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Inheritance Of Children Through The Cloning Process The Perspective Of Civil Law

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Abstrak

Kloning dalam hukum Positif di Indonesia belum mendapat respon dari para pembuat Undang-undang, mungkin karena dianggap masih belum bisa dilaksanakan di Indonesia. Padahal apabila proses kloning embrio ini terjadi, dapat mengacaukan tatanan hukum yang sudah ada di Indonesia, seperti Undang-undang Perkawinan, Undang-undang Waris dan lain-lain. Metode penelitian yang digunakan yaitu metode penelitian kualitatif yang menghasilkan data deskriptif berupa tulisan dari objek penelitian yang diamati. Jenis penelitian pada penelitian ini yaitu menggunakan studi pustaka (*library research*) yaitu dengan melalui metode yang pengumpulan data dengan cara memahami dan mempelajari teori-teori dari berbagai literature yang berhubungan dengan objek penelitian tersebut. Hasil penelitian menunjukkan bahwa kloning merupakan suatu metode prokreasi tanpa melalui proses aseksual, maka hal tersebut dapat dikatakan memiliki kesamaan dengan upaya kehamilan diluar cara alamiah. Hal ini sama halnya tertuang dalam Peraturan Pemerintah No. 61 Tahun 2014 tentang kesehatan reproduksi yang terdapat dalam Pasal 40 Ayat (1) bahwasanya reproduksi dengan bantuan atau kehamilan di luar cara alamiah hanya dapat dilakukan pada pasangan suami istri yang terikat perkawinan yang sah dan mengalami ketidaksuburan atau infertilitas untuk memperoleh keturunan, kemudian ayat (2) menjelaskan bahwa dilaksanakan dengan menggunakan hasil pembuahan sperma dan ovum yang berasal dari suami istri yang bersangkutan dan ditanamkan dalam rahim istri dari mana ovum berasal. Selain itu disebutkan pula dalam melakukan reproduksi dengan bantuan atau kehamilan di luar cara alamiah, harus dilakukan sesuai dengan perkembangan ilmu pengetahuan dan teknologi.

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Kata Kunci:

Waris, Kloning, dan Hukum Perdata

Abstract

Cloning in Positive law in Indonesia has not received a response from the lawmakers, perhaps because it is considered still not feasible in Indonesia. Even though if this embryo cloning process occurs, it can disrupt the existing legal order in Indonesia, such as the Marriage Law, Inheritance Law and others. The research method used is a qualitative research method that produces descriptive data in the form of writing from the observed research object. The type of research in this study is using library research, namely through a method that collects data by understanding and studying theories from various literature related to the object of research. The results show that cloning is a method of procreation without going through the asexual process, so it can be said to have similarities with attempts to conceive outside of natural means. This is the same as stated in Government Regulation No. 61 of 2014 concerning reproductive health contained in Article 40 verse (1) that assisted reproduction or pregnancy outside of natural means can only be carried out in married couples who are bound by a legal marriage and experience infertility to obtain offspring, Then verse (2) explains that it is carried out by using the results of fertilization of sperm and ovum originating from the husband and wife concerned and implanted in the womb of the wife from which the ovum originated. In addition, it is also stated that in carrying out assisted reproduction or pregnancy outside the natural way, it must be carried out in accordance with the development of science and technology.

Keywords:

Inheritance, Cloning, and Civil Law

Introduction

The issue of nasab has recently been in the public spotlight. Not only because it is an issue that is debated by scholars. More than that, the Islamic law that applies in Indonesia tends to be considered out of the teachings of the fuqaha. Various regulations governing legitimate and

illegitimate children, such as in the Marriage Law and KHI, are considered at odds with the fuqaha. In fact, some say that some of these regulations actually provide opportunities for the possibility of children who are considered legitimate even though they are illegitimate children. This will certainly create confusion for the provisions of the child's nasab.¹

The development of scientific progress in this day and age, of course, can create ideas in the form of the cloning process. Cloning aims to help married couples who experience problems in having offspring, besides that it can create offspring in accordance with what is desired, because the cloning process is taking DNA from humans who want to be cloned, and more sadly, a woman can have offspring without the need for a man.² However, the problem is that from a legal perspective, the legal status of the child becomes problematic, because without going through marriage, while one of the requirements to become an heir is through a marriage.

