

Legal Implications on Cancellation of Agreements Made Prior to Custody for Good Faith Land Buyers

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Abstract

This study aims to analyze the construction of the cancellation of the land purchase agreement and legal protection for the seller in land purchases before the custody. The study used statute, case, and conceptual approaches. It focuses on the concept of custody and good faith. After analyzing the relevant legal sources, it is known that, on the one hand, Article 447 of the Indonesian Civil Code allows for the retroactive application of the custody in some conditions: (1) the custody is due to unwise, mental disorder, and irrational; and (2) the reasons underlying the custody had existed at the time the legal action is taken. The implementation of Article 447 can cancel land purchases made before the custody. On the other hand, the state must protect the buyer's principle of good faith even though the seller is an unauthorized person. Article 447 must be applied because (1) the Indonesian Civil Code is a positive law that must be enforced; (2) people who are placed under custody are more at risk of experiencing losses in land purchases, and (3) construction of good faith land buyers cannot be applied because there are fewer parties.

Keywords: custody, good faith buyers, land purchases.

A. Introduction

An agreement is a legal act where one or more people bind each other.¹ Often, the engagement to this agreement offends the interests of other legal subjects. Therefore, in making an agreement, it is necessary to act independently, to assess

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¹ Leonora Bakarbesy and Ghansham Anand, *Buku Ajar Hukum Perikatan* (Sidoarjo: Zifatama Jawara, 2018), 102.

the surrounding conditions, and to take into account the risks of the agreement.² the ability is called competence (*bekwaamheid*).³ Legal subjects are declared competent if they are able to carry out legal actions independently, which bind themselves without being contested.⁴ According to Satrio, a person is naturally competent unless the law stipulates otherwise.⁵ Furthermore, according to Budiono, to perform legal competence, a person should be given an authority to act lawfully.⁶ However, due to the fact that an act may cause legal consequences, the law should protect a person that, according to the law, is unable to understand the consequences of his/her action. Even though all people should be considered competent, the law should stipulate provisions to declare the criteria of a person that cannot understand his/her action and consequences.

In line with the description, competence is a condition for the agreement's validity as stipulated in Article 1320 of the Indonesian Civil Code (*BW –Burgerlijk Wetboek*).⁷ In fact, the BW does not regulate the definition of competence. However, Article 1330 of the BW describes the criteria of incompetent individual legal subjects consisting of:

- (1) immature people,
- (2) people who are under the custody,
- (3) married woman, and
- (4) a person who is prohibited by law from doing certain acts.

After the enactment of the Law Number 1 of 1974 on Marriage, Article 1330 of the BW impacts the competence of a married woman. Article 31 paragraph (2) of the Marriage Law affirms that both husband and wife have the right to carry out legal actions. Thus, the provision that a married woman is considered incompetent becomes unrelated.

From the description, one of the criteria for an incompetent person is under custody.⁸ Article 433 of the BW regulates that mature who are in a state of unwise, mental disorder, or irrational must be placed under custody, even though

² Endra Agus Setiawan, Siti Hamidah, and Istislam, "Konsep dan Kriteria Kecakapan Bertindak bagi Penyandang Disabilitas Autisme menurut Perspektif Hukum Perdata Indonesia," *Jurnal Selat* 5, no. 2 (2018): 167, <http://dx.doi.org/10.31629/selat.v5i2.554>.

³ Devy Kumalasari and Dwi Wachidiyah Ningsing, "Syarat Sahnya Perjanjian tentang Cakap Bertindak dalam Hukum menurut Pasal 1320 Ayat (2) K.U.H.Perdata," *Jurnal Pro Hukum* 7, no. 2 (2018): 6, <https://doi.org/10.55129/jph.v7i2>.

⁴ Agus Yudha Hernoko, *Hukum Perjanjian: Asas Proporsionalitas dalam Kontrak Komersial*, Cet. IV (Jakarta: Prenadamedia Group, 2014), 183-184.

⁵ J. Satrio, *Perikatan yang Lahir dari Perjanjian, Buku II* (Bandung: Citra Aditya Bakti, 2001), 29.

⁶ Herlien Budiono, *Asas Keseimbangan bagi Hukum Perjanjian Indonesia, Hukum Perjanjian Berlandaskan Asas-Asas Wigati Indonesia* (Bandung: Citra Aditya Bakti, 2006), 113.

⁷ Lintang Yudhantaka, Ghansham Anand, and Manik Lingkar Katulistiwa, "The Perspective of Indonesian Law on E-Commerce: Validity, Liability and Dispute Settlement," *Padjadjaran Journal of Law* 7, no. 3 (2020): 338, <https://doi.org/10.22304/pjih.v7n3.a3>.

⁸ Potalfin Siregar, "Perlindungan Hukum terhadap Anak Penyandang Cacat Mental sebagai Ahli Waris dalam Menjual Harta Warisan (Studi Putusan Nomor 185/Pdt.P/2018/PN.Mdn)," *Jurnal Hukum dan Kemasyarakatan Al-Hikmah* 1, no. 1 (2020): 68, <https://doi.org/10.30743/jhah.v1i1.3010>.

sometimes the person can use his/her mind. An adult may also be placed under custody for spendthrift. Thus, the custody is for someone unwise, mental disorder, irrational, or a spendthrift. However, the development of the custody concept in Indonesia does not stop. It is limited to the BW and Marriage Law, but in development, it's also regulated in more specific laws and regulations. First, Article 21, paragraph (3) of the Law Number 18 of 2014 on Mental Health considers persons with mental disorders incompetent to make decisions. Related to the article, the husband/wife; parents, children, or siblings who are at least seventeen years old; guardian; or authorized officials in accordance with the provisions of laws and regulations are parties who have the authority to represent persons with mental disorders for medical treatment. on the other hand, Article 70 regulates the rights of persons with mental disorders that the person's property management can be canceled based on a court decision. Second, Article 32 of the Law Number 8 of 2016 on Persons with Disabilities affirms that a statement of incompetence for persons with disabilities can be assigned based on a district court decision. In this case, the persons with disabilities are also subjects who can be placed under custody. Article 1 point 1 of the Law on Persons with Disabilities limits the definition of disability as follows.

"Persons with disabilities are any person who experiences physical, intellectual, mental, and/or sensory limitations in the long term which in the interaction with the environment may experience obstacles and difficulties to participate fully and effectively with other citizens based on equal rights."

