritizes formal title while lacking mechanisms to detect and regulate concealed beneficial ownership. This divergence reveals the limits of a purely formalist model of property regulation, in which legal prohibition exists normatively but remains vulnerable to functional circumvention.

In light of these findings, this article argues that enhancing the effectiveness of Indonesia's land law regime requires a structural recalibration of regulatory design. Absolute prohibition, without complementary mechanisms of transparency and institutional oversight, risks functioning as a symbolic norm rather than an effective instrument of governance. Strengthening beneficial ownership transparency, enhancing due

diligence obligations within land transactions, and improving institutional coordination would enable the legal system to align formal ownership with substantive control while preserving the constitutional commitment to agrarian sovereignty and the social function of land. More broadly, the Indonesian experience illustrates that maintaining regulatory coherence in contemporary property relations requires legal frameworks capable of addressing the structural gap between formal legality and economic reality. By integrating doctrinal clarity with institutional transparency, Indonesia can reinforce legal certainty, protect distributive justice, and ensure that its agrarian regime remains resilient in the face of evolving transnational investment dynamics.

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