RESEARCH METHODS

This research uses a qualitative-descriptive method because it aims to provide information, understanding and description of the content and quality of the content that occurs in the target or object of research.³ Qualitative research method is one of the research procedures that produces descriptive data in the form of writing from the observed research object.⁴ Data is collected in the form of words, pictures, and not numbers. This is due to the application of qualitative methods. Thus, the

¹ Afif Muamar, "Ketentuan Nasab Anak Sah, Tidak Sah, Dan Anak Hasil Teknologi Reproduksi Buatan Manusia: antara UU Perkawinan dan Fikih Konvensional", *Al-Ahwal* Vol. 6 No. 1 2013, 86.

² Maimun, "Hak Waris Bagi Anak Hasil Kloning Perspektif Hukum Islam", *Jurnal At-Ta'fikir* Vol 11 No. 1 (Juni, 2018), 68.

³ Depri Liber Sonata, "Metode Penelitian Hukum Normatif dan Empiris: Karakteristik Khas Dari Metode Meneliti Hukum", *Jurnal Ilmu Hukum*, Vol.8, No. 1 (Maret 2014), 27.

⁴ Pupu Saeful Rahmat, "Penelitian Kualitatif", *Jurnal Equilibrium*, Vol. 5, No. 9 (Juni, 2009), 3.

results of the study will contain data quotations to illustrate the presentation of the research results.⁵

The type of research in this study is using library research, which is a method of collecting data by understanding and studying theories from various literature related to the research. The data collection uses a way of searching for sources and constructing from various sources such as books, journals and research that has been done, even the literature obtained from various references is analyzed critically and must be in-depth in order to support propositions and ideas.⁶

Discussion

1. Inheritance In Islam

Etymologically mawarith comes from the plural form of the word *mirath*, which is masdar from the word *waratba*, *yaritbu*, *wirathatab*, wa *mirathan*, which means legacy. While terminologically inheritance law is a law regarding the transfer of property caused by death. The existence of inheritance law is very important to regulate the distribution of inheritance about who is entitled to receive it, how much each part is and how it is distributed. The word mawaris is synonymous with the word *faraid* which comes from the word *faridah* which means a predetermined part (*al-Mufrudah*), then known as *faraid* science. The law of inheritance in Islam is strictly regulated in the Qur'an and Hadith.⁷

In some Islamic legal literature, there are several terms to name Islamic Inheritance Law, such as fiqh mawaris, faraidh science, and inheritance law. This difference in naming occurs due to differences in the direction that is used as the main point in the discussion, but the scope of the discussion is the same. Fiqh mawaris is a science that

⁵Lexy J. Moleong, *Metodologi Penelitian Kualitatif* (Bandung: PT Remaja Rosdakarya, 2017), 11.

⁶ Miza Nina Adini, "Metode Peneitian Kualitatif Studi Pustaka", *Edumaspul*, Vol 6 No 1 (Maret, 2022), 2.

⁷ Maimun, *Hukum Waris Perspektif Islam dan Adat* (Pamekasan: Duta Media, 2018), 2-3.

discusses inheritance, about how the transfer process, who is entitled to receive the inheritance and how much each share. Fiqh mawaris is also called the science of faraidh, which is the plural form of the word fardh, meaning obligations and certain parts. When connected with science, it becomes the science of faraidh, meaning the science that knows how to divide the property of someone who has died to those entitled to receive it.

As for the legal literature in Indonesia, several names are also used, all of which are taken from Arabic, namely inheritance, inheritance, heirship, and inheritance law, while those who use the name inheritance law, look at the person who is entitled to receive inherited property, which is the subject of this law. As for those who use the name inheritance, they look at the inherited property which is the object of this law.⁸

The source in the Qur'an that regulates inheritance is found in QS. An-Nisa': 33

وَلِكُلِّ جَعَلْنَا مَوَالِي مِمَّا تَرَكَ الْوَالِدَانِ وَالْأَقْرَبُونَ وَالَّذِينَ عَقَدْتُمْ
أَيْمَانَكُمْ فَأَتَوْهُمْ نَصِيْبَهُمْ إِنَّ اللَّهَ كَانَ عَلَىٰ كُلِّ شَيْءٍ شَهِيدًا

"And for each of them (men and women who have died), we have appointed those who are entitled to inherit his legacy, namely, his parents and close relatives. And those with whom you have made a bond of allegiance (to help in times of anxiety and distress), then give them their share. Verily, Allah is witness to everything".⁹

a. Group of Heirs Based on the Level of Asset Acquisition

1) Heirs who are entitled to 1/2 of the estate

There are five recipient heirs 1/2 (husband, daughter, granddaughter of a son, full sister, and brother in law), namely:

a) Husband

⁸ Moh Muhibbin dan Abdul Wahid, *Hukum Kewarisan Islam Sebagai Pembaruan Hukum Positif di Indonesia* (Jakarta: Sinar Grafika, 2009), 5-9.

