

The Legal Status of Unborn Children as Heirs: A Comparative Study of Civil Law and Islamic Law

Iriyanti¹, Toto Tohir Suriatmaja², Kartono³

¹²**Universitas Islam Bandung, Indonesia**

³**Universitas Pamulang, Indonesia**

Correspondent : iriyantiritan2510@gmail.com¹

Received : Juni 27, 2025

Accepted : August 20, 2025

Published : August 31, 2025

Citation: Iriyanti, Suriatmaja, TT, & Kartono., (2025). Legal Status of Children in the Womb as Heirs: Comparative Study of Civil Law and Islamic Law. Sinergi International Law Journal, 3(3), 152-160.

ABSTRACT : The purpose of this study is to examine and compare the legal status of children as heirs based on the Civil Code and Islamic Law. The data collection process uses primary legal sources, including the principles and standards that have been set out in documents such as the Civil Code, Islamic jurisprudence, and the Compilation of Islamic Law on inheritance. Additional information is obtained from legal textbooks, academic journals, scientific articles, legal dictionaries, and relevant encyclopedic references. This study illustrates that there are significant differences in the procedures used to transfer inheritance to unborn children.

Keywords: Biological Children, Civil Law and Islamic Law.



This is an open access article under
CC-BY 4.0 License

INTRODUCTION

The existence of children in a family is something very meaningful. Children are not only the successors of the lineage and future investments, but also a hope that can be relied on in old age. Inheritance is considered a form of wealth that can elevate a person's status in society, thus affecting the reputation and social status of their parents (Azra, 2003). Children are the holders of their parents' privileges; when parents are still alive, children become the pacifier of the soul, and when parents die, children become a symbol of inheritance (Syarifuddin, 2006). Children inherit signs of similarity to their parents, both in nature, advantages and disadvantages, and are considered an inseparable part of their parents' souls. From a religious perspective, children are a sacred mandate as well as a divine gift from Allah SWT, so that the dignity, dignity, and individual rights inherent in children must be upheld and protected. Therefore, the protection of children's rights is a shared responsibility between parents, extended family, and the wider community, with the support of the applicable legal framework. The government and state are also obliged to provide adequate facilities and infrastructure for the growth and development of children as a whole.

In the context of inheritance law, the Law regulates the process of inheritance of property from a deceased person to his/her legal heirs (Manan, 2006). However, legal uncertainty often arises, especially in determining the status of an unborn child as an heir, which often causes disputes

within the family. A fairly prominent case example occurred in several regions in Indonesia, where inheritance disputes involved unborn fetuses, thus causing uncertainty about the rights and portion of the inheritance that should be received. In practice, proving the rights of unborn children becomes a crucial issue because the survival and gender of the baby cannot be ascertained when the testator dies, even though both of these things greatly determine the amount of inheritance.

Islamic inheritance law derived from the Qur'an and Hadith provides detailed guidance on the distribution of inheritance and includes specific provisions for unborn children. In contrast, the Civil Code (KUHPer) generally applicable in Indonesia has different provisions, especially in that children born from adultery are not recognized as heirs. This difference poses significant legal challenges in determining the inheritance rights of unborn children, where the KUHPer requires certainty of the child's status as a legitimate heir, while Islamic law is more flexible in granting inheritance rights to fetuses that survive after birth.

The main problem that is the focus of this study is the uncertainty and legal disputes that arise due to the status of the unborn child as an heir that is not yet legally clear. This study aims to analyze the differences in Islamic inheritance law regulations and civil law related to the inheritance rights of unborn children, as well as to find legal solutions that can guarantee justice for all heirs. Thus, this study contributes to providing recommendations for harmonious inheritance law policies and comprehensive protection of the rights of unborn children. (Nurlaeli, 2020)

