



**DISCOURSE OF SUBSTITUTE HEIRS  
IN THE INDONESIAN HERITAGE LEGAL PRACTICE  
(Comparative Perspective)**

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**Abstract:** This article examines substitute heirs in Islamic and civil code inheritance laws. In Islamic inheritance law, substitute heirs are regulated based on the provisions of the Islamic Law Compilation in article 185, stating that if the heirs die, their inheritance rights are given to their children. In civil code, substitute heirs are regulated based on articles 841-848, with provisions covering the replacement of rights and obligations such as the replaced person's life. This research relies on two questions: what are the substitute heir concepts according to Islamic and civil code inheritance laws? Moreover, how is the comparison of substitute heir concepts based on Islamic and civil code inheritance laws? This study aims to analyze the existence of substitute heirs in Islamic and civil code inheritance laws. To answer both questions, this research employed a normative juridical method, with an approach to laws, cases, comparisons, and conceptual approaches, including conceptual theories and ideas regarding the substitute heir concept in the perspective of Islamic and civil code inheritance laws. This study finds that Islamic inheritance law is based on the Qur'an and hadith, mentioning that the share of the substitute heirs is not the same as that of the replaced heirs. In contrast, according to civil law, the share of the substitute heirs is similar to that of the replaced heirs. Furthermore, this study contributes significantly to realizing benefit, peace, and justice in the distribution of inheritance.

Artikel ini mengkaji tentang ahli waris pengganti dalam hukum kewarisan Islam dan hukum kewarisan KUH Perdata. Dalam hukum kewarisan Islam, ahli waris pengganti diatur berdasarkan ketentuan KHI dalam pasal 185 di mana diberikan hak kepada ahli waris yang meninggal lebih dulu dapat diganti oleh anaknya. Dalam hukum Perdata, ahli waris pengganti diatur berdasarkan pasal 841-848, dengan ketentuan meliputi

penggantian hak dan kewajiban seperti hidupnya orang yang diganti. Penelitian ini dilandasi oleh dua pertanyaan. Yaitu bagaimana konsep ahli waris pengganti menurut hukum kewarisan Islam dengan hukum kewarisan KUH Perdata? Dan bagaimana perbandingan konsep ahli waris pengganti antara hukum kewarisan Islam dan kewarisan perdata. Kajian ini bertujuan untuk menganalisis keberadaan ahli waris pengganti dalam kewarisan Islam dan BW. Untuk menjawab pertanyaan tersebut, metode yang digunakan adalah yuridis normatif, dengan pendekatan Undang-Undang, kasus, perbandingan dan pendekatan konseptual, berupa teori konsep dan ide mengenai konsep ahli waris pengganti dalam perspektif kewarisan Islam dan hukum kewarisan KUH Perdata/BW. Kajian ini menemukan jawaban bahwa hukum kewarisan Islam bersumberkan al-Qur'an dan hadits, dengan ketentuan bagian ahli waris pengganti tidak sama dengan yang diganti, sementara menurut hukum perdata bersumberkan pada Undang-Undang, ketentuan bagiannya sama dengan yang diganti. Selain itu, kajian ini berkontribusi secara signifikan dalam mewujudkan kemaslahatan, kedamaian dan keadilan dalam pembagian kewarisan.

**Keywords:** *substitute heirs; islamic inheritance law; inheritance law in the civil code.*

## INTRODUCTION

Indonesia is a unitary state of various ethnic groups, languages, cultures, and religions. This diversity has resulted in the pluralism of the legal system in Indonesia. The legal system in Indonesia includes Islamic law, civil law, and customary law. The three legal systems include inheritance law, namely Islamic, Civil Code, and customary inheritance laws.<sup>1</sup> The three inheritance laws refer to one purpose: to regulate property transfer from someone who has passed away to someone still alive.

Talking about inheritance is closely related to the person leaving his property called inheritor, the left properties called inheritance, and the person entitled to receive the left properties called the heir. Thus, the elements of inheritance are inheritors, inheritance, and heirs.<sup>2</sup>

The heir is the person obtaining the properties when their owners or inheritors die. Becoming an heir is caused by blood or lineage and marital relations with the inheritor. The heirs of the lineage relationship consist of the child, father, and mother. Meanwhile, the marriage relationship consists of a wife or husband. All of these heirs are said to be the core heirs in the inheritance law. Apart from the existence of a relationship, an heir can receive an inheritance when the inheritor dies, and the heir is alive when the inheritor dies and recognizes his position as the heir without being hindered by the inheritance.<sup>3</sup>

<sup>1</sup> R. Subekti, *Pokok-Pokok Hukum Perdata* (Jakarta: Intermasa, 1995), 5.

<sup>2</sup> Oemar Moechthar, *Perkembangan Hukum Waris : Praktik Penyelesaian Sengketa Kewarisan Di Indonesia* (Jakarta: Prenadamedia Grup, 2019), 14–25.

<sup>3</sup> Ahmad Rofiq, *Fiqh Mawāris*, Edisi Revisi (Jakarta: PT Raja Grafindo, 1995), 23.

However, the Al-Qur'an and hadith as the primary sources of Islamic law have explained the inheritance law in detail, starting from the person entitled to inheritance to the number of shares that each heir must receive. However, the position of grandchildren when their father dies earlier than their grandfather still needs the *ijtihad* of the scholars. In this case, the scholars have different opinions regarding whether the grandchildren can inherit or not.

