

## PROTECTION TO CHILD CITIZENSHIP RIGHT IN MIXED MARRIAGE IN INDONESIA

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### ABSTRACT

*Citizenship right is every body's right, but a state deserves to determine its citizen's rights. In determining who the citizens are, some principles are used to determine the citizenship. There are two citizenship principles commonly used, such as ius soli and ius sanguinis. Ius soli principle means one's citizenship is determined by the place of birth. Ius sanguinis means one's citizenship is determined by the generation or parents. The issues on citizenship are frequently appeared when a mixed marriage occurs. The child born will have his father's or mother's citizenship. In Indonesia, when such problems occurred, a child was given dual citizenship to provide protection to the child. The child can refer to his father's as well as his mother's citizenship. When he is adult, he can choose one of citizenships.*

*Keywords: protection to child citizenship right, double citizenship.*

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### INTRODUCTION

Based on article 1 of 1993 Montevideo Convention, citizen is one of constitutive<sup>1</sup> elements of **forming a state** in addition to territory and government as well as independent capacity to enter into relations with other states. The term of Citizen is a translation of a Dutch term, *staatsburger*. The English for the same definition is *citizen* and the French one is *citoyen* since the literal meaning of both definition is the people of a city. It is surely related to the influence of policy concept in Ancient Greece. It is understandable considering that the concept of a Modern State or Nation State recently, pioneered by the United States and France in 18<sup>th</sup> century, refers to the policy concept of Ancient Greece. Policy has the people called policy citizen or city people or citizen citizen. These terms were then "perfected" by Dutch and German languages into *Staatsburger* or Citizen.<sup>2</sup>

In other hand, the definition of citizenship according to Ko Swan Sik, as quoted by Koerniatmanto, contains the nature of law in the form of legal binding between a state and someone. This legal binding leads to legal causes, that is, someone turns into citizen and goes down the power environment of relevant state. Therefore, the law of citizenship is essentially a set of principles regulating the emergence and end of relations between a state and its people. Thus, the issues on citizenship are related to the issues of rights and obligations reciprocally between a state and its citizen.<sup>3</sup>

In relation with the presence of reciprocal relation between a state and its citizen, protection to citizen is an obligation of a state. State must assure the fulfillment of its citizen's human rights, and citizens have obligations to their state *vice versa*.

Citizen is one of main elements in the process of forming a state. A state cannot possibly be independent without its citizen. It is strictly stated in Article 1 of 1993 Montevideo Convention on the Rights and Duties of State that states; State as the subject of International Law shall meet the requirements as follows: permanent people, certain territory, government, and the capacity to enter into relations with other states. A state is established due to a social contract or society agreement as stated by JJ Rosseau in People Sovereignty Theory.<sup>4</sup>

It is the right of a state to determine who its citizens are. In various constitutional and literature practices, three principles of citizenship to determine citizenship are the principles of *ius soli*, *ius sanguinis*, and mixed.<sup>5</sup> *Ius soli* principle is the principle stating that one's citizenship is determined by the place of birth or the principle of region of birth. Someone is said to be the citizen of X because he was born in State X. Then, *ius sanguinis* principle is the principle stating that one's citizenship is determined by the generation or the blood flows in his body. Someone is stated to be the citizen of State Y because his parents are the citizen of Y.<sup>6</sup>

After the independence of the Republic of Indonesia, the issues on citizenship were regulated in Act No. 3 of 1946 on Citizen and State Inhabitants. This act had ever been revised into Act No. 6 of 1947 on the Revision of Act No. 3 of 1946 and revised again into Act No. 8 of 1947 on Time Extension to apply for the statement due to citizenship and Act No. 11 of 1948 on Another Time Extension to Propose the Statement Due to Indonesian Citizenship.

