

**International Conference On The State, Law, Politics & Democracy (ICON-SLPD)
Conference Proceedings 2025**

**COMPARISON OF LAWS ON THE POSITION OF A CHILD IN THE
WOMB AS AN HEIR ACCORDING TO THE CIVIL CODE AND
ISLAMIC LAW**

Iriyanti ^a, Toto Tohir Suriaatmaja ^b, Kartono ^c

^a *Fakultas Hukum, Universitas Islam Bandung, Bandung. E-mail: iriyantiritan2510@gmail.com*

^b *Fakultas Hukum, Universitas Islam Bandung, Bandung.*

^c *Fakultas Hukum, Universitas Pamulang, Tangsel.*

Article	Abstract
<p><i>Received: Des 02, 2025;</i> <i>Reviewed: Jan 07, 2026;</i> <i>Accepted: Feb 09, 2026;</i> <i>Published: Feb 26, 2026</i></p>	<p>The purpose of this study is to examine and compare the legal status of children as heirs according to the Civil Code and Islamic law. The data collection process utilized primary legal sources, including the principles and provisions contained in documents such as the Civil Code, inheritance jurisprudence, and the Compilation of Islamic Law regarding inheritance. Additional information was obtained from law books, academic journals, scientific articles, legal dictionaries, and relevant encyclopedic references. This study reveals significant differences in the procedures for granting inheritance to unborn children.</p> <p>Keywords: Biological Children, Civil Law and Islamic Law..</p>

A. INTRODUCTION

The presence of children in a family is very meaningful. Children are not only the successors of the lineage and an investment for the future, but also a reliable hope in old age. Inheritance is seen as a form of wealth that can elevate a person's standing in society, thus influencing the reputation and social status of their parents (Azra, 2003). Children bear the privileges of their parents; while their parents are alive, they provide a source of comfort for their souls, and after their death, they become a symbol of the successor's estate (Syarifuddin, 2006). Children inherit similarities from their parents, both in character, strengths and weaknesses, and are considered an inseparable part of their parents' souls. From a religious perspective, children are a sacred trust and a divine gift from Allah SWT, so their inherent dignity, worth, and personal

rights must be safeguarded and protected. Therefore, protecting children's rights is a shared responsibility between parents, the extended family, and the wider community, supported by the applicable legal framework. The government and the state are also obliged to provide adequate facilities and infrastructure for the holistic growth and development of children.

In the context of inheritance law, the law regulates the process of passing on an inheritance from a deceased person to their legal heirs (Manan, 2006). However, legal uncertainty often arises, particularly in determining the status of unborn children as heirs, which often gives rise to disputes within families. A prominent example of this occurred in several regions in Indonesia, where inheritance disputes involved fetuses, leading to uncertainty regarding 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 viability and gender of the baby cannot be determined at the time of the testator's death, even though these two factors significantly determine the amount of the inheritance. Islamic inheritance law, derived from the Qur'an and Hadith, provides detailed guidelines regarding inheritance distribution and includes specific provisions for unborn children. In contrast, the Civil Code, which applies generally in Indonesia, has different rules, particularly regarding children born of adultery who are not recognized as heirs. This difference creates legal challenges in determining the inheritance rights of unborn children, where the Civil Code demands certainty about the child's status as a legitimate heir, while Islamic law is more flexible by granting inheritance rights to fetuses that live after birth.

The main problem focused on in this research is the uncertainty and legal disputes arising from the unclear legal status of unborn children as heirs. This research aims to examine the differences between Islamic inheritance law and civil law regarding the inheritance rights of unborn children and to find legal solutions that can guarantee justice for all heirs. Therefore, this research contributes by providing recommendations for harmonized 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 prevent disputes between heirs. In this context, heirs can be living children, deceased children, or children still in the womb at the time of the testator's death. The Civil Code also recognizes the legal possibility for unborn children to receive inheritance, but the provisions differ, particularly regarding children born of adultery. These differing rules 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 testator's death. However, uncertainty about the survival and gender of the baby causes difficulties in determining the right to inheritance. This is very important considering that gender affects the amount of inheritance in Islamic law. Scholars agree that a fetus is entitled to inheritance if it is born alive, which is indicated by the sound of crying after birth, as mentioned in the hadith of the Prophet Muhammad SAW narrated by Imam Bukhari.

