LEGAL PROVISION OF INHERITANCE DISTRIBUTION FOR CHILDREN BORN OUT OF WEDLOCK BASED ON REGULATIONS NUMBER 1 YEAR 1974 ABOUT MARRIAGE, CODE OF CIVIL LAW, ISLAMIC LAW COMPILATION, AND CUSTOMARY LAW

ABSTRACT

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The current development has an influence on the youth interaction. Such interaction often led to negative things that do not conform to religious norms, customs and laws. Even, too much freedom in some kinds of interaction among the youths can cause the birth of child out of wedlock. With the birth of child out of wedlock, several problems might occur, such as inheritance rights problems for the out-of-wedlock child. This study aimed to compare the distribution of inheritance for children born out of wedlock based on Regulations No. 1 Year 1974 about Marriage, Code of Civil Law, Islamic Law Compilation, and Customary Law. The research result revealed that the distribution of inheritance for children born out of wedlock based on Regulations No. 1 Year 1974 about Marriage, Code of Civil Law, Islamic Law Compilation, and Customary Law was in accordance to Article 43 on Marriage Law with Pre-Decision of Constitutional Court No.46/PUU-VIII/2010 and Islamic Law Compilation, both provisions state that the out-of-wedlock child does not have inheritance rights on the father side, and only has a civil relationship to the mother. While the Article 43 on Marriage Law with Pre-Decision of Constitutional Court No.46/PUU-VIII/2010, Code of Civil Law, and Customary Law provide the possibility for children born out of wedlock to get the right of inheritance from the father, however the procedures for obtaining those rights are different. In addition, in terms of the amount of inheritance obtained by the out-of-wedlock child who have gained recognition on the Code of Civil Law was determined based on the position of the heirs’ class. Whereas in the Customary Law the amount of inheritance obtained by the out-of-wedlock child was equal to the legitimate child.

Key Words: Out-of-wedlock child, Inheritance Distribution.
A. INTRODUCTION

1. Background
The rapid globalization influences the youth intercommunication that tends to be improper relationship which leads to promiscuity. This causes negative impact that contradicts eastern norms and values. Religion norms and law have been violated when the pregnant outside the wedlock cases are found in the society. Children conceived outside the marriage will later face many legal issues such as inheritance.

In Indonesian inheritance legal system, children hold primary position among other relatives as the recipients of the inheritance. This is also in line with the Adat inheritance law and Islamic inheritance law that state children are the most important heirs and other relatives can only stand as the recipients of the inheritance in case of the absence of offspring. However, in particular cases concerning children outside the wedlock, the inheritance distribution can be complicated. Children conceived outside the marriage are biologically related to the parents though the parents are not legally married based on the Indonesian Law of marriage. Thus, the children are categorized as illegitimate children and these kinship consequences to inheritance distribution. Illegitimate children can have blood ties with her mother and her mother's family.

In Islamic inheritance law, children outside the marriage cannot become the recipients of the inheritance; this is based on the Presidential Instruction article 100 Number 1 of 1991 on the Compilation of the Islamic Law:

The child outside of marriage has a civil relationship with her mother and her mother's family alone. The child outside of marriage is the child born outside legal marriage or adultery. Thus, this child bloodline attaches only to his mother.

The provision of Article 100 of Compilation of the Islamic has the same regulation as stated in Article 43 (1) of Law No. 1 of 1974 on Marriage:

Children who are born outside of marriage just have a civil relationship with her mother and her mother's family.

However, those regulation above of Article 100 Number 1 of 1991 on the Compilation of the Islamic and Article 43 (1) of Law No. 1 of 1974 on Marriage are not valid any longer
since the decision of the Constitutional Court of the Republic of Indonesia No.46/PUU-VIII / 2010 on Marriage Registration and the position of children of unregistered marriage on Law No. 1 of 1974 on marriage, as long as it is proven with science and technology. In other words, children outside the marriage get the same inheritance rights as long as the procedures can be proved with science and technology and by other evidence regulated by the Law indicating blood relationship with the biological father.

