

## **The Impact of Pluralism of Inheritance Law in Registering Land Right Transfer, Based On Inheritance in Indonesia**

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**Abstract** Inheritance law in Indonesia still has pluralistic characteristic. Besides the civil inheritance law, there are also the Islamic inheritance law and the Adat (customary) inheritance law. The pluralistic inheritance laws in Indonesia have the impact on land right transfer, based on inheritance. Registering Land Right Transfer, based on SKAW (Certificate of Heirs), is an absolute requirement for the registration in the Land Office. It seems that SKAW is still based on ethnic groupings as it is stipulated in Article 163 IS and Article 131 IS as they are regulated in Article 42 of PP (Government Regulation) No. 24/1997 on Land Registration in conjunction with Article 111 of the Regulation of Minister of State for Agrarian Affairs/Head of the National Land Agency No. 3/1997 on Administrative Regulation of PP No. 24/1997. SKAW based on ethnic groupings is basically contrary to the prevailing legal provisions in Indonesia. The solution is that it is required to revise any regulations which regulate SKAW which is not based on ethnic groupings.

**Keywords:** Impact of Pluralism, Inheritance Law, Land Registration

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### **I. INTRODUCTION**

#### **1.1 Background**

Land registration is a mandate of Law No. 5/1960 on Basic Regulation of Agrarian Affairs (henceforth, UUPA).<sup>1</sup> According to UUPA, the objective of land registration is to guarantee legal certainty. The Government Regulations mandated by the Government Regulation No. 24/1997 on Land Registration (henceforth, PP No. 24/1997) states that one of the objectives of land registration is to guarantee legal certainty and legal protection.<sup>2</sup> Registration of land right transfer based on inheritance is one of the right transfer objects which has to be registered in the Land Office.<sup>3</sup> In the right transfer, SKAW (Certificate of Heirs)<sup>4</sup> is very important because the right transfer which will be registered in the Land Office contains the names of heirs/the names of heirs of the testator (devisor); they are attached in the SKAW.

The Inheritance law in Indonesia is still pluralistic; besides the civil inheritance law, there are also the Adat (customary) inheritance law and the Islamic inheritance law. SKAW, stipulated in Article 42 of PP No. 24/1997, in conjunction with Article 111 of PMNA/Ka. BPN No. 3/1997 is still based on ethnic groupings. is not uniform, and the principles of determining who will be the heir(s) by the authorized officials are not always based on the prevailing civil law for testator. Besides that, there is also confusion in the regulation to organize the authorized officials in issuing SKAW. Article II of the Transitional Provisions of the 1945 Constitution states that all State's agencies and the prevailing legal provisions until the Indonesian independence on August

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<sup>1</sup>Article 19, paragraph (1) of Law No. 5/1960 states that in order to guarantee legal certainty by the Government, land registration was performed throughout the Indonesian territory according to the provisions regulated by the Government Regulations.

<sup>2</sup>See Article 3, letter a of PP No. 24/1997.

<sup>3</sup>See Article 36, paragraph (2) of PP No. 24/1997

<sup>4</sup>See Article 42 of PP No. 24/1997, in conjunction with Article 111 and Article 112 of the Regulation of the Minister of State for Agrarian Affairs/Head of BPN (henceforth, PMNA/Ka. BPN 3/1997) No. 3/1997 on the Administrative Regulation of PP No. 24/1997

17, 1945, when there was no new regulations according to the Constitution, are still in effect provided that they are not contrary to the Constitution.

The provisions embodied in Article 163 I.S divided the population in the Netherlands East Indies into 3 (three) juridical groups in terms of the civil law and commercial law:

- a. adat law group;
- b. European (Western) law group;
- c. Foreign East Adat law group.<sup>5</sup>

In the division of the people in the Netherlands East Indies, as it is stipulated in Article 163 I.S, the law was put in effect on the three groups above. In Article 131 I.S, paragraph (2), a civil law was determined and put into effect on each of the three groups. Inheritance law is principally a part of the civil law so that based on the provision in Article 131 I.S, besides civil law, the Civil Code, including inheritance law, was also imposed on

- a. the Dutch;
- b. other European people;
- c. the Japanese and other people who were not included in the first and the second groups who complied with the law which had the same principles of kinship law.
- d. Those who were legally born in Indonesia or legally recognized and the descendants of those who were included in the second and the third groups.<sup>6</sup>