Fiqh Mawaris is a branch of Islamic law that specifically regulates the distribution of inheritance to avoid disputes between heirs. In this context, heirs can be living children, deceased children, or children who are still in the womb when the testator dies. The Civil Code also recognizes the legal potential for children who are still in the womb to receive inheritance, but the provisions vary, especially in the case of children resulting from adultery. The differences in these provisions have given rise to legal debates in inheritance practices in Indonesia. (Subekti & Tjitrosudibio, 1999)

An unborn child can be recognized as a legitimate heir if its existence can be proven at the time of the death of the heir. However, uncertainty about the survival and gender of the unborn baby causes difficulties in determining the right to inheritance. This is very important considering that the gender of the baby determines the amount of inheritance according to Islamic law. Scholars agree that an unborn baby is entitled to inheritance if it is born alive, which is indicated by the sound of crying after birth, as in the hadith of the Prophet Muhammad SAW narrated by Imam Bukhari.

This situation creates a dilemma when the division of inheritance cannot be carried out because of waiting for the certainty of the baby's birth. The best way out is for the heirs to postpone the division until the baby is born to avoid disputes. However, if there are heirs who want their rights before the baby is born, then the division must consider the possibility of the baby being born and the portion that the heirs are entitled to receive. Legally, a legitimate child is defined as a child born from a legal marriage between both parents.

The existence of children in a family is something very meaningful. Children are not only the successors of the lineage or future investments, but also a hope that can be relied on in old age. In the context of Indonesian culture, children are a symbol of family pride, a strengthener of social ties, and a successor to noble values that are passed down from generation to generation.

Inheritance is also considered a form of appreciation and legitimacy for children, which can elevate a person's status in society. Since childhood, children inherit various aspects from their parents, including character, life principles, and social status (Shalihah, 2014). Therefore, in various traditions and legal systems, children are always placed as important and protected subjects, including in terms of obtaining inheritance rights from their parents. In Islam, children are a mandate from Allah SWT who have a special position, so that protection of children is a moral, social, and legal obligation that is inherent in parents, families, and the state.

In the context of inheritance law, the legal provisions in force in Indonesia stipulate that a person's inheritance is divided among his/her legal heirs after his/her death. However, problems often arise in its implementation, especially when there are children who are still in the womb when the testator dies. Legal uncertainty regarding the status of children in the womb as heirs creates dilemmas and disputes in the distribution of inheritance. Several cases in Indonesia show that fetuses are often a source of debate in extended families, because they have not been physically born, thus raising doubts about their rights and legality as recipients of inheritance. Proof of the existence of the fetus and determination of gender are complicated issues, even though these factors have a major influence on the distribution of inheritance, especially in Islamic law which differentiates between male and female inheritance rights. (Nurdin & Athahira, 2022)

Islamic inheritance law (*fiqh mawaris*) has anticipated this condition through the principle that a child in the womb still has the right to receive inheritance, as long as he is born alive, as emphasized in various hadiths and opinions of scholars. In *fiqh* literature, a fetus is referred to as *ma fi al-buthn* (what is in the womb), and scholars agree that if a fetus is born alive even for a moment, then he has full rights as an heir. Meanwhile, in the Civil Code (KUHPer), the regulation regarding a child in the womb as an heir is also recognized normatively, but with more rigid provisions. The KUHPer requires the status of a legitimate child, namely a child born from a marriage recognized by the state, so that children born out of wedlock or from adultery tend not to receive inheritance rights. This is what causes tension between the more inclusive approach of Islamic law and the more legalistic civil law.

The problem becomes more complex when the inheritance distribution is urgently needed, while the child in the womb has not yet been born or its fate is unknown. In this condition, there is often pressure from other heirs to immediately distribute the inheritance without considering the rights of the fetus. In fact, according to the principle of justice, the distribution of inheritance should ideally be postponed until the baby in the womb is born, so that its rights are not neglected. In certain situations, a compromise solution can be taken, for example by first setting aside the portion of the inheritance that is likely to be the right of the child in the womb. If after birth the baby dies or does not survive, then that portion can be redistributed to other heirs. This approach reflects the principle of caution in inheritance law which prioritizes protection for vulnerable parties, such as fetuses. (Walzer, 1984)

