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INDONESIAN PRIVATE INTERNATIONAL LAW: THE DEVELOPMENT AFTER MORE THAN A CENTURY

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Abstract

Indonesian Private International Law (PIL) until now is based on Algemene Bepalingen van Wetgeving (AB) described in the State Gazette No.23 of 1847. The latest development of Indonesian PIL was the issuance of Academic Bill of PIL in 2014. Between the time span of more than 150 years, what is the development of Indonesian PIL? Whether the principles of PIL as stipulated in Article 16 AB (Principle of Nationality), 17 AB (Lex Re Sitae) and 18 AB (Locus Rigit Actum) remains in the Bill of Indonesian PIL? Is there any alteration? Is there any PIL regulation in any other Indonesian prevailing regulation besides AB? This writing would like to answer such questions and reviewing the Bill of Indonesian PIL. The comparison research method will be made to the PIL regulation in the Netherlands to see the development of AB in its original country, particularly the three PIL's Principles.

Keywords: Indonesian Private International Law, Academic Bill of Indonesian PIL

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I. INTRODUCTION

The principles of Private International Law (herein referred to as, the “**PIL**”) of the Republic of Indonesia (herein referred to as, the “**RI**”) are contained in Art.16, 17, 18 *Algemene Bepalingen van Wetgeving voor Nederlands Indië* [General Legislative Provisions for the Dutch East Indies], State Gazette 1847 No.23 (herein referred to as, the “**AB**”).

Art.16 AB regarding the applicable law of personal status states that, “*De wettelijke bepalingen betreffende den staat en de bevoegdheid der personen blijven verbindend voor ingezetenen van Nederlands-Indië, wanneer zij zich buiten's lands bevinden.*” [The legal provisions concerning the status and personal authority remain binding for residents of the Dutch East Indies whenever they are abroad.]

Art.17 AB regarding the applicable law of goods or *lex rei sitae* states that, “*Ten opzichte van onroerende goederen geldt de wet van het land of plaats, alwaar die goederen gelegen zijn.*” [Real property is sub-

ject to the law of the country where the property is located.]

Art.18 AB regarding the applicable law of legal form or *lex loci actus* states that, “1. *De vorm van elke handeling wordt beoordeeld naar de wetten van het land of de plaats, alwaar die handeling is verricht.* 2. *Bij de toepassing van dit en van het voorgaande artikel moet steeds worden acht gegeven op het verschil, hetwelk de wetgeving daarstelt tussen Europeanen en Inlanders.*” [1. The form of every transaction is determined by the laws of the country or the place where the transaction takes place. 2. With the application of the current as well as the previous article, consideration should be given to the differences between Europeans and natives as provided in the legislation.]

After more than a century after its promulgation, these PIL articles remain effective in RI based on Art.1 of the Transitional Provision of the Indonesian Constitution 1945. The RI’s PIL is developed, as well as it is in the original country, the Netherlands (hereinafter referred to as “NL”). To see whether those principles are developed differently or remain slightly similar is one of the purposes of this writing.

In relation with the schemes, this writing will be divided in three main topic, namely about the principle described in Art.16, 17, 18 AB in RI and its application and/or development after 169 years. The development of each article will be elaborated pursuant to the prevailing and relevant regulations; particularly the regulations promulgated post the independence of RI. Landmark decisions from the courts will be discussed, if relevant and necessary. Second part is containing the comparison of AB towards the PIL’s regulations in NL.¹The third part is containing any lesson or points which could be learnt to enrich the Academic Bill of PIL in RI (hereinafter referred to as the “**Academic Bill of PIL**”).²

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¹ The Netherlands, Act of 19 the May 2011 on establishment and implementation of Book 10 (Private International Law) of the Civil Code (Book 10 Civil Code establishment and Implementation Act).

² In March 2014, an Academic Bill on PIL was again discussed. The Bill of 1997 acted as the starting point of the discussions conducted by the new team chaired by I.B.R. Suprancana. This team worked for nine months before introducing the new bill on PIL issued in November 2014. The Bill of 2014 was issued by the National Law

II. ARTICLE 16 B: THE PERSONAL STATUS

A. NATURAL PERSONS

Art.16 AB states that the prevailing law and regulation in RI concerning personal authority or the rights and title of a person remains valid and effective for RI's nationals wherever they go. Therefore, the applicable law to RI's nationals in relation with their capacity and competence is the RI's law. It remains to bind them where ever they go, it has extraterritorial title.

This provision is interpreted by analogous to any foreigners who are within the territory of RI. The law of state where they become the citizen will be the applicable law to them in determining their capacity and authority. It is clear that RI is implementing the Principle of Nationality, instead of Principle of Domicile.

1. The Principle of Nationality In Prevailing Regulation and Cases In RI

Art.16 AB is never replaced by any regulation up to this moment. Yet, the principle of nationality has a lot of development in RI. Post the independence of RI, there were several laws of nationality that applied in RI, namely the Law No.3 of 1946 regarding the Nationality and Resident of RI as amended, Law No.62 of 1958 regarding the Nationality as amended, which then replaced by Law No.12 of 2006 regarding the Nationality of RI, as described below.

a. Law No.3 of 1946 as Amended.

For the first time after its independence, the nationality law was stipulated in Law No.3 of 1946 regarding Nationality and Resident of RI, as amended by the Law No.6 of 1947 regarding the Amendment to Law No.3 of 1946 regarding Nationality and Resident of RI, amended by Law No.8 of 1947 regarding Extension of Submission of Nationality Statement and Law No.11 of 1948 regarding Re-extension of Submission of Nationality Statement, hereinafter such laws referred to as the "**Law No.3 of 1946**".

Development Agency (*Badan Pembinaan Hukum Nasional*) under the Department of Law and Human Rights of RI, and should be evaluated by a public hearing. After the process of a public hearing, the Bill of 2014 will be sent to the Government of RI and for approval to the House of Representatives.

Worth to note that it has stipulation regarding entity whereby none in the next nationality acts. It is mentioned that “*Warga Negara Indonesia ialah: ... Badan hukum yang didirikan menurut hukum yang berlaku dalam Negara Indonesia dan bertempat kedudukan di dalam daerah Indonesia.*” This stipulation was added in the first amendment, Law No.6 of 1947, whereby it stated that Indonesian nationals included the entities which established according to the prevailing laws in the territory of RI and having its domiciled or legal seat within the territory of RI.

b. Law No.62 of 1958 as Amended.

On 11 January 1958, Law No.62 of 1958 regarding the Indonesian Nationality was promulgated, which was amended by the Law No.3 of 1976 regarding the amendment to Article 18 of Law No.62 of 1958, hereinafter both are referred to as the “**Law No.62 of 1958**”.³

Law No.62 of 1958 determined that Indonesian nationals were, among others, persons who were determined by agreement or laws as of 17 August 1945 as Indonesian nationals, the children who their father are Indonesian nationals, or their mother are Indonesian nationals while their father were not know whereabouts, including the adopted child whose the parents are Indonesian nationals.⁴ Those are reflects the concept *ius sanguinis*. The concept of *ius soli* was used to avoid any stateless persons. In relation with marriage, Law No.62 of 1958 adopted the principle on law for one family. The foreign wives will become Indonesian nationals, except she makes a statement to refuse it within 1 year after the marriage, and vice versa.⁵ The Law No.62 of 1958 stipulated that one person can only have one nationality at once.

³ Indonesia, *Undang-undang tentang Kewarganegaraan Republik Indonesia (Law regarding Nationality of the Republic of Indonesia)*, UU No.62 Tahun 1958, LN No.113 Tahun 1958, (Law No.62 of 1958, SG No.113 Year 1958; as amended by *Undang-undang tentang Perubahan Pasal 18 Undang-Undang No.62 Tahun 1958 Tentang Kewarganegaraan Republik Indonesia(Law regarding Amendment to Article 18 of Law No.62 of 1958 regarding the Nationality of the Republic of Indonesia)*, UU No.18 Tahun 1976, LN No.20 Tahun 1976 (Law No.18 of 1976, SG No.20 Year 1976).

⁴ Indonesia, Law No.62 of 1958, Art.1.