On the one hand, by referring to the grouping of heirs in the Islamic law, namely *zawilfurud*,<sup>4</sup> *zawilasābah*<sup>5</sup> and *zawilarhām*,<sup>6</sup> then there is no opportunity for grandchildren to replace their father or mother in obtaining the inheritance from their grandparents. On the other hand, based on the thoughts initiated by Hazairin, the heirs are also classified into three groups, namely *zawilfurud*, *zawilqarabat* and *mawālī*<sup>7</sup> (Substitute Heir)

Over time, we are issuing the Islamic Law Compilation through Presidential Instruction of the Republic of Indonesia number 1 of 1991 indicated renewal of Islamic inheritance law. The Islamic Law Compilation gives the right of the deceased heir (father) to the alive descendants (children). Article 185 of the Islamic Law Compilation states that:<sup>8</sup>

- a. The heir who dies earlier than the inheritor, then his position can be replaced by his child, except for those mentioned in article 173.
- b. The share of the substitute heirs must not exceed or be equivalent to the share of the replaced heirs.

Based on the Islamic Law Compilation, the position of the grandchild is upgraded from not getting an inheritance to becoming a substitute heir to replace his or her parents who had passed away earlier than their grandfather.

This is, of course, different from the inheritance law in the Civil Code. The Civil Code stipulates inheritance to the heirs in two ways, namely direct

<sup>4</sup> *Zawil furud* are those who are entitled to receive an inheritance whose share has been determined in the Al-Qur'an. Ibnu Mas'ud dan Zainai Abidin, *Edisi Lengkap Fiqih Mazhab Syafi'i*, Jilid 2 (Bandung: Pustaka Setia, 2007), 191; Mardin, *Hukum Kewarisan Islam Di Indonesia* (Jakarta: PT RajaGrafindo Persada, 2014), 37-38.

<sup>5</sup> Mardin, *Hukum Kewarisan Islam Di Indonesia*, 38-40.

<sup>6</sup> *Zawil arhām* comes from the Arabic word, arham in the plural form of rahmun which means the place where the fetus is formed or stored in the mother's stomach. This meaning is then developed into relatives, both male and female relatives. This meaning rests on the existence of a uterine relationship, so that they are united in kinship relations Muhammad Ali Ash-Shabuni, *Pembagian Waris Menurut Islam, (Al-Mawāris Fi Al-Syariaty Al-Islamiyyah)*, ed. Terj. A.M Basalamah, Cet.1 ed. (Jakarta: Gema Insani, 1995), 144.

<sup>7</sup> Sayuti Thalib, *Hukum Kewarisan Islam Di Indonesia*, Edisi Revisi (Jakarta: Sinar Grafika, 2016), 99-110 In connection with the word *mawālī*, Hazairin defines as a substitute heir. This refers to the interpretation of Surah An-Nisā "verse 3. ولكل جعلنا مولى مما ترك الودان والأقربون والذين عقدت أيمانكم فئاتهم نصيبهم انالله كان على كل شيء شهيد According Hazairin, and الأقربون الودان wording is as fa'il of ترك While lafaz مولى wording is as maf'ul of جعلنا. Thus, the word *mawālī* in the verse has the meaning of heir due to a change; Hazairin, *Hukum Kewarisan Bilateral Menurut Quran Dan Hadits* (Jakarta: Tintamas Indonesia, 1982), 32.

<sup>8</sup> Tim Redaksi Fokus Media, *KHI* (Bandung: Fokusmedia, 2005), 60.

inheritance or inheriting based on one's position (*Uit Eigen Hoofed*) and inheriting by replacing the heirs (*BijPlaatsvervulling*)<sup>9</sup> that is, inheriting for the person who has died earlier than the inheritor, which means replacing the position of the heir who has died first from the inheritor.<sup>10</sup> Inheriting by replacing "*bijPlaatsvervulling*" in the Civil Code is regulated in Articles 841-848.<sup>11</sup> The change in question is limited to inheriting the inheritance and replaces the rights and obligations such as the replaced person's life. This heir occupies the position of the dead person in terms of the assets of "*Saisine*" as stipulated in article 833 (1) *Burgerlijk Wetboek*.<sup>12</sup>

Based on the facts mentioned above, the perspective regarding substitute heirs is different between Islamic and Civil Code inheritance laws. In Islamic inheritance law, a substitute heir appears after a long journey of issuing the Islamic Law Compilation, stating that inheritance rights are granted to the child if the father dies earlier than the grandfather. In this case, no explanation is found whether the replacement is limited to the inheritance property or includes all the replaced person's rights. Meanwhile, in the civil code, a substitute heir replaces a person who has passed away beforehand, and this replacement is not limited to inherited assets. However, it includes rights such as the replaced person's life. In this case, is everything related to the heirs transferred to substitute heirs?