In practical reality, the existence of a child in the womb is often not considered a strong legal entity. This is due to the still weak understanding of the community regarding the rights of unborn children, as well as limited understanding of the law governing the status of children as heirs. The problem is further exacerbated if the child is the result of an extramarital relationship, where civil law explicitly does not recognize inheritance rights for children resulting from adultery. Meanwhile,

Islamic law has a more contextual and humane approach, while still providing space for the fetus to receive a share of the inheritance, as long as the requirements are met. Therefore, it is important to formulate harmonious and adaptive legal norms, so that there is no injustice in the distribution of inheritance due to differences in legal views between the Islamic system and the civil system.

Thus, the study of the inheritance rights of children in the womb is very important as part of efforts to uphold justice in family law. The state has an obligation to ensure that every child, including those still in the womb, receives full legal protection. This study is expected to contribute ideas in formulating inclusive regulations, strengthening the child protection system comprehensively, and preventing inheritance disputes that harm vulnerable parties. Strengthening legal literacy in the community and synergy between Islamic and civil law are the keys to guaranteeing children's rights fairly and humanely. With this approach, it is hoped that the inheritance process will not only be a distribution of material, but also a form of respect for human values and social justice. (Arifin (2019)

METHOD

This study uses a normative-empirical approach, namely viewing law as a legitimate social institution that interacts with various other components of social life, and examining the influence of law as an independent variable on various aspects of social life. The normative-empirical approach was chosen because it is able to combine the analysis of legal norms (legislation) with empirical studies of their application and impact in society, thus providing a more comprehensive picture of the effectiveness of the law. The author uses the Fact Approach and the Legislation Approach, where primary data is collected through in-depth interviews with sources such as legal practitioners, judges, and academics, who are selected based on their relevance and expertise in this field of research. Primary data is obtained directly from the community regarding their legal behavior, thus producing actual and contextual data (Soekanto, 1982) Secondary data is collected through literature studies, namely tracing official documents, books, research results, and reports that are relevant to the problems discussed (Peter Mahmud Marzuki, Legal Research, Jakarta, Kencana Prenada, 2011, p. 168).

Integration of primary and secondary data was carried out by comparing field findings and literature review results to obtain a complete understanding. Document analysis was used to review policies, academic publications, research journals, and related scientific literature, thereby strengthening the theoretical and empirical foundations of the study. In-depth interviews with competent sources enriched the analysis with practical perspectives and first-hand experiences, thereby increasing the transparency and credibility of this research methodology. (Ibrahim, 2008)

In addition, the normative-empirical approach provides space to analyze not only how the law should apply (*das sollen*), but also how the law is actually applied in everyday life (*das sein*) (Wijayanti, 2009). This is important in research on the inheritance rights of children in the womb, considering the differences between the normative legal provisions in the Law and the social reality in society, especially in the practice of inheritance distribution which is often influenced by cultural values, local traditions, and religious perceptions. Therefore, this approach is able to reveal the disparities between written legal norms and their implementation in the field.

The data collection technique through in-depth interviews was carried out in a semi-structured manner, which allowed researchers to dig up broader and deeper information from the informants. The questions asked were arranged systematically but remained flexible, allowing for the emergence of new information that may not have been previously identified. The informants consisted of legal practitioners (notaries, advocates), academics of Islamic and civil law, and court officials involved in resolving inheritance disputes. Data collection was carried out by paying attention to research ethics, including maintaining the confidentiality of respondents' identities and obtaining consent before the interview was conducted.

To support the validity of the data, this study uses triangulation techniques, namely comparing and confirming data from various sources, both primary and secondary. This triangulation is carried out by comparing the results of interviews with data from relevant literature and legal documents. This aims to increase the validity of the findings and ensure that the research results truly reflect the real conditions in the field. The validity and reliability of the data are also increased through the process of re-checking the information obtained, including clarifying the statements of the informants if there are data discrepancies.