⁵ Indonesia, Law No.62 of 1958, Art.5, Art.9, 10.

c. Law No.12 Of 2006 Regarding Nationality

Law No.12 of 2006 regarding the Indonesian Nationality⁶ was promulgated, hereinafter referred to as the “**Law No.12 of 2006**” to replace the Law No.62 of 1958. The Law No.12 of 2006 has slight changes in the Principle of Nationality. This amendment is to protect the children of international mixed marriage and adjustment due to the ratification of CEDAW by RI.⁷

Previously, RI requires that one person can only have one nationality at once while the RI nationality can only be obtained from an Indonesian father. An Indonesian mother can give her nationality to her children when the children do not have the nationality from the father or in certain circumstances.⁸ This provision results there were some children born became foreigners, and in the event of divorce, they could be deported from RI and separated from their beloved mother.⁹

The Law No.12 of 2006 made amendments to overcome those problems. RI remains adopt the Principle of Nationality, but now a limited dual nationality citizenship. The children from international mixed marriage could have dual nationality yet limited until they are eighteen years old. After that, they must choose one of them.¹⁰ The age limitation is accordance with the other maturity limitation that applicable in RI.¹¹

⁶ Indonesia, *Undang-undang tentang Kewarganegaraan Republik Indonesia (Law regarding Nationality of the Republic of Indonesia)*, UU No.12 Tahun 2006, LN No.63 Tahun 2006, (Law No.12 of 2006, SG No.63 Year 2006).

⁷ CEDAW is UN Convention on the Elimination of All Forms of Discrimination Against Women, ratified by RI based on the *Undang-Undang tentang Penghapusan Segala Bentuk Diskriminasi Terhadap Wanita (Law regarding Ratification of Convention on the Elimination of All Forms of Discrimination Against Women)*, Undang-undang No.7 tahun 1984, LN No.84 Tahun 1984 (Law No.7 of 1984, SG No.84 of 1984).

⁸ Indonesia, Law No.62 of 1958, Art.1

⁹ For further explanation see Zulfa Djoko Basuki, “*Dampak Perkawinan Campuran terhadap Perwalian Anak (Child Custody)*” (Jakarta: Yarsif Watampone, 2005).

¹⁰ Indonesia, Law No.12 of 2006, Art.6.

¹¹ Zulfa Djoko Basuki, “*Bunga Rampai Kewarganegaraan, Dalam Persoalan Perkawinan Campuran*” [translation by the author: Anthology of Nationality, Issues in the International Mixed Marriage], (Jakarta: Badan Penerbit FHUI, 2007), p.19. See also Indonesia, *Undang-undang tentang Perkawinan (Law regarding Marriage)*, Undang-undang No.1 tahun 1974, LN No.1 Tahun 1974 (Law No.1 of 1974, SG No.1 of 1974), Art.47. *Undang-undang tentang Perlindungan Anak (Law regarding Child Protection)*, Undang-undang No.23 tahun 2002, LN No.109 Tahun 2002 (Law No.23

With dual nationalities, the children of international mixed marriage will not be threatened of deportation and be separated from their family.

In relation with the applicable law of dual nationalities, the RI's PIL writings concluded that the choice of law to determine his/her personal status shall be the real and effective nationality. The real and effective nationality is the point of contact that covers all the daily life or habitual residence of the relevant child, the social facts i.e. the residence, the centre of his interest, the family relationship, the participation of social and state life, bound or attached feeling to a particular country.¹²The same opinion was also presented by Lennard that in the event of dual nationality, the child must be subject to the law that has the most connected to him.¹³ In this case, the Principle of Nationality is applied together with Principle of Domicile and or Habitual Residence in determining the applicable law.

2. Little Shift From Principle Of Nationality

a. Matrimonial Domicile in Divorce Case

The application of Principle of Domicile has influenced and applied in divorce cases in RI. The divorce cases use the law of RI as it is the law of the judge (*lex fori*). There was a case which involving a couple, NL national and South African national, who lived in RI. In the district court decision, the judge mentioned several legal facts including the fact that the parties/plaintiff had their domicile in RI that led the judge to apply the law of RI.¹⁴This case shows that the judge has done

of 2002, SG No.109 of 2002) as amended to date, Art.1.

¹² *Ibid*, p.20. See also S. Gautama, "*Hukum Perdata Internasional Indonesia*", Jilid II Bagian III, buku Ke-empat (Bandung: Alumni, 1989), p.274. Leenard Palsson, *Marriage and Divorce in Comparative Conflict of Laws* (Leiden, A.W. Sijthoff, 1974), p.84.

¹³ Lennard, *Ibid*.p.85 "... the nationality of the country with which the person in question is most effectively and really linked" or "... the nationality with which, in view of all circumstances the person is most closely connected."

¹⁴ Decision of Central Jakarta District Court, "Decision No.435/Pdt/G/2003/PN.Jkt. Pst dated 7 July 2004", pp.10-11. The plaintiff is a Netherlands national and the defendant is South African national. Both of them are having their marital domicile in Jakarta due to the occupation of plaintiff. Before Jakarta, their domicile was in the Cape Town, South Africa where they officially conclude their marriage. The plaintiff

a legal interpretation (*pelembutan*) from the Principle of Nationality to the Principle of Domicile, particularly the Matrimonial Domicile of the respective spouse.

b. Habitual Residence In Adoption

The requirements of foster child and foster parents in RI are consisting of two parts, the substance requirements and the administrative requirements. The substance requirements are mention in Government Regulation No.54 of 2007 (hereinafter referred to as the “**GR No.54 of 2007**”), while the administrative requirements are detailed in the Regulation of Minister of Social No.110 of 2009.¹⁵

The prospective foreign foster parents could perform adoption if they are met all requirements as stipulated in the prevailing rules and regulations,¹⁶among others, they must have an approval from their original state through its embassy or representative office in RI and also the approval from the Minister of Social of RI.¹⁷In addition to it, the prospective foreign foster parents must have valid legal domicile in Indonesia at least 2 years. They must sign a statement that they will give written report about the development of the foster child at least once a year, if they move abroad the report could be through the Indonesian Embassy or its representative office in their country until the child is 18 years old.¹⁸

The foreign foster parents must have the approval from their original country through its representative office in Indonesia, reflects the Principle of Nationality, that the requirements from their original country to adopt are applied to them. In addition to it, the foreign foster parents are also subject to Indonesian requirements that one of them have

was claiming a divorce from her husband due continuous un-resolved dispute and finally his absence at home for certain period. The first argument is one of the reason for divorce stipulated in MA 1974. The judge apply the RI laws due to the domicile of the plaintiff and defended, further granted the claim of plaintiff.

¹⁵ Indonesia, “*Peraturan Pemerintah tentang Prosedur Pengangkatan Anak (Government Regulation regarding the Procedure of Adoption)*”, Peraturan Pemerintah No.54 tahun 2007, LN No.123 Tahun 2007 (Government Regulation No.54 of 2007, SG No.123 of 2007).

¹⁶ Indonesia, GR No.54 of 2007, Art.13.

¹⁷ *Ibid.*, Art.14 (a).

¹⁸ *Ibid.*, Art.17 and Art.40.

to have been living in Indonesia at least 2 years. It means that the Indonesian regulations are applied to the foreign foster parents. In this situation, both of the requirements of adoption namely their origin country and RI's law are cumulatively applied to the foreign foster parents.

c. Central Of Gravity Of The Child In The Future In Adoption

There was an interesting case in 1989 upon the adoption which conducted by the foreign foster child and foreign foster parents in Galang Island. This case was started when a Canadian couple, who stayed in Galang Island, Indonesia, submitted a request to adopt a Vietnamese girl before Tanjung Pinang district court.¹⁹

The foster child was Vietnamese girl who was 12 years old. Her father was one of the refugees in Galang Island and her mother committed suicidesuffered for mental illness. The foster parents were Canadian Nationals who have been stayed in same island for a year and 8 months as the volunteer of United Nations. They submitted a request to adopt this Vietnamese's girl before the Tanjung Pinang District Court as the authorized district court where both parties had their habitual domicile.

The judge stated that this case was a PIL case. Therefore, the judge considered and referred to the stipulations The Hague Convention of 1965 (Convention of Jurisdiction, Applicable Law & Recognition Decrees relating to the adoptions, 1965), despite RI does not a contracting state to such convention. The judge was considering the stipulations in the convention as the case was involving the foreign parties, the parents and the child. The judge mentioned that he had valid legal jurisdiction since both parties were having their habitual residence in his jurisdiction, in line with the stipulations stated in Art.3 (a) of such Convention.²⁰

¹⁹ Tanjung Pinang District Court. "Decision No.205/Pdt.P/P/N/FPAT dated 20 May 1989." Galang Island (Indonesia) is located in south of Batam Island. It was one of designated places for refugees from Vietnam who were coming between 1979-1996, called as "*Manusia Sampan*". UNHCR built camps and facilities to help those refugees which then closed in 1997.