Previous researchers have conducted many studies regarding substitute heirs. One of them is a study dealing with substitute heirs in the Islamic law executed by Hazar Kusmayanti and Lisa Krisnayanti. Grandchildren who can be substitute heirs to replace their parents are grandchildren and granddaughters based on male lineage, not female lineage. This applies insofar as the heirs have no child. Meanwhile, grandchildren through the female lineage can be substituted heirs if *dzawilfurudh* and *asabah* are no longer there.<sup>13</sup> In addition, another article explained that the substitute heir had been practiced in the community (living law) since hundreds of years ago, either through deliberation, deliberation by the customary council, or the District Court or the Religious Court.<sup>14</sup>

<sup>9</sup> Surini Ahlan Sjarif dan Nurul Elmiyah, *Hukum Kewarisan Perdata Barat: Pewarisan Menurut Undang-Undang* (Jakarta: Kencana, 2018), 17.

<sup>10</sup> Effendi Perangin, *Hukum Waris* (Jakarta: RajaGrafindo Persada, 2018), 11.

<sup>11</sup> In Article 841 and article 842 it is explained: Substitution gives the right to replace someone to act as a substitute in degree and in all the rights of the person he replaces. The alternation in the legal straight down line continues without end. In this case, all substitution matters as above are forever permitted, either joint inheritance with the offspring of a child heir or their descendants jointly inherit or with each other in family relationships of different degrees. Hajar M, "Asy-Syir'ah. Asal Usul Dan Implementasi Ahli Waris Pengganti Perspektif Hukum Islam," *Jurnal Ilmu Syari'ah Dan Hukum*, vol. 50, 2016, 56.

<sup>12</sup> Perangin, *Hukum Waris*, 8.

<sup>13</sup> Hazar Kusmayati and Lisa Krisnayanti, "Hak Dan Kedudukan Cucu Sebagai Ahli Waris Pengganti Dalam Sistem Pembagian Waris Ditinjau Dari Hukum Waris Islam Dan Kompilasi Hukum Islam," *Jurnal Ilmiah Islam Futura* 19, no. 1 (October 12, 2019): 74-75, <https://doi.org/10.22373/jiif.v19i1.3506>.

<sup>14</sup> Hajar M, "Asy-Syir'ah Asal Usul Dan Implementasi Ahli Waris Pengganti Perspektif Hukum Islam."

In this case, there is an assumption that the substitute heir is originated from French law where someone gives his inheritance to heirs who are far from close because the original heirs have died first.<sup>15</sup>

Referring to the above problems, this study examines how the substitute heirs are in the perspective of Islamic and Civil Code laws. The author applied a normative juridical research method with a law, case, comparison, and conceptual approach to answering such a research question. With this method, the author examined the necessary data, including theories, concepts, and ideas about comparing the substitute heirs based on Islamic and Civil Code inheritance laws. This research is also inseparable from analytical descriptive research describing the prevailing laws and regulations related to legal theory and everything related to comparing the substitute heirs according to Islamic and Civil Code inheritance laws.

### THE CONCEPT OF SUBSTITUTE HEIR

Substitute heirs initially did not get inheritance rights but later received inheritance rights because they replaced the rights of their parents, who had passed away first. In simple terms, the term substitute heir consists of the word heir (ثور) (and substitute (الواكلة)). Heirs are those who are entitled to the inheritance left by their heirs.<sup>16</sup> Meanwhile, a substitute is a person in place of the person who receives the inheritance. Thus, what is meant by a substitute heir is a substitute in the distribution of inheritance if the heir dies earlier than the heir. The inheritance can be received by the children who died.<sup>17</sup> In Islamic law, the term substitute heir is in the opinion of Hazairin, which is interpreted as *mawāli*, which means that people who become heirs are because there is no longer anyone who connects them with the inheritor. *Mawāli*<sup>18</sup> should receive the inheritance if he is alive, but he has died earlier than the heir. In this case, the inheritance rights are replaced by the offspring or their children, currently in the inheritance law of the Civil Code known as the *Plaatsvervullingbij*.

Previous successor heirs have become living law in people's lives. This was based on the policies of the Dutch East Indies government, including Christian SnouckHurgronje. The Dutch attempted to unite the Indonesian nation both by

<sup>15</sup> Hajar M.

<sup>16</sup> Ali; Parman, *Kewarisan Dalam Al-Qur'an: Suatu Kajian Hukum Dengan Pendekatan Tafsir Tematik* (Jakarta: Raja Grafindo Persada, 1995), 41.

<sup>17</sup> Yan Pramadya Puspa, *Kamus Hukum Edisi Lengkap Bahasa Belanda-Indonesia-Inggris* (Jakarta: CV Aneka Ilmu, 1997), 320.

<sup>18</sup> Hazairin, *Hukum Kewarisan Bilateral menurut Al-Qur'an dan Hadist*, 33. In Arabic the term *mawāli* is the mufrad form of al-maula (المولى) (that is, the plural of al *mawāli* (الموالي) which means al-maliku wa al-sayyidu (الملك والسيد) (meaning king or lord, neighbor, son). etc. Louwis Ma'luf Al-yassu'i, *Al-Munjid Fi Al-Lughah Wa Al-Alam* (Dār al masyriq, 2002), 916.

association and assimilation. Both are acts of association and assimilation with the aim of the Indonesian nation to unite with the Netherlands, especially in legal unification. Snouck repeatedly said that the foundations of the Dutch empire were strengthened by the association of Indonesians with Dutch culture.<sup>19</sup>

The concept of a substitute heir developed in Indonesia during the Dutch East Indies government and gradually became customary law in the life of Indonesian society. This fact is based on a study. The research results conducted by TerHaarBZn and Soepomo show that the traditional law of inheritance in West Java recognizes the term replacement heir as “change of position.”<sup>20</sup>

Thus, the successor heir in the KHI originates from customary law and adopts Dutch civil law (BW) and French law.