Based on the State Gazette 1917, No. 129, all Western Civil laws (BW), with a little exception, were put in effect on the Chinese in Indonesia. This State Gazette began to be put in effect on May 1, 1919 which stated that the Chinese had to follow BW, including in inheritance law. Based on the State Gazette 1924 No. 557, which began to be put in effect on May 1, 1925, it was stated that BW was put in effect for the Chinese in all over Indonesia Specifically for the other Foreign East groups, except the Chinese, according to the State Gazette 1924 No. 556 which began to be put in effect on May 1, 1925, BW was put in effect, except Book 1, Title 2, Book 1 Title 4, until Book 14 and Book 1 Title 15, with the exception for

- a. the Foreign East people who had not been adults, under 21 years old, and had not yet been married;
- b. part 13 (Title 15 of Book 1 on *weeskamer* followed the regulation on *Boedlemeester*).<sup>7</sup>

Unlike the Western Law and the Adat law which come from human thinking, the Islamic law is a part of religious teaching, Islam. The Koran as a Holy Scriptures and the Sunnah of the Prophet not only organize human spirituality but also social life.

The organization in the Koran and the Sunnah of the Prophet is not only about the relationship between human beings with their God but also the relationship of a human being with other human beings, including the relationship between people and their government; therefore, the system of the Islamic law, compared with the system of the Roman law, can be categorized as public law and civil law, even though they are not exactly similar.<sup>8</sup> The organization in the Koran and the Sunnah of the Prophet is not only about the relationship between human being with their God but also between a human being and the other human beings, including the relationship between people and their Government. Therefore, the system of the Islamic law, compared with the system of the Roman law, can be classified as public law and civil law even though they are not exactly the same.<sup>9</sup>

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<sup>5</sup>See Anwar Haryono, Op. Cit., p. 3

1. Those who complied with the regulations of adat law were all natives except those who had complied by themselves and included in other law groups;  
Those who originally came from other races but they had been considered or accepted as the natives, while the natives who were Christians were not allowed to follow the adat law; in this case, the ordinance had determined other laws for them;
2. Those who complied with the regulations of the European law group were the Dutch, other European people, the Japanese, and other people who complied with kinship law which principles were in line with the principles found in the Civil Code, and those who were born as the children of or recognized as the children of those people, and their descendants;
3. Those who belonged to the Foreign East law group were the other Asian people like the Chinese, the Arabs, the Indian, the Pakistani, and others, on condition that the Foreign East people who were Christians were not allowed to follow the adat law; in this case, the ordinance had determined other laws for them.

<sup>6</sup>J. Satrio. 1992. *Hukum Waris*, Bandung:Alumni, p.4.

<sup>7</sup>R. Supomo, Op.cit., p. 96

<sup>8</sup>Anwar Hariono, Op. Cit., p. 16

(See Anwar Hariono, Ibid.). His public law contains constitutional law, international law, and criminal law, while his civil law includes personal law (*personenrecht*), family law (*familie recht*), marriage law

Based on the explanation above, it can be said that today there is no legal unification on inheritance law for all Indonesian people in Indonesia. Concerning the pluralism of the inheritance law, it can be divided into three legal systems as follows:

- a. Inheritance law according to the Islamic law;
- b. Inheritance law according to the Civil Law which is organized in Book II, from Title 12 until Title 18, and from Article 830 until Article 1130.
- c. Inheritance law according to the Adat law.<sup>10</sup>

One of the causes of the change injudicial data is the right transfer because of inheritance,<sup>11</sup> In the right transfer, the right which is caused by SKAW inheritance is a basic and absolute requirement for land registration which comes from inheritance.<sup>12</sup>

Efforts to realize the unification of inheritance law is very difficult to make since there are numerous inhibiting factors to realize it. One of them, as what is pointed out by Mochtar Kusumaatmadja, is that "...inheritance law is considered as one of legal matters which is outside of "any 'neutral' matters such as law on cooperation, contract law, and law on traffic (land, water, and air)."<sup>13</sup> Therefore, the "Inheritance law, according to Kusumaatmadja's criteria, is included in "...legal matters which contain too many obstacles of cultural, religious, and sociological complications."<sup>14</sup>

Classification of Population. In the colonial era, before Indonesia got its independence on August 17, 1945, it was reasonable when there was the classification of population since the Republic of Indonesia did not exist, and it was still colonized. Historically, before the Dutch surrendered to the Japanese in March, 1942 as the result of the German invasion to the Netherlands on May 10, 1940, at that time Indonesia was the Netherlands East Indies, and the Dutch constitution Indonesia was called the Dutch Kingdom Territory in Asia.<sup>15</sup> At that time, the Government of Dutch Colonialism applied in the Netherlands East Indies Article 163, paragraph (1) IS in conjunction with Article 109 RR on the division of Population classification in the Netherlands East Indies, and at the same time applied various regulations which had to be applied by all people in the Netherlands East Indies, according to Article 131 IS in conjunction with Article 75 RR. The juridical politics of the Dutch Government that applied the classification of population in the colonial territory had its own consequence and influence in determining the criteria of the type of SKAW issued by the authoritative officials. The registration of the land right transfer concerning inheritance, based on PP No. 24/1997 in conjunction with PMNA/Ka.BPN No. 3/1997, the SKAW is still based on the classification of population.