In relation to the custody, it is not immediately possible for people who are unwise, have mental disorders, are irrational, or have spendthrifts to be under custody. It must go through a court order.⁹ Article 436 of the BW mentions that all requests for custody must be submitted to the District Court that the jurisdiction covers the residence of the person requested for the custody. Furthermore, Article 446 of the BW stipulates that custody begins from the time of the decision or stipulation pronounced. All civil acts which are subsequently committed by persons placed under the custody are null and void. However, a person placed under custody because of spendthrift is still entitled to make wills. Article 436, in conjunction with Article 446 of the BW, states that all civil law actions after the custody can be canceled. In line with the provisions, Article 33, paragraphs (1) and (2) of the Law on Persons with Disabilities stipulate the applications for stipulation under guardianship or custody. The application is submitted to the district court where the person with a disability resides, with clear reasons and evidence from a psychologist and/or psychiatrist. In connection with Article 34 paragraphs (1), (2),

⁹ Puspaningtyas Panglipurjati, "Sebuah Telaah atas Regulasi dan Penetapan Pengampuan bagi Penyandang Disabilitas di Indonesia dalam Paradigma Supported Decision Making," *Jurnal Paradigma Hukum Pembangunan* 6, no. 2 (2021): 82, <https://doi.org/10.25170/paradigma.v6i02.2586>.

and (3) of the Law on Persons with Disabilities, the cancellation is submitted to the district court according to the place of residence of the person with disability by the person concerned (the person her/himself) or the family by presenting or include evidence from a doctor, a psychologist, and/or a psychiatrist. Furthermore, Article 70 paragraph (2) of the Mental Health Law emphasizes that the rights of person with mental disorders in managing their property and/or those handed over to them can be canceled upon a court order.

Based on the description, decision causes a person incompetent legally. Therefore, the civil law actions have prospective, not retroactive, character. However, there is a classical law proverb,¹⁰ “*Nemo enim aliquid partem recte intellige repositante quam totum iterum atque iterum perlegerit*” (no one can understand any part of a statute without reading or examining the whole repeatedly). Understanding the BW holistically, there is a potential that the custody can be applied retroactively if the reasons underlying the custody had been existed before the legal action was carried out. Article 447 of the BW reads that “unwise, mental disorder, and irrational people will be allowed to be canceled, if the basis for the custody was already in place at the time the act was committed.”

Article 447 of the BW states that the legal consequences of the custody due to unwise, state of mental disorder, and irrationality can be applied retroactively. Despite the clear norms, there are contradictions in its application. The contradiction can be seen in two court decisions with permanent legal force (*inkracht van gewijsde*): The Supreme Court Decision Number 639 K/PDT/ 2018 and the Surabaya High Court Decision Number 189/PDT/2020/PT SBY. In these decisions, the judges believe that the custody cannot be applied retroactively.

In addition to the inconsistent implementation, the rhetorical arrangement has the potential to cause legal problems, for instance a conflict of rule with the legal protection of land buyers in good faith as regulated in the Circular Letter of the Supreme Court Number 7 of 2012 on the Enforcement of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber, the General Civil Sub Chamber Number IX. It can be understood that the buyer’s good faith must be protected, even if the seller is an unauthorized person. The same thing is also regulated in the Circular Letter of the Supreme Court Number 4 of 2016 number 4.

The conflict of rule between the Circular Letter of the Supreme Court Number 7 of 2012 number IX in conjunction with the Circular Letter of the Supreme Court Number 4 of 2016 number 4 and Article 447 of the BW has the potential to create legal uncertainty (*rechtsonzekerheid*),¹¹ especially in the realm of objects and

¹⁰ Xavier Nugraha and Pradnya Wicaksana, “Keadilan Proporsional Sebagai Landasan Filosofis Pengaturan Perizinan Pendirian Tempat Ibadah di Indonesia,” *Jatiswara* 36, no. 2 (2021): 178, <https://doi.org/10.29303/jatiswara.v36i2.300>.

¹¹ Xavier Nugraha, et.al., “Constitutional Question: Alternatif Baru Pelindungan Hak Konstitusional Warga Negara Melalui Concrete Review di Indonesia,” *Negara Hukum: Membangun Hukum untuk Keadilan dan Kesejahteraan* 10, no. 1 (2019): 133, <http://dx.doi.org/10.22212/jnh.v10i1.1209>.

purchases. It can eventually cause uncertainty in society because of doubt or fear when buyers are going to buy and sell land. This is in line with the view of Lord Lloyd that

“...law seems to require a certain minimum degree of regularity and certainty, for without that it would be impossible to assert that what was operating in a given territory amounted to a legal system”.¹²

The existence of such conflict of norms will cause confusion on the party to be protected by law: the buyer in good faith or the person under the custody.

Given the legal consequences that are very decisive, it is necessary to further analyze the proper legal construction on the implications of cancellation of agreement and purchase involving seller under custody to make sure a logical and clear law. Holmes states that¹³ “an ideal system of law should draw its postulates and its legislative justification from science”. An old proverb states “*lus laudatur quando ratione*” (the law is the more praised, when it is approved by reason). The study covers two legal issues: (1) the construction of cancellation of the agreement that was carried out before the custody; and 2) the legal protection for the seller in the land transfer before the custody.

To ensure the originality of the study, two previous studies and the difference with this study are described. The first is the works of Rizky, Abubakar, and Mansur. The main idea is the Land Deed Officer’s responsibility and legal protection for land buyers having canceled deed. The novelty of their study is the discussion on the cancellation and the purchase made by an incompetent legal subject. The second is the work of Alwi. The main discussion of the study is legal protection for buyers with good faith whose purchase deed is canceled. The novelty of the study is the discussion on legal protection from the seller’s side and its implications for good faith buyers.

B. Construction of Agreement Cancellation Before the Custody

Based on Article 433 of the BW, legal subjects that can be under the custody are adults in a state of unwise, mental disorder, irrational, or spendthrifts. It should be underlined that only adults can be placed under the custody. At the same time, minors who are unwise, mental disorder, or irrational cannot be helped but are under the control and supervision of their father, mother, or guardian (Article 462 of the BW). Of course, the conditions are specific to medical terms, such as dementia, borderline IQ, etc., or even have their legal concepts, such as the concept of People with Mental Disorders in the Law on Mental Health.

¹² Mario Julyano and Aditya Yuli Sulistyawan, “Pemahaman terhadap Asas Kepastian Hukum melalui Konstruksi Penalaran Positivisme Hukum,” *Jurnal CREPIDO* 1, no. 1 (2019): 15, <https://doi.org/10.14710/crepido.1.1.13-22>.

¹³ Faizal Kurniawan, et.al., “Analysis on The Termination of Foreign Public-Private Partnership by The Government,” *IJUM Law Journal* 30, no. 1 (2022): 188, <https://doi.org/10.31436/iiumlj.v30i1.703>.