²⁰ *Convention of Jurisdiction, Applicable Law & Recognition Decrees relating to the Adoptions, 1965*. Art. 3(a) "*Jurisdiction to grant and adoption is vested in one of the authorities of the state, where the adopter habitually reside or, in the case an adoption by spouses, the authorities of the state in which both habitually reside.*"

The next consideration is about the applicable law. The judge mentioned that RI's law was not the applicable law since both parties were foreigners and they did not domicile in RI for 2 years yet. The judge then considered that the foster child would be taken to Canada by the foster parents; therefore the centre of gravity of the child would be Canada. Then the judge stated that the law of Canada is applicable law for the case for the best interest of the child.²¹ After considered the requirements of Canadian law which advised by the Canadian Government, also the Vietnam Law, the request of adoption from the Canadian couple was granted according to the Canadian Law.

The case shows that the Principle of Nationality was not applied rigidly, the judge considered the best interest of the child and the law where the child would have her central gravity and interest as well as her habitual residence in here future became the applicable law.

d. Bill Of Dual Nationality

Nowadays, the Indonesian Diaspora Networking urges the government of RI to allow the dual nationality to the Indonesian persons who are living abroad. They want to possess the RI's nationality to keep the connection with RI, and at the same time also possess the nationality of the state where they are living.

In relation to PIL, the important thing is to determine what the applicable law to the respective person when they have more than one nationality. In relation to this, the Indonesian PIL's scholar agrees that the most related law to the person shall be the applicable law to the respective person.²² Therefore, if the judge have to decide the case which contains the dual nationality issues, it is wise to consider the factual domicile, their real intention to live in order to determine the real connections of the person. If this bill is applied, the appliance of Principle of Nationality needs to be modified with the Principle of Domicile and or Habitual Residence.

²¹ The judge clearly set aside the requirement of Indonesian Law for intercountry Adoption at that time, whereby the foster child in maximum is 5 years old. It shows that the Canadian Law is applied and considered in this case.

²² Sudargo Gautama, "*Pengantar Hukum Perdata Internasional Indonesia*", (Bandung: Binacipta, 1987), pp.87-88. See also Zulfa Djoko Basuki, *Bunga Rampai Kewarganegaraan Dalam Persoalan Perkawinan Campuran*, pp.102-105.

e. Immigration Law And Indonesian PIL Scholar's Opinion

According to the Immigration Law,²³ foreigners could hold Permanent Stay Licence (*Izin Tinggal Tetap*) for 5 years and could be extended for un-limited period as long as no cancellation of such license. The foreigners who hold the Permanent Stay Licenses shall be considered as the inhabitants within the territory of RI.

Sudargo Gautama and Zulfa Djoko Basuki mentioned that the RI's law should be applied to the foreigner who has their permanent domicile within RI.²⁴ Therefore, for the foreigner who hold Permanent Stay License and effectively are living within RI's territory should be applied the RI's Law. In this case, the RI's law is applied according to the domicile of the foreigner.

3. Renvoi

RI recognizes *renvoi* or remission and the transmission (*penunjukkan lebih jauh*) which occurs when Principle of Nationality meets the Principle of Domicile. This is reflected in the cases that settled before the RI's courts, among others so-called case known as "*Palisemen of British India*" issued by the court of Medan in 1925,²⁵ and the case of

²³ Indonesia, "*Undang-undang tentang Imigrasi (Law regarding Immigration)*", Undang-undang No.6 tahun 2011, SG No.52 of 2011 (Law No.6 of 2011, SG No.52 of 2011).

²⁴ Sudargo Gautama, "*Pengantar Hukum Perdata Internasional Indonesia*", *Op.Cit.*, pp.87-88. See also Zulfa Djoko Basuki, "*Bunga Rampai Kewarganegaraan Dalam Persoalan Perkawinan Campuran*", pp.102-105.

²⁵ At that time this case was definitely interesting due to the judge's opinion that was in contrary toward the opinion of judges in the NL. This case was started by an application submitted by a British India who having his domicile in RI. He asked to be declared as bankrupt. The judge understood that this application was from the group of *Timur Asing* who has his domicile in RI. He predicted that the claimant was 17-18 years old when he submitted the application. The legal issue was whether he could be declared as bankrupt according to the law of RI at that time. The judge stated that RI used the Principle of Nationality that means the judge appointed the law of British India, while the PIL of British India applied the Principle of Domicile for personal status. Then the judge applied *Burgerlijk Wetboek* as the prevailing law where subject was having his domicile. Therefore, the application from the British India subject was approved. See Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia*, *Op.Cit.*, pp.101-106.

Armenian Nasrani issued by the *Presiden Raad van Justitie* of Semarang in 1928.²⁶ From both cases described above, the respective judge did not mention any word about “*renvoi*”, but we can conclude that judges applied the theory of *renvoi* in settling these cases.

In practice, RI recognized the *renvoi* even it never mentioned or provides such stipulation in writing. Upon these circumstances Sudargo Gautama opined that the acceptance of *renvoi* resulted the application of national law of the respective judges (*in casu*, the RI’s law) is right and wise. He mentioned in this form *renvoi* can be so-called as the *pelembutan hukum* or *rechtsverfijning*.²⁷ The acceptance of *renvoi* leads to the application of the internal law after the judge give a chance to the foreign law to apply, not from the spirit of *chauvinis juridicsh*. This is a wise and supportive thought.²⁸

4. Public Policy as Limitation of Personal Status

The public policy is the one of the classic topic in PIL. This topic, together with nationality and the choice of law became the three pillars of PIL.²⁹ Public policy was mentioned as the most important discussion in PIL nevertheless it also becomes the most darkness topic compare to the other topics in PIL.³⁰

Sudargo Gautama mentioned that public order allows the judges to apply their own law and set aside the choice of law determined according the PIL, because its appliance will violate the public interest and good moral (*kesusilaan baik*) of the community. The foreign law that is

²⁶ *Ibid.* In this court decision, the judge stated that a Christian Armenian who go abroad and left his country, takes nothing as his personal status and therefore he must obey the law where he had his new domicile. Therefore the judge applied the law enforced in Indische as the new domicile of the respective Christian Armenian that is BW.

²⁷ Sudargo Gautama, “*Pengantar Hukum Perdata Internasional Indonesia*”, *Op.Cit.*, pp.101.

²⁸ *Ibid.*, p.117.

²⁹ Mancini mentioned that Public Order together with Principle of Nationality and Choice of Law (*partaijautonomie*) are three pillars (*drei saulen*) of PIL, quoted by Sudargo Gautama, *Hukum Perdata Internasional Indonesia, Jilid II bagian 3, Buku ke-empat*, [translation by the author: Indonesian Private International Law, Volume II part 3, the fourth book] (Bandung: Alumni, 1989), p.3.

³⁰ *Ibid.*

piercing the sense of justice, fundamental legal system and moral of the respective society can be ruled out by the public order.³¹ In this sense, some writings discussed that public order relates with the words of order and welfare even security (*keamanan*) and justice. The waiver of the application of foreign law is an exception of what supposed to happen based on the PIL principles. In this matter Sudargo Gautama mentioned that such exemption is acceptable in the event of such waiver is the absolute requirement and the only way to enforce the Indonesian law and regulations. Therefore, the application of foreign law must be a manifest incompatible with the principles of national law of respective judges. The requirement of “manifest incompatible” is mandatory. In addition, the public policy cannot be applied to waive an application on a foreign law on the ground that such institution is not recognized in the law of their hands (*lex fori*).³²

Public policy is applied in personal status cases, for instance (among others) slavery or civil death, grounds of divorce whereby considered to be manifest incompatible with the RI’s law.

B. THE PIL OF NL

The Art.16 AB is equal to Art. 11 of PIL of NL whereby whether an individual is a minor and to what extent he has the capacity to perform legal acts is governed by his national law. In the event that a person possesses more than one nationality and has his habitual residence in one of those states, the law of the state of his habitual residence is considered to be his national law. If the person does not have his habitual residence in one of the states of his nationality, his national law is considered to be the law of the state of which he is most closely connected.

For stateless person, his national law shall be considered to be the law of the state of his habitual residence.³³ The personal status of alien who has a residence permit of NL, and an alien who has obtained a corresponding residence status abroad, is governed by the law of his domi-

³¹ Sudargo Gautama, “*Hukum Perdata Internasional Indonesia, Jilid II bagian 3, Buku ke-empat*”, *Op.Cit.*, p.9.

³² Sudargo Gautama, “*Hukum Perdata Internasional Indonesia, Jilid II bagian 3, Buku ke-empat*”, p.42.