In Indonesian Civil Code, illegitimate children are categorized into two groups. One of them is children outside the marriage who get inheritance rights because of illegitimate marriage of the parents that are not bound in any marriage relationship. These children are known as *natuurlijk kind* (natural child). Indonesian Civil Code Article 272 states:

Children conceived outside marriage, with the exception of those who have been conceived in an adulterous or incestuous relationship, is to be legitimized by the ensuing marriage of their father and mother, if the latter-mentioned have acknowledged them legally prior to the concluding of the marriage, or if the acknowledgment took place at the time of execution of the marriage certificate.

And Indonesian Civil Code Article 280 states:

The acknowledgment of a natural child is creating a civil relationship between that child and his father or mother.

According to D.Y. Witanto, children outside the marriage who cannot get inheritance rights even though a valid acknowledgement has been published are:

1. Children outside the marriage including on the category of article 283 of Indonesian Civil Code: Children conceived in an adulterous or incestuous relationship, then to those inheritance rights cannot be given, this is the extension of article 272 of Indonesian Civil Code: Children conceived in an adulterous or incestuous relationship may not be acknowledged ...

Moreover, in *Adat* inheritance law applied in Indonesia, the regulation is referred to statement of Djojodigono, “*Hukum Adat* is the regulation that is not sourced on constitution, as an exception on __________________

Islamic inheritance applied in some regions of Indonesia, thus cannot be called as *Hukum Adat*.

2. Research Problem

Based on the background above, the problem in this thesis proposal is:

“How is the inheritance law of illegitimate children based on Constitution No. 1 of 1974 on Marriage of Indonesian Civil Code, the Compilation of Islamic Law and *Hukum Adat*?”

B. RESEARCH METHODOLOGY

This type of research used in this legal study is a normative legal research or doctrinal legal research, which is a research aims to provide a systematic exposition of the laws governing specific areas of law, to analyze the relationship between the rule of law one with another, to explain parts which is difficult to be understood from a legal rule, maybe even also includes prediction of the development of a specific legal rule in the future. Doctrinal legal research is a research-based literature, which focuses on the analysis of primary and secondary legal materials. Meanwhile, according to Suratman and Philips Dillah, normative legal research is a research literature that studies on secondary data.

In this legal writing, the approach used was more emphasized on Statute Approach which was done by examining all of laws and regulations relevant to the legal issues being addressed. Approach to legislation in this legal writing examines legislation relating to the distribution of inheritance for children born out of wedlock.

Based on the Comparative Approach, this writing has three laws that made to be the comparison, namely the Dutch law, Islamic law and the law of native Indonesian/customary laws governing the distribution of inheritance for children outside of marriage. By doing a comparison of these three laws, it was expected to obtain a conclusion in the form of strengths and weaknesses of each rule, so that from these

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3 Dyah Ochterina Susanti and A’an Efendi, *Penelitian Hukum (Legal Research)*, Sinar Grafika, Jakarta, 2012, pg 11


5 Peter Mahmud Marzuki, *Penelitian Hukum*, Kencana Prenada Media Group, Jakarta, 2005, pg 39
conclusions will contribute to the creation of new rules in the future.

Legal materials used in this paper was firstly primary legal materials, which consisted of Civil Code, Law No. 1 of 1974 About Marriage, Presidential Instruction No. 1 of 1991 on the Compilation of Islamic Law and the Constitutional Court Decision No. 46 / PUU -VIII / 2010 About Marriage Registration Testing and Legal Status of Children born from Unlisted Marriage on Law No. 1 of 1974 About Marriage. Secondly, secondary law, in the form of all the publicities about law which is not official documents. Publications of the law include text books, legal journals, and articles and materials from the internet media and other sources that have a correlation to support this research. In this case the author used secondary legal materials in the form of legal journals from domestic and abroad, the results of legal research as well as the works of the law, including the articles of law on the internet and mass media. The written interview also included in secondary law material. And thirdly, tertiary legal materials, such as Kamus Besar Bahasa Indonesia, Complete General Dictionary of English-Indonesian and Indonesian-English and Law Dictionary.

