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Bipatride for Indonesian Diaspora

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***Abstract**: This study aims to determine the status of dual citizenship law (bipatride) for overseas Indonesian overseas (Diaspora). This research is prescriptive legal research with normative juridical approach method in the form of research on the principle of citizenship law with data collection technique through literature study in the form of primary, secondary and tertiary law material with qualitative legal material analysis. The results of the study show that Law No. 12 of 2006 on Citizenship recognizes only limited dual citizenship that the status of the Diaspora citizenship is limited. However, there is a need for further regulation regarding the limitation of the use of this limited dual citizenship because in the Act does not regulate the consequences of circumstances that allow a person to not choose one of his nationalities in the event that the person has limited dual citizenship status.*

***Keywords:** Bipatride; Legal Status; Indonesian Diaspora.*

INTRODUCTION

The State is an organization within a certain territory and has the highest legal authority, recognized and obeyed by all citizens within the territory. The state is also a social group occupying a certain territory or region organized and managed under effective political and governmental institutions, has a political, sovereign entity so that it is entitled to determine its national objectives[1]. Based on Article 1 of the Montevideo Convention of 1933 on the Rights and Duties of the State stated that a country's qualifications must meet 4 (four) elements, among others:

1. The presence of residents; The population is a group or group of individuals consisting of two sexes regardless of the tribe, religion, language, culture that has lived in a society and is bound in a state through the relationship of jurisdiction and

[1] Pusat Bahasa Departemen Pendidikan Nasional, *Kamus Besar Bahasa Indonesia*, 2007, Jakarta Balai Pustaka, p. 777

politics embodied in the form of citizenship. Population is the main element in the formation of a country and become one of the main requirements of the formation of the state. So an island or territory without a population is unlikely to become a country. Important terms of this element of the population of each individual people or this society must be organized well (organized population). Because it is very difficult to imagine if a country is organized by a disorganized society.[2]

2. Regions are fixed; Definition of a fixed area is an area occupied and made permanent residence by residents or people of that country. Therefore, to be called a fixed area then one of the conditions is that there is a state border. The territory of a country can be land, sea and air above it.
3. The existence of Government; As a supreme organization the state needs representation to properly regulate and manage the country according to commonly defined legal standards, so the state requires statesmen to run the state or government.
4. Recognition from other countries; Recognition from other countries is often referred to as a declarative element, meaning that this element is not constitutive but must be done, because basically every country can not walk alone without recognition from one or more other countries for cooperation between countries can be implemented. Theoretically there are 2 (two) types of recognition, among others: De facto or factual recognition is the recognition that based on the fact (factual) that exist that have met the requirements to become a country. As an illustration, Indonesia's de facto independence on August 17, 1945 and recognition de jure recognition of other countries against a country according to international law. The existence of de jure recognition, the newly formed or newly independent state has the rights and obligations as a member of society on an international scale. The recognition of other countries de jure of the Indonesian nation began on August 18, 1945, upon the passing of the 1945 Constitution of the Republic of Indonesia, the election of the president and vice president, and the inauguration of the legislative body (KNIP) before the formation of the DPR / MPR.

As one of the constitutive elements of the establishment of a state, the existence of the population or the people has become mandatory for the state to organize and manage it in the

[2] Huala Adolf.,2002 *Aspek-Aspek Negara Dalam Hukum Internasional*, Jakarta., Raja Grafindo Persada, p. 3

