

## The Value of Justice in the Distribution of Inheritance for Substitute Heirs in Islamic Inheritance Law

Mawalid Istiqlal<sup>1</sup>, Ma'ruf Hafidz<sup>2</sup>, Abdul Qahar<sup>2</sup> & Zainuddin<sup>2</sup>

<sup>1</sup>Doctor of Law Science, Indonesian Muslim University

<sup>2</sup>Faculty of Law, Indonesian Muslim University

---

### ABSTRACT

This study aims to analyze the nature of the distribution of inheritance for the successor heirs. This research is *library research* using normative juridical research methods. The results of the study show that the nature of the distribution of inheritance for replacement heirs is a solution to the injustices that have occurred so far due to the implementation of inheritance laws that tend to be patrilinealistic. The existence of a substitute heir can provide justice to the heirs and humanity where an unnatural person is punished not to get an inheritance from his grandfather just because his parents have died first.

**KEYWORDS:** Division; Treasure; Heir

---

Date of Submission: 14-11-2021

Date of Acceptance: 29-11-2021

---

### I. INTRODUCTION

Inreality, Muslims constitute the majority in this country. Therefore, it is natural that the expectations of Muslims, in general, make Islamic law a positive law for Indonesian Muslims. This is based on the way of thinking, the outlook on life and the character of a nation reflected in its culture and laws.<sup>[1]</sup> One of the Islamic laws that are still valid and enforced in Indonesia, especially for Muslims, is the Law of Inheritance or what is known as Faraid. Islamic inheritance law is considered an obligation that must be carried out by every Muslim. It is considered as compulsory law (*dwingend Recht*) which is a law that applies absolutely and standardly.<sup>[2]</sup>

There are often problems in Muslim society regarding the distribution of inheritance (*mirath*). This happens because in the Qur'an there are no clear provisions regarding certain issues, such as the granting of inheritance rights to grandchildren whose parents died before their grandfather, and the amount of the share received by Ahl Al-Furud is greater than the property that is received by Ahl Al-Furud. distributed (a state of property deficit). The provisions regarding the matter were not explained in detail, which eventually led to differences of opinion. Jumhur ulama stated that the grandson had no right to inherit his grandfather's property because it was hindered by his parents' relatives.<sup>[3]</sup> Meanwhile, to solve the problem of the property deficit, a proportional *reduction was made* to all heirs.

The problem of inheritance in Islam is a problem that can be said to be easy and also difficult because in Islamic inheritance law the parts of each heir have been determined. It's just that this inheritance can be determined based on deliberation within the family. Heirs (*warits*) are people who will inherit the inheritance of muwarris because they have inherited causes.<sup>[4]</sup>

The principle of justice in inheritance law is something that is very interesting and becomes a subject of discussion that continues to be discussed by legal scholars. Especially, according to Ahmed E. Souaiaia, when the law of inheritance is linked to its legal propositions and the practice of its implementation.<sup>[5]</sup> There are even those who question the existence and manifestation of the principle of justice in inheritance law. Tamar Ezer, for example, argues that justice in inheritance law cannot be seen clearly in every provision of inheritance law applied to Muslims. According to him, this can be seen in the discriminatory provisions for some heirs regarding the size of their share, because according to him, the inheritance law often makes female heirs the second class.<sup>[6]</sup> When viewed from the principles used in Islamic inheritance law, gender classification is not included in it at all. The principles used in inheritance law are based on the principle of kinship and marriage; the principle of gender neglect (that is, not to question the characteristics of male or female, fatherly or motherly); heirs up and down (Al-Usul and Al-Furu'); there is no inheritance rights for brothers and sisters due to the presence of both parents even though they occupy the mother's place with rights from 1/3 to 1/6 of the share, and the male heirs receive a multiple of the female share.<sup>[7]</sup>

The study of substitute heirs in Islamic inheritance law is new and was not previously known by jurists in classical fiqh literature, this provision is a breakthrough in terms of resolving the inheritance of children

*The Value of Justice in the Distribution of Inheritance for Substitute Heirs in Islamic Inheritance Law* (read: grandchildren) from heirs (fathers) who first died of the heir (grandfather), according to the jurists of the school of thought the child is classified in the position of *zaw Al-Arham* which according to the provisions of *syara'* (in this case *Syafi'ifiqh*) that the child (read: grandson) whose father died first from the heir ( grandfather) cannot obtain and receive an inheritance.