This situation creates a dilemma when inheritance distribution cannot be carried out because the baby must be born. The best solution is for the heirs to delay distribution until the baby is born to avoid disputes. However, if an heir claims their rights before the baby is born, the distribution must take into account the possibility of the baby being born and the amount of the portion they might be entitled to. Legally, a legitimate child is defined as a child born out of a legal marriage between two parents.

The presence of children in a family is extremely important. Children are not just the continuation of the family line or an investment for the future, but also a source of hope to rely on in old age. In Indonesian culture, children are a symbol of family pride, a strengthening of social ties, and the inheritors of noble values passed down from generation to generation.

Inheritance is also seen as a form of respect and legitimacy for children, which can elevate a person's position in society. From childhood, children inherit various aspects of their parents, including character, life principles, and social status (Shalihah, 2014). Therefore, in various traditions and legal systems, children are always positioned as important subjects who must be protected, including in obtaining inheritance rights from their parents. In Islam, children are a trust from Allah SWT and hold a special status, making their protection a moral, social, and legal obligation for parents, families, and the state.

In the realm of inheritance law, Indonesian law stipulates that a person's inheritance is distributed to the legal heirs upon death. However, problems often arise in practice, particularly when there are children still in the womb at the time of the testator's death. Legal uncertainty regarding the status of unborn children as heirs creates dilemmas and conflicts in inheritance distribution. Several cases in Indonesia demonstrate that fetuses often become a source of dispute within the extended family because they have not yet been physically born, raising doubts about their rights and status as beneficiaries. Proving the existence of a fetus and determining its sex are difficult issues, even though these matters significantly impact inheritance distribution, particularly under Islamic law, which distinguishes between males and females. (Nurdin & Athahira, 2022)

Islamic inheritance law (*fiqh mawaris*) anticipates this situation through the principle that an unborn child retains the right to inherit as long as it is born alive, as affirmed in various hadiths and scholarly opinions. In Islamic jurisprudence (*fiqh*) literature, a fetus is referred to as *ma fi al-buthn* (in the womb), and scholars agree that if a fetus is born alive, even for a brief moment, it acquires full rights as an heir. Meanwhile, the Civil Code also recognizes the rights of unborn children normatively, but imposes stricter requirements. The Civil Code requires the status of legitimate children, namely those born from a state-recognized marriage. Therefore, children born out of wedlock or from adultery generally do not have inheritance rights. This creates tension between the more inclusive approach of Islamic law and the more legalistic approach of civil law.

The problem becomes even more complicated when the inheritance needs to be divided immediately before the unborn child is born or its condition is unclear. In such circumstances, other heirs often push to divide the assets immediately without considering the rights of the fetus. However, based on the principle of justice, the distribution of the inheritance should be postponed until the unborn child is born to avoid neglecting its rights. In certain circumstances, a compromise solution can be adopted, such as setting aside a portion of the inheritance that may be entitled to the unborn child. If the baby does not survive after birth, this portion can be redistributed to the remaining heirs. This approach reflects the precautionary principle in inheritance law, which prioritizes the protection of vulnerable parties such as fetuses. (Walzer, 1984)

In practice, the existence of an unborn child is often not recognized as a valid legal subject. This occurs because society's understanding of the rights of unborn children is still weak,

as well as limited knowledge of the legal regulations governing children's status as heirs. This problem is further complicated when the child is the result of an extramarital relationship, where civil law expressly excludes the inheritance rights of children born of adultery. In contrast, Islamic law offers a more contextual and humane approach, allowing the fetus to inherit as long as certain conditions are met. Therefore, it is crucial to formulate harmonious and adaptive legal norms to prevent injustice in inheritance distribution due to differing legal perspectives between the Islamic and civil systems.