## **1.2 Problems**

Based on the explanation above, the research problem is as follows: how about the impact of pluralistic inheritance law on registering the land right and ownership transfer of highrise units, based on inheritance law in Indonesia.

## **1.3 The Objective and Benefits of the Research**

The objective of the research was to analyze the impact of pluralistic inheritance law in registering land right and ownership transfer of highrise units in Indonesia. This research was expected to give benefits, either theoretically or practically:

- Theoretically, the benefit was that the research was expected to find the answers on the problems in order to

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(*huwelijksrecht*), inheritance law (*erfrecht*), wealth law (*vermagenrecht*), commercial law (*hendelstecht*), and wakaf law.

The development of the Islamic law throughout the world, including in Indonesia, follows the development of the religion itself among its followers.

<sup>9</sup> Fatchur Raman, *Ilmu Waris*, Bandung: Alma'arif, p.33

<sup>10</sup> Article 94, paragraph (2) of PMNA/Ka. BPN No. 3/1997 on the Implementation of PP No. 24/1997 on Land Registration.

<sup>11</sup> See Article 42 of PP No. 24/1997 on Land Registration in conjunction with Article 111 of PMNA/Ka.BPN No. 3/1997 on the Implementation of PP No. 24/1997 on Land Registration.

<sup>12</sup> Mochtar Kusumaatmadja, *Hukum, masyarakat, dan Pembinaan Hukum Nasional*, Bandung: Binacipta, 1975, p. 14

<sup>13</sup> Mochtar Kusumaatmadja, *Pembinaan Hukum dalam Rangka Pembangunan Nasional*, Bandung: Binacipta, 1975, p. 12.

<sup>14</sup> Ong Hok Ham, *Runtuhnya Hindia Belanda*, Jakarta: PT Gramedia Pustaka Utama, 1st Ed., 2014, p. 1

<sup>15</sup> See Andiko in his book, *Seri Hukum dan Keadilan Sosial*, Edited by Myrna A. Safitri, Jakarta: HUMA, 2011, pp. 59-60.

develop jurisprudence, especially the Land Act or Law on Agrarian Affairs which were related to land registration based on inheritance.

- Practically, the benefit expected from this research was that the research could be the contribution in conceptual thinking to the government in establishing laws or legal provisions on land registration since inheritance and effective and efficient government policy can be the input for the National Land Agency as an institution that is assigned to carry out land registration and to provide legal certainty and legal protection for heirs and stakeholders.

#### **1.4 Theoretical Framework**

The research used the Theory of Constitutional State and Legal Pluralism.

##### **a. Constitutional State Theory**

Constitutional State theory was selected in this research by considering that Indonesia is a Constitutional State (*rechtstaat*) and not a Totalitarian State as it is embodied in the Constitution of the Republic of Indonesia which states that all mobilities of state organization has to be based on law and can be accounted for legally so that inheritance law can be implemented by the pluralistic Indonesian people,<sup>16</sup> either from their ethnicity or from their religion. Those who were viewed from their origin had to have their own religion as the basis for settling their inheritance according to law.

According to Oemar Seno Adji, as it is quoted by Imam Soebechi, Indonesian Constitutional State has its own specific characteristics, since Pancasila (national ideology) has to be used as the basic principle and legal source, and thus the Indonesian Constitutional State can also be called Pancasila Constitutional State. The same opinion is also pointed out by Abu Daud Busroh and H. Abubakar Busroh, as it is quoted by Imam Soebechi, which states that the concept of Constitutional State from western countries, either their ancestors' history or its content, should be based on Pancasila.<sup>16</sup>

According to Jimly Asshiddiqie, as it is quoted by Imam Soebechi, the principle of Indonesian Constitutional State can be divided into 12 (twelve) types: 1) supremacy of law, 2) equality before the law, 3) the process of law, 4) limitation of power, 5) independent executive organs, 6) free and impartial justice, 7) Administrative justice, 8) Constitutional Court, 9) Human right protection, 10) democratic (*demokratische rechtsstaat*), 11) functioned as a facility to realize the welfare of the State (*welfare rechtsstaat*), and 12) transparency and social control.<sup>17</sup> Abdul Mukthie Fadjar points out that the important elements of a Constitutional State which becomes its absolute requirements are a. the principle of recognition and protection against human rights, b. the principle of legality, c. the principle of the share of State's power, d. the principle of free and impartial justice, e. the principle of sovereignty of the people, and f. the principle of democracy and Constitutional principle.<sup>18</sup>