Unlike Indonesia, Singapore's Civil Code does not regulate *curandus*. Singapore's law uses the term "persons who lack capacity" in Article 4 of the Mental Capacity Act 2008. A person who lacks capacity is a person who is unable to make decisions because of impairment or a disturbance in the functioning of the mind or brain, whether it is permanent or temporary. Despite the Singaporean law stipulates the criteria of a person who lacks capacity, it does not mean that the person is unable to decide for him/herself. Therefore, under Article 5, a person who lacks capacity can be considered unable to make a decision only if the person is unable to understand the information relevant to the decision, retain that information, to use the information as part of the process of making the decision, or to communicate his or her decision. Contrary to the Singaporean law, corresponding to article 433 of the BW, the Civil Code of the Philippines limits the criteria for an incapable person. Article 38 of the Filipino Civil Code reads that lacks capacity or *curandus* is a person who is considered a minor, senseless, imbecile, deaf-mute, and prodigal.

Based on the description, one question can be proposed, whether persons under custody are limited to a state of unwise, mental disorder, irrational, and/or spendthrift, as regulated in Article 433 of the Indonesian BW, Article 4 of the Singaporean Mental Capacity Act, and Article 38 of the Filipino Civil Code. Article 434 of the BW defines it as incapable of taking care of one's interests as well as possible. It is logical if a person under custody is not limited to the conditions described in Article 433 of the BW, if the person is an adult and unable to take care of her/his interests properly. The same provision can be found in Article 5 of the Singaporean Mental Capacity Act. The Surabaya District Court, dated August 20, 2021, released a decision Number 1115/Pdt.P/2021/PN.Sby. The case is about Taruna Handojo's wife who submitted a request for a custody against her husband because her husband was suffering from a stroke and motor hydrocephalies. Her husband's condition made him unable to do his job well. A doctor's certificate proves the condition. In fact, illness is not included in the criteria for someone who can be placed under the custody. The court decision, which has permanent legal force, proves that other conditions than unwise, state of mental disorder, irrationality, and spendthrift can be used as the foundation for the application for custody, if it can be proven that these conditions cause a person to be unable to manage his interests properly.

Custody is not only expressed verbally but must be proven by a legal product.¹⁴ Article 436 of the BW stipulates that a custody must be proven by a stipulation. The application for the custody is submitted to the District Court that covers the residence of the person who request the custody. Legal subjects who have legal

¹⁴ Ninis Nugraheni, Hening Prabawa Arifanda, and Alifihan Astaftiyan, "Public Procurement Contract for Goods and Services Following the Presidential Decree Number 12 of 2020 on the Stipulation of the Coronavirus Disease (Covid-19) Pandemic as a National Disaster," *Padjadjaran Journal of Law* 7, no. 2 (2020): 233, <https://doi.org/10.22304/pjih.v7n2.a5>.

standing to apply for custody stipulation are regulated in Article 434 and Article 435 of the BW.

The application for custody must provide supporting documents such as a family card, marriage certificate (if the applicant is a husband or wife), and a doctor certificate that explains the condition of the person who applies the custody.¹⁵ Similarly, Article 19 of the Singaporean Mental Capacity Act 2008 stipulates that statement of “lack of capacity” for a person should be released by a court. However, Singaporean law does not regulate provisions on the appointment of guardianship clearly, unlike Indonesian which defines the right to file a guardianship petition. Under Singaporean law, a person should create a valid lasting power of attorney accompanied by a certificate provided by an accredited medical practitioner or a psychiatrist, or a practicing lawyer that the donor understands the scope and purpose of the authority conferred and that no fraud or undue pressure was used to induce the creation of the lasting power of attorney. Once the lasting power of attorney is completed, it must be registered to the Office of the Public Guardian. Individuals who have not made a lasting power of attorney will have a more complicated process. An application must be made to court whereby the court may decide on the person's behalf related to matters or appoint another person called a deputy to make decisions on behalf of the concern.¹⁶

Considering that a custody stipulation can eliminate a person's ability to act,¹⁷ judges are obliged to apply the precautionary principle in deciding custody. This is appropriate considering that the custody stipulation is to postpone the right to carry out legal actions independently from a person. First, based on Article 437 of the BW, custody applicants are required to describe events that show unwiseness, state of mental disorder, irrationality, or spendthrift conditions. The events must be proven and supported by the testimony of witnesses. Then Article 438 of the BW also stipulates that if deemed necessary, the judge may request the information to be heard from blood relatives and marriage. Most importantly, the statement of the person requesting custody must be heard, according to Article 439 of the BW.

Based on the facts, the judge must hear the information from the person who requests custody. Listening to the opinion of the person requesting custody is a form of legal protection. It avoids the bad faith of other parties who want to take his right to take legal action independently or take advantage. In addition, it is also necessary to assess whether the person needs to be placed under the custody and who should be appointed as the guardian.

¹⁵ Rima Parmita Sita, “Analisis Yuridis Pemeriksaan Calon Terampu sebelum Adanya Penetapan Pengampuan oleh Pengadilan (Studi Putusan Mahkamah Agung Nomor 2221 K/Pdt/2020),” *Premise Law Journal* 1, no. 10 (2016): 9, <https://jurnal.usu.ac.id/index.php/premise/article/view/13514/6028>.

¹⁶ Hang Wu Tang, “Singapore's Adult Guardianship Law and the Role of the Family in Medical Decision-making,” *International Journal of Law, Policy and the Family* 36, no. 1, (2022): 5, 10.1093/lawfam/ebac002.

¹⁷ Albert Wirya, et.al., *Asesmen Hukum Pengampuan Indonesia: Perlindungan Hak Orang dengan Disabilitas Psikososial*, (Jakarta: Lembaga Bantuan Hukum Masyarakat, 2020), 3.

If the judge concludes that there is sufficient information and evidence to place a person under the custody after hearing statements from the parties, then the judge stipulates that the person under custody and appoints a person as the guardian (Article 449 of the BW). Based on Article 446 of the BW, a person is considered under the custody after the date the decision or stipulation of the custody was pronounced in an open trial. The guardian is regulated in Article 451 of the BW. It reads that unless there are important reasons requiring the appointment of another person to be the guardian, the husband or the wife must be appointed as the guardian for his wife or her husband, without requiring the wife to any help or power whatsoever to receive the appointment. Thus, husband or wife must be appointed as the guardian unless there is an important reason to appoint a party other as the guardian.

Custody can end because the underlying causes disappeared. It is regulated in Article 460 of the BW. According to the article, the release of the custody must also through the legal product of the court. However, the articles on custody of the BW does not regulate the procedure of releasing the custody. The court's decision provides the legal gap, namely in the Supreme Court Decision Number 152/K/Pdt/2014. The decision began when Sutoyo submitted a request for the custody against his father, Lukman Sani, for suffering from various diseases. The request was granted. Lukman Sani was placed under the custody and Sutoyo was appointed as the guardian. After a few years, Listiyah, the wife of Lukman Sani, requested that her husband to be released from the custody because he was physically and mentally healthy. The request was granted and Sutoyo was released from the custody. The basis for the judge's consideration is Article 460 of the BW, which stipulates that the basis for releasing custody is if the causes of custody have disappeared. Therefore, the legal rule of the decision is that the wife has the right to file a custody release against her husband through a voluntary lawsuit procedure (application), even though his wife is not the guardian.