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<sup>1</sup> Bagir Manan, *Hukum Kewarganegaraan Indonesia dalam UU No. 12 Tahun 2006*, Yogyakarta; FH UII Press, 2009, p. 1

<sup>2</sup> Koerniatmanto Soetoprawiro, *Hukum Kewarganegaraan dan Keimigrasian*, Jakarta; PT Gramedia Pustaka Utama, 1994, p. 3

<sup>3</sup> *Ibid*, p. 9

<sup>4</sup> B. Hestu Cipto Handoyo, *Hukum Tata Negara Kewarganegaraan dan Hak Asasi Manusia, (Memahami Proses Konsolidasi Sistem Demokrasi di Indonesia)*, Yogyakarta; Universitas Atma Jaya Yogyakarta, 2003, p. 235

<sup>5</sup> Sudargo Gautama, *Warga Negara dan Orang Asing*, Bandung: Alumni, 1987, p. 10

<sup>6</sup> Koerniatmanto Soetoprawiro, *Op.Cit.*, p. 11

Then, the issues on Indonesian citizenship were regulated in Act No. 62 of 1958 on the Citizenship of the Republic of Indonesia as revised into Act No. 3 of 1976 on the Revision of Article 18 of Act No. 62 of 1958. Lastly, Act No. 12 of 2006 on the Citizenship of the Republic of Indonesia was enacted, so Act No. 62 of 1958 had been withdrawn and stated not to be applicable except the implementation regulation of Act No. 62 of 1958 which was not in contrary with or not revised based on Act No. 12 of 2006.

In this globalization era, a marriage among citizens has been common. It is called Mixed Marriage as regulated in Act No. 1 of 1974 on Marriage. The citizenship issues emerged in mixed marriage are regarding the nationality of husband or wife whether the wife's nationality shall refer to the husband's nationality or conversely, whether each of them still has his/her own nationality, how about the child's nationality whether it refers to the father's or mother's nationality.

The problem to discuss in this paper is how Indonesian gives protection to child's citizenship right in mixed marriage?

### **PROTECTION TO CHILD CITIZENSHIP RIGHT IN MIXED MARRIAGE IN INDONESIA**

For a half century, the law on citizenship in mixed marriage between Indonesian citizen and Foreign Citizen has referred to Act No. 62 of 1958 on Indonesian Citizenship. One's citizenship, principally, is based on the principle of *ius sanguinis* which means the law of family matter and parents. However, in Act No. 62 of 1958 on Citizenship of Republic of Indonesia, it emphasizes more on civil relation with his father having the citizenship of the Republic of Indonesia.

The admission of one's citizenship is mostly determined by father's line, whereas the citizenship by mother's line is determined as the exception when the father has no citizenship or the citizenship identity is unknown. In determining child's citizenship, there are differences between the domination of father's citizenship status and the domination of mother's citizenship status. The domination of father's citizenship status is explicitly stated as the determination of child's citizenship. Act No. 62 of 1958 on Citizenship of the Republic of Indonesia in marriage adheres the principle of unity of law since it is subject to the same law that husband and wife do not have to feel difficult in performing their rights and obligations as citizens. Both has the same rights and obligations either public or private to the same state as well. The problem is when it is applied in mixed marriage, which party should give in and remove his/her citizenship.

The problems on child citizenship status in mixed marriage frequently occur. It is frequently found the deportation against a child of mixed marriage between an Indonesian woman and a man of Foreign Citizen caused by the citizenship principle adhered by Indonesian. It caused the child to be a foreign citizenship because of his father's citizenship in accordance with the principle of *ius sanguinis*, or the child who was not aged 18 years old lost his Indonesian citizenship because his parents lost their Indonesian citizenship.

In mixed marriage in Indonesia, it is recognized the principle of equal level in which each party can still keep their citizenship status and does not have to change citizenship. However, this principle also causes a problem to the child on the status of their child's citizenship. For this problem, it has to refer to the principle of citizenship adhered by Act No. 62 of 1958 on Citizenship of the Republic of Indonesia, i.e. the principles of *ius soli* and *ius sanguinis*. In other hand, in *ius soli* principle, a child's citizenship is determined by the child's place of birth. It means, any child of wherever the parents are from, if he was born in a State, he will get the citizenship status from the State. After a child is 18 years old, he can choose the citizenship he wants. It must be bothering for the parents and the State where the parents are from since the citizenship status of the child is dual or bipatride. Even, the citizenship of the child can be different from the citizenship of his parents.

According to *ius sanguinis* principle, a child citizenship is determined by the parents' citizenship. When the parents' citizenship is the same, there will be no problem. Conversely, when it is not the same, it can cause problems in mixed marriage. In patriarchy principle, Act No. 62 of 1958 on Citizenship of the Republic of Indonesia regulates that a child's citizenship status refers to the father's citizenship. When the father's status or existence is not clear, the child's citizenship will refer to the mother's citizenship.