Djardji Darmodihardjo places Pancasila as a legal source by describing the idea of Hans Kelsen about *Grundnorm* or basic norm as the source of all Indonesian laws.<sup>19</sup>

Referring to the opinions above and historical facts, it was found that they were correlated with land registration based on inheritance, especially inheritance law which is in effect in Indonesia. In this case, Indonesian people that consist of various ethnic groups, religion, and geographical area and the large area of its territory, have diversity which is bound with a State philosophy which becomes the source of all laws, that are Pancasila in which the prevailing laws in Indonesia are pluralistic. On this basis lies the Pancasila Constitutional State which recognizes the pluralism of laws in Indonesia. One of the important elements of the Constitutional State which is closely related to this research is the Principle of Legality which states that the State is governed by law and not by individuals or what it is called 'government by laws not by men'. The supremacy of law is the highest authority; it controls power, not power is law (*recht is macht* not *macht is recht*).<sup>20</sup> Assiddiqie, as it is quoted by Imam Subechi, further points out that another important principle in the Constitutional State is that there has to be equality before the law for the whole citizens. In this case, in the registration of land right transfer, the main reference was SKAW which was issued based on ethnic groupings. These ethnic groupings are not recognized anymore and have been prohibited in Indonesia. Indonesia only recognizes Indonesian citizens and foreigners according to Article 26 of the 1945 Constitution, Law No. 24/2013 on Residential Administration, and Law No. 12/2006 on the Citizenship of the Republic of Indonesia. According to Hans

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<sup>16</sup>See Andiko in his book, *Seri Hukum dan Keadilan Sosial*, Edited by Myrna A. Safitri, Jakarta:HUMA, 2011, pp. 59060

<sup>17</sup>Imam Soebechi, Op. Cit., p.24

<sup>18</sup>Abdul Mukthie Fadjar, *Sejarah, Elemen, dan Tipe Negara Hukum*, Malang: Setara Press, 2016, p. 34

<sup>19</sup>Djardji Darmodihardjo in Anthon Susanto, p. 294

<sup>20</sup>Roescoe Poun, *The Task of Law*, translated by Muhammad Rajab, *Tugas Hukum*, Jakarta:Baratha, 1965, p. 13  
21 Ibid.

Kelsen, as it is quoted by Munir Fuady in his theories, 'The Theory of legal norm in stages (*Stufenbau Theorie*) and the Theory of Basic Norm (*Grundnorm*)', a legal provision in laws and regulations must not be contrary to another legal provision, either vertically or horizontally because, according to Hans Kelsen, every law in a State must be based on one legal ground (*grundnorm*) – constitution. In this research, SKAW which was stipulated in PP No. 24/1997 in conjunction with PMNA/Ka.BPN No. 3/1997 must not be contrary to the 1945 Constitution and the other laws in Indonesia where ethnic grouping are not recognized anymore.

#### **b. Legal Pluralism Theory**

From the language point of view, this theory is known with some terms: In English it is called 'legal pluralism theory', in Dutch it is called *Theorie van het rechtspluralisme*, and in German it is called *theorie des rechtspluralismus*. The term, 'legal pluralism' itself in English is known as *legal pluralism*, in Dutch it is known as *pluralisme wet*, while in German it is known as *rechts pluralismus*.<sup>21</sup>

In the perspective of legal pluralism, constitutional law and Adat law have their respective position which stands by itself, but both of them are in effect in the same place and at the same time. What is meant by constitutional law in this research, related to Inheritance law, was the Civil Code because based on the provision in Article 131 IS and Article 163 IS, it is intended for the Chinese ethnic group. Besides the Civil Code, Article 131 IS also states that the Adat law was put in effect for the natives. Besides the Adat law was put in effect for the Indonesian natives, Inheritance law was also put in effect for the natives who were Moslems. It is regulated in the Compilation of the Islamic laws, along with the Indonesian Presidential Instruction No. 1/1991. In its implementation, based on Law No. 3/2006, it is stated that those who are Moslems can request to the Religious Court about who will be the heir(s), and the share of each heir based on the Koran.

It is indicated that legal pluralism is "The theory which studies and analyzes the diversity of the prevailing laws which are implemented in the social life, national life and statehood."<sup>22</sup> Judicially, legal pluralism in Indonesia has been organized in Article II of the Transitional Regulation of the 1945 Constitution which reads: "...all State's agencies and the prevailing regulations are still in effect as long as there is no new regulation according to this law."

There are two things which become the spotlight in Article II of the Transitional Regulations of the 1945 Constitution:

- a. The existence of State's Agencies; and
- b. The existence of the previous regulations.

