The Politics of Law of the Civil Right Protection to Children Born Out of Wedlock in Indonesian Legal System[1]

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ABSTRACT

Child civil rights are the personal rights owned by a child to enjoy the right to alimony, the right to use family name, and inheritance rights. Civil rights are automatically owned by legitimate children, but the civil rights of children born out of wedlock are enjoyed when their fathers and/ or mothers conduct "child recognition" and ”child validation" to children born out of wedlock.

The institution of child recognition and validation was derived from the Dutch *Wetboek Burgelijk* applied for Dutch people who lived in the Dutch East Indies. When Indonesia has been independent, Burgerlijk Wetboek is still applied to fill in the legal vacuum. When Indonesia enacted Law No. 1 of 1974 on Marriage, not all aspects set out in the Civil Code are embodied, including the institution of child recognition and validation. Meanwhile, in practice, there is a need for the protection to children born out of wedlock.

The enactment of Law No. 24 of 2013, makes children born out of wedlock lose the right to get recognition from their biological fathers because according to Law No. 24 of 2013, the recognition of children born out of wedlock can only be conducted if the children’s parents are married religiously. This provision eliminates the rights of children born out of wedlock whose parents may not be religiously married to each other so that children born out of wedlock remains to potentially experience discrimination.

If law is the means to provide protection to children born out of wedlock, it is time for the Government to use its authority to provide the regulation of civil rights in favor of them, so children born out of wedlock can optimally grow to reach maturity and be free from discrimination.

Keywords: children born out of wedlock, politics of law, child civil rights.

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A. INTRODUCTION

Children are potentials and successors of a nation’s ideals. This statement is not an exaggeration because children are the owners of nation’s future. Therefore, they need to get a guarantee to have their rights met so that they can grow and develop perfectly.

The fulfillment of children’s rights is basically parents’ obligation. However, if parents can not meet their obligations, family and society need to take the role to fulfill children's rights. In some circumstances, the State even had to take the role to provide protection to children's rights in the form of regulations, policies and specific technical measures related to the protection of children's rights.

Indonesian government's commitment to provide protection to children is very strong. This is evidenced by the enactment and ratification of several regulations, such as: Law No. 4 of 1979 on Child Welfare; the Convention on the Rights of the Child by Presidential Decree No. 36 of 1990 on the Ratification of the Convention on the Rights of the Child (CRC), and Law No. 23 of 2002 on Child Protection.

Among the seriousness of the Government to give attention to the protection of children, there are various problems faced by Indonesian children, both in the field of public law and civil law / private. In the field of public law, children experience economic exploitation, discrimination, slavery, deprivation of the rights of children, violence against children, trafficking, neglect, street children, and children in conflict with the law. In the field of private law, the

problems are the ownership of children's birth certificate, marriage at early age, and children born out of wedlock.

The issue of children born out of wedlock is not only a legal issue but also the issue of religion, morality and social. The marriage institutions are still viewed as the sacred institutions. Therefore, people do not want a relationship out of legitimate marriage. Therefore, the children born from a relationship considered illegitimate by the society also become illegitimate children. People tend to mock and give negative stigma against children born out of wedlock in several terms such as "*anak haram jadah*", "*anak kampang*", "*anak sumbang*", "*anak kowar*", "*anak astra"*and so forth.

In the law, children out of wedlock face discrimination. The differentiation between legitimate children and children born out of wedlock is the essence of the discrimination as a consequence to children stratum and rights. Legitimate children have special status. They have civil relationships with their fathers and mothers, including their fathers and mothers' family. Children born out of wedlock only have civil relationships with their mothers and their mothers' family. They do not have civil relationships with their biological fathers. The civil relationship with their biological fathers emerges when their biological fathers have performed a recognition to the children born out of wedlock. The specialty of civil rights is that by having the civil rights children are entitled to the rights to care, reciprocal alimony rights, the right to use their fathers' names, the right to be represented in and out of court, and reciprocal inheritance rights.

In the Civil Code, there are the institutions of “the recognition to children born out of wedlock" and "the legitimation to children born out of wedlock"[4]. The two institutions derived from the Dutch legal system are intended to provide legal protection to children born out of wedlock through "raising civil rights" for children born out of wedlock. *Adat* Law (Customary Law), as the native law of Indonesian, does not recognize the institutions of "child recognition" and institutional "child legitimation".