form of rights and obligations that are clearly defined in state regulations. Every citizen of a country can freely choose a citizenship status. It is a basic right of every citizen. According Soepomo[3] referred to as a resident is a person who legally resides within a country. The population consists of citizens and foreigners (non-citizens). Basically every resident must have 1 (one) citizenship status, but some can have 2 double citizenship or Bipatride, even citizenship status may be lost or canceled (Apatride) if the citizen does not violate the applicable legal provisions Some cases law also often occurs related to Bipatride problem in Indonesia. One of them is the case of Arcandra Tahar who was dismissed as Minister of Energy and Mineral Resources after being in charge for approximately 20 (twenty) days because he was known to be a US-Indonesian citizen (bipatride)[4]. It has been proven legally that Arcandra has two state passports. The requirement to become a state official is to be an Indonesian citizen only. So we lost one of the million people of the nation's assets. Although on the other hand they want to dedicate to the nation of Indonesia without removing one of the citizenship. As a country with the densest population number 4 (four) in the world bipatride becomes a problem after a lot of abroad overseas Indonesia or called as Diaspora both non-permanent (non-permanent) and permanent (resident) that not only based by cultural romanticism but to expand the network or networking Indonesia wants to remain an Indonesian citizen status. With around 8 million people, Indonesia's Diaspora is in the 3% range of the total population in Indonesia and spread across seven continents, namely North America, South America, Antarctica, Africa, Europe, Asia and Australia. They live abroad to study or work with various ethnic, religious, and diverse backgrounds in economics and education. This Indonesian diaspora has a variety of ideas, potential and expertise. This can certainly be a new socio-economic and political force if properly utilized by the government

[3] Tutik Triwulan Titik., (2006)., *Pokok-Pokok Hukum Tata Negara*., Jakarta., Prestasi Pustaka p. 227

[4] http://nasional.kompas.com/read/2016/08/19/16573431/menimbang.kewarganegaraan.ganda Harian Kompas Online edisi Tanggal 19 September 2016 pukul 16.47 WIB

METHODS OF THE RESEARCH

The type of research is normative-legal research, which is used to study the rules of law or legal provisions with emphasis on the principles of law that relating to the Bipatride and Diaspora, especially related to the interaction between them.

The technique of data collection used is literature study, by studying various legal materials includes primary, secondary, and tertiary in accordance with the object of study. Data analysis is done by analyzing qualitative data by reducing data, presenting data and drawing conclusion**.**

ANALYSIS AND DISCUSSION

History of Citizenship Arrangement

After the independence period, the Indonesian citizenship law has undergone three changes, namely Law Number 3 Year 1946 on Citizenship (Act No. 3 of 1946), Law Number 62 Year 1968 Citizenship (Act No. 3 of 1946), and the new is Law Number 12 of 2006 (Law Number 12 Year 2006).

1. Act No. 3 of 1946

   In accordance with Article 26 of the 1945 Constitution, on April 10, 1946, Law No. 3 of 1946, which regulates the citizenship and citizenship of the Republic of Indonesia. This law is retroactive since August 17, 1945. Under Article 1 of this first law, Indonesian citizenship may be obtained by:

   a. Indigenous Indonesians within the territory of the state of Indonesia;
   b. A person who does not belong to the above-mentioned group but a derivative of that group and is born at a place of residence, and resides within the territory of the State of Indonesia: and a non-derivative person of the most recently born, occupied, and resident classes for at least five consecutive years separately within the territory of the State of Indonesia.the age of 21 years or has been married;
   c. Persons who obtain Indonesian citizenship by naturalization;
   d. Legitimate child, legalized, or admitted in legal manner by his father, at the time of birth his father has Indonesian citizenship;
   e. Child born within three hundred days after his father who has Indonesian citizenship died;
   f. Children only whose mothers are recognized in a lawful way, who at birth have Indonesian citizenship;

g. Children who are legally appointed by Indonesian citizens;
h. Children born in the territory of the State of Indonesia, whose father or mother is not legally recognized;
i. Children born in the territory of the State of Indonesia who is not known who his parents or citizenship.