The problem emerged is when the father's citizenship is different from the mother's citizenship. In this case, it seems that the law of citizenship in Act No. 62 of 1958 on Citizenship of the Republic of Indonesia does not provide the right to female party to collectively determine a child's citizenship status.

The other problems that might appear is when a divorce occurs between the parents of an immature child. The first problem is when the father dies before the child is mature. Then, the child is inevitably under the responsibility of the mother with different citizenship status. The same thing will also happen when the parents are divorced and the judge decides that the immature child is under the mother's care. It also applies similarly to the child born out of wedlock who is then admitted by his father. According to the law of the father's state, this admission leads to the change to the child's citizenship referring to the father's citizenship status, whereas the child is even still in the cultural environment of his mother.

Act No. 62 of 1958 on Citizenship of the Republic of Indonesia is considered to be incapable of accommodating the interests of parties in mixed marriage, particularly the protection to child. To cope with that, on July 11, 2006, the Legislative Council (DPR) legalized a new citizenship law, Act No. 12 of 2006 on Citizenship of the Republic of Indonesia, which has been applicable since August 1, 2006. In this Act No. 12 of 2006, it provides equal position to father and mother to determine their child's citizenship. This law does not strictly use the principle of *ius sanguinis* anymore meaning that the citizenship status of a child is not merely determined according to the father's citizenship, but also determined by the mother's citizenship. The equality principle between

husband and wife in determining their child's citizenship is stated in the principle that applies in Act No. 12 of 2006 on Citizenship of the Republic of Indonesia mentioning that: "marriage does not change their each origin." This principle leads to consequence that a child born will refer to the father's and mother's citizenship so that the child has dual citizenship (limited).<sup>7</sup>

It is in line with CEDAW (Convention on the Elimination of All Forms of Discrimination against Women) that has been ratified in Act No. 7 of 1984 in article 9 stating that the participating countries shall provide equal rights for both women and men to obtain, change, or keep their citizenship. The participating countries particularly shall guarantee that a marriage to a foreigner and the change of husband's citizenship during marriage does not automatically change wife's citizenship, get her have no citizenship, or force husband's citizenship to her. The General Recommendation of CEDAW Committee in the 13<sup>th</sup> Assembly in 1994 on Equality in Marriage and Family Relation resulted in an analysis result to article 9 of CEDAW Convention. In point 6, it is stated that citizenship is a highly important thing to be able to fully participate in a society. Article 9 also states that State shall provide equal rights for women and men concerning their child's citizenship. It means, children of mixed marriage have the right to get the citizenship from both their father and mother.

Besides, Act No. 39 of 1999 on Human Rights determines that anyone has the right to have, to get, to replace, or to keep his/her citizenship status. Even, anyone is free to choose his/her citizenship and, without any discrimination, has the right to enjoy the rights originated and attached to his/her citizenship as well as shall perform his/her obligation as citizen in accordance with the law (article 26). In addition, article 2 of this law states that anyone has the right to have, to get, to replace, or to keep his citizenship status. anyone is free to choose his/her citizenship and without any discrimination has the right to enjoy the rights originated and attached to his/her citizenship as well as shall perform his/her obligation as citizen in accordance with the law. Then, article 47 states that a woman who is married to a man of foreign citizenship does not automatically follow her husband's citizenship status, but she has the right to keep, to replace, or to get her citizenship status back.

In relation with child's citizenship, actually every child since his birth has the right for name and citizenship status. It is stated in Article 53 paragraph (2) of Act No. 39 of 1999 on Human Rights. In other hand, in article 29 of Act No. 23 of 2002 on Child Protection states that when a mixed marriage occurs between the citizen of the Republic of Indonesia and foreign citizen, the child born from the marriage has the right to get citizenship both from his father and mother in accordance with the applicable law. Then, in article 24 paragraph (3) of International Covenant on Civil and Political Right also states that every child has the right to get a citizenship. Similarly, the Convention on The Rights of The Child also states that The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.

In other hand, this convention obliges participating countries to assure the implementation of this right in accordance with each national law and shall be the subject to relevant international instruments in this field,<sup>8</sup> particularly when the child, in turn, will not have citizenship.