Law No. 1 of 1974 on Marriage does not significantly provide the solution to the civil rights of children born out of wedlock because it does not regulate the institutions of child recognition and child legitimation to children born out of wedlock. The Marriage Law only mentions that the children born out of wedlock have civil relationship with their mothers and their mothers' family.[5] The difficulties arise because the setting of children born out of wedlock which was promised to be regulated in a government regulation, but until now the government regulations have never been published yet. It becomes the difficulties in the practice of civil right settlement to children born out of wedlock.

The institutions of child recognition and child legitimation to children born out of wedlock are only included in Law No. 23 of 2006 on Public Administration. However, this law does not fully regulate these two institutions because it only regulates the obligation to report the recognition to the Officer of Administration and Population Registration within a certain time limit for parents

[4] Read Article 272 and Article 280 of the Civil Code.
[5] Read Article 43 of Marriage Law.

who do the recognition of the children born out of wedlock.[6] In 2013, this law was revised by Law No. 24 of 2013. The basic difference between the two laws is that, under the new law, only biological parents who have been carrying out lawful marriage in accordance with religion law can do recognition. This provision would remove the right to do the recognition for those who do not/ can not marry religiously. This is detrimental to children born out of wedlock because of losing the chance to be recognized by their biological fathers.

The 1945 Constitution in Article 28 paragraph (1) states that: "Everyone has the right to recognition, security, protection, and fair legal certainty as well as equal treatment in public." This is a firm recognition to the principle of equality before the law by the State, that every person has equal rights before the law and government. In Article 28 B paragraph (2), The State ensures that every child has the right to live, grow, and develop and is entitled to protection from violence and discrimination.

Referring to the decision of the Constitutional Court Number 46 / PUU-VIII / 2010, which was amended by Article 43 paragraph (1) of Marriage Law, Article 43 paragraph (1) of Marriage Law should reads:

> "Children born out of wedlock have civil relationship with their mothers and mothers's family as well as with men as their fathers who can be proven by science and technology and/ or other evidence according to the law to have blood relations, including civil relationship with their fathers' family".

With this decision of the Constitutional Court, children born out of wedlock have the opportunity to have a civil relationship with their biological fathers if it can be proven by science and technology and / or other evidence according to the

[6] Read Article 49 of Law No. 23 of 2006 on Population Administration.

law. However, in practice, it is not easy to sue the civil rights or at least the recognition of biological fathers.

It is questionable; how the politics of law of the Government in the matter of the recognition to children born out of wedlock in order to provide legal protection for them, because, based on the Convention on the Rights of the Child that has been ratified by Indonesia, children have protection rights including the protection and discrimination, violence and neglect. Based on these descriptions, the writer was interested in conducting a study on "Politics **of Law of the Civil Right Protection to Children Born Out of Wedlock in Indonesian Legal System**"

B. PROBLEMS

Based on the descriptions above, the problems were formulated as follows:

How does the politics of law of Indonesian government provide protection to the civil rights of children born out of wedlock?

C. DISCUSSION

The politics of law and the history of the regulation development on children born out of wedlock can be described as follows:

1. Protection to the Civil Rights of Children Born out of Wedlock in The Reign of the Dutch East Indies until Indonesian Independence

Protection to the civil rights of children born out of wedlock in Indonesia can not be separated from the history of independence and the history of the enactment of the Civil Code in Indonesia. Political configuration of the Dutch

colonial period began in 1596 when the Dutch first landed in Banten under the command of Cornelis de Houtman with the intention to trade spices. To strengthen his position, in 1602 in Batavia, the Dutch established a trade partnership called "VOC" (Verenigde Oost Indische Compagnie), under the leadership of Governor-General Pieter Both, for the purpose of trade. However, in further development, to gain much control, VOC controlled the trading centers such as: Batavia, Banten, Sunda Strait, Makasar, Maluku, Mataram (Yogyakarta), and various other strategic areas.

At the end of the 18th century, the VOC went bankrupt and was dismissed on December 31, 1799. The Dutch Indies was later ruled by the Dutch colonial government, with Daendels as the first governor general. Daendels was famous for the forced labor to make a road of 1,000 km along the northern coast of Java Island from Anyer to Panarukan (known by the Daendels Street).

