



## LEGAL PROTECTION OF LAND OWNERSHIP RIGHTS IN MIXED MARRIAGES IN INDONESIA

**Siti Mirilda Putri<sup>1\*</sup>, Ilyas Ismail<sup>2</sup>, Muazzin<sup>3</sup>, Sanusi Bintang<sup>4</sup>**

<sup>1</sup>Department of Private Law, Faculty of Law, Syiah Kuala University, Banda Aceh, Indonesia.

<sup>2</sup>Department of Private Law, Faculty of Law, Syiah Kuala University, Banda Aceh, Indonesia.

<sup>3</sup>Department of International Law, Faculty of Law, Syiah Kuala University, Banda Aceh, Indonesia.

<sup>4</sup>Department of Private Law, Faculty of Law, Syiah Kuala University, Banda Aceh, Indonesia.

**Abstract.** Legal protection for various human interests is usually carried out by the state as a power organization used to achieve the goals of the nation. In the context of implementing agrarian reform to determine and enforce a land ownership system, whether collective or individual, the state is granted the highest authority to regulate the use, utilization, control, and ownership of agrarian resources in Indonesia. The purpose of this study is to examine the legal protection of land ownership rights in mixed marriages in Indonesia. The research method used is normative or doctrinal legal research. The results of the study show that the status of land and building acquisition by foreign nationals or foreign legal entities in Indonesia is limited to: the right to use land for a specified period, the right to lease buildings, ownership of units in apartment buildings (strata title), and residential houses with certain conditions. Foreign legal entities are not permitted to control land under freehold title, right to cultivate, or right to build. If foreign legal entity acquires any of these rights, they are required to relinquish them no later than one year, or the rights will be nullified by law and revert to state control.

**Keywords:** Legal Protection; Land Rights; Mixed Marriage.

### Introduction

Legal protection for various human interests is generally carried out by the state as a power organization utilized to achieve the goals of the nation. The involvement and presence of the state in providing legal protection are based on the paradigm of the welfare state, which is one of the fundamental purposes for the establishment of the state.<sup>1</sup> This paradigm views the state as an instrument to achieve a common goal of prosperity and social justice for all people.<sup>2</sup> Therefore, it is indeed the duty and authority of the state to protect all the interests of its people. Accordingly, individuals or communities within this paradigm are positioned as legal subjects who must be protected and ensured well-being in all aspects of their lives.<sup>3</sup>

<sup>1</sup> The Constitution, as a form of written constitution, is the highest legal foundation in almost all sovereign countries today, including Indonesia. Since the constitution is regarded as the supreme law, its purpose is also used to achieve and realize the highest goals. Several scholars associate this ultimate goal with the purpose of establishing a state. In other words, formulating the objectives of the constitution is essentially the same as formulating the objectives of the state. See: Jimly Assiddiqie, *Perkembangan Baru Tentang Konstitusi Dan Konstitusionalisme Dalam Teori dan Praktik* (Yogyakarta: Genta Publishing, 2018), p. 1.

<sup>2</sup> CST Kansil and Christine ST. Kansil, *Hukum Tata Negara Republik Indonesia* (Bandung: Refika Aditama, 1997), p. 20.

<sup>3</sup> Yos Johan Utama, *Building an Authoritative Administrative Court*, Paper, Inaugural Speech for Professorship in Law, Faculty of Law, Diponegoro University (Semarang, 2010), p. 2.



Throughout its historical development, the emergence of the material rule of law state or welfare state was a reaction to the concept of the formal rule of law, which was based on the idea of a "night-watchman state" (*nachtwachter staat*). This night-watchman state operated with an individualistic dimension centered on the interests of the bourgeois class. In this model, the role of the state was merely to protect the interests of the nobility, without the authority to monopolize, coerce, or regulate relationships among members of society. The state's main task was limited to maintaining order and security, while economic affairs and the welfare of the people were considered the responsibility of each individual.<sup>4</sup>

The government is prohibited from interfering in or intervening in the affairs of the people, as a manifestation of the *laissez-faire* doctrine, which is a key component of capitalism. Economic and welfare matters are entirely left to the development of the free market economy. Legal protection for the people is a universal concept within the framework of the rule of law. However, each country has its own ways and mechanisms for realizing such legal protection and determining to what extent that protection should be provided.<sup>5</sup> This is in line with the development of the modern rule of law concept, which is oriented toward the welfare of the people.