Some articles of the BW regulate the legal consequences of custody. Based on Article 452 of the BW, person under custody have the same position as minors. In other words, the custody brings juridical consequences that a person is no longer capable of taking legal action. All civil legal actions taken after custody are null and void. However, person who are put under custody due to spendthrift are still entitled to make a will (Article 446 of the BW). Based on Article 446 of the BW, the stipulation of the custody applies prospectively. As an exception, Article 447 stipulates those civil actions that is prior to the stipulation of *custody* based on unwise, state of mental disorder, and irrationality can be canceled if the custody was happened at the time the action was taken.

Article 447 of the BW essentially stipulates that the custody can be applied retroactively in several conditions: (1) only to custody due to unwise, state of mental disorder, and irrationality; and (2) the custody existed at the time the legal action was taken.

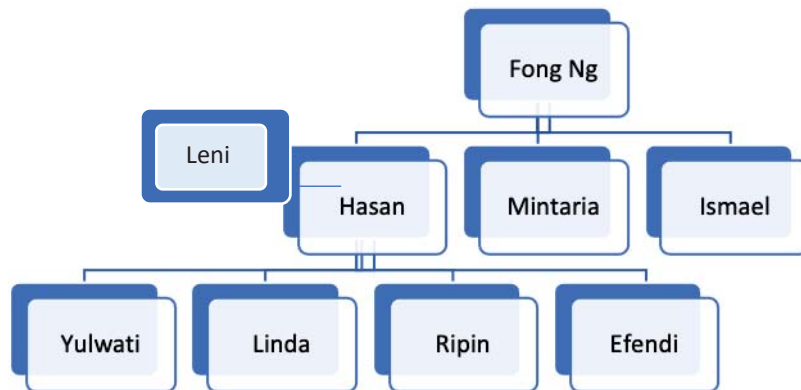
Figure 1. Applicability of Article 447 of the BW



The above conditions are described in the Supreme Court Decision No. 639 K/PDT/2018 on the case of Mintaria, Yulwati and Gunawan Chandra. The position of this case is as follows.

- In 1983, Mintaria bought a piece of land from H. Bukhari, BA, which was later certified as the right of ownership No. 6 of 1983.
- The land was used by Mintaria and his brother, Hasan, to open a spice shop.
- In 1986, Mintaria moved to Bengkulu. Hasan ran the business alone.
- In 2001, Hasan passed away. He left a wife named Leni, and four children: Yulwati, Linda, Ripin, and Efendi.

Figure 2. Family Tree of the Parties in Supreme Court Decision No. 639 K/PDT/2018



- Yulwati and her husband, Gunawan Chandra, continue the spice business.
- Mintaria, Yulwati, and Gunawan Chandra signed an agreement. It states that Mintaria permitted Yulwati and Gunawan Chandra to use Mintaria's land but if at any time Mintaria needed the land, Yulwati and Gunawan Chandra were obliged to give it up.
- The agreement is stated in four deeds as follows.

Table 1. Agreements in the Deeds

Deed Number and Title	Party
Deed of Submission Number 14 Dated March 23, 2015	First party: Mintaria
Deed of Statement Number 15 dated March 23, 2015	Second party: Yulwati and Ripin
Deed of Delivery Number 16 dated 23 March 2015	Ripin acts for himself and as temporary representative of his two sisters, Miss Linda and Mr. Efendi
Deed of Peace Agreement (Dading) Number 17 Dated March 23, 2015	Mintaria and Yulwati

- In 2015, Yulwati and Gunawan Chandra sued Mintaria and claimed that they were the rightful parties to the disputed land based on their parents' inheritance, namely Hasan. Meanwhile, Hasan obtained the land based on a sale and purchase with Bukhari, BA, in 1983. The judge rejected the claim.
- In 2016, Mintaria sued Yulwati and Gunawan Chandra based on unlawful act because they possessed the land owned by Mintaria without legal rights.
- Yulwati and Gunawan Chandra submitted evidence in the form of decision No. 5/Pdt.P/2016/PN.Spn dated March 15, 2016, and decision No. 9/Pdt.P/2016/PN.Spn dated May 12, 2016.

Based on the deeds that form the basis for issuing the Mintaria Ownership Certificate, it is known that in the deeds of handover number 14, 15, and 16, Ripin acts for himself and represents his siblings, Linda and Efendi. On the other hand, Ripin, Linda, and Efendi altogether have been placed under the custody.

The Panel of Judges consider that Mr. Ripin has a mental disorder. Therefore, Mr. Ripin is not a person capable to represent the interests of Miss Linda and Mr. Efendi on the making of the Minutes of Submission Number 14 dated March 23, 2015 (P-2), as well Ms. Linda and Mr. Efendi are not capable of giving power to Mr. Ripin. Based on Article 444 of the Civil Code to represent someone who is not capable of carrying out legal actions, a representative or guardian must first be appointed through a court decision or decision. Mr Ripin's appointment was without a court ruling or decision. It is not based on applicable law. These acts were carried out intentionally to cover up or deceive people's skills in carrying out legal

actions. Since it is proven that one of the parties in the deed of delivery number 14, 15, and 16 is a person who is not legally competent, the judge declared the three deeds null and void:

The Panel of Judges states that the Deed of Submission Number 14 dated March 23, 2015 (P-2), Deed of Statement Number 15 dated March 23, 2015 (P-3), Deed of Submission Number 16 dated March 23, 2015 (P-4), and Deed of Agreement Peace Number 17 dated March 23, 2015 (P-5) altogether are null and void.

In the end, the Panel of Judges decided to reject Mintaria's claim in the decision No.35/Pdt.G/2016/PN.SPN. Subsequently, the decision was upheld at the appeal level as decision No.61/PDT/2017/PT JMB.

Mintaria filed an appeal with the decision No. 639 K/Pdt/2018. At the cassation level, the judge granted the request and passed on judicially some verdicts, among others.

- to declare that Mintaria is the legal owner of the object of the case based on the Certificate of Ownership Number 6 of 1983; and
- to state that Yulwati and Gunawan Chandra are not entitled to the land that is the object of the case.

The judge's considered that Mintaria has stronger evidence of rights. It is the Certificate of Ownership No. 6 on behalf of Mintaria, while Yulwati and Gunawan Chandra's rights is limited to a lease agreement.

The case was analyzed because at the time for the signing of the deeds. When the custody was established, it appears that the three deeds were signed in 2015, while the custody was stipulated in 2016. In other words, the custody is stipulated after the signing of the deed.