In reality, it is often seen that children whose fathers died before their grandfathers lived in poverty, while their father's brothers lived insufficiency. This condition causes the orphan to suffer because of the loss of his father, as well as lose the right to inherit due to being veiled by his father's brothers. Indeed, among the many cases, there are several dispensations where a grandfather makes a will for an orphaned grandson. But often he died before doing so. Seeing this fact, the legislation in several Muslim countries no longer follows the rules of the classical school of jurisprudence, which does not question the case in the ruling of the school, but several changes have been made, especially regarding the rights of children whose father died first from their grandfather.

Seeing this fact, the legislation in several Muslim countries no longer follows the rules of the classical school of jurisprudence, which does not question the case in the ruling of the school, but several changes have been made, especially regarding the rights of children whose father died first from their grandfather.

The motivation for the legal institutionalization of substitute heirs in the inheritance law of the Compilation of Islamic Law is based on a sense of justice and humanity. This is because it is inappropriate and unfair and inhuman to punish a person for not being entitled to receive an inheritance that should have been obtained from his father, just because his father died earlier than grandfather by chance. Especially if the fact is that when the grandfather died, his children were all rich and established, on the other hand, the grandson was left orphaned, destitute and poor and his right to obtain what should have been his father's right because his father died first from his grandfather the. Following the demands of the times and the needs of humanity, the granting of inheritance through a substitute heir institution as contained in the Compilation of Islamic Law is considered very urgent with the basic concept as the principle of justice and benefit and it is hoped that the implementation of a substitute heir as contained in the Compilation of Islamic Law will provide very high Indonesian-style justice, especially to children whose father died first from their grandfather who in the Islamic inheritance system he will not get an inheritance.

## II. RESEARCH METHODS

This research is *library research* using normative juridical research methods. With this normative juridical approach, the required data will be examined in the form of theories, concepts and ideas about the value of equity in the distribution of inheritance for heirs to replace the perspective of the Compilation of Islamic Law. The theological-normative side lies in the norms of Islamic law (*fiqh*) which are derived from revelations from both the Qur'an and the Hadith of the Prophet SAW. Judging from the approach used, this research can be classified as revelation research. While the juridical-normative side lies in the legal norms that apply in the Republic of Indonesia, especially the Compilation of Islamic Law.

## III. DISCUSSION

In essence, all living creatures will surely experience death. Likewise, humans in time will surely experience death just like other living creatures. Humans as one of the other legal subjects have rights and obligations in legal relations. A person as a supporter of rights is from the time he is born and ends when he dies, even if his interests want to be valid from the time he is in the womb, as long as he is born alive. This relates to an inheritance that is open at a time, while the person as a potential heir (heir) is still in the womb.<sup>[8]</sup>

Inheritance law is part of family law which plays an important role, even determines and reflects the family system that applies in society. Inheritance law is closely related to human life because it is related to property and human beings with one another. Death or passing away is an event that will be experienced by someone because death is the end of the journey of human life. If the deceased person known as the heir leaves the family and property called inheritance, in what way will we settle or divide the inheritance left by the testator and what law will be applied to divide the inheritance? The law that discusses the transfer of inheritance, the management and continuation of the rights and obligations of a person who dies, is regulated in inheritance law.

Islam regulates the provisions for the division of inheritance in detail in the Qur'an so that there are no disputes between heirs after the death of the deceased regarding the inheritance. Islam also requires and puts the principles of fairness and justice as one of the joints for the formation and development of a society that can be enforced. These provisions cannot run effectively and properly if they are not supported by experts who have deep experience and can implement these provisions properly.<sup>[9]</sup>

Inheritance has developed very meaningfully for Muslims in Indonesia, and it is caused by the increasingly complex needs of society and the pattern of thought can change according to the changing times.

### *The Value of Justice in the Distribution of Inheritance for Substitute Heirs in Islamic Inheritance Law*

Among the Islamic inheritance law that has developed is the existence of a substitute heir, whose application in Indonesia has been regulated in the Compilation of Islamic Law.

Substitute heirs in Islamic inheritance law to complement existing laws and also aim to seek a sense of justice for the heirs. Substitute heirs are heirs because of replacement, namely people who become heirs because their parents who are entitled to inheritance have died before the testator, so he appears to replace them.<sup>[10]</sup> So the replacement of a substitute heir needs to be developed in Islamic inheritance law, moreover, this will not harm other heirs.