The Dutch Indies is not a state; therefore, the Dutch East Indies did not have its own citizens. The Dutch East Indies government was only as an arm (detentor) of the Netherlands. At that time, the government system of the Dutch East Indies was more dominant, while the system of local authorities (royal / kasultanan) tended to be weak and fragmented because of pitting politic.

The legal and judicial systems in Indonesia at that time were plural, and between the civil law and the court were separated for various racial groups in the colonies, such as the class of European descent State, native of Indonesia, and the group of Chinese and other Foreign East. The plural court system no longer

existed during the Japanese occupation (1942-1945), but the plural civil law was still maintained.[7]

Differentiation of the people in three classes, as stated in Article 163 of Staatsregeling Indies (IS)[8], had a fundamental significance since it was the basis of legislation, administration and judiciary in the Dutch East Indies which, at that time, did not have a legal system and a uniform system of government, but pluralistic. Everyone who had anything to do with governmental laws and justice of the Dutch Indies was included in one of the social classes.[9] This distinction was based principally on the type of nationality.

By considering that the laws applicable to each class of the population were the law of the place where they came from to be the most appropriate for them, Article 131 of IS and Article 75 RR determined the law applicable to each class. For the group of European, they applied Burgerlijk Wetboek (Code of Civil Law), the Wetboek van Koophandel (Code of Commercial Law) and Failisement Verordening (Bankruptcy Regulation) which were applied based on the principle of concordance. The Foreign East group of Tiong Hoa applied the European civil law with some exceptions as well as by the additional regulation on Partnership and Adoption. For the groups of other Foreign East,they applied the European

[7] Lev, Daniel S., 2013, *Hukum dan Politik di Indonesia Kesinambungan dan Perubahan*, LP3ES, Jakarta, page 1-2.
[8] *Indische Staatsregeling* (IS) is a constitution of the Dutch East Indies which started to apply on January 1, 1926 with the State Gazette (Staatsblaad) of 1925 Number 415. IS is a *Regerings Reglement* (RR) which has been renewed. It was caused by the changes in the government sytem of the Dutch East Indies concerning the changes of *Grond Wet* (the Dutch Constitution) in 1922.
[9] Soepomo, R. 1982, *Hukum Perdata Adat Jawa Barat*, Cetakan kedua, Djambatan, Jakarta, page 22.

private law in part (except for family law and inheritance law without testament), and the group of Native people (Bumiputera) still applied their customary law.[10]

It is in line with R. Supomo that at the time of the Dutch East Indies there was a "racial discrimination" in laws, administration and judiciary of the Dutch East Indies.[11] According to Sunarjati Hartono, the distinctions of Indonesian population into three (3) categories were not only the division on the basis of mind which was merely juridical to let the people in a legal atmosphere best suited to them, but the division has hidden motives to differentiate people of Indonesia into three levels of social (caste) with different legal position, from the highest (European group) to the lowest (Indonesian native class / Bumiputera). This social motive was closely related to economic motive which was to facilitate trades between the European and Oriental group. It shows the colonial style of the Dutch government at the time prioritizing their own interests and ignoring the interests of the people.[12]

With the pluralistical law conditions, the protection to the civil rights of children born out of wedlock was also pluralistic in accordance with the system of each law applicable to the population groups. For the European group, the protection to the civil rights of children born out of wedlock was in the form of: "the institution of the recognition of child born out of wedlock" and "the institution of the legitimation of child born out of wedlock". This provision also applied to the Oriental group of Tiong Hoa.

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[10] Ko Tjai Sing, 1960, *Hukum Perdata Jilid I, Hukum Keluarga (Diktat Lengkap)*, Etikad Baik, Semarang, page 37-38.
[11] Ibid., page 23.
[12] Hartono, S., 1968, *Dari Hukum Antar Golongan ke Hukum Antar Adat*, Alumni, Bandung, page 4.