Based on Act No. 12 of 2006 on Indonesian Citizenship, children under 18 (eighteen years old) born before Act No. 12 of 2006 on Citizenship of the Republic of Indonesia is applied, they can register themselves to the authorized officials to get limited dual citizenship until end of August 1, 2010 as set forth in article 41 of Act No. 12 of 2006 stating that the children (with the condition of under 18 years old and unmarried) can get Indonesian citizenship by registering themselves to Minister through the official or representative of the Republic of Indonesia at least 4 (four) years after Act No. 12 of 2006 was enacted. When they do not register after the time, the children are considered as Foreign Citizen. For children who are born after the law applies, they will be automatically the citizens of Indonesia. Therefore, the child can apply for Indonesian passport in the Immigration Office in order to get the treatment as the citizen of Indonesia to his foreign passport. For the child with limited dual citizenship, he shall be registered by his parents or proxy in the Immigration Office or overseas representatives of the Republic of Indonesia.

Based on the principle, it can be recognized that according to Act No. 12 of 2006 on Citizenship of the Republic of Indonesia, husband and wife have equal position in determining citizenship for their child. Substantially, Act No. 12 of 2006 on Citizenship of the Republic of Indonesia is more advanced and democratic compared to Act No. 62 of 1958 on Citizenship of the Republic of Indonesia since Act No. 12 of 2006 has accommodated various thoughts referring to the provision of legal protection to citizens by considering gender equality. It also includes the provision of protection and clarity on the legal status of children of mixed marriage between Indonesian citizen and Foreign Citizen.

It is more important to be stated that the use of limited dual citizenship principle for a child is to provide protection to the child. It is to prevent deportation to the child of mixed marriage from a woman of Indonesian citizen and a man of foreign citizen caused by the citizenship principle adhered is *ius sanguinis*. From father's side, it causes the child become foreign citizen to follow his father's citizenship as well as a child under 18 years old loses the citizenship of the Republic of Indonesia since his parents lose the citizenship of the Republic of Indonesia. When the parents are divorced and the child is not mature, the child is inevitably under the mother's responsibility having different citizenship status.

With the application of *ius sanguinis* principle both from father's and mother's line by Act No. 12 of 2006, when the father's and mother's citizenship are different because of mixed marriage, the child will have dual citizenship. Then, according to article 4 of letter c, letter d, and letter h, article 5, and article 21, the child has dual citizenship, but after the child is 18 years old or married,

<sup>7</sup> Lian Nury Sanusi, Undang-Undang Nomor 12 Tahun 2006 Tentang Kewarganegaraan RI, Jakarta: Kawan Pustaka, 2006, p. 28

<sup>8</sup> See the International Declaration on Human Rights adopted by the General Assembly of United Nations on December 10, 1948 article 15 stating that everyone has the right to citizenship. No one arbitrarily can be repelled from his citizenship or rejected only to replace citizenship.

the child must choose of citizenships by making written statement and enclosing required documents as stated in the law. The statement to choose citizenship must be submitted at least 3 years after the child is 18 years old or married. Then, the procedures to choose Indonesian citizen is regulated in the Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number M.02-HL.05.06 of 2006 on the Procedures to Submit the Statement to be the Citizen of Indonesia.

In the Government Regulation of the Republic of Indonesia Number 2 of 2007 on the Procedures to Get, to Lose, to Cancel, and to Get Back the Citizenship of the Republic of Indonesia, it is stated that a child with dual citizenship as stated in the law shall be registered by his parents or proxy to the Immigration Office or the Representatives of the Republic of Indonesia having the working area covering the place where the child lives.

Furthermore, based on the Regulation of the Minister of Law and Human Rights Number M.80-HL.04.01 of 2007 on the Procedures of Registration, Recording, Providing Immigration Facilities as Indonesian Citizen with Dual Citizenship, the child with dual citizenship must be registered to get an immigration facility as dual citizenship child. When the registration is in the territory of the Republic of Indonesia, the registration is made in an Immigration Office with the working area covering the child's residence. When the registration is made out of the territory of the Republic of Indonesia, the registration is made in the Representative Offices of the Republic of Indonesia with the working area covering the child's residence. The registration is made in written and includes: the child's full name, place/ date of birth, sex, address, Passport Number, Name of Parents, Parents' Nationality (Father and Mother), and parents' marital status. The registration encloses the copy of the child's birth certificate proven in accordance with the original by the Civil Registration Official, the copy of the child's parents' marriage deed proven in accordance with the original by the Civil Registration Official, the copy of the child's foreign passport proven in accordance with the original, 4 sheets of the child's recent photographs sized 4 cm x 6 cm.