⁹ Kementerian Agama, *Al-Qur'an & Terjemahannya* (Jakarta: Jabal, 2010), 83.

A husband whose wife dies is entitled to $\frac{1}{2}$ of his wife's estate on one condition that there is no *fara'* or *furud* inheritance. And if there is *fara'* or *furud* inheritance then he is entitled to get $\frac{1}{4}$ of his wife's property. The *fara'*/*furud* of inheritance in question are the four people listed below:

- Boys
- Daughter
- Grandson of a son
- Granddaughter of a son

So if there is one of the four people, then the husband is only entitled to $\frac{1}{4}$ of the heir's property. And the husband is entitled to $\frac{1}{2}$ if there are no children and grandchildren.

b) Daughters

The daughter of the deceased is entitled to $\frac{1}{2}$ the property of the heir, if she meets 2 conditions, namely:

- There are no sons of the deceased (siblings), and if there is a son then he is entitled to get the property of the heir by way of *ashabah*, and the son gets 2 parts of the daughter.
- There are no daughters of the deceased (sisters), but if there are one or more daughters, then they are entitled to two-thirds of the estate to be distributed equally among them.
- So, a daughter is entitled to $\frac{1}{2}$ if she is one.

c) Granddaughter of a son

The granddaughter of the son of the deceased (heir) is entitled to $\frac{1}{2}$ the property with three conditions, namely:

- The testator has no children or grandchildren, and if the testator has children or grandchildren, then the ruling can be specified as follows:
- If the closest child/grandchild to him is a male, then he is *mahjub* (does not get anything), and if only one woman then she is entitled to $\frac{1}{6}$ of the property and if more than one then he is *mahjub*.

- There is no grandson of a son either of his brothers. And if there is a grandson of a son, then he is entitled by way of 'asabah and the grandson gets 2 parts of the granddaughter.
- If there are no granddaughters of a son, whether they are brothers or sisters, and if there are granddaughters of a son, whether one or more, they are entitled to two-thirds of the property, to be divided equally among them.
- So it can be said that granddaughters of sons are entitled to $\frac{1}{2}$ if alone and not with daughters.

d) Half sisters

The heir's biological sister is entitled to $\frac{1}{2}$ the property of the heir, if it meets the conditions below:

- The deceased (testator) does not have fara'/furud inheritance (children and grandchildren, both male and female), and if there is one of the fara'/inheritance then the ruling is detailed as follows, if it is a man then he is mahjub, and if it is one or more women then he is entitled to inheritance by means of 'asabah, namely taking the rest of the existing fard heirs.
- There is no father of the deceased, and if there is a father of the deceased then he is mahjub can not get anything because the father became his intermediary in approaching the deceased (heir). Meanwhile, there is a rule that says that "if an heir is related to the deceased through an intermediary and the intermediary is still alive, the intermediary obliges him (prevents him from getting the inheritance)".
- There are no brothers, and if there is a brother then he is entitled to inheritance by way of 'asabah, and the brother is entitled to two parts of the sister.
- There are no sibling sisters, and if there are sibling sisters, whether one or more, they are entitled to $\frac{2}{3}$ of the inheritance.

- There is no grandfather, and if there is a grandfather then they get 'asabah as will be explained in the chapter.
- So the point is that siblings get $\frac{1}{2}$ if one.

e) Half-Sister

A sister who is the father of the deceased (testator) is entitled to $\frac{1}{2}$ of the property of the testator, if the following five conditions are met:

- There is no furu'/furud of the deceased's inheritance, which consists of sons/daughters, grandsons/daughters of sons. If there is one of these furu'/furud of inheritance, then the ruling is detailed as follows, if it is a man then he is mahjub and if it is one or more women then he is entitled to get by way of 'asabah (taking the remainder of the furu'/furud taking)
- If there are none of the deceased's siblings, and if there are any of them, then the ruling is as follows: if they are male, then they are mahjub, and if they are female and there is only one of them, then she is entitled to $\frac{1}{2}$ of the estate by way of fard/furud, and this sister gets $\frac{1}{6}$ of the estate. If the female sibling is more than one then she is mahjub. If the female sibling is with a brother who is a father, then the deceased's sibling and the brother who is a father are entitled to inherit the property by using the method of 'asabah.
- There is no father of the deceased (heir), and if there is a father of the deceased (heir) then he is mahjub because the father was the intermediary in approaching the deceased.
- There is no father's brother. If there is a brother in the family, he is entitled to inherit the estate by way of 'asabah, which is by getting double his share.

