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Substitute Heirs in the Compilation of Islamic Law: An Overview from Gender Equality Perspective Case Study of the Religious Courts in Banjarmasin

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Abstract: The enactment of Article 185 of the Kompilasi Hukum Islam, solely translated as Compilation of Islamic Law) in Indonesia has brought some "winds of change" for the grandchildren whose parents (male or female) have died before the heirs. However, in the case of its application in the Banjar Muslim community of South Kalimantan, it seems that it still requires various efforts, such as subpoenas, lawsuits, requests through authorised institutions, and the assistance of advocates. This Article on Inheritance is indeed very brief, thus allowing for a juridical interpretation and opening opportunities for legal discretion against it. Therefore, different responses to it are necessary, and many perspectives can be considered to convey a conclusion and verify that the resolution of this case is by the principles of maqâshid al-syarîah which are gender equitable and benefit the family lineage. The Banjarmasin Religious Court, one of the institutions holding the authority to examine and adjudicate this inheritance issue, has issued its legal products in court decisions and verdicts. This research aimed to determine (1) how the case of substitute heirs in the Banjar community of South Kalimantan is resolved and (2) the application of Article 185 KHI in the Banjarmasin Religious Court. On this basis, a case study of several copies of the letter was the approach employed in this normative legal research. The study found that there were four decisions and two verdicts which were all aligned with Article 185 of KHI and were gender-responsive.
Keywords: substitute heirs, compilation of islamic law, gender equality

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Abstrak: *Kehadiran pasal 185 Kompilasi Hukum Islam di Indonesia telah memberi "angin segar" bagi para cucu yang orangtuanya (laki-laki atau perempuan) meninggal dunia lebih dahulu dari pewaris. Namun dalam terapan kasus di masyarakat muslim Banjar Kalimantan Selatan khususnya, tampak masih harus memerlukan berbagai upaya seperti somasi, gugatan, atau permohonan melalui lembaga yang berwenang, dan bantuan para advokat. Pasal kewarisan ini memang sangat singkat, sehingga memungkinkan adanya penafsiran yuridis dan membuka peluang lebar diskreasi hukum terhadapnya. Perbedaan pendapat dalam menyikapinya adalah suatu keniscayaan, dan ada banyak perspektif yang bisa dihubungkan untuk bisa menyampaikan pada satu simpulan sekaligus verifikasi bahwa penyelesaian kasus ini sesuai tidaknya dengan prinsip-prinsip maqâshid al-syarîah yang adil gender serta maslahat bagi satu ikatan keluarga nasabiyah. Pengadilan Agama Banjarmasin sebagai salah satu lembaga yang memiliki kompetensi untuk memeriksa dan mengadili perkara waris ini, telah mengeluarkan produk hukumnya berupa penetapan dan putusan. Penelitian ini mencoba menjawab bagaimana penyelesaian kasus ahli waris pengganti pada masyarakat Banjar Kalimantan Selatan dan penerapan pasal 185 KHI di Pengadilan Agama Banjarmasin. Atas dasar ini, pendekatan case study terhadap beberapa salinan surat tersebut menjadi metode pendekatan dalam penelitian hukum normative ini. Hasil temuan penelitian ini terdapat empat buah penetapan dan dua buah putusan yang semuanya sesuai dengan pasal 185 KHI dan keenam tetapan serta putusan itu telah responsive gender.*
Kata Kunci: *ahli waris pengganti, kompilasi hukum Islam, kesetaraan gender*

Introduction

The issue of substitute heirs is less well-known in the discussion of *farāiḍ* all this time. However, even if the grandchildren can "rise" to become the heir due to the absence of the testator's children in one particular case, this does not mean that they are classified as substitute heirs of their parents' inheritance[1] as *Plaatsvervulling* (replacement of one's position to inherit) regulated in the *Budgerlijk Weetboek* (BW, solely translated as the Indonesian Civil Code). This

[1] In order to inherit the inheritance of grandparents to grandchildren, it is required that the son as the heir is no longer in the structure of the case. Either because he has died or because he is hindered by something that forbids him from becoming an heir. This is usually related to the row of heirs' *aṣābah* in their turn to "be able to appear" as heirs, due to the absence of people who preclude them, namely *hajib*, which is closer to the relationship, degree, and strength of kinship. See the discussion about *aṣābah bi nafsih.*

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is because they are heirs (male/female) who replace the position of their parents since they died earlier than the testator.[2]

Through Presidential Instruction Number 1 of 1991, the compilation of Islamic law in Indonesia has provided an opportunity for substitute heirs to participate in inheriting their grandparents' property. This is because, through Article 185, substitute heirs are given the right to inherit under the following conditions:

1. In cases where heirs die earlier than the testator, their position may be replaced by their children, except those mentioned in Article 173.
2. The share for the substitute heir must not exceed the share of the replaced heirs equivalent (the original heir's siblings).