³³ The Netherlands, Book 10 Civil Code establishment and Implementation Act, Art.16.

cile, or if he has no domicile, by the law of the state of his place of residence.³⁴ The rights of the stateless person or alien previously acquired which is arising from his personal status, particularly rights relating to marriage, will be respected.

In relation to the name, the similar principle is applied. The applicable law is the national law of the person, or if the person has more than one nationality, the law where the person has his habitual residence is applied. If he has no habitual residence, the law of the state of his nationality with which he has most closely connected, having regard to all circumstances shall be applied. It is also stipulates the choice of name in the event a child recognised or legitimated outside the NL or if a child has been recognized by a person of Dutch nationality, or if a child adopted by the Dutch national, or a child from the parent who one of them possesses the Dutch nationality.³⁵

The PIL of NL stipulates the marriage, whereby for the purpose of solemnization, the spouses must meet the requirement of Dutch law for the conclusion of a marriage and one of them exclusively possesses Dutch nationality or possesses Dutch nationality in addition to another or has his habitual residence in NL or each of the spouses meets the requirements for the conclusion of a marriage whose nationality he possesses. Besides the spouse meets the requirement from his nationality law, he or she is still subject to the public policy and restrictions founded on the ground of public policy.³⁶

If the formal validity is concerned, a marriage may only be lawfully solemnized in NL before the authorized registration in accordance to Dutch law, save the power of foreign diplomatic and consular civil servants to cooperate in the solemnization of a marriage, in accordance

³⁴ *Ibid.*, Art. 17.

³⁵ *Ibid.*, Title 2, Art.18-25.

³⁶ *Ibid.*, Art.29. In any case the spouses have not attained the age of 15, the future spouses are related to each other by blood or by adoption in direct line as brother and sister, the absence of consent of either spouse or the mental capacity of either spouse is so disturbed as to render him unable to determine his own will or the significance of his statement, it would be in breach of the provision that a person may only be united in marriage would with one person at any one time, it would be in breach of the provision that persons who enter into a marriage may not at the same time be united in a registered partnership.

with the provisions of the law of the state represented by them, if neither party exclusively possesses Dutch nationality or possesses Dutch nationality in addition to another.³⁷

In relation with the marriage solemnized abroad, or marriage which has become lawful thereafter according to the law of the state where the marriage took place, it will be recognized as such. A marriage solemnized outside of NL before a diplomatic or consular civil servant, who meets the requirements of the law of the state represented by that civil servant, will be recognized as lawful unless such solemnization was not permitted in the state where it took place. A marriage is presumed to be lawful if a competent authority has issued a marriage certificate.³⁸ A marriage solemnized outside of NL will not be recognized if such recognition would be manifestly incompatible with Dutch public policy.³⁹

Following the stipulations regarding the formation of marriage, the PIL of NL also stipulates the governing law to the personal legal relationship between the spouses. According to the PIL of NL, the governing law is the law that the spouses have chosen prior to or during their marriage, whether or not as a result of a change of a prior notice. It also stipulates the matrimonial property regime, and the relation with any third party.⁴⁰

The PIL of NL continues to stipulate the dissolution of the marriage and legal separation, as well as the registered partnership, including parentage.⁴¹ It regulates also the inter-country adoption. The adoption pronounce in NL is, with exception as stipulated in the relevant law, governed by Dutch law includes the legal effects of adoption. The stipulations of foreign adoption therein includes the legal effects of adoption, recognition of foreign adoption, effect of declaration and also conversion to adoption pursuant to Dutch law.⁴² Furthermore, the PIL of NL also stipulates the parental responsibility and child protection, international child abduction and maintenance which subject to the in-

³⁷ *Ibid.*, Art.30.

³⁸ *Ibid.*, Art.31.

³⁹ *Ibid.*, Art.32.

⁴⁰ *Ibid.*, Art.42-53.

⁴¹ *Ibid.*, Title 5, Art.92-102.

⁴² *Ibid.*, Title 6, Art.103-112.

ternational conventions whereby NL is the contracting party.⁴³

1. Renvoi

The Art.5 of the PIL of NL states that the application of the law of a state refers to the application of the rules of that law with the exception of the PIL. This stipulation closes the possibility of *renvoi* or remission and or transmission. This stipulation is in the contrarily with RI which accept the *renvoi*.

2. Public Policy

Public Policy is limiting the application of foreign law. The PIL of NL states that foreign law will not be applied if its application is manifestly incompatible with public policy, for instance in recognition of divorces that pronounced abroad.⁴⁴

C. THE ACADEMIC BILL OF PIL

The Academic Bill stated that the applicable law to a person is his national law. If the person has more than one nationality, the applicable law shall be considered as the law of the state which most effective and active. If one of those nationalities is Indonesia, the applicable law shall be the law of Indonesia.⁴⁵

To a person who according to the Indonesian law is a stateless person, the applicable law is the law where he has his habitual residence. This provision is effective as long as it has relation with the status and authority to do any legal action, whereas in relation with any other matters, a stateless person is deemed as a foreigner.⁴⁶ Legal status and authority of a foreigner who have domiciled within the territory of RI continuously for settled in 10 years is subject to the Indonesian law.⁴⁷

Marriage. The substance requirements to marry are subject to the law of nationality of the couple wed-to-be, provided that the national

⁴³ *Ibid.*, respectively Art. 113, Art.114, 116.

⁴⁴ *Ibid.*, Art.6, Art.29 in relation with marriage, Art.59 in relation with divorce, Art.89 in relation with registered partnership.

⁴⁵ Art.3 (d) of Academic Bill of PIL.

⁴⁶ Art.3 (e) of Academic Bill of PIL.

⁴⁷ Art.3 (l) of Academic Bill of PIL.

law where the marriage is taken place states otherwise.

In relation with the marital property and divorce, the Academic Bill consistently uses the Principle of Nationality, except for the children. In relation with parentage and obligation between parents and child, the law of the nationality of father is the applicable law. In relation to guardianship of minors, the grounds of guardianship, authorities and obligations of guardian towards to the minors, it is subject to the national law of minor in concerned. The obligations to provide living, is subject to the law of state where the minor in concerned having his habitual residence.⁴⁸

Adoption. Any inter-country adoption is subject to the national law of the parties, if they have the same nationality. If they have different nationality, the capacity and requirements of adoption are subject to the law of state where the child in concerned has the residence. The adoption is centralized at the place where child has his habitual residence. Any legal consequence of adoption and the relation between biological parent(s) and the child shall subject to the law where the child has habitual residence.⁴⁹

D. ENTITY

An entity has its own status personal. The law of status personal will apply to determine the existence of entity, its capacity to take any legal action, to regulate internal organization and any legal relationship with any third party as well as how to proceed to amend its articles of association and the winding-up of entity. This law of status personal will determine the capacity and authority from its establishment until the winding-up of entity.⁵⁰

There are several forms of entities in Indonesia, yet there are two forms which are possible to have foreign elements in it, i.e., Limited Liability Company and foundation. The limited liability company with

⁴⁸ Chapter IV regarding Family, Sub-Chapter 4 of the Academic Bill of PIL.

⁴⁹ Chapter V regarding Adoption of the Academic Bill of PIL.

⁵⁰ Sudargo Gautama, *Hukum Perdata Internasional Indonesia Jilid III Bagian 1 Buku Ketujuh* [translation by the author: Indonesian Private International law Volume III Part 1 7th Book], (Bandung: Alumnus, 2010), pp.326-328.

foreign capital investment facilities could be established by foreign entity or foreign nationals with Indonesian nationals or Indonesian entities, with combination percentage of share ownership pursuant to the Negative List Investment. Foundations could be established by foreign nationals. Therefore, those two entities will be elaborate in this sub-chapter.

1. Limited Liability Company

There were Commercial Civil Code and Law No.1 of 1995 regarding limited Liability Companies which then replaced by Law No.40 2007 regarding Limited Liability Company. And in relation with the foreign investment, there was Law No.1 of 1967 regarding foreign capital investment which then replaced by Law No.25 of 2007 regarding Capital investment in RI.

Law No.1 of 1995 and Law No.40 of 2007 was and is applied to limited liabilities companies which are established⁵¹ according to the law of RI and has its (legal) seat in RI.⁵²This principle is reflected also in Law No.1 of 1967 which replaced by the Law No.25 of 2007 regarding the capital investment. The Law No.25 of 2007 stated that the foreign capital investment must be in a form of entity which is established according to RI's law and has its legal seat within the territory of RI.⁵³

2. Foundation

Foundation is stipulated in the Law No.16 of 2001 regarding Foun-

⁵¹ The process of establishment of a limited liability company as follows: the articles of association of the company firstly must be approved by the Minister of Law, and registered in the Department of Industry and Trade. After such registry, the articles of association will be published in the State Gazette. The process of the establishment takes some time, however the limited liability itself is considered to be an entity on the date of approval of the Minister of Law. Indonesia, *Undang-undang tentang Perseroan Terbatas (Law regarding Limited Liability Company)*, Undang-undang No.40 Tahun 2007, LN No.106 Tahun 2007 (Law No.40 of 2007, SG No.106 of 2007), Art.9, 10, and Art.11.