On the other hand, the assumption is that Islamic law does not recognize substitute heirs in inheritance law, this is considered unfair when it is connected to a grandson replacing his parents and occupying the place of his parents as heirs, nephews replacing his parents and occupying his parents' place as heirs. Cousins replace their parents and take the place of their parents as their uncles, and so on.

Islamic inheritance law has developed very significantly among Muslims in the world without changing its normative text, especially in Indonesia, the institutionalization and development of Islamic inheritance law are pursued through national legislation. This can be seen with the promulgation of Law no. 7 of 1989 concerning the Religious Courts and the issuance of Presidential Instruction No. 1 of 1991 known as the Compilation of Islamic Law (KHI), A. Hussaini said that Islamic inheritance law is a specialist form as a scientific discipline by always relying on the Qur'an and Al-Sunnah.<sup>[11]</sup>

The replacement heirs mentioned in Article 185 of the Compilation of Islamic Law (KHI) Inpres number 1 of 1991, are the result of the *ijtihad* of Indonesian mujtahids, namely a joint decision dated March 21, 1985, the Chief Justice of the Supreme Court and the Minister of Religion of the Republic of Indonesia who formed a committee to collect materials and design The compilation of Islamic law concerning the law of marriage, inheritance and waqf will then be used by the Religious Courts in carrying out their duties and authorities.<sup>[12]</sup> The essence of the Presidential Instruction is an application of the Qur'an letter An-Nisa verse 59 which states that the sources of Islamic law consist of Kitabullah, As-Sunnah, and *Ijtihad*. Regarding the successor of heirs, the Qur'an stipulates it in Surah An-Nisa verse 33 which translates: "For each individual, we determine as heirs of what is left by parents and relatives. And give to those who have been bound by your oath a share of them. Verily, Allah is witness to something." In connection with the word of God "for each individual we assign an heir". This happened at the beginning of Islam. Then this law was enforced.<sup>[13]</sup>

Al-Bukhari narrated from Ibn Abbas (702, "And for every individual, We make heirs" *Mawaliya* means heirs. "And to those who your oath has bound." The meaning is when the Emigrants arrived in Medina, then an Emigrant inherited the inheritance of the Ansar while his relatives did not get a share, through the brotherhood created by the Messenger of Allah between them.

The term substitute heir in Dutch is called *plaatsvervulling*. The replacement of place in inheritance law is called the replacement of heirs, namely the death of a person by leaving grandchildren whose parents have died first. This grandson takes the place of his deceased parents to get an inheritance from his grandparents.

The amount of the share that should be received by the grandchildren is the amount that should be received by their parents if they were still alive. The term replacement of place is only known in western law (BW) and customary law but is not known in Islamic law.

According to Raihan A. Rasyid, the term substitute heir is distinguished between people who are called "substitute heirs" and "substitute heirs". According to him, a substitute heir is a person who from the beginning was not an heir but due to certain circumstances, he became an heir and received an inheritance in the status of an heir. For example, an heir does not leave a child but leaves a son's grandson or granddaughter. Meanwhile, a substitute heir is a person who from the beginning was not an heir but due to certain circumstances and certain considerations may receive an inheritance but remains in the status of not being an heir. For example, the heir leaves children with grandchildren, both male and female whose parents died before the heir. The existence of grandchildren here as a substitute for heir.

What is called *plaatsvervulling* in the Civil Code, mandatory will in Egyptian law and Article 185 of the Compilation of Islamic Law by Raihan A. Rasyid is called a substitute heir, not a substitute heir. However, whatever it is called, what is certain in the Compilation of Islamic Law is that the term substitute heir is used.

In the classic *Faraid* book contained in the book of *fiqh*, it has been recognized that the heirs who died earlier than the heirs were replaced by their descendants. However, the term used is not a substitute heir. Whatever the term is, it is essentially the same, but not absolute. According to him, those who have the position as Substitute heirs are only descendants of sons who died before the heirs, namely only grandsons and granddaughters of sons' descendants (Ibnul-Ibni and Bintul-Ibni) who can receive an inheritance from his grandfather, even that part has been determined with certainty both as *ashabah* and *zawil-furud*. For example, if *bintu*ibnin accepts with a daughter, then he gets a share of 1/6. while the grandsons and granddaughters of the descendants of daughters (Ibnul-Binti and Bintul-Binti) cannot receive a share of the inheritance from their grandparents because they are included in *DzawilArham*.