Analysis technique used in this legal writing was deductive analysis technique, which is a method that stems from the filing of the major premise which then was forwarded the minor premise, then from both premises drawn a conclusion. In this case the major premise of the rule of law is the law, while the minor premise is legal facts which then can be drawn a conclusion in order to get an answer to the formulation of problem.

C. RESEARCH FINDINGS AND DISCUSSION

The occurrence of pluralism on inheritance law in Indonesia started in the Dutch colonial period that divides the population into several groups and each group has its own laws. Classification of the population carried out by the Dutch government under Article 163 Paragraph (2) on Indonesische Staatsregeling (IS), which reads:

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6 Peter Mahmud Marzuki, Op Cit, page 141
7 Ibid, page 163

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Provisions for European groups apply to:
1. All the Netherlands;
2. All those who are not included in the no. 1 originating from Europe;
3. All the Japanese and then all entrants from abroad who are not included in no. 1 and 2 who are in their mother country applicable to those the family law which basically has the legal principles in common with the Dutch family law;
4. Legitimate children or legally recognized by law in Indonesia and their descendants from the people as mentioned in number 2 and 3.

Classification of the population under Article 163 paragraph (2) of this IS, also followed by the application of different laws in each segment of the population living in Indonesia at the time. The legal provisions that apply to each segment of the population under Article 131 IS, which reads:

(1) The civil, commercial, and criminal law as well as procedural civil law and procedural criminal law, governed by "law" (the ordinance), without reducing the authority granted, or under the laws to the legislators of criminal law. This setting is done, both for the entire segment of the population or some groups of the population or part of the group, or both for the parts of the region together or for one or several classes or part of a group in specific.

(2) In the ordinances governing civil law and this trade:
a. For the class of the European applied (adopted) the laws that apply in the Netherlands, and deviations from it can only be done by keeping in mind both for those specially applied according to the situation in Indonesia, as well as for their interests referred to the legislation under the same terms for one or some other population groups;
b. For the people of Indonesia, Orientals group or parts of the that factions, who are two classes of people, as long as the whole community needs, it was applied both the statutory provisions for Europe group, as far as possible to make changes as necessary, as well as the statutory provisions which are the same as the Europe group, while for the other things that have not been determined, for those applied legal regulations related to their religion and customs, which can only deviate from it, if it turns out the public interest or people's needs require so. (ISR. 163; S. 1882-152; 1917-129 S., 130; S. 1924-556; S. jo 1931-53. 177.)

(3) In ordinances governing criminal law, procedural civil law and procedural criminal law, when it applies specifically to groups of Europe, adopted legislation in applied in the Netherlands, but with the
necessary changes due to special circumstances in Indonesia; when due to the application or submission to the general rules that apply equally to other groups or part of a group that, then the law was enacted when there is a rapprochement with the special circumstances…

After the independence of Indonesian on August 17, 1945 it was formed the Constitution of 1945 (UUD 1945) as the legitimate Constitution of the State of Indonesia. In the 1945 Constitution contains a provision to enforce the law before independence, set forth in Article II of the Transitional Provisions of the 1945 Constitution, which reads:

All the state agencies and the existing rules are still immediately effective, as long as the new rule has not been held according to this Constitution.

Then the Constitution of 1945 was amended which also changed the Article II of the Transitional Provisions to Article III of the Transitional Provisions, which reads:

Legislation remain valid for the new has not been published in accordance with the Constitution of the Republic of Indonesia Year 1945 which has been amended is intended to prevent a vacuum in the law or the legal uncertainty as a result of changes in the Constitution of the Republic of Indonesia Year 1945.

Based on Article II of the Transitional Provisions, the provisions of Article 131 paragraph (2) letter (b) Indische Staatsregeling remains valid, also included in the distribution of inheritance through customary law and religious law. Besides, in 1960 through the decision of MPRS number II / MPRS / 1960, in attachment A paragraph 402 stated that:10

a. The principle of national law guidance in order to be corresponded with the state guideline and be based on customary law which does not hinder the development of a fair and prosperous society.

b. In an effort towards homogeneity of law it should be noted the realities of life in Indonesia. In the improvement of the Act of marriage and inheritance laws should pay attention to the factors of religion, customs and others.