Although the Bumiputera groups recognized the distinctions between legitimate children and children born out of wedlock, but they did not recognize the institutions of children recognition and children legitimation to children born out of wedlock. The birth of a child born out of wedlock was generally prevented in Indigenous way by "emergency marriage" (*Tambelan* married / forced marriage). In the customary law area of West Java (except in Banten), there was the habit among the population. When a woman was pregnant without marrying, her family would find a husband for her in order that "the child has a father" which was in Sundanese called "ngangkat bapak" In the legal area of Jakarta, it was called "*buat menerangkan*" meaning that the child becomes "clear" or being legitimate, or called "*buat nambalin orang bunting*". The emergency marriage was called "*kawin tambelan* ", "*kawin liwat*" or "*kawin angkat bapak*".[13] Based on this description, it appears that in indigenous legal systems, there was a pattern in the community to provide protection to the child born out of wedlock, by striving emergency marriages so that the child born in a marriage.

In 1942 the Dutch East Indies was taken over by the Japanese. At the time of the Japanese administration, the conditions of politic and law in Indonesia were not much different from the previous period for approximately 3.5 years. Daniel S. Lev stated that: "The court system was no longer pluralistic during the Japanese occupation (1942-1945), but pluralistic civil laws were still maintained".[14] Thus, for those who were the groups of European and Foreign East of Tiong Hoa and their descendants were still subject to the European civil

[13] Soepomo, R., 1982, *Hukum Perdata Adat Jawa Barat*, Cetakan Kedua, Djambatan, Jakarta, page 3.
[14] Lev, Daniel S., Op.cit., page 1-2.

law, whereas the other groups of Foreign East were subject to their own customary law and the Bumiputera (Native) group remained with their own customary law. It can be concluded that, during the Japanese occupation, the condition of the protection to the civil rights of child born out of wedlock was not much different from the conditions of the occupation by the Dutch in the East Indies.

2. The Civil Rights of Children Born out of Wedlock from the Period of Indonesian Independence (1945) to present (2015)

The politics of law of the civil rights law of children born out of wedlock in the period of Indonesian independence until now can be divided into four periodizations by the time of the state condition of Indonesia, which can be described as follows:

a. From the beginning of independence to the founding of the Republic of Indonesia (1949)

In the early days of independence, Indonesia had not fully prepared as a country with a complete legal system and legislations. Therefore, the legislators of the 1945 Constitution set the issues of the Indonesian legal system with Article II of the Transitional Provisions of the 1945 Constitution which stipulates that all State agencies and existing regulations directly apply as long as the new ones have not been held according to the 1945 Constitution. Thus, the existing conditions of civil law with pluralistic nature at the time the Dutch East Indies were continued, including the institutions derived from the European Law to be continued / used to prevent vacuum of law. This provision was strengthened by the Government

Regulation No. 2 of 1945[15] which stipulates that all agencies of the State and the existing regulations until the founding of the Republic of Indonesia, as long as the new ones have not been held, are valid with the condition that they are in line with the 1945 Constitution.

According to Safioedin, in a-contrario, it could be interpreted that the legislations that existed before the founding of the Republic of Indonesia should not be treated if they were contrary to the 1945 Constitution, Pancasila, and the sense of justice of Indonesian as an independent nation or contradictory, and not in line with the legal needs of the people of Indonesia.[16]

In this period, because Indonesia had not managed to make a written law in the field of civil law, it means that the Civil Code was formally still applicable. Similarly, about the protection of the civil rights of children born out of wedlock, the institutions and agencies of the recognition and legitimation of children born out of wedlock still used the provisions stipulated in the Civil Code. In other hand, for Indonesian citizens and the group of Foreign East excluded Tiong Hoa applied their Customary law respectively, so that the settlement of children born out of wedlock refered to the provisions of customary law, namely the public as much as possible avoid the occurrence of children born born out of wedlock by implementing "emergency marriage" , "Kawin Tambelan" or "forced marriages" so that no child is born out of legitimate marriage. If a woman is pregnant without being married, she will soon be mated to cover the shame. This habit still continues until recently.