### SUBSTITUTE HEIR IN ISLAMIC INHERITANCE LAW PERSPECTIVE

Inheritance law is a law that regulates the transfer of inheritance from the heir to the heir. This law exists because of the event of death. In Islamic legal literature, Islamic inheritance is known by several terms such as faraidh, fiqh mawarist, and the law of al-inheritance. This difference in naming is due to the difference in direction, which is used as the primary point in the discussion. In this case, the word that is commonly used is *farāid̄*.<sup>21</sup> The faith discussion cannot be separated from the elements of people leaving their assets, namely the heirs, assets to be transferred to those entitled to receive them, namely inheritance, and people entitled to receive an inheritance from the heir, namely the heirs. Regarding heirs and inheritance, in general, the scholars have no differences of opinion. Because what the heir says is a person who has passed away, either legally or essentially. Likewise, the inheritance is the property of the heir himself. Meanwhile, the scholars disagree regarding the heirs, meaning that the scholars have different opinions on the heirs who can inherit and some heirs cannot.

The legal basis for the distribution of inheritance in Islam is Al-Qur'an and Hadith. As for what is used as a source of law in transferring inheritance in Islamic inheritance in general, is Surah An-Nisa 'verses 7, 11, 12, 33, 176 and Surah al-Anfal 75? These verses cannot stand alone but mutually merit<sup>22</sup> or complement each other, from one verse to another, to give birth to a law that can serve as a guide in people's lives.

<sup>19</sup> Aqib Suminto, *Politik Islam Hindia Belanda* (Jakarta: pustaka LP3ES indonesia, 1985), 39.

<sup>20</sup> R. Otje Salman S. Mustafa Haffas, *Kesadaran Hukum Masyarakat Terhadap Hukum Waris*, Cet. 2 (Bandung: Alumni, 2007), 64.

<sup>21</sup> Amir Syarifuddin, *Hukum Kewarisan Islam*, Edisi Kedua (Jakarta: Kencana Prenada Media Group, 2004), 5.

<sup>22</sup> Munasabah in language is a combination and closeness, namely the place where the verses return to a meaning that connects to them, both general and specific, which are logical, imaginary senses, as well as other relationships or logical linkages, such as between cause and consequence, between two equivalent things, two opposites and so on Imam Jalaluddin As-Suyuthi, *Al-Itqan Fi "Ulu>m Al-Qur'an*, (*Studi Al-Qur'an Komprehensif*) (Solo: Indiva Media Kreasi, 2009), 627.

Based on the above verses, the transfer of the inheritance of a person who has died is not only limited to the man, but the woman also has the right to inherit it, as explained in the letter An-Nisa 'verse 7. Likewise, the explanation in the verses the other is about the provision of the share of men and women, depending more or less on the rights and obligations imposed on them.

Referring to the explanation of the above verses, the heirs who are entitled to inherit from the heir depend on the relationship between the heir and the heir, either through the *sababiyah* or *nasabiyah*.<sup>23</sup> The heirs consist of children, father, mother, based on *nasabiyah*, and husband or wife based on *sababiyah*. Based on the *nasabiyah*, the heirs include *furu al-manyit*, *ushul al-manyit* and *al-hawasyi*.<sup>24</sup> The heirs are expanded to mean from children to grandchildren, father to grandfather and mother to grandmother, and *al hawasyi* extended to the offspring.

The group of heirs can generally be divided into three groups, namely *dzawilfurudh*, *dzawilashabah* and *dzawilarham*. *Zawilfurud* are those for whom there are provisions in the Qur'an as mentioned in Surah An-Nisā' 11. The verse above describes the heirs who get  $\frac{1}{2}$ ,  $\frac{1}{3}$ ,  $\frac{1}{4}$ ,  $\frac{1}{6}$ ,  $\frac{1}{8}$ , and  $\frac{2}{3}$ .<sup>25</sup> *Zawilasabah* are those who are not included in the *zawilfurud* group, and they get the rest of the *zawilfurud*.<sup>26</sup> This group generally applies to the male party. As the basis for this group is a hadith narrated by Ibn Abbas, namely

عن ابن عباس رضي الله عنه عن النبي صلى الله عليه وسلم قال: الحقوا الفرائض بأهلها  
فما بقي فهو لأولى رجل ذكر.<sup>27</sup>

(Give the *faraid* (the parts that are determined) to those who are entitled and the rest give it to men from the closest male offspring).

The hadith informs that the remaining assets or more than the provisions of *dzawilfurudh* are given to men, not to women. For the female lineage, *fiqh* scholars include in the *zawilarhām* group. This group is also one of the heirs related by blood to the heir but based on the female lineage. Referring to the above hadith, this group is veiled with male heirs. Can inherit if there is no more *zawilfarud* and *asābah*.