The requirements for legal pluralism are, first, it does not violate fundamental rights of other people, and secondly, it is not contrary to the principles and the provisions in law.<sup>23</sup>

## **II. DISCUSSION**

The pluralistic Inheritance Law in Indonesia has caused the incidence of the difference in evidence or documents which contain information or statements which indicate that a person is an heir of the testator. Besides he gets certificate as an heir from SKAW issued or acknowledged by village head and subdistrict head, the SKAW is also issued by BPH (Probate Court) and by a Notary. These impacts can be explained as follows:

### **2.1 Certificates of Heirs Issued by Village Head and Subdistrict Head**

The essence and to a certain extent, the purpose of Constitutional States is the existence of the sense of justice, peace, and order which will create the atmosphere of a certain State through various regulations as the principle and the starting point in organizing the rules for achieving the goal of a State.<sup>24</sup> The same is true to the making of Certificate of Heirs for the Indonesian natives. Article 111, paragraph 1, letter c, figure 4 of PMNA/Ka. BPN No. 3/1997 states that for the Indonesian natives, certificate of heirs which is made underhandedly by heirs, witnessed by 2 (two) witnesses and acknowledged by Village Head and Subdistrict Head where the testator lived and died.

Based on the explanation in Articles 126-127 and Articles 206-207 of Law No. 32/2004 on Regional Government, the Subdistrict Head and the Village Head are considered as the officials who have carried out their governmental authority. Therefore, they belong to the scope of State Administrative law with the position as the Agency or Officials of State Administration who have the right to do administrative work like issuing Directives which is in line with their authority. Therefore, it is ambiguous if Certificates of Heirs which is in the

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<sup>22</sup>H. Salim Hs and Erlies Septiana, Op. Cit., p. 97

<sup>23</sup>Maria S.W. Sumardjono, *Tanah dalam Perspektif Hak Ekonomi, Sosial, dan Budaya*, Jakarta: Kompas, 2008, p. 58

<sup>24</sup>Abdul Aziz, *Hukum, Negara Hukum dan Demokrasi di Indonesia*, Yogyakarta: Pustaka Pelajar, 2011, p. 107.

civil law domain should be acknowledged and validated by the agency or officials of State Administration. Both the civil law and the action of the official of State Administration have different legal consequence. In the civil law, when someone feels dissatisfied, he can file a complaint to the District Court, and when he feels dissatisfied with a decision or an action done by the agency or officials of State Administration, he can file a complaint to the State Administrative Court. It is very unreasonable if Subdistrict Head and Village Head acknowledge, witness, validate, and sign civil evidence like Certificate of Heirs.

Abib Aji points out that, based on the explanation above, Subdistrict Head and Village Head do not have any authority to acknowledge, witness, and sign Certificate of Heirs underhandedly. It is stipulated in Article 126-127 and Articles 206-207 of Law No. 32/2004 on Regional Government which are also in different scope of legality. Subdistrict Head and Village Head in carrying out their duties have to comply with the principles of Administrative law as the agency or officials of State Administration, while Certificate of Heirs is made by a citizen individually according to the Civil Law.

Certificate of Heirs for the Indonesian native citizens, according to the Circular Letter of the Ministry of Internal Affairs, Directorate General of Agrarian Affairs No. Dept/12/63/12/69 on December 20, 1969 on Certificate of Heirs and Evidence of Citizenship and PP No. 24/1997, is made by the heirs themselves, witnessed by 2(two) witnesses and acknowledged by Village Head and Subdistrict Head in the place where the testator lives and dies.

The authority of Subdistrict Head is regulated in Article 225, paragraph (1) of Law No. 23/2014 on Regional Government,<sup>25</sup> while the authority of Village Head is regulated in Article 229, paragraph (4) of Law No. 23/2014.<sup>26</sup> The authority of Village Head is also regulated in Article 26 of Law No. 6/2014 on Village.<sup>27</sup> In Article 225, paragraph (1) and Article 229, paragraph (4) of Law No. 23/2014, and Article 26 of Law No. 6/2014, there is no provision which mentions in detail the authority of Village Head and Subdistrict Head in acknowledging and validating Certificate of Heirs made by the heirs of Indonesia natives. It is in accordance with the opinion of R.J.H.M. Huisman which states that the authority is given only by law.<sup>28</sup>

Certificate of Heirs which is acknowledged by Village Head and Subdistrict Head as it is stipulated in Article 111 of PMNA/Ka. BPN No. 3/1997 brings up a question about its legality.<sup>29</sup> Let alone, based on law which regulates village affairs, there is no indication of the authority of Village Head to acknowledge or validate Certificate of Heirs.<sup>30</sup>

SKAW acknowledged by Village Head and Subdistrict Head usually generalizes who will be the heirs. Usually the heirs are husband or wife who lives the longest life and the children of the husband or the wife without paying any attention to the existence of inheritance law in Indonesia, either the Adat law, the Civil law, and the Islamic law.