[15] PP No 2 of 1945 has been retroactive since August 17, 1945.
[16] Safioedin, 1990, *Beberapa Hal tentang Burgerlijk Wetboek*, Cetakan ketujuh, Citra Aditya Bakti, Bandung, page 59.

b. The period of the United States of Indonesia (1949-1950)

the period of the the United States of Indonesia is very short, from December 27, 1949 to August 17, 1950. During this period, there was no new regulation in the field of the recognition and legitimation of children born out of wedlock. With no changes during the period, the laws derived from the previous period (1945-1949) remained applicable under the provisions of the Transitional Provisions of Article 142, the Constitution of the United States of Indonesia (KRIS). Thus, in politics of law, there was no change in law and applicable legal patterns.

c. The period of the Unitary State with the Provisional Constitution (1950-1959)

In 1950, Indonesia came back to the form of unitary state with a Provisional Constitution (UUDS) 1950. To set the legal order and the system of government in the transitional period, there was Article 142 of the Provisional Constitution of 1950 which was the law that regulates the the laws applicale at the beginning to get to the unitary state.[17] The legal condition in Indonesia at the beginning of the Provisional Constitution of 1950 was the same as the condition during the period of 1945-1949 and the RIS Constitution. The difference is that during the period 1950-1959, the Government enacted Law No. 62 of 1958 on Citizenship of the Republic of Indonesia[18], which revoked the classification of the

[17] Article 142 of the 1950 Constitution determines that the laws and provisions of administration which had been available since August 17, 1950 is still applicable and does not change during and just when the laws and provisions are not revoked, added, or changed by the new law and provision.

[18] Law No. 62 of 1958 has been revoked by Law No. 12 of 2006 on Citizenship.

population based on Article 163 of IS in conjunction with Article 109 of RR. During the period of UUDS 1950, there was no new regulation concerning the civil rights of children born out of wedlock. Thus, the problem of recognition and legitimationn to children born out of wedlock is as a form of the protection of civil rights of children born out of wedlock, still applied the old provisions, i.e.: the native Indonesian citizen applied customary law, the descent of the European group and Foreign East of Tiong Hoa and their descendants applied the provisions of the Civil Code, while the Foreign East group of non-Tiong Hoa applied the customary law of the country of their ancestors.

d. The period of the Unitary State of the Act of 1945 (1959- current)

In the period from 1959 until 2015, there were several important events in the field of law –directly or indirectly related to the institution of the recognition and legitimation of children born out of wedlock, i.e.:

1) The Supreme Court Circular (SEMA) No. 3 of 1963.
2) Law No. 1 of 1974 on Marriage.
3) Law No. 4 of 1979 on Child Welfare.
4) Presidential Decree No. 36 of 1991 on the Ratification of the Convention on the Rights of the Child.
5) Law No. 23 of 2002 on Child Protection.
6) Law No. 23 of 2006 on Population Administration.
7) The decision of the Constitutional Court Number 46 / PUU-VIII / 2010.

8) Law No. 24 of 2014 on the amendment of Law No. 23 of 2006 on Population Administration.

The Circular of the Supreme Court (SEMA) No. 3 of 1963, addressed to the Chairman of the District Courts and the Provincial Courts in Indonesia, basically contains the idea to assume Burgerlijk Wetboek (BW) not as a book of Law (geschreven recht), but as a document that just describes a group of unwritten law (beschreven recht)[19]. Due to the nature of the differences between laws and SEMA, then basically SEMA No. 3 of 1963 which is administrative juridical in nature can not annul or cancel the application of laws which are the products of the legislature. Asis Safioedin (1990) mentions that the Civil Code is a law that may only be revoked or treated as a rechtboek with a law anyway, and should not be a circular as SEMA No. 3 of 1963, or simply by an idea.[20]

Law No. 1 of 1974 on Marriage, as the Indonesian marriage law, is intended as the unification in the field of marriage law. However, the Marriage Law does not regulate the institution of child recognition and legitimation of children born out of wedlock. The only article that regulates children born out of wedlock is Article 43 which states that a child born out of wedlock only has the civil relations with his mother and his mothers's family. The Marriage Law promises that, for the children born out of wedlock, a special regulation will be issued to regulate the matter, but to date, the government regulation has not been issued.

[19] SEMA Number 3 of 1963 is in the form of ideas stated by the Minister of Justice, Mr. Sahardjo, SH, which basically contains the idea not to consider BW as the Code of Regulation, but as the Code of Law.
[20] Safioedin, Op.Cit., page 58.