However, in Hazairin's view, there is no distinction between men and women, so for this group of *asābah* Hazairin names the *qarabah* group and the *zawilarhām* is called *mawālī*. In inheritance law, the term *mawālī* is defined as an heir

<sup>23</sup> Amin Husein Nasution, *Hukum Kewarisan Suatu Analisis Komparatif Pemikiran Muftahid Dan Kopilasi Hukum Islam* (Jakarta: Rajawali Pers, 2014), 99.

<sup>24</sup> Muhammad bin Shalih Al-Utsaimin, *Panduan Praktis Hukum Waris Menurut Al-Qur'an Dan as-Sunnah Yang Shahih*, ed. Abu Ihsan al-Atsari Terj (Jakarta: Pustaka Ibnu Katsir, 2013), 32-35.

<sup>25</sup> Mardani, *Hukum Kewarisan Islam Di Indonesia*, Cet. 1 (Jakarta: PT RajaGrafindo Persada, 2014), 37.

<sup>26</sup> Mardin, *Hukum Kewarisan Islam Di Indonesia*, 37.

<sup>27</sup> Al-Bukhari, *Shahih Al-Bukhari*, Jilid IV (Kairo: Dar wa Mathba' al-Sya'by, n.d.), 181.

who replaces another heir to obtain a share of the inheritance previously acquired by the replaced person. This understanding is based on Surah An-Nisa 'verse 33. This verse explains that there is a substitute heir for mother, father, child, or in other words, the person who becomes the heir of *Mawāli* is the descendant of the heir, the descendant of siblings. However, Hazairin's view does not distinguish between men and women, so for this group of asabah, Hazairin called the *qarābah* group and *zawilarhām* called *mawāli*. In the law of inheritance, the term mawali is defined as an heir who replaces another heir to obtain a share of the inheritance that would previously be obtained by the person who was replaced. This understanding is based on Surah An-Nisa 'verse 33. The verse explains that there is a substitute heir for the mother, father, child, or in other words, the person who becomes the heir of the mawali is the descendant of the heir, the heir, an heir,<sup>28</sup> or descendants of people who enter into some inheritance agreement (it can be in the form of a will) with the inheritor.<sup>29</sup>Hus, all heirs who are included in the *zawilarhām* class is also said to be *mawāli*.

Thus, it can be said that the understanding that prioritizes the male lineage is known as the patrilineal teachings, which are usually adhered to by people with the Syafi'i sect and which do not differentiate between men and women, which are called bilateral teachings originated by Hazairin.

As mentioned above, the replacement heir in Islamic inheritance law is only applied to Islamic inheritance after the Islamic Law Compilation. In the Islamic Law Compilation, a substitute heir is the right of an heir who has passed away to his surviving descendants. This rule is contained in article 185 of the Compilation of Islamic Law, which explains that:<sup>30</sup>

- a. The heir who dies earlier than the heir, then his position can be replaced by his child, except for those mentioned in article 173.<sup>31</sup>
- b. The share of the replacement heir must not exceed the share of the heir, which is equivalent to the one who was replaced.

Based on Article 185 letter an above, it is clear that grandchildren can inherit together with sons and daughters. They do not veil each other because the grandson's position replaces his father or mother, who had passed away first. Whereas in letter b, it is also explained that the share for the replacement heirs must not be more than the share of the heirs, which is equivalent to those who are replaced.

<sup>28</sup> Zainuddin Ali, *Pelaksanaan Hukum Waris Di Indonesia* (Jakarta: Sinar Grafika, 2008), 63.

<sup>29</sup> Thalib, *Hukum Kewarisan Islam Di Indonesia*, 103.

<sup>30</sup> Media, *KHI*, 60.

<sup>31</sup> Article 173 reads: a person is prevented from becoming an heir if, by a verdict, a judge who has permanent legal force, is convicted of: a) being blamed for murder or trying to kill or severely abusing the heir. B) has been accused of defamation for filing a complaint that the heir committed a crime punishable by 5 years in prison or a harsher sentence.



However, if it is linked to the practice of the inheritance of the Acehese people,<sup>32</sup> such a concept is called a *patahtiti*. In theory, heirs and heirs are no longer related because they are dead. In this case, the grandchildren who can inherit are only limited to the grandchildren of the male party, not the female side. However, in practice, some people seek other policies to set aside their inheritance to the grandchildren left by their parents. Thus, the inheritance law adhered to by the people of Aceh is more towards Islamic law with the Syafi'i sect.

### **SUBSTITUTE HEIR IN THE LEGAL PERSPECTIVE OF THE INITIATION OF CIVIL / BW LEGAL LAWBOOK**

Inheritance law Civil Code / BW is a collection of legal regulations regarding wealth due to the death of a person. This regulation regulates the transfer of wealth left by observers and the consequences of the relationship between the heir and the heir and the relationship between the heir and a third party.<sup>33</sup> M Idris quoted the opinion of Wirjono Prodjodikoro, who said that inheritance law is the laws or regulations that govern whether and how various rights and obligations regarding a person's wealth when he dies will be transferred to other people who are still alive.<sup>34</sup> Inheritance law can also be interpreted as all legal regulations governing the inheritance transfer from the heir to the heir or the person appointed.<sup>35</sup>