Based on the case, there are differences of opinion between judges at the first level of appeal and judges at the level of cassation. At the first level and appeal, the judge applied the custody retroactively. This is in line with the *ratio decidendi* of the case examiner judge.

Based on Article 447 of the Civil Code, all civil acts that occurred before the custody order due to state of unwise, mental disorder, or irrational may be canceled, if the reason of the custody was in place at the time the actions were carried out.

However, the judge at the cassation level had a different opinion. The panel of judges only assessed the evidence for the parties' rights. Mintaria has the proof of rights in the form of a certificate of ownership. Yulwati and Gunawan Chandra only have a lease agreement. In this case, of course, the certificate of ownership has stronger evidentiary power than the lease agreement. Deeper analyze can find the fact that the deeds, which became the basis for the issuance of the certificate of ownership in the name of Mintaria, did not meet the requirements for the validity of the agreement in the form of capacity. They were made by someone under the custody, Ripin. However, competence is a subjective condition of the agreement. If

it is violated, the agreement can be canceled (*vernietigbaar*). It means that the agreement remains binding until it is canceled. In this case, Yulwati and Gunawan Chandra did not ask for the cancellation of the deeds. Consequently, the deeds remain binding.

Based on the description, one of the legal consequences of the custody is that a person cannot transfer rights from the start of the custody. However, in the case of a custody due to unwise, state of mental disorder, and irrationality, the custody may cancel the transfer of rights that were carried out before if it is proven that the custody had existed at the time the transfer of rights was carried out. The custody of the seller after the sale-and-purchase process can be detrimental to the buyer. This situation is exacerbated through the recognition of the principle that land buyers with good faith must be protected, even if the seller is unauthorized. In this case, there is a conflict of rule between Article 447 of the BW and the principle of protection for land buyers in good faith.

C. Legal Protection for Sellers in Land Purchase Prior to Custody

Historically, the very notion of good faith derived from Roman Contract Law ethics. It contains three forms: firmness in keeping promises, prohibition not to take advantage of actions that mislead one of the parties, and the obligation to act with honor and honesty.¹⁸ Theoretically, the law and economics literature mainly relates the good faith principle to the prevention of opportunism. According to Burton, good faith is an antithesis of bad faith.¹⁹ Burton relates bad faith to a condition when a discretion is used to recapture opportunities forgone upon contracting and when the discretion-exercising party refuses to pay the expected cost of performance.²⁰ Over decades, the term good faith and its definition has become endless debate among scholars. Even in jurisdictions that recognize a general principle of good faith there exist a variety of established legal dogmatic forms that define terms and conditions under which principle of good faith is to be used. Any violation to the principle can cause legal consequences.²¹ There is still no clear definition or characterization of the principle. According to Satrio, the principle of good faith is casuistic; and it depends on the court decision to apply and to define the principle on certain cases.²²

Khairandy divides the notion of good faith in two dimensions: subjective and objective dimensions. In the subjective dimension, good faith leads to honesty, while the objective dimension is defined as appropriateness and propriety or justice. The regulation of good faith in Article 1338 paragraph (3) of the BW is the

¹⁸ Ridwan Khairandy, *Itikad Baik dalam Kebebasan Berkontrak* (Jakarta: FH UI, 2004), 128.

¹⁹ SJ Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith," *Harvard Law Review* 94, no. 2, (1980): 369-404, <https://doi.org/10.2307/1340584>.

²⁰ SJ Burton.

²¹ Hans-Bern Schafer, et.al., "Good Faith" in *Encyclopedia of Law and Economics* (New York: Springer, 2015), 3.

²² Ridwan Khairandy, 129.

core of the objective dimension. The implementation of the contract must pay attention to appropriateness and decency.²³

In line with the descriptions, the meaning of good faith is abstract. The notion of good faith is taken from the thoughts of legal experts and the decisions of judges, especially the Supreme Court, which plays an important role in interpreting the meaning of good faith.²⁴ Even though judges, in making a particular verdict, had different exegesis in terms of their interpretation of good faith. Hence, they had to be up to date with current development and renewed the provision of Law.²⁵

Initially, it was sufficient to prove good faith by ignorance of the status and/or defects in acquiring rights to the object of sale and purchase. The statement is in line with the elements of good faith that are described in the Business Dictionary as follows.²⁶

1. Buyer has purchased an item with a certain payment price.
2. Buyer has purchased the object for personal use.
3. Buyer does not know the claims of other parties on the goods.

The Black's Law Dictionary provides an explanation of good faith (*bona fide*) as a state of mind that consists of²⁷

- (1) honesty in belief or purpose,
- (2) faithfulness to one's duty or obligation,
- (3) observance of reasonable commercial standards of fair dealing in each trade or business, or;
- (4) absence of intent to defraud or to seek an unconscionable advantage.

In addition, Subekti also states that a buyer with good faith is someone who does not know that she/he is dealing with a person who is not the owner. She/he is thought to be the owner, and whoever obtains an item from it is protected by law.²⁸

in the progress, the buyer's ignorance about the status of the object is not enough to prove good faith. The buyer must also apply the precautionary principle.²⁹ The Supreme Court, in its decision Number 1816 K/Pdt/1989, dated October 22, 1992, states that a buyer cannot be classified as a buyer in good faith

²³ Ridwan Khairandy, "Kebebasan Berkontrak dan Pacta Sunt Servanda Versus Iktikad Baik: Sikap yang Harus Diambil Pengadilan", (Speech on confirmation in the position of professor's contract law), Universitas Islam Indonesia, 2011, 41.

²⁴ Umar Haris Sanjaya, "Good Faith on Contract Performance," *Arena Hukum* 12, no. 3 (2019): 504, <https://doi.org/10.21776/ub.arenahukum.2019.01203.6>.

²⁵ Mokhamad Khoirul Huda, "Good Faith in Life Insurance Contract by Indonesian Court," *Hasanuddin Law Review* 3, no. 1 (2017): 50, <http://dx.doi.org/10.20956/halrev.v3i1.1046>.

²⁶ Widodo Dwi Putro, et.al., *Penjelasan Hukum Pembeli Beritikad Baik (Perlindungan Hukum Bagi Pembeli Yang Beritikad Baik Dalam Sengketa Perdata Berobyek Tanah)* (Jakarta: Judicial Sector Support Program (JSSP) dan Lembaga Kajian & Advokasi Independensi Peradilan, 2017), 30.

²⁷ Bryan A. Garner, *Black's Law Dictionary, Ninth Edition* (United States: Thomson Reuters, 2009), 762.

²⁸ R. Subekti, *Aneka Perjanjian* (Bandung: PT Aditya Bakti, 2014), 15.