Every child having the Minister Decree gets the Immigration Facilities such as the child holding foreign passport when he enters and be in the territory of the Republic of Indonesia is free from the obligation to have visa, immigration permit, and the permit to reenter. The child who only holds foreign passport travelling in or out of the territory of the Republic of Indonesia, his passport is given the Departure Permit/Entry Permit by the Immigration Officials or Registration Checking Officials in the Immigration Checking Area. The child holding both Indonesian and foreign passport shall use one same passport when he gets in and out of Indonesian territory.

The child who has not chosen citizenship and under 21 years old is given Indonesian passport. The validity period of Indonesian passport is limited until the child is aged 21 years old. The child who chooses to use foreign passport when he gets in and out of Indonesian territory, the Immigration Official or Landing Checking Official in the Immigration Checking Area will put on the stamp on his A/D card.

The Office of Law and Human Rights, particularly the Department of Legal Division Service, is assigned to record every incoming application for registration and to check whether the documents required have been completed or not. If they are not complete, the authorized official has the right to return to the parents or proxy to be completed. After everything is complete, the Legal Service Division processes the application in order to get the Minister Decree since basically all applications must be granted and get the Minister Decree. After the Minister Decree is issued, the applicant shall report to the local Immigration Office in order to record that the name of the child has obtained the Minister Decree from the Office of Law and Human Rights. In addition, the Immigration Office can also make an Indonesian Passport for the child.

In Indonesia, based on Act No. 12 of 2006 on Citizenship of the Republic of Indonesia, the single citizenship principle is adhered, whereas the dual citizenship principle is limitedly used as the exceptional principle which applies for the child of mixed marriage from the father and mother who, one of them, has foreign citizenship. The purpose is to provide protection to the child because the child can refer to the citizenship of both father and mother. Nevertheless, the dual citizenship status is only temporary until the child is aged 18 years old or married. After the child is 18 years old or married, he must choose one of citizenships. According to Jimly Assiddhiqi, a child is allowed to leave and not to respect his mother's loyalty to be in Indonesian citizenship. In this case, can it morally be acceptable that a state can force the child to choose one of citizenships between his mother and father? It is exceptional when the child consciously and with his own willingness chooses his own choice, a state cannot force by using a legal instrument in order that he chooses one of his mother's or father's citizenships. It is important for a state that the citizen meets his obligation as a citizen. His willingness to keep the dual citizenship cannot be seen as the loss for a state.<sup>9</sup>

## CONCLUSION

The application of *ius sanguinis* principle from the line of mother and father by Act No. 12 of 2006, when the citizenship of father and mother is different because of mixed marriage, the child has limited dual citizenship until aged 18 years old or married. After that he must choose one of citizenships.

Based on the Regulation of the Minister of Law and Human Rights Number M.80-HL.04.01 of 2007 on the Procedures of Registration, Recording, Providing Immigration Facility as Indonesian Citizen with Dual Citizenship, the child with dual citizenship must be registered to get the immigration facility as the child with dual citizenship. One more important thing to consider is that the use of limited dual citizenship for child is to provide protection to child.

<sup>9</sup> Jimly Assiddhiqi, *Pengantar Ilmu Hukum Tata Negara jilid III*, Jakarta: Konstitusi Pers, 2006, p. 144

Nevertheless, the dual citizenship status is only temporary until the child is aged 18 years old or married. After the child is 18 years old or married, he must choose one of his citizenships. It is the same as telling the child to leave and not to respect his mother's loyalty to keep her Indonesian citizenship. It can also be said that the state through the law forces the child to choose one of his mother's or father's citizenships, except the child with his own willingness and awareness makes his own choice. In this case, what is important for a state is that the citizen meets his obligation as a citizen. When he still wants to keep the two citizenships, it cannot be seen as a loss for the state.

There will be the time when dual citizenship principle for everyone who wants it also requires considering since the life recently tends to be integrated with the social dynamics among human beings which is getting looser and more dynamic. Dual citizenship is highly needed and it is related to the issues of meeting human rights in terms of citizenship right.

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