Basically Article 1 of Law No. 3 of 1936 states there are 4 (four) ways to become an Indonesian citizen. First, for indigenous people automatically become citizens of Indonesia. Second, people who have been more than 5 (five) years and never declare themselves to reject Indonesian citizenship are Indonesian citizens. Third, all the descendants of the first and second ways. Fourth, foreigners who register to become citizens of Indonesia[5] This law in principle adheres to the principle of ius soli. Indonesians passively obtain the status of Indonesian citizens. However, for those who do not wish for the status, it is permissible to exercise their right of repudiation (the right to refuse citizenship) by submitting a statement in writing to reject Indonesian citizenship. Act No. 3 of 1946 has been amended several times, amended by Act No. 6 of 1947, Law No. 8 of 1947, and Act number 11 of 1948, Law No. 6 of 1947 added provisions in Article 1 of Law no. 3 years 1946 with: Letter J which reads "a legal entity established under the law applicable in the state of Indonesia and domiciled within the territory of the state of Indonesia." Law Number 6 Year 1947 then stipulates that an Indonesian citizen referred to in Article 1 Subb, having the nationality of another country, may relinquish his nationality from the Indonesian state by expressing an objection to being an Indonesian citizen. Changes to the latter two laws are intended to provide an opportunity for those who wish to exercise their repudiation rights until the 17th of August 1948. From August 17, 1948, the Indonesian population consists of Indonesian citizens and foreign nationals. Every foreigner who becomes an Indonesian citizen must go through the process of citizenship. Based on Article 5 of Law No.3 of 1946

2. Charter of Contracting of Citizenship

Legal certainty regarding Indonesian citizenship status based on Act No. 3 of 1946 became disturbed by the existence of the Citizenship Approval Charter (PPPWN) on

[5] Benny D. Setianto,. *Pergulatan Wacana Hak Asasi Manusia di Indonesia*, 2003, Jakarta: Masccom Media, p. 146

27 December 1949. At that time there was surrender of sovereignty from the Dutch kingdom to the Republic of Indonesia and the 1945 Constitution of NRI replaced by the Constitution of RIS 1949. The transfer of sovereignty brought the consequences of the division of citizens between the Dutch kingdom and the United States of Indonesia. The two countries must determine who is the citizen of each country, on 17 August 1950, the 1945 Constitution of RIS 1949 replaced by UUDS 1950. Article 144 UUDS 1950 determines that while waiting for the law that regulates Indonesian citizenship, that is citizen of Indonesia is those who have Indonesian citizenship based on PPPWN and those whose nationality is not stipulated by PPPWN, which on December 27, 1949 have become citizens of Indonesia based on Law No. 3 of 1946. Charter approval of citizenship distribution adheres to the principle of ius soli, as good for people Indigenous Indonesians, Arabs, Chinese, and Dutch descendants who became Indonesian citizens determined that they were first born or have resided for a certain time in Indonesia.

3. Law No. 62 of 1958 on Citizenship

   Based on Article 5 of the Provisional Constitution of 1950 on January 11, 1958, Law No. 62 of 1958 on the Citizenship of the Republic of Indonesia was enacted. Article 1 of Law No. 62 of 1958 stipulates that Indonesian citizens are persons based on legislation and / or agreements and /or regulations that have been effective since August 17, 1945 have become citizens of the Republic of Indonesia. In terms of the principle of citizenship by birth, Law No. 62 of 1958 emphasizes the use of sanguine principles. This is clearly seen in Article 1 of Law No. 62 of 1958 which regulates who the Indonesian citizen is. But the ius soli principle is also used to avoid the emergence of apatride status. In the case of marriage, this law in principle embraces the principle of legal unity. This is stipulated in the provisions of article 5 (five) on citizenship and Article 9 (Nine) and Article 10 (ten) on obtaining Indonesian citizenship as a result of marriage. General explanation of Law Number 62 Year 1958 states to obtain Indonesian citizenship, that is because birth, appointment, granted the petition, nationality, marriage, father and / or mother and because of statement.