This causes a " vacuum of law" in terms of the protection of the civil rights of children born out of wedlock.

The enactment of Law No. 23 of 2006 on Administration and Population (Adminduk Law of 2006), Indonesia has the law that regulate the institution of the recognition of children born out of wedlock and the legitimation of children born out of wedlock. But in this law, the issue of the recognition of the children is only regulated briefly, that is, in Article 49 which states that a child recognition shall be reported by the parents at the Executing Agency no later than thirty (30) days from the date of the Child Recognition by the fathers and approved by the mothers of the child. This reporting obligation shall not apply to parents whose religion does not justify the recognition of children born out of wedlock. Based on these reports, the Officer of Civil Registration records in the Register of Child Recognition Deed and publishes the Excerpt of Child Recognition Deed.

In the Law, the institution of the legitimation of children born out of wedlock is also arranged briefly, that is in Article 50, which essentially requires the recording of the legitimation of children born out of wedlock by their parents to the Executing Agency no later than 30 days after the father and mother of the children concerned are married and get the certificates of their marriage. The obligation to report such legitimation shall not apply to the parents whose religion do not justify the legitimation of children born out of wedlock. Adminduk Law does not regulate the procedure of legitimation, anyone who may be legitimated as well as the legal effect of legitimation, only promising that the Presidential Regulation will be held regarding the requirements and procedures for child

recognition and the legitimation of children born out of wedlock, which is up to present (2015), the Presidential Regulation has not been published yet.

Although there are still shortcomings in the articles of Adminduk Law of 2006, it is still special because:

1. This Law was enacted after 61 years of Indonesian independence, and 32 years after the enactment of the Marriage Law. Thus, during this period, there is a vacuum of law in the field of recognition and legitimation of children born out of wedlock.
2. If until recently the institutions of child recognition and the legitimation of children born out of wedlock are in the field of civil law, then in the Adminduk Law of 2006 there are regulatory "leap" from the issue of civil law to the issue of administration and population.

Further leap occurred with the enactment of Law No. 24 of 2013 on the Amendment of Law No. 23 of 2006 on Population Administration. The changes include several chapters, including the changes in paragraph (2) of Article 49 of Adminduk Law of 2006 into:

(1) Child recognition shall be reported by the parents to the Executing Agency no later than thirty (30) days from the date of the Child Recognition by the father and approved by the mother of the child.

(2) Child recognition applies only to children whose parents carried out legal marriage according to religious law, but not legal in accordance with the State Law.

(3) Based on the report referred to in paragraph (1), the Civil Registration Officer records on the register of child recognition certificate and publishes child recognition certificate.

The change to Article 49 of Adminduk Law has a major impact because the one who can make the recognition of children are those who have been legally married according to religious law. This means that it closes the opportunities for children born out of wedlock – whose parents are incidentally not legally married or not under religious law - to get the recognition of their biological fathers. The change in paragraph (2) of Article 49 of this Adminduk Law deprives children's rights to get the right to care, education and growth of their biological fathers.

The change to Article 49 of Adminduk Law of 2013 is contradictory to the Constitutional Court Decision No. 46 / PUU-VIII / 2010, which changes the content of the provisions of Article 43 paragraph (1) on Marriage Law, that a child born out of wedlock can have a relationship with his biological father and the family of his biological father proven by science, because even if it can be proven that the child born out of wedlock is someone's biological child - but the recognition can not be performed when the child's biological mother and father are not married in a religious way, and the recognition cannot be performed. According to the chairman of the National Commission for Child Protection, Aris Merdeka Sirait[21], the changes to the Marriage Law by the Constitutional Court would be a valid legal basis in promoting the advocacy for children born out of

[21] http://www.lemhannas.go.id/portal/in/daftar-artikel/1715-analisis-hukum-putusan-mahkamah-konstitusi-nomor-46puu-viii2010-tgl-13-feb-2012-tentang-status-anak-luar-kawin.html, diakses 1 Nov 2014.

wedlock to obtain their civil rights. Although in practice it is not always easy to apply or claim the recognition of children born out of wedlock.