However, when we want to understand the fundamental goals of a state, we must refer back to the constitution of the respective country. In the specific case of Indonesia and its adoption of the *welfare state* ideology, we must base our understanding on the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), which also contains Pancasila as the philosophical foundation of Indonesia as a nation-state.<sup>6</sup> The ideal of a *welfare state* as contained in the Preamble to the Indonesian Constitution includes several terms related to the regulation of the national economy. The founding fathers used the term "just and prosperous", which is often debated or seen in contrast, even though these two concepts should in fact run in parallel.<sup>7</sup>

In addition, the terms "general welfare" and "social justice" are also used. When these terms are interpreted in the context of economics, they imply that the people have the right to be treated fairly in economic matters and to have access to welfare in their lives.<sup>8</sup>

The welfare paradigm found in the Preamble of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) is further elaborated in Chapter XIV of the Constitution, titled "National Economy and Social Welfare." Jimly Asshiddiqie interprets this title to mean that the entire Indonesian economic system must not be separated from its spirit, which is rooted in the perspective of social welfare. Welfare should not be treated as a mere add-on or decorative policy (*piecemeal*), but rather social welfare must be its core objective.<sup>9</sup>

This chapter consists of two articles: Article 33, which discusses the National Economy, and Article 34, which addresses Social Welfare.

<sup>4</sup> Hotma P. Sibuea, *The Principles of the Rule of Law, Policy Regulations, and the General Principles of Good Governance* (Jakarta: Erlangga, 2010), p. 26.

<sup>5</sup> Paulus E. Lotulung, *Several Systems of Legal Control over the Government* (Bandung: Citra Aditya Bakti, 1993), p. 123.

<sup>6</sup> Moh Mahfud MD, *Constitution and Law in Controversial Issues* (Jakarta: Rajawali Press, 2012), pp. 36–37

<sup>7</sup> Faturochman, *The Psychology of Justice for Welfare and Social Cohesion*, Inaugural Professorship Speech at the Faculty of Psychology, Gadjah Mada University, Yogyakarta (2008), pp. 17–18.

<sup>8</sup> Elviandri, Khuzdaifah Dimyati, and Absori, *Quo Vadis Welfare State: Affirming the Ideology of the Welfare State in Indonesia's Rule of Law*, *Mimbar Hukum Journal*, Vol. 31 No. 2 (2019), p. 261. <https://jurnal.ugm.ac.id/jmh/article/view/32986>

<sup>9</sup> Jimly Asshiddiqie, *Op. Cit.*, p. 111.



In the context of implementing agrarian reform, particularly in establishing and upholding land ownership systems, whether collective or individual the state is granted the highest authority to determine the use, utilization, control, and ownership of agrarian resources within Indonesia.

When discussing this highest authority, it is closely related to the concept of sovereignty. Sovereignty is the primary factor in regulating the behavior of anyone within a given territory through coercive power. As a result, sovereignty is not merely a capacity, but also the highest and even potentially unlimited power and authority over the sovereign territory concerned.<sup>10</sup> Therefore, the state's power over land is closely tied to national sovereignty in the context of territorial sovereignty.

Territorial sovereignty is the absolute right of a state to govern the geographic area under its jurisdiction, including land, sea, airspace, and all natural resources contained within it. The state's authority over its territory must be obtained both legitimately and legally.<sup>11</sup>

Specifically in the context of agrarian matters, the state's legal authority over land must be obtained in accordance with the prevailing laws (*ius constitutum*), while its legitimate authority must be based on real support within the shared life of the community. Thus, the control of agrarian resources by the state is an integral part of its capacity to uphold its authority and sovereignty over its territory—this must be grounded in both legitimacy and legality, in order to grant the state the right to regulate and manage its entire territory.

This idea aligns with the social contract theory espoused by philosophers such as John Locke and Jean-Jacques Rousseau, where state legitimacy is based on an implicit agreement between the people and the government. This agreement is manifested in the form of law, particularly the Constitution, which represents a contract made by the people to govern themselves and their government. At the same time, it ensures constitutionalism, the principle of statehood that upholds the protection of human rights.

Therefore, the social contract theory provides a philosophical foundation for the formation of the state and the regulation of power, while the Constitution serves as the formal embodiment of that social contract in legal form. Because it is considered to protect the public interest and ensure the fair distribution of resources, particularly land, the state gains legitimacy to regulate and manage land affairs.

