

# Legal Certainty in the Land Registration Process Originating from Inheritance

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## ABSTRACT

To guarantee legal certainty by the Government, land registration is carried out for the entire territory of the Republic of Indonesia according to the provisions regulated by Government Regulations. The problem formulation in this study is how the land registration originating from inheritance in Indonesia since the enactment of PMA No. 3 of 1997 is implemented. This study used a legal research method with a normative juridical approach. Data collected through literature were then analyzed qualitatively. The results show that the implementation of land registration originating from inheritance in Indonesia returned to the Dutch colonial era, by dividing the population of Indonesia into 3 (three) groups. By the overlapping of regulations, this ultimately led to no legal certainty in the registration of land originating from inheritance. Thus, the Notary experienced a dilemma in making inheritance certificates for all Indonesian citizens, due to the provisions of Article 111 PMA No. 3 of 1997. As for the suggestions, the Notary must provide legal counseling to the National Land Agency (BPN) relating to land registration originating from inheritance, so that the inheritance certificate made by a Notary for all groups is accepted by the National Land Agency.

**Keywords:** *legal certainty, land registration, inheritance*

## 1. INTRODUCTION

Indonesia is a unitary state consisting of diverse ethnic groups, languages and religions. In the framework of unity, these differences are bound well by Unity in Diversity, as one of the pillars. Through history, the Indonesian people realized that these differences could be the basis of strength. In the pre-independence era, the diversity experienced compartmentalization. This made it easier for the Dutch to implement divisive politics, or better known as politics of *divide et impera*, so that time, Indonesia was colonized easily.

The period of Dutch rule in Indonesia was very miserable for the community because the aim of colonialism was to dredge Indonesia's abundant natural products without regard to the life and education of all Indonesian citizens. As a colonial state, in Indonesia, the rules and legal system in force in the Netherlands were enacted and applied. The transplant was without a filter, because Indonesia did not have the power to reject the rules applied by the Dutch.

During the occupation of Dutch Government in Indonesia, Indische Staatsregeling (IS) was applied. The government regulation at that time was based on Staatsblaad Number 415 and 416, on June 23 1924 as well

as Number 557 of 1925. There were two important articles related to the legal system in force in Indonesia, namely Articles 131 and 163 IS.[1] Article 163 I.S divides the population of Indonesia into 3 (three) classes of population, such as: European class, Bumiputera/ Native group and Foreign Easterner class.[2] The division of population is further described below:

1. European class
 

According to article 163 verse (2) I.S, Those belong to the European class included:

  - a. All Dutch citizens;
  - b. Europeans;
  - c. Japanese citizens;
  - d. People from other countries whose family law is the same as Dutch family law, especially the monogamy principle;
  - e. Their descendants mentioned above.
2. Indigenous groups
 

According to article 163 paragraph (3) I.S, below are those who are included as indigenous group: Indonesian native;

  - b. Those who originally belonged to other groups, then mixed themselves into native Indonesians.
3. Foreign Easterners

According to article 163 paragraph (4) I.S, those belonging to the Eastern Eastern class are those who are not included in the original European or Indonesian class, namely:

- a. Foreign Eastern Chinese (China);
- b. Foreign Easterners who are not Chinese.

The legal rules that apply to the 3 (three) groups of the population are regulated in Article 131 I.S. In Article 131 paragraph 1 sub a stipulated that the material civil law for Europeans applies the principle of concordation.[3] This principle can be held exceptions and deviations, if:

- a. There is something special happening in Indonesia;
- b. The same rules apply to Europeans and other population groups. Article 131 IS is also a political guideline against the law in Indonesia which states, ie:[4]

- 1) Civil Law, Commercial and Criminal Law, Civil Procedure Law and Criminal Procedure Law must be regulated in the form of a Law or Ordinance (paragraph 1);
- 2) Legislation in the field of Civil Law and Commercial Law in force in the Netherlands applies to Europeans (paragraph 2 sub a);
- 3) European legislation in the area of Civil Law and Commercial Law can be applied to Native Indonesians and Foreign Easterners if the needs of the people want it (paragraph 2 sub b);
- 4) Native Indonesians and the Foreign Easterners are allowed to bow (*onderwerpen*) into European legislation in part or in whole, the regulations and their consequences are regulated in the Law / Ordinance (paragraph 4);
- 5) Customary Law (including Customary Civil Law) and Customary Trade Laws) that still apply to Native Indonesians and Foreign East (paragraph 6).