⁵² Indonesia, *Undang-undang tentang Perseroan Terbatas (Law regarding Limited Liability Company)*, Art.1(1) jo.Art.5(2).

⁵³ Indonesia, *Undang-undang tentang Penanaman Modal (Law regarding Capital Investment)*, Undang-undang No.25 Tahun 2007, LN No.67 Tahun 2007 (Law No.25 of 2007, SG No.25 of 2007), Art.5 (2).

dations as amended by Law No.28 of 2004.⁵⁴ This law is implemented in the Government Regulation No.63 of 2008 regarding Implementing Regulation of Law regarding Foundation, as amended by GR No.2 of 2013 regarding the Amendment to Government Regulation No.63 of 2008 regarding Implementing Regulation of Law regarding Foundation, herein referred to as the “**Law No.16 of 2001**”.

According to the Law No.16 of 2001 as amended to date, the foundation must be established according to Indonesian law and regulation and it must have its seat in the territory of Indonesia.⁵⁵ Therefore, it can be concluded that foundations also use the combination of the two principles, the principle of incorporation and the principle of legal seat of entity.

From those two forms of entities, a limited liability company and foundation, it shows that RI combines the two principles, the Principle of Establishment and the Principle of Legal Seat are combined cumulatively in determining the status personal of entities. This is consistent since the independence of RI, and with the Law No.3 of 46 regarding Nationality.

E. PIL OF NL

The PIL of NL stipulates the corporations. Whereby the corporation, which pursuant to its agreement or deed of incorporation, at the time of establishment its seat or, in the absence thereof, its centre of external operations at the time of its establishment on the territory of the state under the law of which it has been incorporated, is governed by the law of that state. It also mentioned the scope of application of the governing law of the corporations.⁵⁶

⁵⁴ Indonesia, *Undang-undang tentang Yayasan (Law regarding Foundation)*, Undang-undang No.16 Tahun 2001 LN No.112 Tahun 2001 (Law No.16 of 2001, SG No.112 of 2001); as amended by Indonesia, *Undang-undang tentang Perubahan atas Undang-Undang No.16 tahun 2001 (Law regarding the Amendment to Law No.16 of 2001 regarding Foundation)*, Undang-undang No.28 tahun 2004, LN No.115 tahun 2004 (Law No.28 of 2004, SG No.115 of 2004).

⁵⁵ *Ibid.*, Art.9-11.

⁵⁶ The Netherlands, Book 10 Civil Code establishment and Implementation Act, Art.118.

F. THE ACADEMIC BILL OF PIL

Limited liability company, association, and any legal entity subject to the law where such entity is established and in which determines its nationality. Legal entity established outside the territory of RI which conducting its activity within the territory of RI is subject to the Indonesian law.⁵⁷

The stipulation of applicable law for entities according to above is the law where the entities are established. If such companies having its activities within the territory of RI, the RI's law is applicable to such entities, however the RI's law does not applied to regulate its personal status.

G. SUMMARY

The primary principle of personal status in Indonesia is in Art.16 AB. After the independence, this principle is developed to remain the same whereby the Principle of Nationality is still primary applied in determining the applicable law of Indonesian nationals and foreigners. This principle is embodied scattered in the family law in RI.

The deviation of Art.16 AB is the appliance of the principle of domicile to the stateless person within RI, whereby the law of RI is applies to the stateless person within of RI. In relation with divorce of foreign couple within RI, it is possible to apply the RI's law as the matrimonial domicile. While in the inter country adoption case, the central gravity or closest connection in the future of the child was the applicable law for the best interest of the child. It shows that the appliance of Principle Nationality is not hard and rigid in RI.

RI and NL remain use the Principle of Nationality. PIL of NL states that if Principle of Nationality cannot apply, the law of where the person has his habitual residence will apply. In relation with the adoption, the principle of the best interest of the child.

The Academic Bill stipulates almost the same with the situation of RI, whereby the Principle of Nationality remains determine the applicable law of a person. Further, it stipulates that if a person has dual nationality, the applicable law shall be the law where the person has

⁵⁷ Art.3 (h) of Academic Bill of PIL.

its domicile. If RI is one of nationalities, the law of RI shall be the applicable law. Upon stateless persons within RI, the applicable law shall be RI's law. In relation to this, it is advisable to be consistent that after the Principle of Nationality, the applicable law is referring to the Habitual Residence of the respective person, instead of refer to Principle of Domicile.

The Academic stipulates the formation of marriage, matrimonial agreement, etc. In relation with this, it is advisable if the Academic Bill of RI's PIL could adjust its stipulations with the current situation, for instance the nationality of children which they have from father and mother. If RI does not the contracting party of an international convention, yet the team is in the opinion that it is important to adopt such convention, it is advisable if the team could adopt the principle and particular stipulations from the relevant conventions into the Academic Bill.

In relation to the children and adoption, it is also advisable that the Academic Bill could be consistent to refer to the Habitual Residence for the best interest of the child. The central gravity in the future of the child could be one of the options. In relation with the adoption it will be good if the Academic Bill of RI's PIL could embody the inter country adoption as stipulated in GR No.54 of 2007, so it will not in contrary each other and both of them could give priority to the best interest of the child.

II. ARTICLE 17 AB: LEX RE SITAE

Art.17AB adopt the principle of *lex re sitae* whereby the applicable law of goods is the law where the respective goods is situated or located. If the goods are within RI, then the law of RI is applicable to the respective goods. Upon those goods, either movable or immovable goods, as well as tangible or intangible goods, which situated within RI, are subject to the law of RI. The law of RI is also applied to the encumbrance transaction upon those goods.

A. LEX RE SITAE AND PREVAILING REGULATIONS IN RI

1. Land

Upon the land within the territory of RI, the applicable law, namely

the Law No.5 of 1960 regarding Agrarian, hereinafter referred to as the “**Agrarian Law**”, is applied. It is stipulated that only Indonesian nationals are allowed to hold the Ownership Right (*Hak Milik*) and Right to Build (*Hak Guna Bangunan*) upon a plot of land.

Foreigners are allowed to own a property in RI with particular restrictions. These ownership stipulations are described in the Government Regulation No.103 of 2005,⁵⁸ hereinafter referred to as the “**GR No.103 of 2005**”. Foreigner who domiciled in Indonesia promulgated this regulation to provide legal guarantee regarding the ownership of resident.⁵⁹ A foreigner is eligible to own the resident unit if his or her existence gives benefit, or he or she is doing business, is working or performs (direct) investment within the territory of RI.⁶⁰ In terms of license, it means any foreigner who holds Stay Permit License according to the prevailing regulations.⁶¹

Foreigner could own a house residence or residence unit in the framework of Right to Use (*Hak Pakai*).⁶² The residence could be single house on a plot of land with Right to Use or Right to Use upon Ownership Right based on a notarial agreement. The other option, he or she could a unit of strata title on a plot of land with Right to Use.⁶³ He could own the property for 30 years, and can be extended twice, each for 20 and them 30 years.⁶⁴ Any extension can only be granted if he is still eligible to own the residence house or residence unit, or in other words he is still holding a valid stay permit in Indonesia.⁶⁵ This right could inherit to his descendant provided that his descendant(s) hold a valid limited stay permit in Indonesia.⁶⁶

⁵⁸ Indonesia, “*Peraturan Pemerintah tentang Pemilikan Rumah Tempat Tinggal atau Hunian oleh Orang Asing yang berkedudukan di Indonesia (Government Regulation-regarding Ownership of Residence House or Residence Unit by a Foreigner domiciled within Indonesia)*”, Peraturan Pemerintah No.103 Tahun 2015, LN No.325 Tahun 2015 (Government Regulation No.103 of 2015, SG No.325 of 2015).

⁵⁹ *Ibid.*,Point (a) of Consideration.

⁶⁰ *Ibid.*,Art.1 (1).

⁶¹ *Ibid.*,Art.2 (2).

⁶² *Ibid.*,Art.2 (1).

⁶³ *Ibid.*,Art.4.

⁶⁴ *Ibid.*,Art.6.