²⁹ I Gusti Ngurah Muliarta, "The Principle of Good Faith in the Sale and Purchase Agreement of Rights Made Before a Notary," *Community Service Journal of Law* 1, no. 1 (2022): 45, <https://doi.org/10.55637/csjl.1.1.4477.44-48>.

since the purchase process is made if there is an inaccuracy of the buyer during the buying process. For instance, the buyer has not checked the status of the rights and the status of the purchase related to the object in question. Therefore, the buyer is not entitled to legal protection from the transactions made.³⁰

The criteria of buyers with good faith continue to develop following the ecosystem of the business world. Faisal explains the criteria for good faith in the agreement as follows.³¹

1. The parties have an obligation to carry out their achievements in accordance with the agreement.
2. The parties are not allowed to take advantage of the agreement by means of deception.
3. The parties must comply with their obligations such as respect and honesty even though it is not explicitly stated in the agreement.

This is in line with the maxim *Bona fides exigit quod convenit fiat* (good faith demands that what have been agreed upon shall be done). Thoughts on good faith do not only develop in Indonesia, Hesselink separates good faith into subjective and objective good faiths.³² He explains that subjective good faith is closely related to the state of mind about knowing or unknowing a certain fact or event. The objective of good faith relates to the conformity of the norms of good faith with the behavior of the party entering the contract, whether the party is in good faith or not.³³

Santoso clarifies that there are several conditions that someone must fulfill to be classified as a buyer with good faith in sale-and-purchase of land as follows.³⁴

1. The certificate is issued legally.
The validity of the certificate is proven by the issuance of a certificate by a state appointed institution with procedures that are in accordance with the legal regulations.
2. The certificate is on behalf of a person or a legal entity.
The certificate contains an appointment to a person or legal entity that, according to the laws and regulations, can have land rights.
3. The land rights are obtained in good faith.
Everyone is considered to have good faith, so bad faith must be proven. Thus, the burden of proof is borne by the party who filed a lawsuit for the loss caused

³⁰ Noorzana Muji Solikha, "Asas Itikad Baik sebagai Pembatas Kebebasan Berkontrak dalam Perjanjian Kredit Bank," (Tesis, Magister Ilmu Hukum Universitas Islam Indonesia, 2015), 19.

³¹ Muhammad Faisal, "Makna Itikad Baik sebagai Landasan Hak Kepemilikan Pembeli: Wujud Standar Tindakan dalam Menentukan Kejujuran Pembeli," *Jurnal Mercatoria* 14, no. 1 (2021): 17, <https://doi.org/10.31289/mercatoria.v13i1.5079>.

³² Muhammad Jibril and Talitha Amanda Ekadhani, "Legal Assurance: A Comparative Study of the Good Faith Doctrine in Australia and Indonesia," *Jurnal Jurisprudence* 11, no. 2 (2021): 135, <https://doi.org/10.23917/jurisprudence.v11i2.13718>.

³³ Martin W. Hesselink, "Towards a European Civil Code: The Concept of Good Faith" in A.S. Hartkamp, et.al., *Towards a European Civil Code, 3rd Edition* (Boston: Kluwer Law International, 2004), 478.

³⁴ Urip Santoso, *Perolehan Hak Atas Tanah*, (Jakarta: Kencana, 2015), 173-175.

by the issuance of the certificate as the object of sale and purchase in the agreement.

4. The land rights are actually controlled.

Land rights are physically controlled and used by the holders of land rights themselves or other people who have been approved by the holders.

5. The certificate is five years old.

No one has filed an objection or cancellation lawsuit within five years of certificate issuance.

Based on the description, it appears that good faith, especially in land purchase, contain objective criteria along the time. Thus, to prove that a land buyer has good faith, ignorance on the defects of purchase is not enough. It must be proven that the party has applied the precautionary principle and carried out the sale and purchase of land following the provisions of the legislation.³⁵

To this point, there are no clear criteria of the buyer's principle of good faith since the sources of law are spread on several court decisions and doctrines. Therefore, the Supreme Court uses its authority to accommodate the principle of good faith in its regulation: the Circular of the Supreme Court. The first circular that regulates the buyer's principle of good faith is the Circular of the Supreme Court number 7/2012 number IX. Knowing that the above provision was still vague, the Supreme Court later complement the buyer's principle of good faith by accommodating it on the Circular of the Supreme Court number 4/2016 number IV.

Prior to the Circulars of the Supreme Court number 7/2012 and 4/2016, the criteria of buyer's good faith principle in land purchases were vary mainly sourced from court decisions and doctrines. In addition, there was no obligation to protect the buyer with good faith. The protection of buyer with good faith depended on the judge's consideration. Therefore, the Supreme Court decided to accommodate the principle in the Circular of the Supreme Court to create a single benchmark and legal certainty on the criteria of buyer with good faith in land purchases. If the buyer fulfilled the criteria, then the court has an obligation to protect the buyer even though it is later discovered that the seller was an unauthorized party.

After understanding the legal norms, both on the custody and the principle of a buyer with good faith, there is a potential that the Article 447 of the BW conflicts with the buyer's principle of good faith. The conflict occurs when the seller is placed under the custody after the purchase of land occurs. On the one hand, based on Article 447 of the BW, the purchase can be canceled. However, the principle of land buyers in good faith must be protected. Thus, the purchase cannot be canceled. In other words, there is a legal problem in the form of a conflict of rule.

³⁵ Muhammad Faisal, "The Legal Protection for A Good Faith Buyer Under A Court Decision, Yogyakarta," *Jurnal Mimbar Hukum* 27, no. 2 (Juni 2015): 368, <https://doi.org/10.22146/jmh.15892>.

To resolve the conflict of the rule, the arguments for each norm can be described. First, the arguments that support the Article 447 of the BW are as follows.

- a. The BW and the Circular of the Supreme Court are legal products with different characteristics. The BW is a regulation (*regeling*), while SEMA is a decision (*beschikking*). On the one hand, regulations (*regeling*) are abstract and general in character. Abstract means the norms are general. General means binding on all legal subjects without exception.³⁶ On the other hand, decisions (*beschikking*) are concrete and individual. Concrete means the arrangement is special. Individual means the norms only applicable to the certain subject and object in the decision. The BW, as a rule, is valid to all legal subjects; and the norms are general. The Circular of the Supreme Court is valid only to internal judges and special arrangements.³⁷
- b. Another argument supports the enforcement of Article 447 of the BW is the principle of fairness.³⁸ Persons under custody are more at risk of suffering losses because of their inability to make good decisions. The main risk is that the seller is persuaded to sell the house at too low a price. the implementation of Article 447 of the BW, on the one hand, protects person under custody. On the other hand, the opposing party in the sale and purchase also does not suffer a big loss (Article 1451 in conjunction with Article 1452 of the BW). The loss of by a skilled party in a land sale and purchase agreement is the loss of opportunity. However, it is not comparable to the potential loss of person under custody.
- c. The legal construction of the buyer of good faith that must be protected cannot be applied because in the Circular of the Supreme Court number 7/2012, number IX in conjunction with the Circular of the Supreme Court number 4/2016 states that protection must be given to buyers who have good faith even if it is later discovered that a seller is an unauthorized person (on the object of land purchase). The original owner can only file a claim for compensation to the seller who is not entitled to it. From this statement, it can be understood that there are three parties in the construction of a buyer of good faith: the original owner, the seller who is not entitled to it, and the buyer with good faith. In the case of cancellation of the sale and purchase of land agreement by the guardian, there are only two parties because the seller is also the original owner. The original owner who feels aggrieved by an unauthorized

