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Legal Protection of The Rights of Indonesian Citizens for Children in Lifetime Mixed Marriages

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ABSTRACT

This study focuses on the first problem how to determine the principles of ius sanguinis and ius soli in relation to the status of children from mixed marriages, second, how the concept of legal protection for children from mixed marriages in guaranteeing human rights in the future. The method used in this research is normative juridical research with a research approach in the form of a normative approach. The results of the study show that dual citizenship for life is still difficult to do in Indonesia because Article 6 of the citizenship law adheres to the principle of single citizenship. On the principle of "ius sanguinis" has limited dual citizenship arrangements that apply to children resulting from mixed marriages. This application is only valid until the child is 18 years old and is extended by 3 years to avoid being stateless. The state is obliged to fulfill and protect the rights of its citizens, including the right to the citizenship status of children resulting from mixed marriages which is an inseparable part of the conception of human rights contained in the constitution of the 1945 Constitution of the Republic of Indonesia. The concept of legal protection for children resulting from mixed marriages in guaranteeing rights In the future, in making regulations to take special temporary action, the 18 year citizenship law is extended by 3 years and the rights as Indonesian citizens can be protected for life. This is in line with the age that is capable and mature in choosing to become an Indonesian citizen to be able to have their rights in accordance with the legal provisions in force in Indonesia and based on Article 28 H paragraph (2) of the 1945 Constitution of the Republic of Indonesia.

INTRODUCTION

Marriage is one of the most important aspects of human life, even becoming a basic basic demand need for every normal human being Legally, the subject of marriage has been regulated in Law Number 1 of 1974. Likewise, interstate marriage or mixed marriage is affirmed in Article 75 of Law Number 1 of 1974, the next Article states that people who engage in mixed marriages can acquire citizenship from their spouses and can also lose their citizenship.(Candra, 2018).(Basuki, 2005)

So far, in protecting the legal activities of its citizens who come into contact with foreign nationals, it still uses colonial heritage rules, namely Algemeene Bepalingen van Wetgeving voor Nederlands Indie (Article 1 of the Transitional Auran of the NRI Constitution of 1945) so that in the legal world the Private International Law (HPI) emerges. Mixed marriage will be a matter of Private International Law, because it concerns 2 (two) different national legal systems.

States are obliged to fulfill and protect the rights of their citizens, including the right to citizenship status. This status will make it easier for citizens to live their lives, both in the country that gave them citizenship status and in other countries. In Indonesia itself, adheres to several principles of citizenship which can be seen in the general explanation of Law Number 12 of 2006. In determining citizenship, based on the side of birth

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there are two principles, namely the principle of ius soli or law of the soil and the principle of ius sanguinis or law of the blood (Bakarbessy & Handajani, 2012; Malahayati, 2013)

Article 26 of Law Number 12 of 2006 regulates the loss of citizenship of a husband or wife if the husband or wife adheres to the principle of wife or husband following the nationality of his spouse which is the principle of legal unity in the family as previously in Indonesia adopted in article 2 GHR (Regeling of de Gemengde Huwelijken). Regarding HPI arrangements, currently Indonesia still uses three old articles of Dutch heritage, namely Article 16, Article 17, and Article 18 Algemeene Bepalingen van Wetgeving voor Nederlands Indie (AB) Staatsblad 1847 No 23 of 1847.

The problem of the difference in the legal system of citizenship adopted by married couples who carry out mixed marriages also affects the citizenship status of children resulting from mixed marriages as stipulated in Law Number 62 of 1958 adhering to the principle of "ius sanguinis" and Law Number 35 of 2014. But not all countries adhere to the principle of "ius sanguinis", there are countries adhering to "ius soli" as embraced by almost all countries in Europe so that the child has dual nationality. In such cases, the child must choose to become a citizen at the age of 18 (five years of turning 18(Bernanda, 2020; Bradley & Ewing, 2003)).