⁶⁵ *Ibid.*,Art.8.

⁶⁶ *Ibid.*,Art.2 (3) and (4).

GR No.103 of 2015 provides the stipulations of possibility to own a property by a foreigner who is having his domicile within Indonesia. The existence of the respective Foreigner within Indonesia is giving benefit for Indonesia or he/she is performing business or, is working or performs an investments. In the event that the Foreigner is married with Indonesian national, it confirms that the availability of Foreigner to own a property does not negate or reduce the right of his or her spouse to also own a plot of land. GR No.103 of 2015 affirms that the Indonesian national has the same right to own a plot of land similarly like any other Indonesian national. The plot of land must not be a matrimonial asset as proven by a pre-marital agreement between husband and wife.⁶⁷

The situation or the right of Indonesian national based on GR No.103 of 2015 does not change the previous regulations. The spouse of foreigner still could own a plot of land as long as it is not part of the matrimonial assets. With such stipulation a plot of land is still belong to Indonesian national only, which in line with the principles of nationality in Agrarian Law, the principle which re-confirmed in GR No.103 of 2015.⁶⁸

According to the author, the limitation as stated in Agrarian Law does not in contradiction with the constitutional right of the Indonesian national to own a plot of land. However, it will be nice if the Government of Indonesia could provide an administration proceeding for Indonesian national to own a plot of land even though that she or he is already married with a foreigner without any pre-marital agreement.

2. Intellectual Property Rights

The Intellectual Property Rights, namely trade secrets, industrial design, integrated circuit design, patent, trademark are stipulated separately each in particular laws and regulations.⁶⁹

⁶⁷ *Ibid.*, Art.3.

⁶⁸ *Ibid.*, Paragraph 2 of Point I General of the Official Elucidation.

⁶⁹ Respectively those Intellectual Property Rights are stipulated in (1) Indonesia, *Undang-undang tentang Rahasia Dagang (Law regarding Trade Secrets)*, Undang-undang No.30 Tahun 2000, SG No.242 Tahun 2000 (Law No.30 of 2000, SG No.242 of 2000); (2) Indonesia, *Undang-undang tentang Desain Industri (Law regarding Industrial Design)*, Undang-undang No.31 Tahun 2000, LN No.243 Tahun 2000 (Law No.31 of 2000, SG No.243 of 2000); (3) Indonesia, *Undang-undang tentang Desain Sirkuit Terintegrasi (Law regarding Integrated Circuit Design)*, Undang-undang

Those laws are applied to the intellectual property which is registered in RI based on those laws. The intellectual property rights are arisen on the date of certificate which effective retroactively as of the acceptance date of the respective application. Those rights could be assigned based on inheritance, grant, intestate or will, agreement in writing or any other causes permitted by the prevailing laws. The underlying agreement of assignment(s) must be comply and permitted by the Indonesian law. Such assignment must be registered in the General Registration Book of the respective Directorate General; otherwise it has no legal impact to any third party.

In relation with the encumbrance, those rights, as the movable and intangible goods, could be charged by an encumbrance in the frame of fiduciary security according to the Law of Fiduciary Security.⁷⁰

The Copyright Law states that it is applied to: (a) the creation of Indonesian national or entities or inhabitants, also (b) the creation of Non-Indonesian nationals or entities provided that the first announcement of the creation was made within RI, and (c) the creation Non-Indonesian nationals or entities which its states has bilateral or multilateral agreement with Indonesia.⁷¹The Copyright Law stipulates that copyright is a movable and intangible goods and it can be charged by a fiduciary encumbrance.⁷²

These stipulations are showed that the applicable law to these Intellectual Property Rights are the law where they are registered or, in case of copyright, the first announcement with exception to any international conventions whereby RI as a contracting state.

No.32 Tahun 2000, LN No.244 Tahun 2000 (Law No.32 of 2000, SG No.244 of 2000; (4) Indonesia, *Undang-undang tentang Paten (Law regarding Patent)*, Undang-undang No.14 Tahun 2001, LN No.109 Tahun 2001 (Law No.14 of 2001, SG No.109 of 2000; (5) Indonesia, *Undang-undang tentang Merek (Law regarding Trademark)*, Undang-undang No.15 Tahun 2001, LN No.110 Tahun 2001 (Law No.15 of 2001, SG No.110 of 2001).

⁷⁰ Indonesia, “*Undang-undang tentang Jaminan Fidusia (Law regarding Fiduciary Security)*”, Undang-undang No.42 Tahun 1999, LN No.168 Tahun 1999 (Law No.42 of 1999, SG No.168 of 1999).

⁷¹ Indonesia, “*Undang-undang tentang Hak Cipta (Law regarding Copyright)*”, Undang-undang No.28 Tahun 2014, LN No.266 Tahun 2014 (Law No.28 of 2014, SG No.266 of 2014), Art.2.

⁷² *Ibid.*, Art.16 (1), (3).

3. Aircrafts And Ships

Aircrafts. The Law No. 1 of 2009 regarding Aviation, hereinafter referred to as the “**Aviation Law**”,⁷³ states that it is applied to all activities of the aircrafts and the foreign aircrafts which having activities from or to the territory of RI, also the Indonesian aircrafts which are abroad.⁷⁴ Indonesian Aircrafts are the aircrafts which have the Indonesian registration signs and the Indonesian nationality signs.⁷⁵ In this case, the nationality signs and the activities to, within or from RI are the indication that the Aviation Law is applied to the respective aircrafts.

Ships. The same stipulations are applied to vessels as described in Law No.17 of 2008 regarding Shipping, hereinafter referred to the “**Shipping Law**”.⁷⁶ The Shipping Law regulates that it is applied to the all foreign ships which are sailing within the waters of RI and all Indonesian flagged ships which are abroad.⁷⁷ This Law is applies extraordinary to the Indonesian flagged ships. The same stipulations to the Indonesian flagged aircrafts.

Each laws of the above regulates to the specific goods within the territory of RI. Some of them apply extra-territorial due to the registration or because of the Indonesian flagged that attached to the vessels or aircrafts.

B. PIL OF NL

PIL of NL stipulates that property law regime relating to objects is governed by the law of the state where the object is located. The exception is made to registered vessels which are governed by the law of the state in which the vessels is registered. The registered aircraft and aircraft exclusively registered in nationality register as referred to in Art.17 of Convention on International Civil Aviation concluded in Chi-

⁷³ Indonesia, “*Undang-undang tentang Penerbangan (Law regarding Aviation)*”, Undang-undang No.1 Tahun 2009, LN No.1 Tahun 2009 (Law No.1 of 2001, SG No.1 of 2001).

⁷⁴ *Ibid.*, Art.4.

⁷⁵ *Ibid.*, Art 1 point (6).

⁷⁶ Indonesia, “*Undang-undang tentang Pelayaran (Law regarding Shipping)*”, Undang-undang No.17 Tahun 2008, LN No.64 Tahun 2008 (Law No.17 of 2008, SG No.64 of 2008).

⁷⁷ *Ibid.*, Art.4 (b), (c).

cago on 7 December 1944, is governed by the law of the state in which the aircraft is registered or entered into the nationality register.⁷⁸

The law referred to in the above determines in particular whether the object is movable or immovable, what a component of an object is, whether an object is susceptible to transfer of ownership thereof or the creation of a right in respect thereto, which requirements are posed to a transfer or creation, which rights can be attached to an object and what the nature and content of these rights are, and in which way those rights arise, alter, pass and perish and what their mutual relation is. For the purpose of application of the previous paragraph, as far as the acquisition, the creation, the passing, the alteration or the perishing of rights on an object, the time at which the necessary legal facts occur is determinative. This stipulation applies analogous in case of transfer and creation of rights to real rights.⁷⁹

The PIL of NL also determine the property law consequences of retention of title, conflict mobile, acquisition without power to dispose, involuntary loss of possession and international transport. It also regulates a claim which laid down in a documents, nominative claim, bearer claim, share certificate, nominative share, bearer share, securities, and trusts.⁸⁰

C. ACADEMIC BILL OF PIL

Academic Bill of PIL 2014 proposed the stipulation of goods that the applicable law to the goods are the law where the goods are situated of located. In the event the movable goods are in transportation or carriage, the applicable law is the law chosen by the parties in the respective agreement. If the parties have no choice of law between the parties, the applicable law is the law where the respective goods are located. However, if the goods are on the high seas, the applicable law is the law where the claim is submitted or the law of the judge.⁸¹

⁷⁸ The Netherlands, Book 10 Civil Code establishment and Implementation Act, Art.127 (1), (2).

⁷⁹ *Ibid.*, Art. 127 (4).