In the BW Civil Law, there are two ways to obtain inheritance: inheritance utilizing *AbIntestato*, namely legacy according to law, and testamentary inheritance, namely inheritance because it is appointed in a will or testament. Inheritance based on the law (*AbIntestato*) has two ways of inheriting, namely inheriting based on one's position (*Uit Eigen Hoofde*) and based on Replacement (*BijPlaatsvervulling*).<sup>36</sup>

Inherit under the law, the heirs are specified in article 832 *BurgelijkWetboek*. In that article, it is explained that those who have the right to become heirs are related by blood, both legal and outside of marriage, and have a marital relationship with the heir. If the two relationships (blood and marital relations) do not exist, refer to article 859. In that case, the inheritance must be divided into

<sup>32</sup> The traditional inheritance of Aceh is subject to Islamic law, adhering to the Syafi'i school of thought. In Aceh customary law with Islamic law cannot be separated. The two laws are united in terms used by the Acehese people with the motto of *hukom ngon adat lagee substances ngon sifeut* (law with customs like substances by nature), that is how the Acehese people think about Islamic law and customary law. In the view of the Acehese people, they do not know a substitute heir, because they refer to the hadith of Ibn Abbas Fauzi Fauzi, "The Concept of Patah Titi: The Problem of Inheritance and Its Solution in Aceh Tengah," *Studia Islamika* 26, no. 1 (April 10, 2019): 35-36, <https://doi.org/10.15408/sdi.v26i1.6529>.

<sup>33</sup> A. Pitlo, *Hukum Waris Menurut Kitab Undang-Undang Hukum Perdata Belanda*, ed. alih bahasa M. Isa Arif (Jakarta: PT Intermedia, 2006), 1.

<sup>34</sup> M. Idris Ramulyo, *Perbandingan Pelaksanaan Hukum Kewarisan Islam Dengan Kewarisan Menurut Kitab Undang-Undang Hukum Perdata (BW)* (Jakarta: Sinar Grafika, 1994), 84.

<sup>35</sup> Abdul Kadir Muhammad, *Hukum Perdata Indonesia* (Bandung: PT Citra Aditya Bakti, 2000), 267.

<sup>36</sup> Elmiyah, *Hukum Kewarisan Perdata Barat: Pewarisan Menurut Undang-Undang*, 16.

two equal parts: one for all blood relatives in the straight-up male (father) line and one for all the woman's family (mother).<sup>37</sup>

Blood relationship becomes the determining factor in inheriting the inheritance of the heir. In this case, the heir family members are divided into several groups. Based on article 852a of the Civil Code, heirs can be divided into four groups, namely:<sup>38</sup>

- a. The first group, the family in the straight down the line, includes children, their offspring, husbands, or wives who are left behind or who have lived the longest.
- b. The second group includes parents and siblings of the heir, both male and female, as well as their offspring. Parents have a special rule that ensures that their share will not be less than  $\frac{1}{4}$  of the inheritance, even if they inherit together with the female.
- c. The third group includes grandparents, grandmothers, and later ancestors onward from the heir.
- d. The fourth group includes family members on the sideline and other relatives up to the sixth degree.

The groups inherit according to the order of the group level. The first group can block the next group. As long as there is a first group member, the next group cannot inherit it, like the second, third, and fourth groups. They can inherit according to their position.

Inheritance based on replacement (*BijPlaatsvervulling*) is inheritance where the heir inherits by replacing heirs who have died before the heirs.<sup>39</sup>In other words, it can be said, since the person entitled to inherit in the first place has died first, the recipient of the inheritance is replaced by another heir, preferably from the offspring of the heir. For example, a father dies earlier than his father (grandfather) and leaves his children (grandchildren) from the grandfather. The grandfather's children (grandchildren) can appear as heirs to replace their father's position, who passed away earlier than his grandfather.<sup>40</sup>

In the provisions of article 841 BW, the law that regulates replacement explains that *Plaatsvervulling* gives the right to someone who replaces him to act as a substitute in degrees and all rights for the person who is replaced (successor to the heir gets the same rights as the replaced heir). In replacing the heirs, it must be based on the legal descendants of the substituted.<sup>41</sup>

<sup>37</sup> Elmiyah, 125.

<sup>38</sup> Moechthar, *Perkembangan Hukum Waris : Praktik Penyelesaian Sengketa Kewarisan Di Indonesia*, 28-30; Elmiyah, *Hukum Kewarisan Perdata Barat: Pewarisan Menurut Undang-Undang*, 50-76.

<sup>39</sup> Perangin, *Hukum Waris*, 11.

<sup>40</sup> Moechthar, *Perkembangan Hukum Waris : Praktik Penyelesaian Sengketa Kewarisan Di Indonesia*, 34-35.

<sup>41</sup> Elmiyah, *Hukum Kewarisan Perdata Barat: Pewarisan Menurut Undang-Undang*, 26.

Inheriting based on a change or inheriting indirectly, in BW law, there are three kinds of change of place based on law, namely:<sup>42</sup>

1. Article 842 of the Civil Code regulates that the legal, straight-down replacement will continue without end. Substitution like the one above is allowed forever. Either in the case of several children heirs' co-inheritance with the offspring of a child who died earlier, or their offspring inherit together, even though different families of different degrees.
2. Based on article 844 of the Civil Code, it is permissible to change inheritance on a sideline to benefit all children and offspring of brothers and sisters who have died first, whether they inherit together with their uncle or aunt. After the death of all the brothers from the first heir, all inheritance must be distributed to all the descendants of the brothers who had died beforehand, even if to a different degree.
3. Article 845 of the Civil Code regulates that nephews are related to the closest blood family to the heir in deviant lines. There are still children and descendants of the heir's uncle or aunt.