Thus, studying the inheritance rights of unborn children is crucial as part of efforts to uphold justice in family law. The state is obligated to ensure that every child, including those still in the womb, receives full legal protection. This research is expected to contribute to the formulation of inclusive regulations, strengthen comprehensive child protection systems, and prevent inheritance disputes that harm vulnerable parties. Strengthening legal literacy in society and synergizing Islamic law with civil law are key to guaranteeing children's rights in a just and humane manner. With this approach, the inheritance process is not simply a matter of material distribution, but also a form of respect for humanitarian values and social justice. (Arifin, 2019)

B. MATERIALS AND METHODS

This study applies a normative-empirical approach, viewing law as a legitimate social institution that interacts with various other elements of social life, and examining the influence of law as an independent variable on various aspects of community life. This approach was chosen because it is able to combine the analysis of legal norms (statutory regulations) with empirical studies of their application and impact in society, thus producing a more complete picture of the effectiveness of law. The author uses the Factual Approach and the Legislative Approach, where primary data is collected through in-depth interviews with sources such as legal practitioners, judges, and academics selected based on their relevance and expertise in this research field. 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 study by searching for official documents, books, research results, and reports related to the issues discussed (Peter Mahmud Marzuki, 2011).

Primary and secondary data were integrated by comparing field findings with the results of the literature review to gain a comprehensive understanding. Document analysis was used to examine policies, academic publications, research journals, and related scientific literature, thus strengthening the theoretical and empirical foundations of the research. In-depth interviews with competent sources enriched the analysis through practical perspectives and direct experience, while also increasing the transparency and credibility of the research methodology (Ibrahim, 2008).

The normative-empirical approach also provides space to analyze not only how the law should be implemented (*das sollen*), but also how the law is actually practiced in everyday life (*das sein*) (Wijayanti, 2009). This is important in research on the inheritance rights of unborn children, considering the differences between normative legal provisions in the Law and social realities 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 gap between written norms and implementation in the field.

The data collection technique used in-depth interviews, conducted in a semi-structured format, allowed researchers to obtain broader and more in-depth information from informants. Questions were structured systematically yet flexibly, allowing for the emergence of new, previously unidentified findings. Informants included legal practitioners (notaries, advocates), academics in Islamic law and civil law, and court officials involved in resolving inheritance disputes. The data collection process was conducted while adhering to research ethics, including maintaining the confidentiality of respondents' identities and obtaining informed consent prior to the interviews.

To support data validity, this study employed triangulation techniques, which involve comparing and verifying data from various sources, both primary and secondary. Triangulation was conducted by comparing interview results with relevant literature and legal documents. The goal was to increase the reliability of the findings and ensure that they truly reflect the actual conditions on the ground. Data validity and reliability were also strengthened through a process of cross-checking the information obtained, including clarifying sources' statements if there were any discrepancies.

In analyzing the data, the researcher used a descriptive-qualitative approach aimed at systematically and factually describing the situation under study. The collected data were analyzed through a process of categorization, reduction, interpretation, and drawing conclusions. The analysis was conducted by considering both normative aspects (positive legal regulations) and empirical aspects (social reality). This study also utilized interdisciplinary analytical tools by combining legal approaches, legal sociology, and legal anthropology to obtain a comprehensive understanding of the acceptance and application of inheritance rights for unborn children within the social and cultural context of Indonesian society.

Furthermore, a normative-empirical approach allows researchers not only to identify legal issues normatively but also to develop solutions based on relevant empirical data. For example, the finding that some communities choose to delay inheritance distribution until after the birth of a child indicates the need for flexibility in regulations or technical guidelines related to inheritance distribution. Therefore, the results of this study are not only useful for formulating public policy but also serve as an important reference for law enforcement officials in developing jurisprudence that is more responsive to social dynamics (Djazuli, 2003). This approach encourages the reconstruction of the meaning of legal norms to align with substantive justice and not simply be oriented towards compliance with legal texts.