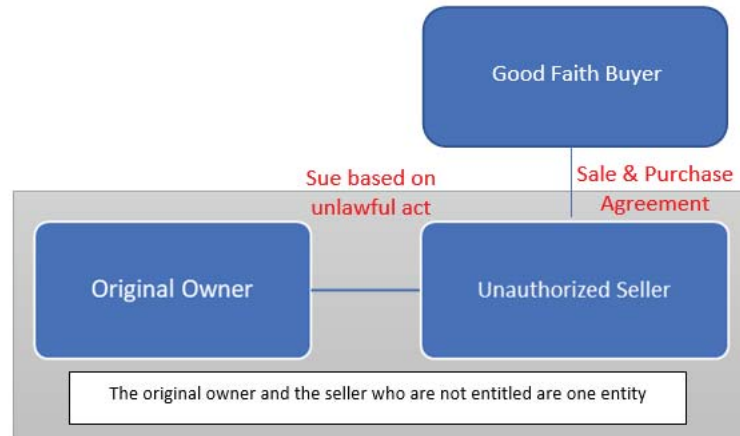
³⁶ Pery Rehendra Sucipta, "Kekuatan Hukum Kebijakan Pemerintah Daerah dalam Menerbitkan Keputusan (*Beschikking*) Dihubungkan dengan Penerapan Asas *Praesumptio Iustae Causa*," *Jurna Selat* 2, no. 1 (2014): 202, <https://ojs.umrah.ac.id/index.php/selat/article/view/124>.

³⁷ Yuda Asmara, "Kedudukan SEMA terhadap Suatu Undang Undang," *Hukum Online*, April 17, 2022, <https://www.hukumonline.com/klinik/a/kedudukan-sema-terhadap-suatu-undang-undang-lt5da3d5db300a9>.

³⁸ Niru Anita Sinaga, "Peranan Asas-Asas Hukum Perjanjian dalam Mewujudkan Tujuan Perjanjian," *Binamulia Hukum* 7, no. 2 (2018): 114, <https://doi.org/10.37893/jbh.v7i2.20>.

seller does not have any legal remedies because the original owner and seller are one entity.

Figure 3. Construction of Land Agreement Cancellation by Guardian



Furthermore, the arguments that support the principle of protection on buyers with good faith.

- a. Based on the theory of knowledge (*Vernemings Theorie*), an agreement occurs when the party making the offer knows that the offer has been known by the party who was given the offer. In this case, when the purchase of land is carried out by a land deed officer, the parties must know that they are in good health and wish to practice the purchase (carrying out achievements). If a person is truly mentally retarded but it is not visible, then the person must be considered healthy. This opinion is parallel and supported by the arrest of HR June 22, 1962, NJ. 1963, 3.
- b. Based on the theory of statements (*Verklarings Theorie*) in the agreement, the formation of will occurs in the realm of one's psyche.³⁹ The opposing party is considered unknowing other's mind. In this case, the buyer has good faith. Therefore, a will that the other party cannot recognize cannot be the foundation for the formation of an agreement. This is in line with Satrio, who states that the will of the statement giver can be replaced by an image (such as actions, attitudes, actions, etc.) caused by the statement giver to the opposing party in the agreement. Thus, a person can be bound by an agreement even if he does not want it. For example, when someone has limitations, but does not

³⁹ Shohib Muslim, "Legal Protection for Parties in Transferring Receivables from Factoring Transactions (Factoring)," *Yuridika* 37, no. 1 (2022): 153, <https://doi.org/10.20473/ydk.v37i1.32169>.

appear, and declare himself normal, then it is very natural for other people to believe his statement.

- c. If Article 447 of the BW is implemented, then it becomes a legal loophole for irresponsible parties to cancel the land purchases carried out by a person before the person is under custody.

Based on the description, both Article 447 of the BW and the principle of a buyer with good faith have equally strong arguments.

Table 2. Argumentation on Article 447 of the BW and the Principle of a Buyer with Good Faith

Article 447 of the BW	Good faith buyer
The BW is a regulation (<i>regeling</i>) that is valid to all legal subjects without exception, while the Circular of the Supreme Court is a decision (<i>beschikking</i>). Thus, it is only valid to internal judges	Based on the theory of knowledge, even if a person is truly mentally retarded, but is not visible, then that person must be considered healthy. Thus, a good faith buyer who does not know the seller's condition must be protected.
Based on the principle of fairness, persons who under custody are more at risk of experiencing losses.	Based on the statement theory, the buyer with good faith does not know the mental condition of the seller, especially if the mental condition does not appear. The buyer believes in the seller's statement that the seller is physically and mentally healthy.
The construction of a buyer of good faith cannot be implemented because there are three parties in it. In the case of sale and purchase of land by the person being supervised, there are only two parties.	If Article 447 of the BW is implemented, it has the potential to be used as a legal loophole to cancel a land purchase.

This study is of the position to agree that the Article 447 of the BW is more secure and in line with the purpose of law in the form of justice and legal certainty.

- Justice: if the land purchase agreement is canceled, then the person under custody will be protected. On the other hand, the buyer will get the paid money.
- Legal certainty: the BW is a statutory regulation, a positive law. Thus, the norms must be implemented to create legal certainty.

The argument that Article 447 of the BW can be used as a legal loophole seems unlikely to happen if the norms on custody are implemented properly. Article 447 of the BW can be used as a legal loophole if a person who should be capable to act independently is intentionally placed under the custody. Thus, later his legal action can be canceled. However, before determining a person's custody, the judge has an obligation to examine the relevant evidence and witness statements and to hear

the statements of the person for whom a custody is requested. This is solely to determine whether the person needs to be placed under custody. In other words, the person under custody is proven unable to take care of his or her interests. Therefore, it will be difficult to use Article 447 of the BW as a legal loophole.