By doing legal unification of marriage and inheritance through Law Number 1 of 1974 on the Marriage, then the marriage is legitimate according to the state should be based on the Law of Marriage. Under the

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10https://iismardeli30aia.wordpress.com/2013/12/02/dasar-berlakunya-hukum-adat/
provisions of article 2, verse (1) the Law of Marriage states that:

Marriage is legal if it is done according to the law of each religion and its belief.

Whereas Article 2 verse (2) states that:

Each marriage is recorded in accordance with the legislation in force.

From the second chapter of the provisions above, it can be concluded that the marriage is legitimate if it is conducted under the law of each religion and belief, as well as a register of the country. The use of law of each religion and its belief in marriage, give raise to legal consequences, for the law to be used in the division of inheritance later. Marriages based on Islamic law, the inheritance is based on Islamic law contained in the Presidential Instruction No. 1 of 1991 on the Compilation of Islamic Law.

For the people who perform marriages under the provisions of religions outside of Islam, the division of inheritance is applicable provisions of the Code of Civil Code (BW). BW implementation as a legal basis of inheritance to people who perform marriages outside of Islam is based on Article 131, verse (3) IS which reads: "... if it is because of the application or submission to the general rules applicable to other groups or part of that group, then the law is enacted when there is a rapprochement with the special circumstances ".

While for the people who perform marriages based on their beliefs (custom or habit), then the distribution of inheritance is using customary law that they wear or use. This provision is based on Article 131, verse (2) (b) Indische Staatsregeling.

The third legacy of legal systems mentioned above, only Islamic inheritance law and civil inheritance law already regulate in detail the parts received by each heir. This can be seen in the rules that are set out clear and detailed governing inheritance. In civil law, inheritance law is set in the second book of Civil Law, whereas the Qur'an Islamic law has also been set in the Letter of An Nisa' of verse 1, 7, 8, 9, 10, 11, 12 as well as in the Al-Anfal verse 75. Meanwhile in customary inheritance law because it is part of customary law, which the customary law in Indonesia is mutual
vary between one another, the settings of the inheritance is also different from one region to another based on the kinship system adopted, whether patrilineal, matrilineal, or using the parental system. Then only Islamic inheritance law and civil inheritance system could be used as a comparative reference inheritance law.

The inheritance system in Indonesia, children have a preferred position compared to the other heirs either according to the Islamic law system, civil or customary law. But the position of the child as the principal heir becomes problematic when the child was born of the illegitimate marriage. Under the terms of article 42 of Law No. 1 of 1974 on marriage, states that:

Legitimate child is a child born in or as a result of a legal marriage ", it can be concluded that the out of wedlock child is a child who is born to not base on legitimate marriage.

While according to Sirman Dahwal explained that:11

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11Sirman Dahwal, Hukum Perkawinan Beda Agama Dalam Teori Dan Praktiknya Di

In general explanation marriage law number 1 of 1974 point 4 (b) of verse (2) states: "recording every marriage is the same as recording important events in one's life, such as birth, death stated in the letter information, an official certificate is also included in the list of recording ". Thus, can also be interpreted to mean that marriage is an important event in a person's life such as birth and death, in the sense of a legitimate marriage that's an important time to be listed, not the time when listed it becomes important to be recognized as the time for the marriage, for time recording is only administratively.

Registration of marriage is one of the conditions the validity of marriages under Indonesian positive law, according to Sirman Dahwal explained that:12

The consequences of the unrecorded marriage will result in:

a. Marriage is illegitimate and has no legal force.

Article 5, verse (1) of Compilation of Islamic Law states, in order to ensure order marriages for Muslims then the marriage should be recorded. Then in Article 6 of Compilation of Islamic Law arranges the marriages performed outside the supervision of the Registrar of

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12Ibid, Page 220
Marriage Employees have no legal force...

b. Children only have a civil relationship with the mother and the mother's family.

c. In accordance with article 42 of Marriage Law No. 1 of 1974, legitimate child is a child born in or as a result of a legitimate marriage. Therefore the uncommitted registration of marriage, then according to the law, the child is an illegitimate child and only has a civil relationship with his mother or his mother's family...

d. Children and their mothers are not entitled to make a living and heritage. A further, legal effect of a marriage that is not recorded is, both wife and children born are not eligible to demand living or inheritance from his father.