As a manifestation of carrying out the mandate of the Constitution as the highest law in the state, the government is required to enact laws that are hierarchically, functionally, and substantially aligned with the Constitution. In Indonesia, Law No. 5 of 1960 on Basic Agrarian Principles (UUPA) serves as an instrument to implement the provisions contained in Article 33 of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), even though there are criticisms that the UUPA overreaches by including the term "outer space", which is never mentioned in Article 33 of the Constitution.<sup>12</sup> This inclusion is also seen as conflicting with the 1967 Outer Space Treaty, which Indonesia ratified through Law No. 16 of 2002, where it is

<sup>10</sup> Budiono Kusumohamidjojo, *Political Philosophy and Pandora's Box of the 21st Century* (Bandung: Yrama Widya, 2020), pp. 120–121.

<sup>11</sup> Ibid., p. 108.

<sup>12</sup> Henry Sinaga, *Agrarian Law in Theory and Practice: A Compilation of Writings on the Disarray of Regulations in Indonesia* (Bandung: Citra Aditya Bakti, 2018), pp. 97–99.



stipulated that countries are prohibited from claiming sovereignty or ownership over outer space.<sup>13</sup>

In addition, the terminology of "agrarian" used in the UUPA is considered overly broad, whereas in various international literatures, "agrarian" is generally limited to land or agricultural land.<sup>14</sup> Despite the criticisms toward the existence of the UUPA, in the administration of the state, this law grants authority to the government as a state organ to supervise all aspects of land, including ownership, management, and utilization of land. Abdul Manan states that the UUPA serves as a general safeguard of social interests in individual human life, thereby creating a balance of interests.<sup>15</sup>

Thus, the UUPA provides a framework for the management of agrarian resources under state control, aimed at achieving the people's welfare, as intended in Article 2 paragraph (1) of the UUPA, which states that:

“Based on the provisions of Article 33 paragraph (3) of the Constitution and the matters referred to in Article 1, the earth, water, and outer space, including the natural resources contained therein, shall be controlled by the State at the highest level, as the authority organization of the entire people.”

This provision indicates that state control can be understood as the state's full authority to regulate the use, ownership, and utilization of land and other natural resources. The state must act as both a regulator and administrator of land, with the primary goal of safeguarding the social and economic welfare of society and ensuring fair distribution of natural resources. The state may grant certain rights to individuals or groups within society; however, these rights remain under the control of the state, which retains ultimate authority over land. Therefore, state control over land, in the context of sovereignty, serves to protect and preserve the integrity of the state from both external and internal threats.

State control of land can extend to various areas, including national land policy, land rights regulation, management of agrarian conflicts and disputes, land redistribution, defense of territorial sovereignty, and more. Such control is exclusive in nature, empowering the state to regulate the ownership, use, and benefit of land in order to meet the needs of its people. This state authority provides the legitimacy for the government to establish agrarian policies aimed at protecting national territory and preserving natural resource wealth as an essential component of national sovereignty.

Moreover, within the framework of modern sovereignty, the state not only has the right to control land but also bears the responsibility to manage it in the public interest, as an embodiment of the “land for the people” doctrine, which is embraced in many countries, including Indonesia. Based on the above background, the purpose of this research is to examine how legal protection is provided for land ownership rights in mixed marriages in Indonesia.

The research method used in this writing is normative or doctrinal legal research. This type of research views law as a system of norms. From this perspective, law is conceptualized as an

<sup>13</sup> Ibid., pp. 97–99.

<sup>14</sup> Ibid., pp. 97–99.

<sup>15</sup> Abdul Manan, *The Dynamics of Legal Politics in Indonesia* (Jakarta: Kencana, 2018), p. 120.



instrument of the state or *polis* concerned with justice, with rules of conduct to regulate human behavior.<sup>16</sup>

Research from this perspective is conducted with the aim of providing legal arguments as a basis for determining whether a particular event is right or wrong, as well as how such an event should be treated according to the law.<sup>17</sup> Its function is to offer juridical arguments in situations where there is a legal vacuum, ambiguity, or conflict of norms.<sup>18</sup>

## Analysis and Discussion

### 2.1. The State's Involvement in Land Control

Land in Indonesia is not viewed merely as an economic asset, but also as a source of life and societal welfare. Therefore, the control and ownership of land rights are strictly regulated within the national legal framework, particularly through the Basic Agrarian Law (UUPA) No. 5 of 1960.