4. Law Number 12 Year 2006 regarding Citizenship

   The old citizenship law is judged by various aspects to be contrary to the concept of equality of every citizen, so it

is replaced by a new citizenship law that is Law Number 12 Year 2006. This law has made a significant breakthrough in eliminating various discriminations during this. Article 2 of Law Number 12 Year 2006 states that the Indonesian citizens are indigenous Indonesian people and other people of the nation who are ratified by law as citizens. Article 4 of Law Number 12 of 2006 states that Indonesian citizens are:

a. Anyone who is in accordance with the laws and / or the agreement of the Government of the Republic of Indonesia with another country before this Act becomes a citizen of Indonesia;
b. Children born from the legal marriage of a father and mother of an Indonesian citizen;
c. Child born from a legal marriage of an Indonesian citizen father and a foreign national mother;
d. A child born of a legal marriage of a foreign father and a mother of an Indonesian Citizen;
e. A child born of a legal marriage of a mother Indonesian citizen, but her father does not have the nationality or law of the country of origin her father does not grant citizenship to the child;
f. A child born within 300 days after his father dies from a legal marriage and his father is an Indonesian citizen;
g. A child born outside the legal marriage of a mother of an Indonesian citizen;
h. A child born outside the legal marriage of a mother of a Foreign Citizen recognized by an Indonesian Citizen's father as a child and the admission is made before the child is 18 years of age or unmarried;
i. Child born in the territory of the Republic of Indonesia which at the time of birth is not clear the status of the father and mother's citizenship;
j. Newborns found in the territory of the Republic of Indonesia as long as his father and mother are unknown;
k. Child born in the territory of the Republic of Indonesia if his father and mother have no nationality or unknown existence;
l. Child born outside the territory of the Republic of Indonesia from a father and mother of an Indonesian citizen who due to the provisions of the country in which the child is born grants citizenship to the child concerned;

m. The child of a father or mother who has been granted his citizenship request, then his father or mother dies before taking an oath or declaring a pledge of allegiance.

The principles of citizenship adopted by Law Number 12 of 2006 are as follows:

a. The principle of ius sanguinis (law of the blood) is the principle that determines one's nationality based on offspring, not on the country of birth.
b. The principle of ius soli (law of the soil) is the principle that determines the nationality of a person by country of birth, which is limited to children in accordance with the provisions of Law No. 12 of 2006.
c. The principle of single citizenship is the principle that determines a citizenship for every person.
d. The principle of limited dual citizenship is the principle that determines dual citizenship for children in accordance with the provisions set forth in Law Number 12 of 2006.

The Diaspora

The term diaspora comes from the Greek word "diaspeiro" used in the 5th century (five) BCE. The word diaspora is increasingly popular when used by the Jewish Diaspora and Black / Africa Diaspora where the Jewish nation is spread in various other countries as well as the African nation in the United States and England. The term diaspora itself is related to a group of nations that are engraved in another country. Gabriel Sheffer in his 1986 book entitled " a New Field of Study: Modern Diaspora in International Politics " gives the definition of the modern Diaspora a migrant ethnic minority of origin who resides and acts in the host State but maintains the sentimental and material relations strong with their homeland / country of origin. Relating to Indonesian diaspora can be divided into 4 (four) Diaspora categories, namely: (1) Indonesian Indonesian passports (2) Indonesians who then become other citizens (3) people who are of Indonesian descent (4) lovers / Indonesian sympathizers.

Bipatride for Diaspora

Before this law was born, as previously described, Law No. 62 of 1958 has fully recognized Bipatride or dual citizenship. This is clearly reflected when the New Order era of the Indonesian diaspora can have two nationalities, for example, when an

Indonesian citizen migrates or works permanently abroad, that person will not lose his status as an Indonesian citizen. Similarly, when ethnic tianghoa, whose ancestors embraced the principle of Ius Sangunis to live and settle in Indonesia, will not erase the Chinese citizenship status that it has. The birth of Law Number 12 of 2006 on Citizenship is a big leap for Indonesian diaspora. However, this rule basically does not recognize bipatride or apatride, but the dual citizenship granted to the child in this law is an exception. This relates to the legal status of the child in order for the child to obtain legal protection from the State concerned.