Implicitly the distribution of population groups in Indonesia has been abolished based on Article 27 paragraph (1) of the 1945 Constitution, which reads as follows: Every citizen is equal in his position in law and governance and must uphold the law and governance with no exception. To emphasize the elimination of the division of population, a Cabinet Presidium Instruction was issued 31/U/IN.12/1966 dated 27 December 1966, which is carried out for the achievement of integrated and homogeneous unity development of the Indonesian nation. [5] Based on Cabinet Presidium Instruction Number 31/U/IN.12/1966, the provisions regarding the distribution of population classifications regulated in Articles 131 and 163 I.S are no longer enforced in Indonesia.

With enactment Cabinet Presidium Instruction Number 31/U/IN.12/1966, then the Notary as Official Public should have the right to make the transfer deed due to inheritance for all Indonesian people. However, this did not happen because the State Minister for Agrarian Affairs issued Regulation of the State Minister for Agrarian Number 3 of 1997 as amended by the Regulation of the

Head of National Land Agency Number 8 of 2012 Concerning Implementing Provisions of Government Regulation Number 24 of 1997 Concerning Land Registration. The Regulation of the Minister of Agrarian Affairs has so far undergone changes twice. The first amendment is based on the Head of the National Land Agency Regulation Number 8 of 2012 and the second amendment is based on the Minister of Agrarian and Spatial Planning / Head of the National Land Agency Number 7 of 2019.

The enactment of the Regulation of the Minister of Agrarian Number 3 of 1997 has raised legal uncertainty in the case of land registration due to inheritance in Indonesia, because Article 111 paragraph 1 letter c number 4 recognizes the division of population groups in Indonesia. This condition resulted in dilemma for a Notary in making a Deed of Inheritance for all Indonesian people. The distribution of population groups and the legal system that applies to each population group impacts on officials who make a civil registration certificate and/or inheritance certificate. This will certainly have implications for the rejection of the Deed of Inheritance, which is the basis of the transfer of rights due to inheritance, at the District / City Land Office because it is not in accordance with Article 111 paragraph 1 letter c number 4 Regulation of the Minister of Agrarian Affairs Number 3 of 1997. Therefore, it is very necessary to know how land registration originating from inheritance in Indonesia since the enactment of PMA No. 3 of 1997 is implemented.

## 2. METHODS

This research was conducted using the normative juridical approach. This method focuses on research on library data collection which is secondary data. All data obtained from library research were then analyzed qualitatively and systematically compiled to answer the problems in this study.

## 3. DISCUSSION AND RESULT

The government as the state organizer has an important role in manipulating individuals in social life. The implementation can be carried out if there is a guarantee of legal certainty in all fields. As a country that adheres to the law as commander in chief, it requires that laws and regulations complement each other and are in line, not in opposite, conflicting which ultimately does not provide legal certainty.

In the land sector, the government provides services to people who want to register their land. The aim is to provide legal certainty. Guarantee legal certainty is one of the objectives of Law No. 5/1960 concerning Basic Rules on Agrarian Principles (then called UUPA) contained in Article 19 paragraph (1) which reads as

follows: “To guarantee legal certainty by the government, land registrations are held in all regions of the Republic of Indonesia according to the provisions stipulated by Government Regulations.”

On July 8, 1997, Government Regulation Number 24 of 1997 concerning Land Registration was promulgated (then called PP 24 Tahun 1997). This regulation has become effective<sup>3</sup> (three) months after promulgation. The obstacle in carrying out land registration is the objective condition of the land itself, in addition to being large in number and spread over a large area, most of its control is not supported by means of proof that are easily obtained and trusted. In addition, the existing legal provisions have not been able to realize the implementation of land registration in a short time.[6]

As implementing regulations of PP 24 of 1997, the Regulation of the Minister of Agrarian Number 3 of 1997 concerning Implementing Regulations of Government Regulation Number 24 of 1997 concerning Land Registration (then called PMA 3 of 1997) was issued on October 1, 1997. Regulations regarding the transfer of rights due to inheritance are regulated in Article 111 PMA 3 of 1997. Pursuant to Article 111 paragraph 1 letter c number 4 it is stated: Application for registration of transfer of land rights or Ownership Rights in Flats is submitted by the heirs or their attorneys by attaching: certificate of proof as an heir that can be:

- a. For native Indonesian citizens: certificate of heirs made by the heirs witnessed by 2 (two) witnesses and corroborated by the Head of the Village / District Head where the heirs lived at the time of death;
- b. for Indonesian citizens of Chinese descent: notary deed of inheritance from a Notary;
- c. for other Indonesian citizens of Eastern descent: certificate of inheritance from Heritage Center