Land is a highly valuable resource for humans. Its value is linked to various aspects, both from the perspective of physical ecology and social ecology, which grow and develop in accordance with certain value systems that differ across places and times.<sup>19</sup> These differing value systems lead to variations in land law systems. As a result, land issues are highly multidimensional and laden with questions of justice that are inherently relative. Therefore, a person's or a nation's perspective on law and justice will be determined by their worldview and philosophy of life. Consequently, the perspective of those who adhere to the philosophy of individualism will naturally differ from those who adhere to collectivist philosophy.<sup>20</sup> The fundamental conflict over land value systems is also illustrated by the opposition between collectivist and individualist values. Collectivism and individualism are two concepts that describe differing views on the role of individuals in society. Collectivism emphasizes the importance of the group over individual interests, while individualism prioritizes personal freedom and individual achievement within society.<sup>21</sup> Specifically in the context of land values, individualism can be interpreted as the view that land is a private resource that can be owned, cultivated, and traded for personal gain. In societies that embrace individualist values, private ownership of land is of great importance, and individuals have full rights to manage their land according to their own wishes.

Individualism considers private ownership of land as a fundamental right that must be respected and protected. Landowners are free to manage and use their land as they wish in order to achieve maximum profit or other personal goals. This concept is closely tied to the

<sup>16</sup> FX Adji Samekto, *Legal Science in the Development of Thought Towards Post-Modernism* (Bandar Lampung: Indept Publishing, 2012), p. 2.

<sup>17</sup> Mukti Fajar & Yulianto Ahmad, *The Dualism of Legal Research: Normative & Empirical* (Yogyakarta: Pustaka Pelajar, 2015), p. 36.

<sup>18</sup> I Made Pesek Diantha, *Normative Legal Research Methodology in the Justification of Legal Theory* (Jakarta: Kencana, 2019), p. 12.

<sup>19</sup> Julius Sembiring, *Land in the Perspective of Legal Philosophy*, *Mimbar Hukum Journal*, Vol. 23 No. 2 (2011), p. 397. <https://jurnal.ugm.ac.id/jmh/article/view/16185>

<sup>20</sup> A. Mukthi Fadjar, *The Rule of Law and the Development of Legal Theory: History and Paradigm Shifts* (Malang: Intrans Publishing, 2018), p. 116.

<sup>21</sup> Hofstede, G., *Culture's Consequences: International Differences in Work-Related Values* (Beverly Hills, CA: Sage Publications, 1980).



development of the capitalist system, which emphasizes private property rights as the foundation of a strong economy. The individualistic approach to land is commonly found in capitalist economic systems, where land is viewed as a commodity that can be bought and sold. In short, in this system, personal gain and private ownership are central, and the state is often required to provide legal protection for private land ownership. Conversely, collectivism emphasizes the importance of the community, group, or society over the individual.

In the context of land values, collectivism sees land as communal property that must be managed for the benefit of all members of the community. This approach stresses the concept of togetherness, where land is regarded as a resource to be collectively managed for shared welfare, rather than solely for individual profit. In collectivist societies, land is often not owned by individuals, but by groups, tribes, or the state. Land ownership is communal, and its use is regulated by traditions or social norms passed down through generations. Collectivist land values are often found in indigenous communities, where land is seen as part of a shared identity, and thus cannot be sold or transferred without the consent of the entire community.

Since the emergence of the modern state, both collectivist and individualist values have evolved into ideologies. Collectivism has given rise to socialist/communist ideologies, while individualism has led to liberalism.<sup>22</sup> Indonesia, however, does not glorify either of these extremes but instead has chosen to develop land values that reflect its national identity, namely Pancasila. As a result, Indonesia's land value system refers primarily to collectivism, while also recognizing individual land rights. Nonetheless, this hybrid approach has led to certain inconsistencies and agrarian imbalances.<sup>23</sup> However, efforts to strengthen the Pancasila-based land value system are imperative, and this must be supported by reinforcing collective land values as well as enhancing the role of the state as the land regulator.<sup>24</sup>