It is not uncommon that Village Head and Subdistrict Head, in issuing SKAW, do not check any further to the Will List Center so that it is mostly possible that there are other heirs like Testamentary heirs. Based on this assumption, the SKAW which is acknowledged by Village Head and Subdistrict Head should be reviewed.

## **2.2 Certificates of Heirs Issued by BHP (Probate Court)**

BPH (Probate Court), in the Organizational Structure of the Department of Justice, is under the Directorate of Civil Law in the Directorate General of Law and Legislation, the Ministry of Justice. One of the duties of BHP was to make Certificates of Heirs for foreign East people except the Chinese according to Article 14, paragraph (1) of the Instruction of *Voor de Gouvernements Landmeters* in the State Gazette 1916 No. 517. Its job description was to make Certificates of Heirs for the Foreign East people such as the Arabs, the Indian, the Pakistani, and others except the Chinese. The certificates had to be made based on the inheritance law which was in effect in their original countries.

Today, it is controversial and difficult to determine who is the real Indonesian that is categorized as the foreign east people. The State Gazette was intended for the Indonesian people (the Netherlands East Indies at that time). Today, they become the Indonesian citizens and have been mixed with the other ethnic groups in Indonesia. In that provision, it is still a question how about an Arab who gets married with a Batakese or a Javanese, or a person from Kalimantan, and vice versa. Several of them have even converted to other religions. Therefore, it is ambiguous which officials who will issue Certificates of Heirs. Based on Article 163 IS and

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<sup>25</sup>The task and authority of Subdistrict Head stipulated in Article 224, paragraph (1) is not related to Certificate of Heirs.

<sup>26</sup>The task and authority of Village Head have no relation with Certificate of Heirs.

<sup>27</sup>Village Head is assigned to organize village government with no relation with Certificate of Heirs.

<sup>28</sup>Ridwan H.R., *Hukum Administrasi Negara*, Jakarta: Raja Grafindo Persada, 2006, p. 100.

<sup>29</sup>Habib Adji, Loc. Cit., pp. 31-32.

<sup>30</sup>See Article 26, paragraphs (1) and (2) of Law No. 6/2014 on Village.

Article 131 IS, those who are categorized as Foreign East people (that complies with the group of the Adat law of Foreign East) are:

- a. The Chinese
- b. The Arabs
- c. The Indian
- d. The Pakistani

Based on the State Gazette 1917 No. 12, the Chinese had completely complied with the Western Civil Law in Indonesia, including its inheritance law, while the other Foreign East people had the problem with their Certificates of Heirs since it is still ambiguous where or what agency/officials they can get their Certificates of Heirs, especially for those who have gotten married with the Indonesian citizens and for those who have converted to other religions.

The use of the Adat law or the Islamic law for the SKAW which will be published by BHP highly depends on the ethnicity of the applicants, whether they are the Indian, the Pakistani, the Tamil, or the Arabs. For the Arabs, there is no Adat law and no joint property, unless when there is a marriage agreement; it is stipulated in Article 36 of Law No. 1/1974 on Marriage concerning joint property.

When the justification of BHP to issue SKAW for only to the Foreign East group according to Article 163 IS, it is not relevant anymore today because ethnic groupings are not recognized anymore, and it is contrary to the 1945 Constitution, especially to Article 26, since there are only the Indonesian citizens and foreigners in Indonesia. Therefore, the authority of BHP to publish SKAW needs to be reviewed.

### **2.3 Certificates of Heirs Issued by a Notary**

The authority of a Notary to make deeds is regulated by law; it cannot be regulated by the Government Regulation<sup>31</sup> and the other jobs done by a Notary which must follow the law are the authority of a Notary to make SKMHT,<sup>32</sup> the Certificates of Corporation,<sup>33</sup> Certificates of Fiduciary,<sup>34</sup> memorandum of the establishment of mass organizations,<sup>35</sup> Certificates of Foundations,<sup>36</sup> an other jobs which become the authority of a Notary which must comply with the law. Today, the authority of a Notary to make Certificates of Heirs is regulated in Article 15, paragraph (1) of Law No. 30/2001 in conjunction with Article 15, paragraph (1) of Law No. 2/2014 on Notarial Position which states that a Notary has the authority to make authentic certificates on all contracts which have to follow the laws and/or intended by the persons appearing to be stated in the authentic certificates, to guarantee the date of making the certificates, to keep certificates, to give gross, copies, and excerpts of the certificates as long as the jobs are not assigned to the other officials or other people as it is stipulated in laws.