The principle of limited dual citizenship is itself the principle that determines dual citizenship for children in accordance with the provisions of this law. This limited dual citizenship principle generally occurs because of mixed marriages committed by the Indonesian diaspora, thus giving birth to children who have parents of different nationalities. A child is an incompetent person to determine, he needs more protection. Therefore the state is obliged to guarantee that protection through its status as a citizen so that a child may obtain his citizenship status for his protection even if he has obtained citizenship from another country. It is certainly limited to the maturity level of the child, because at the level of maturity a child can make his choice. The provision of limited dual nationality serves to facilitate the child to live his life in the country concerned, such as the issue of the child's residence permit.

A residence permit granted to foreigners children is valid for one year only. In addition it is required to report to the police, to various levels of administration from the level of Village, District, District to the Office of Population Affairs at the Provincial level. Every year the processing of these letters takes a long time and costs a lot. With limited dual citizenship no residence permit is required. Also related to the child's education, with the dual dual citizenship of the child can get education in public schools. Under the provisions of this law dual citizenship may occur, but it is restricted only to the age of 18 years or has been married. This is confirmed in Article 6 of Law Number 12 of 2006 which states:

> Paragraph (1): "In the case of the citizenship status of the Republic of Indonesia against children as referred to in Article 4 letter c, letter d, letter h, letter l and Article 5, the child shall have dual citizenship, after the age of 18 or married the child shall declare choose one of his nationalities".
>
> Paragraph (2): "The declaration to elect citizenship as referred to in paragraph (1) shall be made in writing and submitted to the official by enclosing the documents as stipulated in the laws and regulations".
>
> Paragraph (3): "Statement to elect citizenship as referred to in paragraph (2) shall be submitted within 3 (three) years after the child is 18 (eighteen) years old or already married".

On the other hand, according to Bagir Manan[6], there is a problem in Article 6, the question arises that if the child (person) does not perform the obligation? This law in no way regulates the consequences of not performing the obligations required of Article 6. This shall be prescribed. According to Bagir Manan, there are two options, first: considered to choose Indonesian citizenship. second; considered to choose foreign citizenship. The two options both contain legal issues. With respect to the first choice, what is a legal presumption, the child (s) chooses Indonesian citizenship, given the dual nationality of the person (s). This will depend on the citizenship law of the country concerned, or on the basis of a bilateral agreement between Indonesia and the country concerned. One of the risks is the rights and obligations of the state that do not "recognize" the unilateral discharge. The second option also contains legal issues, namely: Firstly it is contrary to the obligation to protect the citizens and the principle of not giving ease to release Indonesian citizenship. Second; laws and attitudes of the state to the dual citizenship of the child (persons).

Concerned. One of the risks is the rights and obligations of the state that do not "recognize" the unilateral discharge. The second option also contains legal issues, namely: Firstly it is contrary to the obligation to protect the citizens and the principle of not giving ease to release Indonesian citizenship. Second; laws and attitudes of the state to the dual citizenship of the child (persons).

However, dual nationality does not apply to Indonesian diaspora if it has

[6] Bagir Manan, *Hukum Kewarganegaraan Indonesia dalam UU Nomor 12 tahun 2006*, FH UIIPress, Yogyakarta. 2009. p. 70

done the things contained in Article 23 namely:

1. Obtaining another nationality of his or her own will;
2. Not refusing or not releasing another nationality, while the person concerned shall have the opportunity;
3. Declared lost citizenship by the President on his own application, if the concerned is 18 years old or already married, residing abroad, and with the declared lost Indonesian citizenship does not become without citizenship;
4. Enter in the foreign army service without prior authorization by the president;
5. Voluntarily enter into foreign service, whose offices in such a service in Indonesia in accordance with the provisions of law and regulations can only be held by Indonesian citizens;
6. Voluntarily pledge an oath or declare a pledge of allegiance to a foreign country or a part of that foreign country;
7. Not obliged but to participate in the election of a constitutional nature for a foreign country;
8. Having a passport or a letter of a passport from a foreign country or a letter that may be interpreted as a valid citizenship mark of another country on its behalf;
9. Residing outside the Republic of Indonesia for 5 years continuously not in the framework of the state service, without a valid reason and intentionally not expressing his intention to remain an Indonesian citizen to the representatives of the Republic of Indonesia whose working area covers the residence concerned.