This is a source of legal uncertainty, because the norms in the Article have reactivated the distribution of population groups. In the National Medium-Term Development Plan in 2004-2009, one of the goals of development in the legal sector is the elimination of all forms of discrimination in various forms, which are carried out by means of perfection (making things better), changes (in order to be better and modern ), or the elimination of something that exists in the old legal system that is neither needed nor in accordance with the new legal system.[7]

Based on the 2004-2009 National Medium-Term Development Plan, Law Number 12 of 2006 concerning Citizenship of the Republic of Indonesia and Law Number 23 of 2006 concerning Population Administration as amended according to Law Number 24 of 2013, and Law Number 40 of 2008 concerning the Elimination of Racial Discrimination and Ethnicity. With the legalization of Law Number 12 of 2006 concerning Citizenship of the Republic of Indonesia, Law Number 23 of 2006 concerning Population Administration as amended according to Law Number 24 of 2013, Law Number 40 of

2008 concerning the Elimination of Racial and Ethnic Discrimination, supplemented by the Cabinet Presidium Instruction Number 31/U/IN.12/1966 which explicitly has eliminated the distribution of population groups, as well as the provisions contained in the 1945 Constitution of the Republic of Indonesia, especially Article 27 paragraph 1 (the right to obtain the same position before the law), Article 28 D paragraph 1 (the right to recognition, guarantee of protection and legal certainty), Article 28 I paragraph 1 (the right to be free from discrimination), then the provisions of Article 111 paragraph 1 letter c number 4 PMA 3 of 1997 should be set aside.

To strengthen the argument about the exclusion of Article 111 paragraph 1 letter c number 4 PMA 3 of 1997, it is necessary to keep Law Number 12 of 2011 concerning the Formation of Laws and Regulations. Based on Article 7 paragraph 1 of Law Number 12 of 2011 concerning the Formation of Regulations of Legislation, the types and hierarchy of Legislation Regulations consist of:

- a. The Constitution of the Republic of Indonesia in 1945;
- b. Stipulation of the People's Consultative Assembly;
- c. Government Act/ Regulations as Substitute of Law;
- d. Government regulations;
- e. Presidential Regulations;
- f. Regional Regulations of the Province; and
- g. Regional Regulations of Regency/ City.

Based on the above hierarchy, the norm contained in Article 111 paragraph 1 letter c number 4 PMA 3 of 1997 violated the principle *lex superior derogat legi inferior* (Higher regulations can rule out low ones).

This understanding then becomes the basis for the actions of a Notary having the authority to make a Deed of Inheritance for all Indonesian citizens. The provision is based on Article 15 paragraph 1 of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary (then referred to as UUJN), which reads as follows: The notary has the authority to make an authentic deed regarding all deeds, agreements and stipulations required by legislation and / or that is desired by the interested parties to be stated in an authentic deed, guaranteeing the certainty of the date of making the deed, keeping the deed, giving the certificate, copy and quotation of the deed, all this as long as the making of the Deed is not also assigned or excluded to other officials or other people determined by law.

Legal certainty is “*sicherheit des Rechts selbst*” (certainty about the law itself). There are four things related to the meaning of legal certainty. First, that the law is positive, which means that it is legislation (*gesetzliches Recht*). Second, that the law is based on facts (*Tatsachen*), is not a formula for judgments to be made later by judges, such as “goodwill”, “politeness”. Third, that the facts must be formulated in a clear manner so as to avoid misrepresentation, as well as being easy to carry out.

Fourth, the positive law must not be changed frequently.[8] The law must be absolutely certain and fair. It must be a code of conduct and be fair because the code of conduct must support an order that is considered reasonable. Only because it is fair and carried out with certainty, the law can carry out its functions. Certainty and justice are not just moral demands, but factually characterize the law. A law that is uncertain and does not want to be fair is not just a bad law, but not a law at all.[9]

The exact law is the law that leads to justice, and the fair law is a law that benefits many people.[10] The existence of legal certainty in inheritance will ultimately provide justice to every citizen. Especially since the enactment of the Citizenship Law, every citizen in the territory of the Republic of Indonesia receives the same rights and position.

#### 4. CONCLUSION

Article 111 paragraph 1 letter c number 4 PMA 3 of 1997 is contrary to the provisions stipulated in Article 7 paragraph 1 of Law Number 12 of 2011, so that the norm in Article 111 paragraph 1 letter c number 4 can be set aside. That way, the Notary can make a Deed of Inheritance for Indonesian citizens, in accordance with their authority as stipulated in Article 15 paragraph 1 of the UUJN.

The notary must provide legal counsel to the National Land Agency regarding the registration of land originating from inheritance, so that the certificate of inheritance deed made before by a notary for all groups which are the basis of the transfer of land rights is accepted by the National Land Agency.

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