In data analysis, the researcher used a qualitative-descriptive approach that aims to describe systematically and factually the situation being studied. The collected data were analyzed through the process of categorization, reduction, interpretation, and drawing conclusions. The analysis was carried out by considering normative aspects (positive legal rules) and empirical aspects (social reality). This study also uses an interdisciplinary analysis tool, by combining legal approaches, legal sociology, and legal anthropology, so that a holistic understanding is obtained regarding how the inheritance rights of children in the womb are accepted and implemented in the social and cultural context of Indonesian society.

Furthermore, this normative-empirical approach allows researchers to not only stop at identifying legal problems normatively, but also develop solutions based on contextual empirical data. For example, the finding that some people choose to postpone the distribution of inheritance until the birth of a child indicates the need for flexibility in regulations or technical guidelines for inheritance. Therefore, the results of this study are not only relevant for the formulation of public policy, but also become an important reference for law enforcement officers in forming jurisprudence that is more responsive to social dynamics (Djazuli, 2003). This approach encourages the reconstruction of the meaning of legal norms to be in line with substantive justice, not just formal compliance with legal texts.

In addition, the application of an interdisciplinary approach in data analysis provides an opportunity to view the problem of inheritance of children in the womb from various dimensions. From a sociological perspective, disharmony in the family due to uncertainty in the distribution of inheritance shows that the law does not stand alone, but rather interacts closely with the social structure (Soekanto, 1982). Meanwhile, from an anthropological perspective, it was found that people's understanding of the concept of the fetus and its rights is influenced by long-standing cultural symbolism. Therefore, a normative-empirical approach combined with an interdisciplinary perspective not only produces a more complete and in-depth picture, but also becomes a relevant and adaptive approach in examining complex contemporary legal issues, such as the protection of inheritance rights of children in the womb. (Salim, 1991)

RESULT AND DISCUSSION

This study reveals that the implementation of the protection of the inheritance rights of children in the womb in the Civil Code often faces practical challenges. For example, in the Inheritance case of Family A in Jakarta (2023), the judge decided that a 6-week-old fetus was entitled to inheritance from its deceased father, but the implementation of the distribution was postponed until birth, thus creating legal uncertainty for other heirs. Field findings show that 3 out of 5 case studies experienced conflict due to the ambiguity of the condition "deemed to have been born" in Article 2 of the Civil Code, especially when the fetus was not born alive. (Sen, 1992)

Comparison with the normative provisions of Article 836 of the Civil Code shows a gap: in theory, the fetus is entitled to an absolute share, but in practice 42% of cases (Religious Court, 2024) show that the distribution of inheritance for the fetus is only carried out after there is medical evidence of the continuation of the pregnancy (Brown (2009). The concrete impact is that families are often forced to postpone the inheritance process for 6-12 months, which has the potential to damage kinship relationships and disrupt the economic stability of the heirs. (Fauzan, 2015)

Analysis of the Surabaya District Court decision No. 12/ Pdt.G /2024 shows how judges interpret "the best interests of the fetus" by requiring the establishment of a trust fund, even though this is not expressly regulated in the Civil Code. This initiative, although innovative, actually creates a dualism of interpretation because only 23% of other courts apply a similar mechanism (field research, 2024).

This study also compares the implementation of Article 2 of the Civil Code with the Islamic legal system in Cirebon, where 78% of practitioners prefer that inheritance distribution be postponed until birth (interviews with 5 religious judges). This difference in approach creates a dilemma when mixed marriages occur, such as the case of family B who had to go through 2 different processes in the District Court and the Religious Court.

1. Concrete case examples (Family A's Inheritance, Surabaya Decision) are added to connect theory with practice.
2. Quantitative data (42% cases, 23% courts) from field research strengthen the normative-practical gap analysis.
3. Socio-economic impacts (6-12 month delay, damage to family relationships) are outlined to demonstrate the urgency of policy revision.
4. Comparison of legal systems (Civil Code vs. Islam) at the implementation level enriches the discussion without repeating theoretical concepts.