Furthermore, Article 26 states the loss of citizenship for the husband or wife of an Indonesian Citizen with the following provisions:

1. WNI woman married to a foreigner who has lost her nationality, if by law the country of origin of her husband's citizenship of a wife follows the husband's nationality as a result of such marriage
2. WNI men married to WNA women lose the nationality of RI, if according to the law of his wife's nationality the husband follows the citizenship of the wife as a result of the marriage page.

This is in contrast to the Indonesian constitution which makes the regulation of citizenship in the perspective of Human Rights (Human Rights) namely 28D paragraph (4) of the 1945 Constitution of the Republic of Indonesia states that everyone is entitled to citizenship status. Article 28F Paragraph (1) of the 1945 Constitution states that every person is free to embrace religion and worship according to his / her religion, choosing education and teaching, choosing a job, choosing citizenship and without

discrimination entitled to enjoy the rights sourced and attached to citizenship and obliged to perform his duty as a citizen countries in accordance with the provisions of legislation. The reality of Indonesian diaspora is as a networked community and strengthened with the potential of human resources that are not only great, but " the selected few ". Demanding a new political paradigm of legal and human rights for Indonesia, advocacy of dual citizens requires steps as part of the world's largest democracy. Moreover, the struggle of dual citizenship should be interpreted as a struggle to ensure the realization of the protection of human rights, especially children and the Indonesian diaspora perempun. Need smart attitude of Indonesian society and national policy makers in articulating the phenomenon and the national policy makers in a policy conducive to the continuity of ideas and national goals of Indonesia.

Advantages and Disadvantages of Bipatride for Indonesian Diaspora

The rules in each country must have different rules on the Bipatride principle, there are countries that allow dual citizenship such as, the United States, Canada, France. However, there are also countries that do not allow Bipatride, such as Indonesia and Japan. In Indonesia alone known only the principle of limited dual citizenship, which is given to the child of a married perpetrator, a child of a father / mother who obtains the citizenship of the Republic of Indonesia, a child of a foreign citizen appointed by an Indonesian citizen, and a child of an Indonesian citizen born in country ius soli.

The advantages of applying Bipatride principles for diaspora Indonesia are:

1. The ease of access of diaspora to entry in two areas of the country that have the potential to enhance the career and development of both countries;
2. Encouraging investment between the two countries;
3. Improved skills and education in various fields that can encourage technology transfer cooperation between the two countries;
4. When applied in Indonesia, the climate of labor and employment growth is increasing.

On the other hand, Bipatride has the following disadvantages:

1. A diaspora may have dual duties such as paying taxes on both States;
2. Can encourage migration for citizens who may not have enough skills and education, especially for an advanced target country;
3. Where a diaspora commits a non-criminal or separatist movement may escape or seek asylum in another country;
4. Citizens will tend to choose to live in a developed country like dual Indonesian - American citizenship.

CONCLUSION

From the description above it can be concluded that:

1. Bipatride for Indonesian Diaspora has actually been applied to Law Number 62 Year 1958 about Citizenship so that some citizens like ethnic tianghoa who legally embrace ius sanguinis have two citizenship namely China and Indonesia. However, it has been changed to single citizenship since Law No. 12 of 2006 on Citizenship is enacted, even if it only recognizes Limited Dual Citizenship to the children of Indonesian Diaspora.
2. The political development of Indonesian citizenship law, dual citizenship or Bipatride is only limited to 18 years old or married to Law Number 12 Year 2006 regarding Citizenship. It is used in order to provide protection to immature children. However, there is a need for further regulation regarding the limitation of the use of this limited dual citizenship because in the law it does not regulate the consequences of circumstances that allow a person to opt out of one of his nationalities in the event that the person has a limited dual citizenship status.

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