Point (1) of this article, in addition to indicating that *żawil arḥām* can be inherited, also verifies that Islamic inheritance law is gender-responsive. The statements of this article regulate the heirs of grandchildren (male/female) from daughters, who have been touted as people who are not entitled to a share.[3]

This issue is one of the latest breakthroughs in Islamic inheritance farahidh, so the pros and cons are inevitable. For those who coincidentally have the status of grandchildren whose parents died earlier than the testator, the conditions of Article 185 of KHI (Compilation of Islamic Law) will be an encouraging news, but not for other heirs, the uncle or the aunt of the substitute heir.[4]

If the issue of inheritance of substitute heirs is accommodated, this problem can be resolved even through trials in court. Due to the proceeding cases

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[2] Tisnawati, Novita Ernila, and Sri Budi Purwaningsih, "Legal Protection Against Substitute Heirs Based on Islamic Law," *The Indonesian Journal of Islamic Studies* 4 (2021): p. 10.

[3] Ibn Qayyim al-Jawziyah, *I'lām al-Muwaqqi'īn 'an Rabb al-'Ālamīn* (Dār al-'Ālamiyyah, 2015). See the chapter that discusses the inheritance of *Żawil Arḥām*. The first group opinion of imam Syāfi'i and imam Malik; this cluster is not entitled to inherit because *Bayt al-Māl* is entitled to receive the remaining portion of the inheritance that does not exist *Żawil Furūḍ* dan *aṣḥabah* or even though *Żawil Furūḍ* exists, *aṣḥabah* does not exists, yet, *Żawil Furūḍ* (such as husband/wife of the bequeather) refused to accept *Radd* as the opinion of Ali from the majority because it is supported by the majority of Jurists.

[4] As indicated by three sample settlement cases in the Muslim community of Banjar in South Kalimantan (Hulu Sungai Tengah Regency). In the city of Banjarmasin, the last information that the author obtained directly through interviews was revealed from one of the six brothers who stated: "later our niece (two women) will be given a share of the inheritance "sepambari haja" when the inherited land has been sold. In Banjar regency, the settlement of this case was seen as something that (felt) would harm some of the "aunts", so when the deliberation process was carried out between one of the uncles who (present at that time) and three nephews (substitute heirs) needed the help of lawyers and mediators to get the settlement desired by both parties.

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related to the substitute heir, now grandchildren (male/female) whose parents died earlier can inherit the (original) heir's inheritance.[5]

Some examples of Religious Court decisions and orders found in Banjarmasin Religious Court also show that the case of these substitute heirs has become part of the applied settlement. Even though the reality at trial is that there were differences of opinion that could not be avoided from members of the panel of judges (distinction opinion).[6]

Similar to what happened to the people of Banjar in South Kalimantan, some proceeding cases show that there has been a subpoena attempt which then had to involve lawyers and mediators because the family deliberation between the substitute heirs with the uncle/aunt seems to reach a "deadlock."

This fact shows that differences of opinion regarding the settlement of this substitute heir issue are also inevitable. However, regardless of the pros and cons of one's understanding, idea, or view on this issue, what is clear now is that the enactment of Article 185 KHI has fulfilled the expectation of justice seekers regarding grandchildren whose parents died earlier.[7]

On this basis, how could the public view that there is justice in Islamic inheritance law if Article 185 KHI, a good reference, cannot be applied in settling the inheritance of the substitute heir's case? While in fact, it is believed that *maqāṣid al-syarī'ah* contained the principles of justice, benefit, and gender equality.