In the matter of the legitimation of children born out of wedlock, the changes in Adminduk Law of 2013 are in the form of strict orders that the legitimation of children applies only to children whose parents had carried out a legal marriage according to religious law and state law. This provision is similar to the provisions in the Civil Code, that the legitimation of the child can only be performed after the child's parents are legally married. Adminduk Law of 2006 and 2013 do not regulate whether child recognition is prior to child legitimation.[22]

The absence of national laws regarding the child recognition institutions and the legitimation of children born out of wedlock will make the practice needs of the institution of child recognition and legitimation of children born out of wedlock seek basic rules of the old provisions, namely the Civil Code. It is interesting to quote the opinion of Bagir Manan who mentions that there has been "secret unification" in the application of the laws of the colonial period which was originally valid only for the group of the European population or the equivalent, and a group of Foreign East. Therefore, formally, the provisions of the Civil Code are intended to only be applicable to European groups, but in practice, these provisions have been applied to all population groups and citizens.[23]

[22]It is different from the provisions in the Civil Code that a child must be recognized before he is legitimated.

[23] Manan, 2004, *Hukum Positif Indonesia, Suatu Kajian Teoritik*, First Edition, FH Universitas Islam Indonesia, Yogyakarta, page 42-43.

3. The need for setting civil rights of the Child Born out of wedlock

In Indonesia, a special attention to children begins with the enactment of Law No. 4 of 1979 on Child Welfare. The Indonesian government's commitment to provide welfare to children is on the basis that children are future owners. Therefore, children should be given the widest opportunity to grow and develop naturally, spiritually, physically, and socially.

The publication of Presidential Decree No. 36 of 1991 on the Ratification of the Convention on the Rights of the Child (often referred to as CRC) is a new round of child protection in Indonesia, because the decree is a form of Indonesia's commitment to the world community, that Indonesia participates in assuring Children's Rights. By attaching themselves to the UN Convention on the Rights of the Child, Indonesia is obliged to provide an annual report on the development of child protection in Indonesia as well as the efforts undertaken by the Government to ensure that children can grow and develop optimally, free from discrimination and violence, assured rights in the field of civil law as well as their public rights.

In 2002, Indonesia enacted Law No. 23 of 2002 on Child Protection. By Presidential Decree No. 77 of 2003 on the Indonesian Child Protection Commission, the Indonesian Child Protection Commission (KPAI) is established. KPAI is one of three national institutions as the guardians and supervisors for the implementation of human right in Indonesia (NHRI / National Human Rights Institusion) such as KPAI, the National Commission of Human Rights, and the

National Commission for Women. KPAI formation further confirms that the Government considers it important to ensure child protection in Indonesia.

Regarding the need for the regulation on the civil rights of children born out of wedlock, based on the writer's exploration, in Indonesia there is no official publication of the exact number of children born out of wedlock. But by looking at the development of society, in which the norms of decency largely ignored in the form of the tendency of free sex behavior, it potentially causes an increase in the birth rate of children born out of wedlock. The absence of legislation that specifically protects the rights of children born out of wedlock causes the need for an earnest effort to provide protection to children born out of wedlock, in order to keep the right to grow and develop perfectly.

Law is not the goal, but only a bridge that brings people to the idea aspired, that is, a fair and prosperous society as stated in the Preamble of the 1945 Constitution. namely: (a) to protect the entire Indonesian nation and country; (B) to promote the general welfare; (C) to educate the life of the nation; and (d) to participate in implementing the world order based on freedom, everlasting peace and social justice.[24]

It has been commonly realized that children are the successors to the ideals of the nation. As the successors to the ideals of the nation, they should be able to grow and develop into adult humans who are healthy spiritually and physically, smart, happy, educated and have high and commendable moral character. In order

[24] Hartono, S., 1991, *Politik Hukum Menuju Satu Sistem Hukum Nasional*, Alumni: Bandung, page 2.

that children can grow and develop, it is necessary to provide protection to the rights of the children.

In the matter of the civil rights of children born out of wedlock and the institution of child recognition and the legitimation of children born out of wedlock, it is important for Indonesia to have the law regulating those issues since Indonesia until recently has not had the law that regulate these fields. Until now, substantially, Indonesia only relies on the Civil Code, while the development of the need of local and international community for having a material law in that field is so urgent. Currently, the existing law gives the responsibilities of: birth, life, education and development of the children born out of wedlock only to their mothers and their mothers' family. They are the ones who have to bear the whole future and life of the children born out of wedlock, , while the men who are responsible for the birth of the child are freed from the responsibility and moral burden.