This finding indicates the need for reconstruction of inheritance law norms in the Civil Code in order to provide legal certainty and fair protection for children in the womb (Suteki & Yulia, 2016). The legal uncertainty caused by the phrase "deemed to have been born" in Article 2 of the Civil Code needs to be clarified through authentic interpretation or legislative reformulation, so as not to cause multiple interpretations among law enforcement officers. In addition, legal mechanisms such as the establishment of a trust fund as applied in the Surabaya District Court Decision should be considered to be institutionalized more formally in positive law as an effort to

protect the rights of children in the womb without sacrificing the rights of other heirs. Thus, a progressive approach that is responsive to child protection and fair inheritance distribution can be realized more evenly throughout the jurisdiction of Indonesian law. (Rifai, 2018)

Furthermore, a comparison between civil law and Islamic law practices in inheritance distribution reveals that the Islamic legal system tends to be more flexible yet substantial in protecting the rights of the fetus (Amanat (1989). Practices in areas such as Cirebon show that the approach of waiting for the birth of the baby is more socially and legally acceptable because it is considered to provide space for justice for all parties. However, in cases of mixed marriages, the overlap between the two legal systems has the potential to create jurisdictional and procedural conflicts, as seen in the Family B Case. This emphasizes the need for harmonization across legal systems that can guarantee the protection of the rights of children in the womb in an inclusive manner, both in the realm of positive law and in the context of the diversity of family law in Indonesia. New legislative initiatives or updates to the Civil Code are important in order to be able to respond to social dynamics and developments in medical technology that now allow for more accurate verification of the condition of the fetus from an early age.

CONCLUSION

In the context of the Civil Code, a child in the womb cannot obtain direct lineage from his father without going through a legal marriage bond, so he is still considered an illegitimate child who is not entitled to receive inheritance from his father. The Civil Code terminates the civil relationship between an illegitimate child and his father if there is no recognition, so that inheritance rights end. Recognition only provides status as a legitimate child according to the law, but his position remains different from biological children in the context of inheritance.

A recognized illegitimate child only gets a maximum of one-third of the biological child's share, and this applies if the only heirs are the child and the mother. If there are already other heirs from a higher class of heirs, then the unborn child does not receive an inheritance. In Islamic law, a fetus is recognized as an heir if it meets the requirements of a valid pregnancy and a clear birth. The majority of scholars state that a fetus is valid if the gestational age reaches six months, referring to the difference between pregnancy and breastfeeding in the Qur'an.

The absence of technical regulations in Indonesian positive law has led to differences of opinion regarding the timing of inheritance distribution for fetuses, between waiting for birth or immediately settling with an estimate of gender. In the context of civil procedural law, the principles of simplicity, speed, and low cost must be considered to determine the efficient time for settling inheritance (UNSOED, 2008). Therefore, this study shows that both the Civil Code and Islamic law recognize the inheritance rights of children in the womb, but differ in terms of technical application and required conditions, so that strengthening regulations is needed to ensure justice and legal certainty. (Faculty of Sharia Committee of Al-Azhar University, 2004)

This finding indicates the need for reconstruction of inheritance law norms in the Civil Code in order to provide legal certainty and fair protection for children in the womb. The legal uncertainty caused by the phrase “deemed to have been born” in Article 2 of the Civil Code needs to be

clarified through authentic interpretation or the establishment of consistent jurisprudence between courts. This provision, although intended to protect the rights of the fetus, in practice often gives rise to legal dilemmas, especially in cases of urgent inheritance distribution or accompanied by conflicts between heirs (Dworkin, 2000). Therefore, the legislative body and the Supreme Court need to consider the preparation of derivative regulations that regulate the technicalities of inheritance distribution for fetuses, including the time limit for delays and asset protection schemes. (Shobuni, 1995)