If it is associated with the position of the out of wedlock child, the child is not born from legitimate marriage without a civil registry, in accordance with article 43 verse (1) Law No. 1 of 1974 on Marriage, stating that:

The out of wedlock child only has a civil relationship with his mother and his mother's family.

Further to Article 43 verse (2) Law No. 1 of 1974 on marriage states:

The child notch verse (1) above will further be regulated by government regulation.

Meanwhile in 2010 it has been submitted to the judicial review of the article 43 verse (1) Law No. 1 of 1974 on Marriage to the Constitutional Court, upon the request of the Constitutional Court by the Judges granted the request of the applicant with Amar verdict, stating:

a. Granted the request of the applicant for most

b. Article 43 verse (1) Law No. 1 of 1974 on marriage (State Gazette of the Republic of Indonesia Year 1974 Number 1, Additional sheets of Republic of Indonesia No. 3019) which states, "the out of wedlock child only has the relationship civil with his mother and his mother's family", contrary to the Constitution of the Republic of Indonesia in 1945 along with interpreted eliminating the civil relationship with a man who can be proved based on science and technology and / or other evidence according to the law that is turned out to have a blood relationship as a father;

c. Article 43 verse (1) Law No. 1 of 1974 on marriage, states, "the out of wedlock child only has the relationship civil with his mother and his mother's family", does not have binding legal force if it is interpreted as eliminating the civil relationship with a man who can be proved based on science and technology and / or other...
evidence according to the law that is turned out to have a blood relationship as a father, till the verse should be read, “the out of wedlock child only has the relationship civil with his mother and his mother's family as well as the man as the father which can be proved based on science and technology and / or other evidence according to law have cognation, and civil relationship with his father”;

Based on the decision of the Constitutional Court above, then the position of the born out of wedlock child set in Article 43 verse (1) Law No. 1 of 1974 on Marriage, "do not have binding force anymore, as long as it can be proven by science and technology and / or other evidence according to law ".

Thus it can be concluded that the out of wedlock child not only has inheritance rights to the mother but also on his father's inheritance rights if it can be proved either by science and technology and / or other evidence according to law, that he is the biological child of the father. In the inheritance distribution on constitution of marriage number 1 year 1974 and Constitutional Court Decree number 46/PUU-VIII/2010 do not set the procedure of inheritance for child born out of wedlock who is having an inheritance right, so that the inheritance distribution on implementation was done by Code of civil law for non-moslems and presidential Instruction number 1 year 1991 about the compilation of Islamic Law for moslems, and customary law for marriages performed by custom.

However, by the released of Constitutional Court Decree Number 46/PUU-VII/2010 was created conflicts in the distribution of inheritance which was based on Islamic Law, because in the compilation of Islamic law the child born out of wedlock do not have inheritance rights. This provision was based on paragraph 100 of presidential instruction number 1 year 1991 about the compilation of Islamic Law, that stated:

The child born out of wedlock will only have a line age from his/her mother and mother line. The child born out of wedlock also means that the child was born on the non legitimate condition or because of illegitimate relationship. So, blood relatives between children and their parents only child and birth mother.

The illegitimacy of child born out of wedlock as the heir from father
line, so that there is no decision in Islamic law or in the compilation of Islamic Law that manage the inheritance of child born out of wedlock. Different from the Civil Code that mentioned about the possibility of child born out of wedlock as a heir. Civil Code divides the child born out of wedlock into two, first the child born from parents which has marriage relatives to others, or child born from parents which has blood relatives, so the child from this condition will not have heritage. Both of child born out of wedlock with unmarriage parents legitimacy and unmarriage to others or no marriage relations called as natural child, they were possible for heritage through the decision on Civil Code on paragraph 272.