3. Ius Consituendum of the Civil Rights of Children Born out of Wedlock in Indonesian Legal System

According to Romli Atmasasmita, law is the unity of the three characters; law as the unity of system of norms, system of behavior, and system of values, called "Tripartite Character of the Indonesian legal theory Social and Bureucratic Engineering (SBE)."[25] When Roscoe Pound argues that law is a tool of social engineering, Romli stresses the need for bureaucracy and society engineering

[25]Atmasasmita, R., 2012, *Teori hukum Integratif, Rekonstruksi terhadap Teori Hukum Pembangunan dan Teori Hukum Progresif*, First Edition, Genta Publishing, Yogyakarta, Op.Cit., page 96-97.

based on system of norms, system of behavior, and system of values rooted in Pancasila as the ideology of Indonesian nation.[26]

In the matter of the institutions of child recognition and the legitimation of children born out wedlock, in the norm, there is a regulatory disharmony of the 1945 Constitution, the Civil Code, the Marriage Law, and the Adminduk Law. This disharmony happens because of: different law makers (the Civil Code is the western legal product), while the 1945 Constitution and other laws are the 'products' of Indonesian law, and not doing the harmonization at the time of drafting legislations.

The Ius Constituedum which is ideal for the recognition issue of children born out of wedlock is of the legal norm which is capable of:

1. Providing the rights and opportunities as wide as possible for the biological fathers of the children born out of wedlock to perform the recognition for the children born out of wedlock. This recognition is not only aimed at causing civil relationship between the children with their biological fathers, but at the same time, it is an ideal burden sharing between their biological mothers and fathers in the problems of care, education and child development assistance.
2. It is necessary to have a regulation of the institution of “the recognition to children born out of wedlock” and “the legitimation to children born out of wedlock” in specific, not just an administrative law because the issue of child recognition and legitimation are related to civil rights. The setting in the field

[26] Ibid.

of administrative law is only concerned with the issue of recording, while the material side is part of civil law.

3. Ius constituendum in the matters of child recognition and legitimation should also be the attention of the legislators in the elements of: gerechtigkeit (justice), zweeckmassigkeit (benefit), and rechtsicherkeit (legal certainty). This is in accordance with the purpose of law which provides protection to members of community as many as possible.
4. Adat Law (Customary Law) as the living law and most suitable for Indonesia as well as the religious law becomes the source of inspiration in making regulations concerning the institutions of child recognition and legitimation to realize the fair and proper law for the nation of Indonesia.

D. CONCLUSION

Based on these descriptions, it can be concluded that the politics of law of the civil right protection to children born out of wedlock in Indonesian legal system can be described as follows:

1. That the Government of Indonesia has made various efforts to provide protection to children born out of wedlock, but the aspect of the civil rights of children born out of wedlock has not received adequate attention. The vacuum of law that occurs in practice is solved by applying the settings of the institutions of child recognition and legitimation as stipulated in the Civil Code.

2. The Marriage Law which is expected to be the unification of the national marriage laws only gives the civil rights of children born out of wedlock with their mothers and their mothers' family. The decision of the Constitutional Court Number 46 / PUU-VIII / 2010 opens the opportunity to the civil relationship between children born out of wedlock with their biological fathers. This opportunity is given if they can prove the existence of a blood relationship based on science and technology and/ or other evidence.
3. The enactment of Law No. 23 of 2006 in conjunction with Law No. 24 of 2013 is not able to solve the problems because the law only regulates the administrative records of children recognition and legitimation. Adminduk Law would eliminate the opportunities for children born out of wedlock to get the recognition and legitimation of their biological fathers when their biological parents are not married by law.
4. It is necessary to have the new law in the field of the civil rights of children born out of wedlock, which is the harmony between: Pancasila, the 1945 Constitution, and the child protection law (public). Adat law (customary law) is the living law and religious views to organize the institutions of child recognition and legitimation of children born out of wedlock as an attempt to provide legal protection to children born out of wedlock in realizing a just and prosperous society based on Pancasila.

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