According to Simonangkir & Sastropranoto (1957), mixed marriages involving the citizenship status of the parties, basically concern two areas of law, namely the field of marriage law (huwelijksrecht) and the field of citizenship law (nationaliteitsrecht). Thus the issue of citizenship is closely related to the issue of rights and obligations of a reciprocal nature between the state and its citizens . In the case of differences in nationality between husband and wife, the husband's national law is used. For the relationship between parents and children, the principle of domicile as adopted by Civil Law countries is used while the father's domicile is used for Common Law countries such as England and the father's nationality for Civil Law countries such as Germany, the Netherlands. (Garner, 2014; Simorangkir & Sastropranoto, 1957)

Different citizenship determinations by each country can create citizenship problems for a citizen. In summary, the problem of citizenship is the emergence of apatride and bipatride, and can even appear multipatride. In the Indonesian Citizenship Law, basically does not recognize dual citizenship (bipatride) or statelessness (apatride).(Kartasaputra, 1987; Starke, 1989)

The manifestation that has been reflected in legal rules that are discriminatory, does not guarantee the fulfillment of human rights and equality between citizens and does not provide protection for women and children. Based on the 1958 Citizenship Law in Article 8 Paragraph (1), it is stipulated that an Indonesian woman who intermarries, will lose her citizenship. Likewise, children born from marriages between Indonesian women and foreign men, automatically follow their father's nationality. The Indonesian citizenship law, also grants dual citizenship to children of Indonesian citizens born outside the territory of the Republic of Indonesia if based on the provisions of the country where the child was born gives citizenship to the child concerned, but the parents state that they still choose the citizenship of the Republic of Indonesia for the child (article 3 paragraph 1)

Regarding the protection of children from mixed marriages born in the State of Indonesia and legal protection arrangements according to Law Number 12 of 2006, considering that the enactment has consequences that are different from previous legislation, where a child if he wants to get legal protection must register his chosen citizen in order to get legal protection of a State.

The principle of legal protection against government actions rests and originates from the concept of recognition and protection of human rights which places society in an economically and juridically weak position, giving birth to concepts of recognition and protection of human rights derived from humans themselves, so that human rights cannot be revoked by the state, but human rights are directed to restrictions and laying down obligations of society and government. In the principle of equality, it is determined that a marriage does not cause a change in the citizenship status of each party, both husband and wife remain original nationalities. Their respective nationalities remain the same as before the marriage took place . From the point of view of the national interests of each country, the principle of equality has a positive aspect. This principle can avoid the risk of legal smuggling.(Human, 2008).(Locke & Gough, 1948; Maclver, 1950)(Mahfud, 2010)

In relation to Law No. 12 of 2006, namely the explanation of Law 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection, it is explained that, starting from the conception of complete, comprehensive, and comprehensive child protection, Law No. 23 of 2002 lays down the obligation to provide protection to children based on the following principles: 1. Nondiscrimination, 2. The best interests of the child, 3. The right to life, survival and development, respect for the opinion of the child. Protection of children's rights in all aspects is part of national development activities, especially in advancing the life of the nation and state to realize the best life for children who are expected to be potential successors of the nation(Fakih, 2003).

METHODS

The type of research used in this study is juridical-normative, and is descriptive analytical using both primary, secondary and tertiary legal materials as the main data. Data analysis is carried out qualitatively with a theoretical abstract approach. While the approach used in this study is the statutory approach (statute approach) and concept approach (conceptual approach). The statute approach is carried out by reviewing all laws and regulations related to the legal issues being handled. While the conceptual approach is an approach that departs from the views and doctrines that develop in legal science (Marzuki, 2011).

The legal materials examined in this study, among others, consist of First, primary legal materials, namely: authoritative legal materials, including the Constitution of the Republic of Indonesia 1945, Basic Agrarian Law Number 5 of 1960, Law Number 39 of 1999 concerning Human Rights, Law Number 12 of 2006 concerning Citizenship, Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, Law of the Republic of Indonesia Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection, Algemene Bepalingen van Wetgeving (General Provisions of Laws and Regulations), BW (Burgerlijk Wetbook) or the Civil Code. Second, secondary legal materials, namely secondary legal sources in the form of books, articles in scientific journals, newspapers, magazines, and others related to the topic under study, and Third, tertiary legal materials, namely: dictionaries, encyclopedias, and others that explain more concisely from a study. These data are collected using the document study method(Rajab, 2017).

RESULTS

Finding the Principle of Ius Sanguinis and Ius Soli in the Status of Children from Mixed Marriages

As a subject of law, the state consists of elements of the territory of the state, citizens and residents, legitimate government, and international recognition of the independence and sovereignty of the state. The citizen is used as a guideline for the state to determine who is its citizen so that the renewal of citizenship arrangements is closely related to the naturalization process with all its consequences and follow-up because citizenship laws only regulate who is a citizen, who is a foreigner, ways to obtain citizenship, lose citizenship, and regain citizenship(Rodee, 2000) .