The conflict of rule in the provisions of Article 447 of the BW and the principle of a buyer with good faith causes a serious impact: the inconsistencies in terms of court decisions. This can be found in the court decisions with permanent legal force (*inkracht van gewijsde*), namely the Surabaya High Court Decision Number 189/PDT/2020/PT SBY between Honey Michael and Hadi Djojo Kusumo against Widodo Gunawan and Lukas Haridjaja Gani, S.H.

The case above was chosen for analysis because the custody of Aji Wijaya was set in 2018, while the purchase was made in 2017. The custody is established after land purchase. In this decision, there were differences of opinion between the judges at the first level and the appeal level. In the first level, the judge argued that Aji Wijaya was declared incompetent to act according to the law due to a growth disability. Thus, Aji's actions before the stipulation could be annulled, including the making of PPJB a power of attorney. At the appeal level, the judge explicitly argues that the stipulation of the custody cannot be applied retroactively. Thus, when Aji Wijaya signed the agreement and the Deed of Power, he was still capable to take legal action. In other words, in the end, the buyer with good faith will receive legal protection in this decision. It needs to be criticized because, according to Article 447 of the BW, the case of the position above meets the requirements to apply the custody retroactively: (1) Aji Wijaya was placed under custody because of unwise; and (2) Aji Wijaya has suffered from borderline IQ since birth. It can be proven that when the land purchase was made, Aji Wijaya was already in unwise condition.

Based on the analysis, if a lawsuit for the cancellation of the sale and purchase of land is found because one of the parties under custody after the sale and purchase, there are two opinions. The first, the sale and purchase was void based on Article 447 of the BW. The second, the custody cannot be applied retroactively. consequently, the sale and purchase of land remain legal. In other words, it protects land buyers with good faith, as mandated by the circular of the Supreme Court number 4/2016. Based on a factual point of view, disputes over land purchase cancellations that were carried out before custody were quite widespread. Therefore, the conflict of rule should be addressed immediately to create justice and legal certainty.

D. Conclusions

Under certain circumstances, the stipulation of custody may apply retroactively, namely in the case of a custody due to unwise, state of mental disorder, and irrationality. The basis of the custody must be in place when the civil action was carried out as stipulated in Article 447 of the BW. The sale and purchase of land is

not an exception. The sale and purchase of land carried out before the custody can also be canceled if the conditions are fulfilled.

The solution to the paradox of the norm of Article 447 of the BW with the principle of good faith land buyers is to apply Article 447 of the BW. In other words, the sale and purchase of land can be canceled, then the parties are obliged to return the goods and the value they have received.

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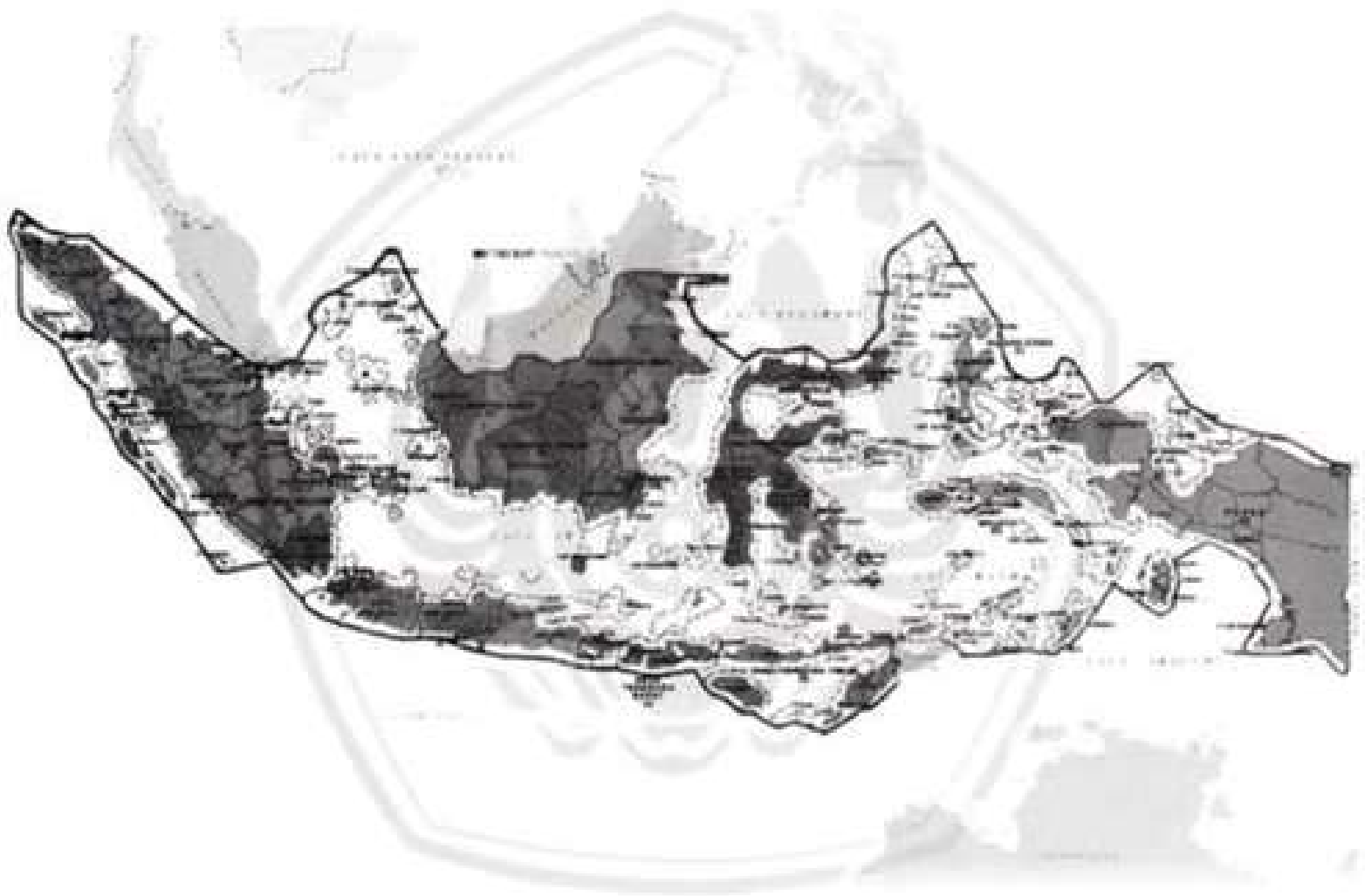
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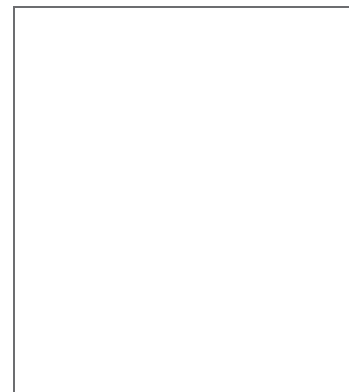
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