- There is no sister who is the father of the deceased. If there is one of the seayah sisters, then they (seayah sisters) are entitled to 2/3 of the estate and divided equally among them.
- There is no grandfather, and if there is a grandfather then they get 'asabah.
- So, a sister in law gets 1/2 if a person

2) Heirs entitled to 1/3 of the estate

As for the 1/3 beneficiary heirs, there are three people (mother, two or more siblings, and grandfather), namely:

a) Mother

The mother of the deceased (heir) is entitled to 1/3 of the estate of her deceased son with two conditions, namely:

- There are no fara' heirs (children/grandchildren) of the testator, if there are fara' heirs of the deceased, both male and female, then the mother is entitled to 1/6 of the inheritance.
- There are no two or more siblings of the deceased, whether they are brothers, fathers or mothers, whether male or female. If there are two or more siblings of the deceased, the mother is entitled to 1/6 of the estate.

b) Two or more siblings

One-mother siblings get 1/3, if two or more people and there are no children, grandchildren, fathers, and grandfathers

c) Grandfather (father's father)

Grandfather gets 1/3 when with one or more siblings.¹⁰

3) Heirs Entitled to 1/4 of the Estate

As for the heirs receiving 1/4 there are two people (husband and wife), namely:

¹⁰ Segaf Hasan Baharun, *Bagaimanakah Anda Membagikan Harta Warisan Dengan Benar*, 21-33.

a) the husband

The husband of the deceased (testator) is entitled to $\frac{1}{4}$ of the property provided that the deceased has fara' inheritance, such as children. If the testator (the deceased) left children, then the husband is entitled to $\frac{1}{4}$, and if there is no fara'/furud inheritance (children) then he (the husband) is entitled to $\frac{1}{2}$ the property of the deceased (the testator).

b) Wife

The wife of the deceased (heir), whether one or more, is entitled to $\frac{1}{4}$ of the deceased's property, provided that the deceased has no fara' inheritance. And if the wife is entitled to $\frac{1}{4}$ if there are no children or grandchildren.

4) Heirs Entitled to $\frac{1}{8}$ of the Estate

The heirs who are entitled to $\frac{1}{8}$ are the wife

a) Wife

The wife gets $\frac{1}{8}$ if there are children or grandchildren. If there are no children or grandchildren, the wife gets $\frac{1}{4}$. The $\frac{1}{8}$ share for the wife (who has children or grandchildren) applies to one wife or several other wives, starting from the second wife to the fourth wife, but with a fixed share of $\frac{1}{8}$, which then $\frac{1}{8}$ is divided equally according to the number of wives, provided that the wife is still dependent on the heir or at least still in the iddah period for divorce *raj'i*.¹¹

5) Heirs entitled to $\frac{2}{3}$ of the estate

The heirs receiving the $\frac{2}{3}$ share are three (two or more daughters, two or more granddaughters, two or more sisters), namely:

a) Two or more daughters

Two or more daughters if not with a son. Two or more daughters are entitled to $\frac{2}{3}$ of the property, provided that there is no son (his

¹¹ Maimun Nawawi, *Pengantar Hukum Kewarisan Islam* (Surabaya: Pustaka Radja, 2016), 128.

brother), if with a son then two or more daughters are entitled to inheritance by means of *ashabah* and the son gets two parts of the daughter.

b) Two or more male-line granddaughters

Two or more male-line granddaughters if not together with a male-line grandson.

c) Two or more sisters

Two or more sisters if not with a brother or sister.¹²

2. The Position of Inheritance Rights for Cloned Children from the Perspective of Civil Law

Humans are living creatures created by Allah swt with the most perfect condition compared to other living things, because humans have what other living things do not have, namely reason and mind.¹³

Cloning is not explicitly regulated in the provisions of Indonesian legislation, and from a legal point of view, cloning is still a controversy, because when arguments are given to allow it, it will deal with other aspects of the law. Meanwhile, cloning in Positive law in Indonesia has not received a response from the lawmakers, perhaps because it is still considered unworkable in Indonesia. Whereas if this embryo cloning process occurs, it can disrupt the existing legal order in Indonesia, such as the Marriage Law, Inheritance Law and others. If one legal order has not complemented each other, it will also damage other rules.