The relationship between the state and land values must encompass the state's role in regulating, managing, and defining the values associated with land ownership and use. The state holds significant power in determining how land is managed through legal policies and regulations. It plays a central role in establishing and enforcing land ownership systems be they collective or individual. Additionally, the state plays a key role in land redistribution through agrarian reform policies, where the basic principle of reform is that land must serve justice and public welfare.<sup>25</sup>

Based on this principle, the framework of agrarian reform in Indonesia is defined as a restructuring of the use, management, control, and ownership of agrarian resources, especially land in a way that guarantees justice and the sustainable improvement of people's welfare, as outlined in MPR Decree No. IX/MPR/2001. This decree was enacted in response to various past problems, including land control disparities, environmental degradation, and agrarian conflicts, particularly those resulting from centralized and unjust policies.

In essence, the relationship between the state and land values is highly complex and dynamic. The state plays a crucial role as the main regulator balancing individual rights,

<sup>22</sup> Julius Sembiring, *Land in the Perspective...*, Op. Cit., p. 399.

<sup>23</sup> Ibid., p. 399.

<sup>24</sup> Ibid., p. 403.

<sup>25</sup> Suriansyah Murhaini, *Land Law: Land Function Conversion and the Social Function of Land Rights* (Yogyakarta: LaksBang Justitia, 2021), p. 23.



collective interests, economic development needs, and environmental protection. In land governance, the state must confront various challenges, such as maintaining justice and sustainability, protecting indigenous peoples' rights, formulating fair and sustainable agrarian and natural resource policies, resolving agrarian issues with certainty and fairness, and ensuring the empowerment of both the state and society in agrarian policy for the welfare of all Indonesians.

Furthermore, differences in concepts of land control rights between Customary Law and Western Law demonstrate a fundamental contradiction. Customary Law is based on the *ipso facto* theory, whereas Western Law as adopted in the Netherlands is based on the *ipso jure* theory, supported by the Utrecht School, which gave rise to the *domein verklaring* doctrine (Peter J. Burns, 1999).<sup>26</sup> This doctrine holds that land ownership must be proven by formal legal evidence based on rationalist principles.

Therefore, if a person cannot prove legal ownership of the land they occupy, that land is declared state land.

More specifically, the *domein* doctrine defines land within the scope of state power whether as owned property, property with similar status, or administratively controlled-based on the following considerations:

A.	Objects that are specifically designated for the state to be used for the benefit of the public.
B.	Objects that do not have an owner, either because of their nature or because they cannot be owned by individuals.
C.	Objects that are specifically designated for the state to be used by the state itself.
D.	Objects that, due to their use for public benefit, are controlled by the state. <sup>27</sup>

**Principle of Authority in Granting Land Rights.** The demand for land has increased year by year, and in major cities, land has become increasingly commercialized, tending toward individualistic ownership and concentration in the hands of a small number of owners. This situation has caused the social function of land, as mandated by Article 6 of the Basic Agrarian Law (UUPA), to shift and transform into an economic function. As a result, changes in land control and usage patterns tend to favor the granting of land rights to particular groups that have sufficient access to land resources.

In General Explanation II, point 4 of the UUPA, it is firmly stated that any land rights held by an individual cannot be justified if the land is used or left unused, solely for personal interests, especially when such use (or lack thereof) causes harm to the public. Therefore, the issue of granting land rights must receive careful attention, as it reflects the extent to which land distribution and justice in land control are being realized.

in observing issues related to land distribution, stated that land distribution in Indonesia continues to move toward a form of increasingly narrow stratification. Year after year, people's land falls into the hands of powerful capital owners, whether through institutional processes or individual transactions. In this regard, protection must be provided to economically weaker

<sup>26</sup> Peter J. Burns, *The Leiden Legacy: Concepts of Law in Indonesia* (Jakarta: PT. Pradnya Paramita, 1999), p. 95.