### **SUBSTITUTE HEIR: BETWEEN THE ISLAMIC INHERITANCE LAW AND THE INHERITANCE LAW OF THE CIVIL CODE**

Inheritance law is a law that regulates the transfer of inheritance from the heir to the heir. Transfer of inheritance to an heir occurs after the heir dies, either directly or indirectly (replacement). In the Indonesian context, a substitute heir is one of the legacies of the Dutch colonial era. As previously explained, wherein French law applies to inheritance to distant heirs, it is then adopted by the Dutch government and applied in the life of Indonesian society. Based on this, there is an assumption that successor heirs developed since the Dutch era and developed into customary law and are now positive law in Islamic inheritance law<sup>43</sup> formulated in the KHI, of course, through various processes of study of books that become references to the Indonesian Muslim community.<sup>44</sup>

Based on several descriptions of the successor heirs above, several sides have similarities and differences between the two laws. Regarding the definition of a substitute heir, the two inheritance laws do not have differences of opinion. However, the method used in the two laws is not the same. In Islamic law, when a person dies, his inheritance is transferred directly or through *ijbari*<sup>45</sup> to the heirs.

<sup>42</sup> Moechthar, *Perkembangan Hukum Waris : Praktik Penyelesaian Sengketa Kewarisan Di Indonesia*, 28-33.

<sup>43</sup> Diana Zuhroh, "KONSEP AHLI WARIS DAN AHLI WARIS PENGGANTI: Studi Putusan Hakim Pengadilan Agama," *Al-Ahkam* 27, no. 1 (June 9, 2017): 45, <https://doi.org/10.21580/ahkam.2017.27.1.1051> For the successor heirs in Islamic law developed under the KHI can be traced, Habiburrahman, *Rekonstruksi Hukum Kewarisan Islam Di Indonesia*, Cet. 1 (Jakarta: Kencana, 2011), 63.

<sup>44</sup> Nasution, *Hukum Kewarisan Suatu Analisis Komparatif Pemikiran Mujtahid Dan Kopilasi Hukum Islam*, 17-18.

<sup>45</sup> Mardin, *Hukum Kewarisan Islam Di Indonesia*, 5.

This is different from BW inheritance law, where the heir inherits from his position because a will appoint him.<sup>46</sup>

In terms of lineage, Islamic inheritance law prioritizes male descent over female offspring. Grandchildren can inherit and are limited to only the grandchildren of male descendants. However, this depends on the understanding of the mazhab adhered to, namely the Syafi'imazhab or bilateral teachings coined by Hazairin. This can be traced in determining the class of heirs according to patrilineal and bilateral teachings<sup>47</sup>. Namely, *zawilfurud*, *ashābah* or *qarābah*, *zawilarhām* or *mawāli*.

Meanwhile, in the BW Civil Code, children of male and female descent can replace their father's position to receive an inheritance. This acceptance is based on the condition in which the child replaces the heir who has died, and the person who is replaced is the link between himself and the heir. Even the child (grandchild) can inherit his position even though his father is still alive.<sup>48</sup>

Judging from the side of the right to acquire inheritance in Islamic inheritance law, the rights obtained by a substitute heir are not necessarily the same as the rights of the person who is replaced and may not exceed the share of the heirs, which is equivalent to those who are replaced.<sup>49</sup> Meanwhile, in BW Civil Law, the share that the successor heir earns has the same portion that the father should have had if his father were still alive. This means that BW civil law does not pay attention to acquiring inheritance for the successor heirs and provides the same rights as the surviving heirs.

Observing from the point of view of the person entitled to receive inheritance property, Islamic inheritance law refers to KHI, where the right to inherit from men is father, son, brother, uncle, and grandfather. Meanwhile, from the women's side are mothers, daughters, sisters, and grandmothers. Thus, inheriting based on KHI consists of three sides: children based on a straight line down and so on, father based on a straight line up and so on, and a straight line to the side of siblings and descendants. In other words, the three straight lines are the lineage entitled to a share of the successor heirs.<sup>50</sup>

In contrast to Islamic inheritance law, BW Civil Law provides three directions for the right of a substitute heir, namely a straight line downward and so on, and a straight line to the side and a line to the side that deviates. In other words, the three directions are the lineage direction for successor heirs in obtaining an inheritance in BW civil law.

<sup>46</sup> Moechthar, *Perkembangan Hukum Waris : Praktik Penyelesaian Sengketa Kewarisan Di Indonesia*, 27.

<sup>47</sup> Ali, *Pelaksanaan Hukum Waris Di Indonesia*, 59-60.

<sup>48</sup> Elmiyah, *Hukum Kewarisan Perdata Barat: Pewarisan Menurut Undang-Undang*, 27.

<sup>49</sup> Kompilasi Hukum Islam, pasal 185 huruf b

<sup>50</sup> Kompilasi Hukum Islam, pasal 174 huruf a.