Inheritance is a rule regarding the transfer of property rights of a person who has died to his heirs.<sup>[14]</sup> In Indonesian legal literature, the word "waris" or inheritance is often used. While the word heir is a person who

*The Value of Justice in the Distribution of Inheritance for Substitute Heirs in Islamic Inheritance Law* gets an inheritance or heirloom.<sup>[15]</sup> Thus, it is clear that inheritance is property given to heirs by the testator when the testator has died. In the Civil Code (BW) according to Article 830 "Inheritance only occurs when there is death". Inheritance only occurs when there is death. "Inheritance is a matter of whether and how the various rights and obligations regarding a person's wealth at the time of his death will pass to someone else who is still alive." There are three pillars of inheritance, namely Al Muwaris is a person who inherits his inheritance or the person who inherits his property, Al Waris is an heir who has kinship relations and maurus, namely inheritance after deducting the cost of treating the corpse, debts and after the will is fulfilled so that it can be understood that inheritance will take place when the testator dies and the heir leaves the inheritance.<sup>[16]</sup>

Given this provision, what needs to be considered are the reasons or reasons for receiving an inheritance and the obstacles to receiving an inheritance. At the time of death, there is a high possibility that at that time the person who died had assets that according to the Shari'a provided provisions at the time of death that the transfer of ownership rights had occurred automatically. The majority of phenomena that occur in society are that the heir has more than one heir so that the distribution must be divided in detail according to the provisions contained in the text. In Islamic inheritance law, people who are entitled to inherit property are people who have blood relations with the heirs, namely: children, brothers, fathers, mothers. Second, because of the marriage bond and the reasons for being prevented from obtaining inheritance, namely killing the heir, different religions, and apostates.<sup>[17]</sup>

The process of forming the Compilation of Islamic Law has a close relationship with the current state of Islamic law in Indonesia. Islamic law as a legal order that is held/observed by the majority of the population and the people of Indonesia is a law that has lived in society, is part of Islamic teachings and beliefs and exists in the life of national law and is an ingredient in its guidance and development.<sup>[18]</sup> While existing Islamic law is a product or product of the thought of scholars of the second Hijri century or later and some people tend to maintain classical fiqh and some are trying to offer new ideas because there has been a shift in times as well as social changes that require a solution. which is then actualized into a new interpretation of the text. The interpretations are adjusted to the actual conditions so that ijtihad needs to be encouraged.<sup>[19]</sup> The existence of the Compilation of Islamic Law is to formulate material law aimed at the Religious Courts by reviewing classical books, workshops, comparative law and jurisprudence.

Based on the compilation, it can be concluded that this compilation has the position of being a guide for judges of the Religious Courts in deciding and resolving cases. This reason makes the Religious Courts in addition to implementing the provisions outlined in the compilation also have a role in developing and completing them through the jurisprudence made by the judges of the Religious Courts. This emphasizes that the basis for the Compilation of Islamic Law, on the one hand, judges must be sensitive and explore the legal values that exist in a society which are expected to be able to make the Compilation of Islamic Law an achievement that plays a role in efforts to realize the unification of the rule of law in writing.

The concept of successor heirs emerged later and was often linked to Hazairin's ideas. The idea was then accommodated and contained in the Compilation of Islamic Law, Article 185 which states: "A substitute heir who dies before the heir can be replaced by his son, except for those mentioned in article 173 who are due to murder. the successor heirs may not exceed the share of the heirs who are equal to the heirs being replaced."<sup>[20]</sup> The use of the word 'can' in this article is seen as a tentative characteristic of replacing the position of heirs. In other words, the successor heir can replace the position of his parents or not, can get an inheritance or not. However, in its development, the judges of the Supreme Court considered the position of substitute heirs important. The explanation from the context of Article 185 paragraph 1 shows that the successor heir here is the grandson of the heir, in this case, the heir is the grandfather. Article 2 shows that because it must not exceed the share of the heirs' assets which are equal to those being replaced, in this case, the grandchildren cannot exceed the inheritance of their parents (father) who died first. While Article 173 is an absolute exception which results in the loss of the right of grandchildren to inherit due to murder, including apostasy or different religions.

This concept presents several different views from various circles, both academics, practitioners and scholars who are pro and contra about substitute heirs as part of a legal inheritance according to law. For example, the debate among the participants of the 2009 National Working Meeting in Palembang, started with a presentation by Habiburrahman (MA Supreme Court Justice) who criticized Hazairin's idea that Hazairin is a child of customary law who is the parent of Van Vollenhoven and SnouckHourgronje. In his book, Hazairin claims to be a mujtahid but his writings do not reflect that of a mujtahid. Therefore, Hazairin was deemed unfit to interpret the provisions of replacement heirs based on customary law.