In positive law in Indonesia it is clearly explained that giving birth to a human being must be in a legal marriage. If a pregnancy occurs and then gives birth outside of a legal marriage, it will have an impact on many legal aspects, starting from inheritance (rights and obligations), and also the act will be considered violating criminal law norms. If a

¹² Segaf Hasan Baharun, *Bagaimanakah Anda Membagikan Harta Warisan Dengan Benar*, 28.

¹³ Candra Nila Dewajati, *202 Tanya Jawab Fiqh Wanita* (Jakarta: Al-Maghfiroh, 2014), 64-66.

pregnancy occurs outside of the natural way, then the health law has regulated as follows:

1. Pregnancy outside of natural means can be carried out as a last resort to help a husband and wife to conceive.
2. Attempts to conceive outside of natural means can only be made by legally married couples under the following conditions:
 - a. The result of the fertilization of the sperm and ovum of the husband and wife in question, implanted in the womb of the wife from which the ovum came.
 - b. Performed by health workers who have the expertise and authority.¹⁴

In the Indonesian legal system, the position of the Civil Code can be said to be the main spirit in protecting the rights and obligations of every legal subject, as well as ensnaring anyone (legal subject) who violates these provisions. with regard to the protection of human life, the Civil Code regulates it in detail, even children who are still in their mother's womb, the legal consequences have been regulated, but unfortunately the Civil Code has not yet contained in detail the law on human cloning. However, what is stated in the Civil Code can be likened to the process of human confinement to the body, which is commonly referred to as persecution, because in human cloning there are many defective embryos that will be removed. The Civil Code itself has explained and regulated the types of persecution and the legal consequences of committing such offenses, the articles that explain the problem of persecution are mostly contained in Articles 351 to 355 of the Civil Code, including Articles 346-349 of the Civil Code on Miscarriage or Gestational Homicide.

Cloning is a method of procreation without going through the asexual process, so it can be said to have similarities with attempts to

¹⁴ Majestika Septikasari, Dwi Maryanti, *Kesehatan Reproduksi* (Yogyakarta: Nuha Media, 2009), 77-78.

conceive outside of natural means.¹⁵ This is as regulated in Law Number 36 of 2009 concerning health contained in Article 127 paragraph (1) that pregnancy efforts outside of natural means can only be carried out by a legal married couple with the provisions, namely the results of fertilization of sperm and ovum from the husband and wife concerned implanted in the womb of the wife from which the ovum comes, carried out by Health Workers who have the expertise and authority for that, and at certain health facilities. Continued in paragraph (2), provisions regarding the requirements for pregnancy outside the natural way as referred to in paragraph (1) shall be regulated by Government Regulation.¹⁶

Government Regulation No. 61 of 2014 concerning reproductive health contained in Article 40 Paragraph (1) that assisted reproduction or pregnancy outside the natural way can only be done to a married couple who are bound by a legal marriage and experience infertility or infertility to obtain offspring. Then Paragraph (2) explains that it is carried out by using the results of fertilization of sperm and ovum originating from the husband and wife concerned and implanted in the womb of the wife from which the ovum originated.¹⁷ Then it is also mentioned that in carrying out assisted reproduction or pregnancy outside the natural way, it must be carried out in accordance with the development of science and technology. This is clarified by the provision that assisted reproduction or pregnancy outside of natural means must also be carried out by Health Workers who have the competence and authority to carry out the procedure.

Conclusion

Inheritance rights for cloned children according to civil law are as contained in the provisions of Law Number 36 of 2009 concerning health contained in Article 127 paragraph (1) that pregnancy efforts outside of natural means can only be carried out by a legal married couple with the provisions, namely the results of fertilization of sperm and ovum

¹⁵ Suryo, *Sitogenetika* (Yogyakarta: Gajah Mada University Press, 1995), 44.

¹⁶ Undang-undang Nomor 36 tahun 2009 Pasal 127.

¹⁷ Peraturan Pemerintah No. 61 Tahun 2014 tentang kesehatan reproduksi Pasal 40

from the husband and wife concerned implanted in the womb of the wife from which the ovum comes, carried out by Health Workers who have the expertise and authority for that, and at certain health facilities. Continued in paragraph (2), provisions regarding the requirements for pregnancy outside the natural way as referred to in paragraph (1) shall be regulated by Government Regulation.

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