Article 15, paragraph (1) above confirms that a Notary has the authority to make authentic certificates on everything which is concerned with all actions, agreements, and stipulation,

- a. because they are ordered by laws;
- b. because they are intended by the persons appearing.

Today, it seems that there is permission of the sustainable mistakes in Indonesia where the SKAW issued by the officials is still plural and partial; It is based on ethnic groupings and on the regulations which come from the colonial era. The term, ethnic groupings themselves do not exist anymore in Indonesia. It is contradictory to the 1945 Constitution which states that Indonesia is a Constitutional State,<sup>37</sup> every citizen is equal before the law and the government and must pay homage to it without any exception.<sup>38</sup> Every Indonesian citizen has the right on recognition, security, protection, and legal certainty which is just, and has equal treatment before the law.<sup>39</sup> Today, Indonesia as a sovereign nation that pays homage to law and democracy, has validated the International Convention on the Civil and political Rights, based on Law No. 12/2005 on the Validation of the International Covenant on Civil and political Rights in which sub (d) point of Law No. 12/2005 states that the international instrument as it is stipulated in circular letter states that the United Nations in the Meeting on December 16, 1966 validated the International Covenant on Civil and Political Rights which

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<sup>31</sup>See Article 1868 of the Civil Code, in conjunction with Article 1, figure 1, Article 1, figure 7, Article 15, paragraphs (1), (2), and (3) of Law No. 2/2014 on the Amendment of Law No. 30/2004 on Notarial Position.

<sup>32</sup>See Article 14, paragraph (1) of Law No. 4/1996 on Hypothecation.

<sup>33</sup>The limitation of a Notary's authority to make Certificates of Corporation is regulated in Law No. 40/2007 on Corporation.

<sup>34</sup>See Law No. 42/1999 on Fiduciary Collateral.

<sup>35</sup>See Law No. 17/2013 on Mass Organization

<sup>36</sup>See Law No. 28/2004 on the Amendment of Law No. 16/2001 on Foundation.

<sup>37</sup>See Article 1, paragraph (3) of the 1945 Constitution.

<sup>38</sup>See Article 27, paragraph (1) of the 1945 Constitution.

<sup>39</sup>See Article 28d, paragraph (1) of the 1945 Constitution.

are basically not contrary to the Indonesian Pancasila and the Constitution as a Constitutional State which pays homage to human dignity and values that guarantee the equal position of all Indonesian citizens before the law and the will of the Indonesian people in advancing and protecting human rights in the Nation.<sup>40</sup> By the inactions of Law No. 29/1999, Indonesia has ratified the international Convention on the Abolition of all types of Racial Discrimination in 1965.<sup>41</sup> The ratification of the convention indicates that Indonesia is still bound to the convention. In the general explanation of the law, it is confirmed that racial discrimination is basically a rejection against Human Rights and basic freedom. It is not uncommon that racial discrimination occurs because of the government's support through various policies on racial discrimination in the form of apartheid, separation, and segregation, or support from the people in the form of spreading doctrines of racial supremacy, skin color, hereditary, origin, nationality, or ethnicity. Therefore, according to Jimly Asshiddiqie,<sup>42</sup> racial discrimination becomes the public enemy, nationally and internationally, so that it has to be abolished from human civilization. Indonesia as a Constitutional State must be consequent in implementing the principles of a Constitutional State. Based on various principles of Constitutional State pointed out by legal experts and by seeing the development of modern Constitutional States which yield new important principles to realize Constitutional States, there are 12 basic principles as the main pillar which support the establishment of a Constitutional State: Supremacy of Law, Equality before the Law, Limitation of Power, Independent supporting Organs, Free and Impartial Justice, State Administrative Court, Constitutional Court, Protection against Human Rights, Democratic (*Democraische Rechtsstaat*), Functioning as Facility to Realize the Welfare of the State (*Welfere Rechtsstaat*), Transparency, and Social Control.

According to Maria S. W. Sumardjono, the requirements for legal pluralism are as follows:

- a. It does not violate other people's rights;
- b. It is not contrary to the principles and provisions in law.<sup>43</sup>

In Indonesia, ethnic groupings, according to the law, are not relevant anymore. Since 1966, ethnic groupings have been prohibited by the issuance of the Instruction of the Cabinet Presidium No. 31/U/IN/12/1966 on December 27, 1966. In the instruction, it is explained that ethnic groupings in Indonesia were prohibited for the sake of the realization of the unity of the Indonesian people completely and homogeneously and the equality of the Indonesian people. In reality, however, up to the present time, SKAW has been based on ethnic groupings and ethnic origin. Based on the explanation, it is the time for the existence of unification of SKAW in Indonesia. It can be issued by a Notary because a Notary has been given a mandate by Law to make authentic certificates so that in the future SKAW certificates can be guaranteed their validity in its subjects and their validity in the rights or the share of the heirs, the certain date of their issuance, the avoidance of the incidence of ant-datum in a certain document, the authenticity of their documents, and the legal protection and the legal certainty for heirs.