The system of determining citizenship status is based on two principles, namely the principle of ius soli and the principle of ius sanguinis. In the event of a mixed marriage involving different citizenship statuses between married couples (regardless of the different citizenship systems adopted by each spouse's home country), the legal relationship between the spouses who enter into such a mixed marriage always raises questions regarding the citizenship status of their children.

A vulnerable and frequent problem in mixed marriages is the issue of child citizenship. The old citizenship law adhered to the principle of single citizenship, so that a child born of a mixed marriage could have only one nationality, which in the Act stipulated that the father's nationality must be followed. This arrangement raises the problem if in the future the marriage of parents breaks out, of course, the mother will find it difficult to get the care of her child who is a foreign national. With the birth of the new Citizenship Law, it is interesting to examine how the birth of this Law affects the legal status of children of mixed marriages.

Children can be categorized as legal subjects who are incompetent to perform legal acts, the exception in Article 2 of the Criminal Code is that children who are still in the womb can become legal subjects if there are interests that desire and are born alive (Susilowati et al, 2005), so that they are represented by their parents or guardians in carrying out legal actions. Even so, children can still be categorized as legal subjects who both have rights, one of which is citizenship rights. Therefore, the protection of children needs to be considered and kept away from discriminatory life (Human Rights Law article 13 paragraph 1). Human rights are a means of protecting human beings against political, social, economic, cultural, and ideological forces that will oppress them if they are not contained(Sujatmoko, 2015)

Indonesia's attitude that declares itself as a state based on law and upholds human rights, can be seen from the 1945 Constitution which contains provisions on respect for several very important aspects of human rights, such as the right of all nations to independence (first paragraph of the preamble), the right to citizenship (article 26), equality of position of all Indonesian citizens before the law and government (article 27 paragraph 1), the right of Indonesian citizens to work (article 27 paragraph 2), the right of every Indonesian citizen to a decent life for humanity (article 27 paragraph 2) and the right of citizens to education (article 31 paragraph 1).

Based on this, Law Number 12 of 2006 concerning Indonesian Citizenship exists to replace Law Number 62 of 1958 concerning Indonesian Citizenship which invited many polemics and discrimination.

Children born of mixed marriages have the possibility that their mother's father has different nationalities and is therefore subject to two different legal jurisdictions. When examined in terms of private international law, dual citizenship also has potential problems, for example in terms of determining personal status based

on the principle of nationality. Basically, not only children from mixed marriages have dual citizenship, there are other children who have the opportunity to have dual citizenship status according to article 6 of Law No. 12 of 2006.

In Indonesia, until now there is no provision of the Law that regulates which law will apply in the event of child maintenance as a result of the breakup of mixed marriages of both parents. Researchers did not find colonial-era rulings regarding child maintenance as a result of the breakup of marriage between parents who entered into mixed marriages due to differences in nationality within the meaning of article 1 GHR (Regeling opnde Gemengde Huwelijken Staatsblad 1898 Number 158) while in article 2 the wife must submit to the husband's law. Thus the nationality of the child may differ from the nationality of his parents, if the child was born in a country adhering to ius soli (the right to obtain citizenship that can be obtained for individuals based on the place of birth in the territory of a country), but if the child was born in a country that adheres to the principle of ius sanguinis. Then his nationality remains the same as the nationality of both parents.

The granting of dual citizenship is a positive new breakthrough for children resulting from mixed marriages. But it needs to be examined, whether this granting of sanity will cause new problems in the future or not. Having dual citizenship means being subject to two jurisdictions. It needs to be reviewed by private international law experts in relation to this dual citizenship. The author argues that because this citizenship law is still new, the potential problems that can arise from the issue of dual citizenship have not been studied by private international law experts.

The new Indonesian citizenship bill also grants dual citizenship to children of Indonesian citizens born outside the territory of the Republic of Indonesia if based on the provisions of the country where the child was born gives citizenship to the child concerned, but the parents state that they still choose the citizenship of the Republic of Indonesia for the child (article 3 paragraph 1). There is no firm stipulation, until what age the child can still hold dual citizenship as stipulated in the Citizenship Law (Basuki, 2005). However, because children who are immature or unmarried in general their residence follows their parents, and if the place of residence of their parents is in Indonesia, the habitual residence of the child is in Indonesia. When related to the Domicile Principle that applies in the Common Law System, the child's domicile depends on the domicile of his parents, namely Domicile of Origin, Domicile of Dependency and Domicile of Choice (Salim & Nurbani, 2017)

The manifestation that has been reflected in legal rules that are discriminatory, does not guarantee the fulfillment of human rights and equality between citizens and does not provide protection for women and children. Based on the 1958 Citizenship Law in Article 8 Paragraph (1), it is stipulated that an Indonesian woman who intermarries, will lose her citizenship. Likewise, children born from marriages between Indonesian women and foreign men, automatically follow their father's nationality. The realization of state democratization in the new Citizenship Law is reflected in its responsive legal products, namely in the form of equal treatment and position of citizens before the law and the existence of gender equality and justice.