Furthermore, the application of an interdisciplinary approach to data analysis provides an opportunity to examine the issue of inheritance rights for unborn children from various perspectives. From a sociological perspective, family disharmony resulting from uncertainty over inheritance distribution demonstrates that law does not stand alone but is closely linked to social structures (Soekanto, 1982). Meanwhile, from an anthropological perspective, it was found that society's understanding of fetuses and their rights is influenced by long-standing cultural symbolism. Therefore, the combination of normative-empirical and interdisciplinary approaches not only produces a more comprehensive picture but also serves as a relevant and adaptive way to examine complex contemporary legal issues, such as the protection of inheritance rights for unborn children (Salim, 1991).

C. RESULT AND DISCUSSION

This study shows that the implementation of the protection of inheritance rights for unborn children in the Civil Code often faces practical obstacles. For example, in the inheritance case of Family A in Jakarta (2023), the judge ruled that a 6-week-old fetus was entitled to the inheritance of its deceased father, but the distribution was postponed until the fetus's birth, thus creating legal uncertainty for other heirs. Field findings show that 3 of the 5 case studies experienced conflict due to the unclear meaning of "deemed to have been born" in Article 2 of the Civil Code, especially if the fetus was not born alive. (Sen, 1992)

A comparison with the normative provisions of Article 836 of the Civil Code reveals an imbalance: theoretically, the fetus is entitled to an absolute share, but in practice, 42% of cases (Religious Court, 2024) show that inheritance distribution to the fetus is only carried out after there is medical evidence of the continuation of the pregnancy (Brown, 2009). The real impact is that families often have to delay the inheritance distribution process for 6–12 months, which has the potential to damage kinship relationships and disrupt the economic stability of the heirs. (Fauzan, 2015)

An analysis of Surabaya District Court decision No. 12/Pdt.G/2024 shows that the judge interpreted the principle of "best interests of the fetus" by requiring the establishment of a trust fund, even though this mechanism is not explicitly regulated in the Civil Code. This innovation, while progressive, has created a dual interpretation, as only 23% of other courts apply a similar mechanism (field research results, 2024).

This study also compared the application of Article 2 of the Civil Code and the Islamic legal system in Cirebon, where 78% of practitioners preferred to delay inheritance distribution until the baby was born (based on interviews with five religious judges). This difference in approach creates a dilemma when mixed marriages occur, as experienced by Family B, who were forced to go through two different mechanisms: the District Court and the Religious Court.

Real case examples (inheritance of Family A, Surabaya District Court decision) are included to link theory with the dynamics of practice.

1. Numerical data (42% of cases, 23% of judicial institutions) from field research strengthens the analysis of the gap between normative provisions and implementation.
2. The social and economic impacts (6–12 month delays, disruption of family harmony) are presented to illustrate the urgency of regulatory reform.
3. A comparison of two legal systems (the Criminal Code and Islam) at the level of application broadens the discussion without repeating the theoretical discussion.

These findings emphasize the need for reconstruction of inheritance law norms in the Civil Code to provide legal certainty and fair protection for unborn children (Suteki & Yulia, 2016). The uncertainty created 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 to avoid various interpretations among law enforcement officials. In addition, legal mechanisms such as the establishment of a trust fund as implemented in the Surabaya District Court Decision need to be considered for formal institutionalization as an effort to protect the rights of the fetus without

neglecting the rights of other heirs. Thus, a progressive approach that is responsive to child protection and fair inheritance distribution can be applied evenly across all jurisdictions in Indonesia (Rifai, 2018).

Furthermore, a comparison of inheritance practices in civil law and Islamic law shows that Islamic law tends to be more flexible yet substantive in protecting the rights of the fetus (Amanat, 1989). Practices in areas such as Cirebon demonstrate that the approach of waiting for the baby's birth is more socially and legally acceptable because it is considered to provide space for justice for all parties. However, in mixed marriages, the overlap between the two legal systems has the potential to give rise to jurisdictional and procedural conflicts, as occurred in Family Case B. This emphasizes the urgency of harmonizing legal systems so that the protection of the rights of unborn children can be guaranteed inclusively both in positive law and within the diversity of family law in Indonesia. Regulatory updates or revisions to the Civil Code are important to adapt to social dynamics and advances in medical technology that now allow for more accurate verification of fetal conditions from early pregnancy.