### III. CONCLUSION AND SUGGESTION

#### 3. 1 Conclusion

Pluralistic inheritance law in Indonesia today indicates that the inheritance law which is in effect in Indonesia consists of the civil inheritance law, the Islamic inheritance law, and the Adat inheritance law. The imposition of the inheritance law is in accordance with what is regulated in Article 163 IS, Article 131 IS, and

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<sup>40</sup>Concerning Certificate of Heirs (from the viewpoint of the party that issues it) is still based on ethnic, racial, and religious groupings discriminatively, Law No. 39/1999 on Human Rights gives definition on what it means by discrimination as stipulated in Article 1, figure (3) which states that discrimination is every limitation, harassment, or segregation, directly and indirectly, based on human discrimination in religion, ethnicity, race, group, classification, social status, economic status, gender, language, and political belief which cause deprivation, deviation or abolition of the implementation or the use of human rights and basic freedom in life, either in individuals or collectively in politics, economy, law, socio-culture, and the other aspects of life. Based on Article 1, figure (3) above, Certificate of Heirs is still discriminative. Certificate of Heirs is a document which belongs to legal domain. The government should provide services for the people by paying attention to juridical development. It is the time for all products of legislation to be free from discrimination. Article 71 of Law No. 39/1999 states that the Government is required to and responsible for respecting, protecting, upholding, and advancing human rights as stipulated in this law, in the other legal provisions, and in the international laws on human rights which are accepted by the Republic of Indonesia.

<sup>41</sup>The point of consideration in sub a states that the Republic of Indonesia that is based on Pancasila and the 1945 Constitution is a Constitutional State that pays homage to human dignity and guarantees all Indonesian citizens to have equal position before the law so that all types of racial discrimination must be avoided and forbidden.

<sup>42</sup>Jimly Asshiddiqi, *Konstitusi dan Konstitusionalisme Indonesia*, Mahkamah Konstitusi Republik Indonesia dan Pusat Studi Hukum Tata Negara, Jakarta: Fakultas Hukum, Universitas Indonesia, 2004, pp. 124-130.

<sup>43</sup>Maria S.W. Sumardjono, *Op.cit.*, p. 58.

Article 134, paragraph (2) IS so that there are ethnic groupings and there are different types of civil law, including inheritance law. The impact of the imposition of Article 163 IS, Article 131 IS, and Article 134, paragraph (2) IS on SKAW, as it is stipulated in PP No. 24/1997 and PMNA/Ka. BPN No. 3/1997 in conjunction with the Directives of the Department of Internal Affairs, Directorate General of Agrarian Affairs, Kadaster (Directorate of Land Registration) No. DPT/12/63/12/1969, on December 20, 1969, is that Certificate of Heirs still uses documents issued by the authoritative officials based on ethnic groupings: for the Indonesian native citizens certificate of heirs are issued by the heirs themselves, witnessed by 2 (two) witnesses, and acknowledged Village Head and Subdistrict Head in the place where the testator lives and dies. For the Chinese Indonesian citizens Certificates of Heirs are issued by Notaries, while for the other Foreign East Indonesian citizens Certificates of Heirs are made by the Probate Court. Referring to ethnic groupings, SKAW is contrary to the 1945 Constitution, to Law on Citizenship of the Republic of Indonesia, to Regional Administration, and to the other laws.

### **3. 2 Suggestion**

Recommendation or suggestion of the research are as follows

Concerning the reasons for issuing SKAW in Indonesia, it is recommended that it should not be referred to ethnic groupings. It is also suggested that SKAW be made by a Notary as a public official because it is a document issued because of an important event, that is, death as it is stipulated in the Residential Administration. The position of a Notary who has the authority to make an authentic SKAW should be confirmed in Law on Residential Administration. Therefore, the Notarial Act should be amended by stating in it the position of a Notary in making SKAW for all Indonesian people. Those who are Moslems should attach the Ruling from the local Religious Court in order to avoid ambiguity of who will be the heir(s) according to Article 49 and its Explanation of Law No. 3/2006 on the Amendment of Law No. 7/1989 on Religious Court. Before a SKAW is made, the Notary should check it in the Will List Center at the Ministry of Law and Human Rights of the Republic of Indonesia.

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