<sup>27</sup> Ronald Z. Titahelu, *Establishment of General Legal Principles in Land Use for the Greatest Public Prosperity: A Philosophical and Theoretical Study on Land Regulation and Utilization in Indonesia*, Dissertation, Faculty of Law, Airlangga University, Surabaya, 1993, p. 118.



groups of citizens against stronger fellow citizens, and in such conditions, the government is obligated to intervene. According to Article 13 paragraph (2) of the UUPA, the government is obliged to prevent the formation of private monopolistic organizations or individual efforts in the agrarian sector. In paragraph (3), it is stated that not only private enterprises but also government efforts of a monopolistic nature must be prevented if they may harm the public. Any government monopolistic activities may only be carried out under the authority of a law.<sup>28</sup>

## 2.2. State Control over the Acquisition of Land Rights

In essence, the relationship between ownership rights and the state's right to control is both hierarchical and functional, where land ownership rights are subordinate to the state's control through the right to control. Ownership of land is not an absolute right, but rather a right granted or recognized by the state. Thus, even though an individual or legal entity holds ownership rights to land, the state still retains the authority to regulate and oversee the existence and use of that land.

In principle, individual land ownership is limited by the state's authority to regulate and manage agrarian resources for the national interest. These state-imposed limitations may include restrictions on land use, prohibitions on alienating land to foreign parties, land acquisition for public purposes, and others. Therefore, the essence of the relationship between ownership rights and the state's control reflects a balance between individual interests and the public interest. Ownership rights protect the individual's right to possess land, while the state's right to control ensures that land and natural resources are used fairly and sustainably for the benefit of the wider society.

Ownership rights grant a person full legal title to land; however, these rights are subject to the state's ability to monitor and regulate land use in the public interest. Through its right of control, the state has the authority to determine how land is distributed and used in accordance with the principles of social justice and national development. Accordingly, ownership rights are not absolute, but are subject to limitations set by the state. Conversely, the state's right to control serves to ensure that land use is carried out fairly, sustainably, and for the common good.

The national agrarian law regulates land rights comprehensively, although the social function of land continues to limit various land rights. This means that any land rights held by an individual are not justified if the land is used (or left unused) solely for personal interests, but must take into account the conditions, functions, and nature of the land rights.<sup>29</sup> In other words, the Basic Agrarian Law (UUPA) aims for individual interests and community interests to progress hand in hand and balance each other so that the goals of prosperity, justice, and happiness for all the people can be achieved.<sup>30</sup>

Ownership rights (*hak milik*) are one of the land rights regulated under Article 20 paragraph (1) of the UUPA. This type of right is hereditary, the strongest, and the most complete right that a person can have over land, while still considering its social function. Although referred to as the "strongest and most complete" right, ownership rights remain subject to certain limitations set by

<sup>28</sup> Adi Sasono in Au Sofwan Husein, *Political Economy of Land Control* (Jakarta: Pustaka Sinat Harapan, 1995), p. 11.

<sup>29</sup> Yusriadi, *Industrialization and the Changing Social Function of Land Ownership Rights* (Yogyakarta: Genta Publishing, 2010), p. 58.

<sup>30</sup> Ibid., p. 58.



national law for the interests of society and the state. As long as these provisions are not violated, holders of this right have full authority to use, exploit, or transfer the land to others.

One of the limitations imposed by national law regarding land ownership is that ownership rights may only be held by Indonesian citizens. Referring to Article 21 of the UUPA, only the following persons may hold land rights with ownership status:

A.	Indonesian citizens who have land rights without limitations except those specified by law.
B.	Certain legal entities designated by the government, specifically those legal entities responsible for public or social interests, are permitted to own land with ownership status.

Furthermore, Article 21 paragraph (3) of the UUPA clearly states that foreigners are prohibited from holding ownership rights over land in Indonesia. Therefore, it is evident that citizenship status determines a person's entitlement to land ownership.

## Conclusion

Legal protection for various human interests is generally carried out by the state as an organization of power utilized to achieve the goals of the nation. In the context of implementing agrarian reform, particularly in determining and enforcing land ownership systems, whether collective or individual, the state is granted the highest authority to regulate the use, utilization, control, and ownership of agrarian resources to be administered in Indonesia. Research findings show that the status of land and building ownership that can be acquired by foreign nationals (FN) or foreign legal entities in Indonesia is limited to:

- Right of use over land for a specific period.
- Lease rights for buildings.
- Ownership of units in strata title buildings (apartments)
- Ownership of residential houses under certain conditions.

Foreign nationals or foreign legal entities are not permitted to hold land under freehold title (Hak Milik), Right to Cultivate (Hak Guna Usaha), or Right to Build (Hak Guna Bangunan). If a foreign national or foreign legal entity acquires any of these three rights, they are required to relinquish them within a maximum period of one year, or those rights will automatically be nullified by law and revert to state control.

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