According to the 2006 Citizenship Law in Article 2, it is stated that a native Indonesian citizen is an Indonesian who has been an Indonesian citizen since his birth and has never received another citizenship of his own free will. It is this article that nullifies the cornering of certain ethnicities. This law implies the rejection of the concept of discrimination in the acquisition of citizenship on the basis of race, ethnicity, and gender, as well as discrimination based on marital status. In another article, it is also stated that Indonesian citizens who marry foreign men are no longer considered to automatically follow their husband's nationality, but are given a grace period of three years to make a choice, whether to remain an Indonesian citizen or let go. In addition, if the wife decides to remain an Indonesian citizen or during the grace period of three years, she can sponsor her husband's stay permit in Indonesia. The most important part of the new law is the adoption of the Ius Sanguinis - Ius Solli mixed principle and recognizes dual citizenship in children of intermarried couples and children born and living abroad up to the age of 18. This means that until the child turns 18, it is allowed to have dual citizenship. After reaching that age plus a grace period of three years, then the child is required to choose one of them. It is this provision that avoids the occurrence of stateless.

This law seems philosophically keen to say that cultural acculturation through the medium of citizenship becomes something inevitable. Here, law as social engineering functions. It's just that the penetration of the value system contained therein, as a result of marriage mixing, for example, is outside the context of the law. The state, which has succeeded in producing this progressive law, must also provide a comprehensive understanding to a group of people who strictly maintain customary and religious values, who reject the tradition of intermarriage because it is heavily charged with sara. So that this very proud legal product becomes more acceptable. Mixed marriages have penetrated all corners of the country and layers of society

The Concept of Legal Protection for Children from Mixed Marriages in Guaranteeing Human Rights in the Future

States shall ensure the fulfillment of the human rights of their citizens. Conversely, citizens have obligations to their country. Citizens are one of the main elements in the process of forming a state. A country

cannot exist without citizens. Thus a citizen is a member of a state. The state is formed because of a social contract or community agreement as proposed by JJ Rosseau, in the theory of People's Sovereignty it is stated that no government is legitimate unless we give recognition to its authority.

The rights of citizens that need to be protected. The issue of rights and protection of citizens must be positioned appropriately within the framework of human rights protection without disturbing state sovereignty (Mahfud, 2010). All are entitled to equal protection against any form of discrimination contrary to the declaration of human rights and against any incitement leading to this kind of discrimination (National Commission on Human Rights, 2008). Likewise, citizenship status as a right of citizens that must be protected by the state.

A single citizenship system was implemented in anticipation of dual and stateless citizenship. The principle of single citizenship explained in the general explanation of Law Number 12 of 2006 makes there is no room for dual nationals and stateless people (Bernanda, 2020). The Indonesian state applies the principles of Ius Soli and Ius Sanguinis in a limited manner. Law Number 12 of 2006 accommodates the application of dual citizenship status on a limited basis for children born from mixed marriages (Charity, 2016).

The framers of the law set the dual citizenship status on a limited basis to address the problems arising from mixed marriages. These problems can occur during the marriage or after the end of the marriage. Limited dual citizenship has consequences for children resulting from mixed marriages, where the child is required to submit to two jurisdictions of parents of different nationalities. Dual citizenship status is regulated in a number of articles in Law Number 12 of 2006, including Article 4, Article 5 paragraph (1), Article 6 paragraph (1), paragraph (2), and paragraph (3), Article 21 paragraph (1), Article 23 letter c, Article 25 paragraph (1), Article 25 paragraph (2), Article 25 paragraph (3), and Article 25 paragraph (4), as well as Article 41.