⁸⁰ *Ibid.*, Chapter 2, Art.127-133.

⁸¹ Chapter III of the Academic Bill of PIL.

D. SUMMARY

The principle of *lex re sitaeis* remain the same, and it is applied to the registered goods, such as the intellectual property rights. The law of RI is applied to the goods which located within the territory of RI or registered in RI. The registered goods, aircrafts or ships or vessels, are still in line with this principle. Same as the personal status, these stipulations could be found scattered in the relevant law, such as Aviation Law or Shipping Law.

It is worth to note that compare to the PIL of NL, that the scope of applicable law to the goods is to determine whether an object is movable or immovable, what a component of an object is, whether an object is susceptible to transfer of ownership thereof of the creation of a right in respect thereto, which requirements are posed to a transfer or creation, which rights can be attached to an object and what the nature and content of these rights are, and in which way those rights arise, alter, pass and perish and what their mutual relation is.⁸²

It is advisable if the Academic Bill of Indonesian PIL could also determine the scope of the appliance of the applicable law as the PIL of NL does for avoidance of doubt. It also could adopt the stipulation of shares or securities, and excluded the part of trust since RI does not recognise this legal concept.

III.ART.18 AB: LOCUS RIGIT ACTUM

The principle of *locus rigid actum* is the principle which determines that the form of legal action shall be valid if it is according to the local law where the legal action is taken place, save the execution of immovable goods that uses the principle of *lex re sitae*.⁸³

A. PREVAILING LAWS AND REGULATIONS

This principle remains within the prevailing law and regulations in RI, among others, in the stipulations of marriage, adoption and the making of legal documents, for instance, a will or a power of attorney.

⁸² The Netherlands, Book 10 Civil Code establishment and Implementation Act, Art.127.

⁸³ Art.9 of the Academic Bill of PIL.

1. Marriage And Adoption

Marriage. This principle was recognized in Art.83 BW also in Law No.1 of 1974 regarding Marriage, hereinafter referred to as the “**MA 1974**”. Both stipulate that marriages that solemnized abroad shall be valid if it is solemnized according the local law where the marriage is solemnized, provided that such marriages do not contradict with BW or MA 1974.⁸⁴ Within a year after their returning to RI, their marriage must be registered in the Civil Registration Office in RI.⁸⁵

The same principle is applied upon the marriages between Indonesian national and foreign national which are solemnized within RI. Such marriages shall be valid if the solemnization is held according to MA 1974.⁸⁶ The same principle is applied for the marriage of Indonesian nationals which is held abroad but in the Representative Office of RI in the relevant state. This regulation uses the extraterritorial of the Representative Office of RI, therefore such marriages could be considered as solemnized within the territory of RI. These regulations are embodied in the Joint Ministerial Decree from the Minister of Religion and the Minister of Foreign Affairs No.589 of 1999 No.182/OT/99/01⁸⁷

Adoption. According to Government Regulation No.54 of 2007 regarding Adoption, hereinafter referred to as the “**GR 2007**”, intercountry adoption in RI has two variations: (i) an Indonesian child who ad-

⁸⁴ Indonesia, “*Undang-undang tentang Perkawinan (Law regarding Marriage)*”, Art.56.

⁸⁵ *Ibid.*, and Art.84 Burgerlijk Wetboek. See also, Indonesia, “*Peraturan Menteri Agama tentang Pendaftaran Surat Bukti Perkawinan Warga Negara Indonesia Yang Dilaksanakan di Luar Negeri (Regulation regarding the Registration of Marriage Certificate between Indonesian Nationals Held Abroad)*”, Peraturan Menteri Agama No.1/1994 tertanggal 2 April 1994 (Regulation of Minister of Religion No.1/1994 dated 2 April 1994).

⁸⁶ Indonesia, “*Undang-undang tentang Perkawinan (Law regarding Marriage)*”, Art.59 (2).

⁸⁷ Indonesia, “*Surat Keputusan Bersama Menteri Agama dan Menteri Luar Negeri tentang Petunjuk Pelaksanaan Perkawinan Warganegara Indonesia di Luar Negeri (Joint Decree of Minister of Religion and Minister of Foreign Affairs regarding Implementing Regulation of Marriage between the Indonesian Nationals held Abroad)*”, Surat Keputusan Bersama Menteri Agama dan Menteri Luar Negeri No.589 Tahun 1999 No.182/OT/99/01 tertanggal 13 Oktober 1999 (Joint Decree of Minister of Religion and Minister of Foreign Affairs No.589 of 1999 No.182/OT/99/01 dated 13 October 1999).

opted by the foreign foster parent(s) and (ii) a foreign child adopted in RI by the Indonesian foster parent(s).⁸⁸ Inter country adoption can be deemed as a legal action that performed to move away or to swift a child from the authority of her biological parent, legal guardian, or any other party who has responsibility for taking care, educate and raising up the child, into a foster family whereby both party (within the territory of Indonesia) have different nationality and one of them is RI's national.⁸⁹ Inter country adoption in Indonesia must be performed according to the RI's Law, particularly through an authorized child care institution which then must be solemnized by a district court decision.⁹⁰ In relation to the jurisdiction, as mentioned above the district courts in RI are the authorized ones.

2. Power Of Attorney And Will Or Testament

Power of Attorney. If a power of attorney is concluded abroad which will be exercised within RI, it must be according to the formality regulation where it is made and must be legalized by the Indonesian representative.⁹¹ This regulation is confirmed by the High Court and Supreme Court in its decisions.⁹²

Will or Testament. A will or testament made abroad is stipulated in Burgerlijk Wetboek (hereinafter referred to as the “**BW**”). In Art.954 BW, it is mentioned that testament made abroad must be authentic documents in accordance with the law where the document was produced. This authenticity or whether document is in line with the local law must

⁸⁸ Indonesia, Indonesia, “*Peraturan Pemerintah tentang Prosedur Pengangkatan Anak (Government Regulation regarding the Procedure of Adoption)*”, Art.7.

⁸⁹ *Ibid.*, Art.1 point (7).

⁹⁰ *Ibid.*, Art.11 (2) jo. Art.14 point (c).

⁹¹ Regulation of the Minister of Foreign Affairs No.09/A/KP/XII/2006/01 dated 28 December 2006, point 68 and 70 of the Attachment. The legalization in the document is validation of the signature only, excluded the content or the substance of or described in the respective documents.

⁹² Supreme Court of the Republic of Indonesia, “Decision No.3038/K/Pdt/1981 dated 18 September 1981”. The authenticity of power of attorney is subject to the formality regulations where it is concluded, and it is has to be legalized by the Indonesian Representative. See also the Religion High Court, “Decision No.No.60/Pdt.G/2008/PTA.Sby”. See Hukumonline, “*Kewajiban Legalisasi Dokumen Yang Ditandatangani di Luar Negeri*”. Available at: <http://www.hukumonline.com/klinik/detail/cl2168/dokumen-yg-ditandatangani-di-luar-negeri>, accessed on 1 September 2016.

be confirmed by the local notary. This document legalized by the Indonesian representative where the document was produced.

3. Electronic Information And Transaction

Electronic Information and Transaction is stipulated under the Law No.11 of 2008 (hereinafter referred to as the “**EIT Law**”).⁹³ EIT Law applies to anyone who conduct a legal act as stipulated in EIT Law, either within the territory of RI or outside of RI which has legal consequences within the territory of RI and/or outside the territory of Indonesia and detrimental to the interest of Indonesia.⁹⁴The EIT Laws stipulates electronic transactions under the Chapter V, Art.17-22 and the domain names under the Chapter V, Art.23-26.

In relation to the electronic transaction, EIT Law states electronic information and electronic records shall be declared lawful if using electronic systems in accordance with provisions as governed by this EIT Law.⁹⁵EIT Law gives exception to the documents which required by prevailing law and regulation to be in writing or even in a notarial deed.

In relation with the electronic transaction, EIT Law mentions that an electronic contract embodied an electronic transaction have a legal binding to the parties to the respective contract. If the contract has foreign elements, the parties have the authority to have the choice of law in their transaction, provided that it is in line with Indonesian PIL. In the event no choice of law made by the parties, the applicable law shall be determine according to the principles of PIL.⁹⁶The parties also could have the choice of court, either a court or arbitration or any other alternative dispute resolution. If no choice of court made by the parties, it shall be determined by the principle of Indonesian PIL. In the elucidation, it is stated that the location of the basic presence of the parties or the location of effective place of the assets of parties shall be the choice

⁹³ Indonesia, “*Undang-undang tentang Informasi dan Transaksi Elektronik (Law regarding Electronic Information and Transaction Law)*”, Undang-undang No.11 tahun 2008, LN No.58 tahun 2008 (Law No.11 of 2008, SG No.58 of 2008).