D. CONCLUSION

From the perspective of the Civil Code, an unborn child cannot have a direct civil relationship with his father if it is not preceded by a legal marriage bond, so he is still treated as an illegitimate child who does not have inheritance rights against his father. The Civil Code cuts off the civil relationship between an illegitimate child and the father if there is no recognition, so that inheritance rights are automatically lost. Recognition only provides the status of a legitimate child under the law, but his position remains different from that of biological children in the distribution of inheritance.

A recognized illegitimate child is only entitled to a maximum of one-third of the rights of a biological child, and this provision applies if the heirs consist of the child and his mother only. If there are other heirs from a higher class, then the unborn child is not entitled to inheritance. In Islamic law, a fetus is recognized as an heir if it meets the conditions of a valid pregnancy and its birth can be confirmed. Most scholars have determined that a fetus is considered valid if its gestational age reaches six months, referring to the difference between pregnancy and breastfeeding in the Quran.

The absence of technical regulations in Indonesian positive law has resulted in differing opinions regarding the timing of inheritance distribution for fetuses, between waiting for birth or settling it by estimating the sex. In the context of civil procedural law, the principles of simplicity, speed, and low cost must be considered in determining the efficient time for inheritance settlement (UNSOED, 2008). Therefore, this study shows that both the Civil Code and Islamic law recognize the inheritance rights of unborn children, but differ in terms of technical implementation and the required requirements, so that regulatory strengthening is needed to ensure justice and legal certainty. (Committee of the Faculty of Sharia, Al-Azhar University, 2004)

These findings indicate the need to update inheritance law norms in the Civil Code to provide legal certainty and adequate protection for unborn children. The uncertainty arising from the use of the phrase "deemed born" in Article 2 of the Civil Code must be clarified through

authentic interpretation or the establishment of consistent jurisprudence among 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 involving conflicts between heirs (Dworkin, 2000). Therefore, the legislature and the Supreme Court need to consider developing derivative regulations regarding inheritance distribution procedures for fetuses, including a time limit for delays and mechanisms for protecting assets. (Shobuni, 1995)

In response to the resulting legal vacuum, a number of judges have exploited the interpretive space by establishing trust funds as a form of temporary protection for fetal rights. However, because the Civil Code does not explicitly provide provisions for this mechanism, its implementation has been uneven. Field findings indicate that only 23% of courts apply a similar protection model, resulting in inconsistent treatment across jurisdictions. This inconsistency not only impacts substantive justice but also creates procedural uncertainty that can undermine public confidence in the justice system. Therefore, a uniform legal framework is needed so that judicial innovations such as trust funds can be institutionalized and implemented nationally. (Sidharta & Arief, 2008)

Furthermore, a comparison of inheritance law practices in the civil and Islamic legal systems demonstrates the importance of cross-system harmonization. In Islamic law, the existence of a fetus as a potential heir is more firmly recognized as long as it is born alive, as emphasized in the Prophet's hadith. In regions where Islamic law is dominant, such as Cirebon, the approach of delaying inheritance distribution until birth has proven to be more socially and legally acceptable, as it can prevent conflicts between heirs. However, in the context of mixed marriages or pluralistic 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 cross-system harmonization policies that not only adapt legal norms to the reality of societal plurality but also provide comprehensive protection for the rights of unborn children.

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

159| Sinergi International Journal of Law
<https://journal.sinergi.or.id/index.php/law> Legal Status of Unborn Children as Heirs: A Comparative Study of Civil Law and Islamic Law

160| Sinergi International Journal of Law <https://journal.sinergi.or.id/index.php/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*.