If referring to the provisions above, the State of Indonesia recognizes the principle of limited dual citizenship for children. The child has dual citizenship or dual citizenship until the specified age limit, which is 18 years or until the child is married. This policy was issued because the previous regulation did not reflect the human rights of children from mixed marriages, thus injuring the human rights of these children. With the new Citizenship Law, it is hoped that there will be no more children from mixed marriages who do not have citizenship. However, the implementation of dual citizenship status in Law Number 12 of 2006 raises problems. The problem arises, because the provision does not provide automatic Indonesian citizenship status for foreign women who marry Indonesian men, and vice versa. This results in differences in nationality within the family of a mixed marriage. The factor of nationality difference between the parties that distinguishes a mixed marriage from a non-mixed marriage. Differences in nationality not only occur at the beginning of a mixed marriage, but can continue after the formation of a mixed marriage family (Rajab, 2017).

To provide legal protection to every citizen and provide legal certainty guarantees about who are Indonesian citizens so that legal equality among citizens is reflected. Furthermore, in the 1945 Constitution of the Republic of Indonesia, especially in several articles, it states that citizenship rights which are part of human rights are rights for everyone listed in Article 28 D (4), Article 28 E (1), Article 28 G (1), Article 28 H (2), and Article 28 I (12) so that they must get legal protection.

The term protection according to Black's Law Dictionary, protection is the act of protecting (Garner, 2014). Regarding citizenship status, it is very important for everyone so that their position as a legal subject entitled to legal rights and obligations can be guaranteed legally and actually. Especially in international traffic law that connects a person with others in international associations (Bradley &; Ewing, 2003).

From the above provisions of international law, it is clear that the international community recognizes that citizenship status is important. Related to dual citizenship, the relevance of international law underlying dual citizenship, in which Indonesia as a member of the United Nations, has ratified the International Covenant on Civil and Political Rights (ICCPR) which relies on the Universal Declaration of Human Rights, in the form of Law Number 12 of 2005 concerning the Ratification of the International Covenant on Civil and Political Rights in Article 13.

In the provisions of national law, it is explained that national law considers citizenship status to be an important human right and has been recognized juridically. For this reason, it is very important for everyone to get certainty about their citizenship status, to know the legal rights and obligations of the person concerned and to ensure the protection of their human rights. According to Satjipto Raharjo, legal protection is to provide protection for human rights that are harmed by others and legal protection is given to the community in order to enjoy all the rights provided by law (Rahardjo, 2014) which is divided into two, namely preventive legal protection and repressive legal protection (Muchsin, 2003). The context of child protection resulting from mixed marriages can be done in a preventive way. According to Law Number 12 of 2006 that the Regulation Regarding Children from Mixed Marriages The new citizenship law contains the principles of general or universal citizenship.

The principle of single citizenship contained in the laws and regulations on citizenship in Indonesia can be seen as a process that emphasizes the existence of an external relationship between each citizen and his

country of origin. This will certainly give birth to close relationships and relationships between fellow citizens. The process of the birth of a law related to human rights values is an inseparable part of the state's guarantee of the rights of every citizen. Laws born by the legislative process clearly have a generally applicable and binding nature. The enforceability of norms in the Law lies in the conformity of norm needs and human rights as State obligations (Soemantri, 2006)

CONCLUSION

From the results of the study, it can be concluded that First, the determination of the principle of ius sanguinis and ius soli in relation to the status of children resulting from mixed marriages including Ius sanguinis or the principle of descent and the principle of ius soli based on the place of birth in the territory of a country". Dual citizenship for life is still difficult to practice in Indonesia because Article 6 of the Citizenship Law adheres to the principle of single citizenship. On the principle of "ius sanguinis" there is a limited dual citizenship arrangement that applies to children of mixed marriages. This applies only until the child turns 18 years old is extended to a limit of 3 years or married to avoid stateless (without citizenship). The implementation of the law has not run fully in accordance with the expectations of the community in efforts to protect children resulting from mixed marriages. Second, the concept of legal protection for children resulting from mixed marriages in guaranteeing human rights in the future. In ensuring the legal protection of children resulting from mixed marriages, making regulations to take temporary special measures, the citizenship law has an 18-year time limit extended by 3 years and the rights as an Indonesian citizen can be protected for life. This is in line with the age of being capable and mature in choosing to become an Indonesian citizen to be able to have their rights in accordance with the provisions of the law in force in Indonesia and based on Article 28 H paragraph (2) of the NRI Constitution of 1945. The aim is to further guarantee the citizenship rights of children resulting from mixed marriages that are no longer in accordance with the development and demands of the international community in global associations that require the treatment and position of citizens to the law.

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