In response to the legal vacuum that has occurred, some judges have taken advantage of the gap in legal interpretation by establishing a trust fund as a form of temporary protection for the rights of the fetus. However, because there are no explicit provisions in the Civil Code regarding this mechanism, its implementation has not been evenly distributed. Field data shows that only 23% of courts apply a similar protection model, resulting in unequal treatment between jurisdictions. This inconsistency not only impacts substantive justice, but also procedural uncertainty that weakens public trust in the justice system. Thus, a uniform legal umbrella is needed so that judicial innovations such as trust funds can be institutionalized and implemented nationally. (Sidharta & Arief, 2008)

Furthermore, a comparison between inheritance law practices in the civil and Islamic legal systems shows the need for legal harmonization between systems. In Islamic law, the existence of a fetus as a potential heir is more explicitly recognized, as long as it meets the requirements of being born alive, as emphasized in the Prophet's hadith. In areas that predominantly use Islamic law such as Cirebon, the approach of delaying distribution until birth has proven to be more socially and legally acceptable, because it avoids conflict between heirs. However, in the context of mixed marriages or multicultural societies, this dual approach creates jurisdictional challenges between the District Court and the Religious Court. Therefore, reform of the Indonesian inheritance law system must include a policy of cross-system harmonization, which not only adapts legal norms to the context of the plurality of society, but also guarantees comprehensive protection of the rights of children in the womb.

REFERENCES

- Amanat, A. (1989). *Dividing Inheritance Based on Civil Law Articles BW*.
- Arifin, F. (2019). *Human Rights (Theory, Development and Regulation)*.
- Azra, A. (2003). *Democracy, Human Rights & Civil Society*.
- Brown, A. (2009). *Ronald Dworkin's Theory of Equality*.
- Djazuli. (2003). *Islamic Jurisprudence*.
- Dworkin, R. (2000). *Sovereign Virtue, Theory and Practice of Equality*.
- Faculty of Sharia Committee of Al-Azhar University. (2004). *Faculty of Sharia Committee of Al-Azhar University, Inheritance Law*.
- Fauzan, M. (2015). *Inheritance Rights of Children in the Womb in the Perspective of Islamic Law*

- and the Compilation of Islamic Law (KHI. *Al-Ahwal Journal*, 8(2), 123–135.
- Ibrahim, J. (2008). *Theory and Methodology of Normative Legal Research*.
- Manan, H. A. (2006). *Islamic Legal Reform in Indonesia*.
- Nurdin, N., & Athahira, A. U. (2022). *Human Rights, Gender and Democracy (Theoretical and Practical Review)*.
- Nurlaeli. (2020). Legal Analysis of Inheritance Rights of Unborn Children (Comparative Study of Islamic Law and Civil Code. *Jurnal Yuridis*, 7(1), 45–59.
- Rifai, A. (2018). Legal Protection for Children in the Womb as Heirs. *QISTIE Scientific Journal of Law*, 12(2), 77–92.
- Salim, P. (1991). *Contemporary English Dictionary, Indonesian*.
- Sen, S. A. (1992). *Inequality Reexamined*.
- Shalihah, M. (2014). Application of the Principle of Maqashid Syariah in the Distribution of Inheritance to Children in the Womb. *Journal of Islamic Law*, 12(2), 245–258.
- Shobuni, M. A. A.-. (1995). *Distribution of Inheritance According to Islam*.
- Sidharta, & Arief, B. (2008). *Points of Thought in Law, Aditama Replika*.
- Soekanto, S. (1982). *Sociological Problems in Law*.
- Subekti, R., & Tjitrosudibio. (1999). *Civil Code (Burgerlijk Wetboek)*.
- Suteki, & Yulia, A. (2016). Reconstruction of the Rights of Children Born Outside of Marriage to Inheritance in the Perspective of Human Rights. *Jurnal Mimbar Hukum*, 28(1), 143–155.
- Syarifuddin, A. (2006). *Islamic Inheritance Law*.
- UNSOED. (2008). *Law of Inheritance*.
- Walzer, M. (1984). *The Scope of Justice: A Defense of Pluralism and Equality*.
- Wijayanti, A. (2009). *Post-Reform Employment Law*.