⁹⁴ *Ibid.*, Art.2.

⁹⁵ *Ibid.*,Art.5(3).

⁹⁶ *Ibid.*, Art.18.

of courts.⁹⁷

The EIT Law is adopted the principle *lex loci actus*. The electronic information, electronic data and or electronic transaction wherever concluded must fulfil the requirements of EIT Law, if it will be implemented within RI.

B. PIL OF NL

Art.18 AB is equal to Art.12 of PIL of NL, whereby it stipulates that a legal act is formally valid if it satisfied the formal requirements of the law which governs it in substance or of the law of the state where it is performed. A legal transaction that is performed by persons who are in different states is formally valid if it satisfies the formal requirements of the law which governs the legal act itself or of the law of either of those states or of the law of the states where either of the parties has his habitual residence.

Marriage. A marriage may only be lawfully solemnized in NL before the relevant Registrar Office according to the Dutch law, save the power of foreign diplomatic and consular civil servants to cooperate in the solemnization of a marriage, according to its law, if neither party exclusively possesses Dutch nationality or possesses Dutch nationality in addition to another.⁹⁸

A marriage lawfully solemnized outside the NL or a marriage which has becomes lawful thereafter according to the law of the state where the marriage took place will be recognized as such. A marriage solemnized outside of NL before a diplomatic or consular civil servant, who meets the requirements of the law of the state represented by the civil servant, will be recognized as lawful unless such solemnization was not permitted in the state where it took place. A marriage is presumed to be lawful if a marriage certificate has been issued by a competent authority, provided that such recognition shall not be manifestly incompatible with Dutch public policy.⁹⁹

⁹⁷ *Ibid.*

⁹⁸ The Netherlands, Book 10 Civil Code establishment and Implementation Act, Art.30 of the PIL of NL.

⁹⁹ *Ibid.*, Art.31 jo.32.

Adoption. An adoption pronounced in the NL shall be governed by Dutch Law. The inter country adoption subject to the 1993 Hague Convention on Adoption. The inter country adoptions which are not subject to the said convention, is stipulated separately. The inter country adoption which pronounced abroad will be recognized in NL by operation of law, if it is pronounced by the a locally competent authority of the state where both the adoptive parents and the child had their habitual residence both at the time of the petition for adoption as well as the time of the decision; or a locally competent authority of the state where either the adoptive parents or the child had their habitual residence both at the time of the petition for adoption as well as at the time of the decision.¹⁰⁰

C. ACADEMIC BILL OF PIL

The Academic Bill of RI's PIL stipulated that unless stipulates otherwise by the PIL law, or other laws and regulations, the validity of a legal action is determined by the law where such legal action were taken place. In any legal action related to the immovable goods, the law where the immovable goods are situated applies to govern the required form of action to the validity of such legal action.¹⁰¹

Marriage. The solemnization of marriage that the solemnization of marriage is valid if it is according to the law where the marriage is taken place (*lex loci celebrationis*). These stipulations are also applied to the parties who have left their domicile to avoid the procedures and law applied in their previous domicile.¹⁰²

Adoption. It is stipulated that the law of the habitual residence of the child is the priority since the consideration is the best interest of the child. However, no stipulation to the solemnization of the adoption is self.¹⁰³

Will. The Academic Bill of RI's PIL Any testament or will is made in a form that subject to the national law of the descendent when he made his will or at his death; or the law where the descendent has his domicile when he made his will or at his death; or the law where the

¹⁰⁰ *Ibid.*, Art.43.

¹⁰¹ Art.3 point (j) of the Academic bill of PIL.

¹⁰² Chapter IV, Part 1 of the Academic Bill of PIL.

¹⁰³ Chapter V of the Academic Bill of PIL.

descendent has his habitual residence when he made his will or at his death, or the law of state where the immovable assets is situated as long as it is in relation with the immovable assets.¹⁰⁴

D. SUMMARY

The principal of *lex loci actus* as described in Art.18 AB is remain the primary principle in RI. It still applied in marriage, adoption and also the making of legal documents and electronic transaction.

The Academic Bill of RI's PIL also applied the same principle. However, in relation with adoption, the prevailing regulations and the Academic Bill of RI's PIL need to be adjusted one another. Both states that adoption is made for the best interest of the child. However, in relation with the legal action of adoption, the prevailing regulation states that Indonesian courts are the authorized courts, while the Academic Bill of RI's focuses on the courts where the child has her habitual residence.

In general, the principle of *locus rigit actum* is reflected in the PIL of NL. However, for legal action, it is slightly different with RI, whereby the first option is the law which governs it in substance, and then the law of the state where it is performed. In RI, legal action is valid if it is according to the law where it is took place.

In relation to marriage which solemnized abroad, the stipulations between RI and NL is similar. For adoption, the PIL of NL and RI are developed slightly similar that both of them state that adoption is for the best interest of the child and it is centralized to the law where the child had her habitual residence, while the prevailing regulation of RI state different.

IV. CONCLUSION

The personal status in RI is determined by the Principle of Nationality since the promulgation 16AB. The application of such principle in cases of PIL in RI does not hard and rigid. The judges in RI have also considered the other principles in PIL in determining the applicable law

¹⁰⁴ Chapter VI regarding Inheritance of the Academic Bill of PIL.

of a person, such as the Principle of Domicile in relation with marriage and Habitual Residence in relation with adoption.

The Nationality in RI also developed that currently RI gives possibly for children from international mixed marriage to have dual nationality. This chance urges the judges to consider another factor, such as the central gravity or the effective and active nationality or habitual residence in determining the applicable law. In relation to this, the Academic Bill suggests the appliance of Habitual Residence factor to determine the applicable law. In relation to this, the author would like to suggest that this appliance could be consistence in personal status cases, as the PIL of NL does.

The application of the Principle of Nationality shall be different if the judges must adjudicate the cases of the person who his states applies the Principle of Domicile. The *renvoi* or remission or even transmission could be appearing in RI since RI accepts such appliance pursuant to its jurisprudences. In the contrary, NL closes the appliance of *renvoi*.

The public policy also becomes the limitation of the application of foreign law either in RI or NL. Both of them stipulate that the application of foreign law shall not be applied if it is manifest incompatible with public policy. And this is applied also in personal status cases.

In relation with the entities, RI uses the principle of establishment and legal seat (only) in determining the applicable law, while NL applies according to the principle of establishment and legal seat and also it centre of external operation at the time of establishment.

The Personal Status in RI and NL though it started from the same, the development leads them to its own modification though similarities in both of NL and RI still could be found in the primary principle.

The principle of *lex re sitae* in 17 AB, such principle remains the same in RI. It is applied to the goods located in RI, and also registered (for the intellectual property rights) in RI, exception is made for aircrafts and vessels which has the nationality flags or nationality signs that makes it persists to subject to the RI's law ever it is abroad. The same principles are also the same in NL, and our Academic Bill.

The principle of *Locus rigit actum* in 18 AB remains the same in

RI. NL stipulates slightly different whereby the first option of the applicable law is the law which governs it in substance then the law of the state where it is performed.

In relation to marriage which solemnized abroad, the stipulations between RI and NL is similar. For adoption, the PIL of NL and RI are developed slightly similar that both of them state that adoption is for the best interest of the child and it is centralized to the law where the child had her habitual residence, while the prevailing regulation of RI state different. In relation with adoption, the Academic Bill and the prevailing regulations need to be adjusting one another. Both states that adoption is made for the best interest of the child. However, in relation with the legal action of adoption, the prevailing regulation states that Indonesian courts are the authorized courts, while the Academic Bill of RI's focuses on the courts where the child has her habitual residence. Therefore, to avoidance any contradiction or doubt it is advisable that such stipulations to be compromised.

The 16, 17 and 18 AB become the skeleton of PIL rules in RI, and then the current regulations are scattered in another law pursuant to the respective topics. Fortunately, the scattered regulations do not in contradiction with the primary principles in AB. It will be nice if it could be codified in one book as same as the PIL of NL which are embodied in one book of Civil Code, namely Book 10. Therefore, the author supports the drafting of the Bill of PIL in RI.

In relation to the Academic Bill, it is advisable if the international conventions which RI become the party could be also become reference as the international instruments. It also advisable f it could adopt the stipulations of international conventions as described above. In details, it will be prudent if the Academic Bill could be compare side by side with the prevailing regulation so it will not in contradiction one to another.

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