While, in the custom of inheritance system, child born out of wedlock or illegitimacy child also called by.\textsuperscript{13}

\textquotedblleft \ldots child born out of wedlock or other terms are child who were born from parents that they are not in the religious requirements, such as:

- The child from mother’s womb before marriage,
- The child from mother’s womb after divorced by her husband,
- The child from mother’s womb without legitimacy marriage,
- The child from mother’s womb because of adultery to other people,
- The child from mother’s womb which unidentified fathers,

The custom law gives the different position toward Child born out of wedlock, so there is a custom that admitted the inheritance to child born out of wedlock with its requirements that have been determined and also not recognized absolutely. Soedarso gives example the custom laws that admitted the heir to child born out of wedlock, they were:\textsuperscript{14}

In Minahasa, the child born from illegitimacy marriage have same deals with the heir of father line after the child indicate of admission which is called mehelilikur. The different areas are not applicable and if it is yes, may take hidden. In the Java’s family, the “child born out of wedlock” may come as the heir or have been gotten from fathers line and families based on the humanistics (parimirma, welas asih).

\textsuperscript{13} Hilman Hadikusuma, \textit{Hukum Waris Adat}, Citra Aditya Bandung, 1993, pg 68

\textsuperscript{14} ibid, page 68-69
By this situation, the example is: “Kk, from Bantul, Kapanewon Bantul, was married and been divorced. But, this couple was met to each other without any confirmation to the authorities, so that they have two son. They were growth. After that Kk getting married and in this second marriage he has a son. When Kk was passed, both of his children which born after the divorced asking for their heir but it was rejected by the child from second wife because they were not born from legitimate marriage, they were child born out of wedlock, so they were not inheritance. Because of that both of child reports their problem to the village governmental. The village governmental said right to for that rejections. This problem was continued to the House of People Representatives of Village. The metting of House of People Representatives of Village decided that even if they were not inheritance but they were the biological child of Kk, and they had been help for Kk (long time getting happy and sad life) should be get their part. Based on the willingness of the child of second wife, both of them has 114 parts of the farm and field. The next example was the child with unidentified father also have the parts of the inheritance less than legitimate heir, that was explained then “Pawirosentono, lives in Sukaredjo, Kelirahan Gadingsari, Kapanewon Sanden Kabupaten Bantul, death and have one wife and 3 children. Four years after her husband died, Mrs Pawiro bith a child without knows who is the father. After that Mrs Pawiro died. Moreover the inheritance from Mr. Pawiro be devided which is the four of his child get less on it. Actually, this part is not the heir, but it was like a gift, because they were also the child from same mother. In fact, that gift are based on neighbors’ pressure.

D. CLOSING

1. Conclusion

Based on the research and discussion that was conducted, it can be concluded that the distribution of inheritance for child born out of wedlock according to constitution number 1 year 1974 about marriage, Civil Code, compilation of Islamic Law, and Custom Law that child born out of wedlock based on constitution number 1 year 1974 about marriage paragraph 43 section 1 pre
Constitutional Court Decree number 1 year 1991 about compilation of Islamic Law of child born out of wedlock do not have heir on father line, except for blood relatives and civil to his/her mother and mothers’ family. After post of the declaration of Constitutional Court Decree number.46/PUU-VIII/2010, have change the provision paragraph 43 of Constitutional number 1 year 1974 about marriage, which has possibility of child born out of wedlock can be a inheritance by the requirements that can be proved from knowledgment and technology and another instrument of law, this provision has same with the paragraph 280 civil code that possible to child born out of wedlock has their inheritance from father line. Going ahead with the paragraph 43 Constitutional number 1 year 1974 about marriage and 280 civil code, provisoon in custom law toward child born out of wedlock was possible for having the inheritance from father through admission on that. However, the quantity of inheritance parts of child born out of wedlock which have provision from civil code and custom law has different requirements, parts of the heir of child born out of wedlock based on civil code was determined by the class of inherits, while the big parts of child born out of wedlock based on law custom were legitimamate children.

2. Suggestion
The government should early in crating and relasing the rule of the implemetation of Constitutional Court Decree number.46/PUU-VIII/2010, include of the large of heir to child born out of wedlock, the rule of how to implement and so on. So that toward the Constitutional Court Decree number.46/PUU-VIII/2010 had declared without too much interpretation from the society.

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