Then it reaped various responses by participants, one of which was MukhsinAsyrof, the Head of the Palembang Religious High Court, who revealed that the provisions for substitute heirs were not stated in fiqh as in the mandatory will but this was intended to provide justice to the heirs. Meanwhile, KH AzharBasyir, who chaired the meeting for the compilation of the Islamic Law Compilation, stated that the replacement heir article was ratified by agreement of the scholars.

#### IV. CONCLUSION

## *The Value of Justice in the Distribution of Inheritance for Substitute Heirs in Islamic Inheritance Law*

The nature of the distribution of inheritance for the successor heirs is a solution to the injustice that has occurred due to the implementation of inheritance law which tends to be patrimonialistic. As a middle ground between the party that wants change and the party that maintains the establishment, it is natural that the share of the successor heirs (temporarily) is limited to the share of the relatives being replaced. The replacement system in Islamic inheritance law is based on the Word of God in Surah An-Nisa verse 33 with the term *Mawali*, namely heirs by replacement, namely people who become heirs because there is no longer a liaison between them and the heir. So the replacement of the heirs should be absolute. This is following the spirit of the Koran regarding concern for the welfare of orphans and the poor. This is not against the sunnah and meets the socio-economic conditions of Islam

### REFERENCE

- [1] R. Subekti, *Comparison of Civil Law CetXII.*, Pradnya Paramita, Jakarta, 1993, hlm
- [2] Aminullah HM, *About the Formulation of Inheritance Law in the Spirit of Islamic Teachings*, in Munawir Sjadzali, et al., *Reactualization Polemics*, Pustaka Panjimas, Jakarta, 1998, p.164
- [3] Muhammad Jawwad Mughniyah, *al-Fiqh al-Madhahib al-Khamsah: al-Jafari, al-Hanafi, al-Maliki, al-Shafi'i, al-Hanbali*, Maktabah al-Shuruq al-Dawlah, Cairo, 2008, pp.442-443
- [4] Muhammad Ma'shum Zein, *Fiqh Mawarits*, Darul Hikmah Jlopo TebelBareng, Jombang, 2008, pp.18
- [5] Ahmed E. Souaiaia, *Contesting Justice: Women, Islam, Law, and Society*, p.68
- [6] Tamar Ezer, *Inheritance in Tanzania: The Impoverishment of Widows and Daughters*, *The Georgian Journal of gender and the Law*, Vol. 7, 2006
- [7] Muhammad Amin Suma, *Measuring the Justice of Islamic Inheritance Law through Text and Context Approach al-Nusus*, *Ahkam: Journal of Sharia Science*, 2012, hlm.214
- [8] Subekti, *Principles of Civil Law cet. XXXII*, Intermasa, Jakarta, 2005, pp.20
- [9] Ahmad Rofiq, *Fiqh Mawarits*, Raja Grafindo Persada, Jakarta, 2012, p.5
- [10] Ahmad Zahari, *Islamic Inheritance Law*, FH Untan Press, Pontianak, 2008, p. 148
- [11] Hussaini A., *The Islamic Law of Succession*, Darussalam Global Leader In Islamic Books, New York, 2005, pp.13
- [12] Abdurrahman, *Compilation of Islamic Law in Indonesia*, Akademika Pressindo, Jakarta, 1992, pp. 18
- [13] Muhammad Naib Ar-Rifai, *Ease from Allah, Summary of Ibn Kastir's Tafsir (Translation) Syihabuddin*, Gemalnsani Press, Jakarta, 1999, p.701
- [14] Wirjono Prodjodikoro, *Inheritance Law in Indonesia*, Source Bandung, Bandung, 1991, pp.13
- [15] Beni Ahmad Saebani, *Fiqh Maqawis*, CV Pustaka Setia, Bandung, 2009, pp.1
- [16] Abdul Ghofu Anshori and Yulkarnin Harahap, *Islamic Law: Dynamics and Development in Indonesia*, Total Media Creation, Yogyakarta, 2008, hlm. 223
- [17] Beni Ahmad Saebani, *Fiqh Mawarits*, CV Pustaka Setia, Bandung, 2009, pp. 116
- [18] Abdurrahman, *Compilation of Islamic Law*, Akademi Pressindo, Jakarta, 1992, pp.20
- [19] Ibid. pp.21
- [20] *Compilation of Islamic Law*