However, substitute heirs in Islamic inheritance are not absolute (tentative). As stated in Article 185a in the KHI, the word "can be replaced." The word "can" here means that it can be replaced and can not be replaced because many other policies are taken in exchange for a substitute heir. This is also an order in the Qur'an, as stated in the letter An-Nisa 'verse 8 and 9, in order to give rights to orphans and relatives who have no provisions for their share.

On the other hand, applying substitute heirs in Islamic inheritance does not necessarily mean that children must appear as substitutes for their deceased parents. However, many policies are carried out to benefit the lives of children whose parents have died. Among them, the child's life is the responsibility of the guardians or relatives of the deceased child, taking care of him as his child, providing education, and so on.

In addition, there are also the children's lives are more adequate than their parents' siblings. Therefore, even if the right to replace a child whose parents have died is not granted, it is not a problem. Because his life is more sufficient than his guardian's, on the other hand, the right of replacement is very much needed by children who are left behind by their parents who are not well off. Therefore, referring to the contents of article 185 of the compilation of Islamic law, the word "can be replaced by his son" is not absolute or tentative because the circumstances very much determine it.

However, granting the right of a substitute heir or not giving the right of a substitute heir does not mean abdicating responsibility for the child. The child remains the responsibility of his guardians (parents' siblings). Even in the Qur'an and also the hadith of the Prophet Muhammad, there are many explanations about how to care for orphans. All of these are ways to benefit the orphans. As a real example that happened in the life of the Prophet Muhammad, when the Prophet Muhammad was orphaned, Rasulullah SAW was cared for by his grandfather Abdul Muttalib. When Abdul Muttalib died, Rasulullah SAW was looked after by his uncle Abu Talib.

This event shows that grandfather plays the central role of a substitute father for children whose parents have died earlier than their grandfathers. Similarly, the role of the father's brother (uncle) when his grandfather died. All of them are in charge or caretakers of children whose parents have died first. This is one of the reasons why the application of a substitute heir is tentative or not absolute. However, as a rule in positive Islamic law, substitute heirs are regulated in the Compilation of Islamic Law.

This is, of course, very different from BW's civil inheritance law. Where the heirs who replace the original heirs must act as the original heirs. Like a child who

appears as the successor to his father's heir, he has the same rights as his replaced father. Then his father's brother (his uncle) is not a barrier for a child to inherit from his grandfather's inheritance. While in Islamic inheritance, uncles are the heirs most closely related to the heirs compared to grandchildren. As a condition for inheriting, the heir most closely related to the heir can veil the heir most distant from the heir. Therefore the hijabi grandson with his father's brother (his uncle). However, his uncle has a responsibility as a caretaker of the child (grandson).

However, the Civil Code does not always have different rules between Islamic inheritance law (Islamic Law Compilation) and Civil Inheritance Law. The two laws have the same goal: to realize the benefit of children whose parents have died while maintaining the rights of heirs who should receive a share from the heirs and strengthening the ties of brotherhood between the heirs and the heirs who replace them.

In civil inheritance law, BW has institutionalized a substitute heir system in the Civil Code. In contrast, the substitute heir system is regulated in the Compilation of Islamic Law in Islamic inheritance law. It has not been institutionalized in the form of a law. From the two rules, it is clear that there is a meeting point between Islamic inheritance law and civil inheritance law. The two laws provide rights for heirs who have died earlier than the heirs to be replaced by their descendants (children), their successors.

However, in practice, the two inheritance laws have their systems. In Islamic inheritance law based on the Compilation of Islamic Law, heirs who can appear as substitute heirs are not only limited to men, but girls also have the same right to inherit. This is also following the word of God in Surah An-Nisa 'verse 7, where sons and daughters have rights from the inheritance of their parents and relatives. The same thing is also contained in the BW Civil Code, which does not limit the difference between boys and girls.

On the other hand, the provisions in Islamic inheritance between men and women are set in two parts for men and one for women (2:1). Meanwhile, in BW civil inheritance, the fairest share is one to one or men, and women get the same share.

Examining the provisions mentioned above, the system of substitute heirs formulated in the Compilation of Islamic Law has similarities with the system of substitute heirs in Civil Inheritance BW. This is also one factor that identifies the successor heirs in the Islamic Law Compilation, which Hazairin developed as adoption of BW Civil law.

Based on this, in inheritance law, substitute heirs are one solution to realize benefit and justice and a real contribution to avoiding conflicts in inheritance distribution.

## CONCLUSION

Substitute heirs in inheritance law in Indonesia seek to maintain the rights of heirs for the sake of family survival and continue continuously. In addition, the existence of a substitute heir can maintain or strengthen the brotherly and *ukhuwah Islamiyah* relationship between the family of the heir and the successor. There is no explicit text in Islamic law that describes it, either based on the Al-Qur'an or the hadith. However, after Hazairin's thought and the birth of the Compilation of Islamic Law, the term substitute heir was only applied in society. Whereas in the legal perspective of the Civil Code / BW, the successor heirs are as stipulated in articles 841 to 848 of the Civil Code. The distribution of inheritance to successor heirs is known as three ways of distribution. First, change it with a straight line down. The division is regulated in article 842. Second, the replacement is with a straight line to the side. The division is regulated in article 844, and third, the alternation in the line to the side of the line is regulated in article 845.

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