Such an issue is essential to be studied because, so far, *farāiḍ* has been seen as a *patrilineal* (gender bias) inheritance law, and yet there is no regulation on the issue of substitute heir. Moreover, apart from being contradictory with the point of *ḥijāb maḥjūb*, granddaughters and grandsons (of daughters) are also considered as heirs of *żawil arḥām* who are not entitled to inherit. Therefore, Muslim communities still find it difficult in the context of its implementation, except through legal channels from the authorities.

Plaatsvervulling in The Civil Code/Budgerlijk Weetboek

Representation (the substitution of an heir who dies earlier than the testator by his children or descendants) exists almost everywhere. In Anglo-Saxon law, this is called "Substitution of Heir"."[8] The concept of Dutch Civil Law

[5] Erliyani Khairin, "Penyelesaian Kasus Waris Pengganti di Pengadilan Agama Banjarmasin" (IAIN Antasari Banjarmasin, 2012).

[6] Khairin., p. 50-51.

[7] Baharuddin Ahmad, "Konsep Keadilan Dalam Kompilasi Hukum Islam di Indonesia, Analisis Keadilan Hukum Dalam Kewarisan," *Ar-Risalah Jurnal Ilmu Syariah Dan Hukum* 6, no. 1 (2006): p. 35–54.

[8] Subekti R, *Perbandingan Hukum Perdata* (Jakarta: Pradnya Paramita, 1978), p. 27.

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contained in *Budgerlijk Weetboek* (*BW*) fully recognises the rules regarding *Plaatsvervulling* in inheritance law (replacement of the position to inherit). This can be seen through its articles (on inheritance) that manage this issue.

According to the *BW* conception of inheritance law, the rights of those whose parents died earlier than the testator are regulated in a particular article in order to receive a share of their grandparents' inheritance. Such inheritance distribution through the replacement of position or *Plaatsvervulling*, is regulated in Article 841 to Articles 848, 975, and 1060 and several other articles throughout the *Budgerlijk Weetboek*. The replacement gives the right to a person or several substitute heirs to hold the equal position as the replaced heirs and all the rights of the ones being replaced.

The heirs who inherit based on *Bij Plaatsvervulling* are called indirect heirs.[9] Please take the following case as an example: A died, leaving a wife named B with three children, namely C, D, and E. C (the first child of A) died earlier than his parents, leaving two children with the initials C1 and C2. According to the provisions of division of inheritance in *BW*, the legal heirs at the time of A's death shall be:

1. Wife: ¼ share
2. A' children (D and E): ¼ share, respectively
3. A's grandchildren (children of C), i.e., C1 and C2, who act as the substitute heirs of their parents (C) who died earlier than their testator/grandfather (A): ¼ share. Since there are two children of C, each C1 and C2 gets 1/8 share.[10]

Inheritance Replacement in Bilateral Customary Inheritance Law

The kinship system in a *parental/bilateral* society has distinguished characteristics, i.e., "that heirs are sons and daughters." Sons and daughters have the same rights over their parents' inheritance, so in transferring/passing on their assets to heirs, sons and daughters have the right to be treated equally.[11]

[9] Eman Suparman, *Intisari Hukum Waris Di Indonesia* (Bandung: Armico, 1985), p. 12.

[10] The result of the share received by children C (C1 and C2) is the share/inheritance rights (C) if he is alive. In this case, (C) belongs to class I heirs in an inheritance. Their children will inherit the inheritance of their parents, as well as the heirs of Group I. But since there are two children of C (C1 and C2), then Part C is divided in half so that each gets 1/8. If (C) is still alive, then the two children (C1 and C2) can not inherit their grandfather's inheritance because it is related to Article 847 *BW*.

[11] Sukiati, "The Practice of Hibah as a Substitute Heir Among the Javanese Family," *MIQOT: Jurnal Ilmu-Ilmu Keislaman* 42, no. 1 (2018): 59–78.

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Replacement of position in this indigenous community was meant for those who would replace the part of his parents because they died earlier than the testator. The essence of inheritance replacement here can be a *straight line up, down, or sideways*. A sample of the case settlement can be seen in the jurisprudence of the Supreme Court of the Republic of Indonesia (as a cassation legal process).

The Supreme Court, on March 18th 1959, with Case Number: 391 K/Sip/1959, ordered that the right to fill or replace the position of an heir who died earlier than the testator is on the descendants in a descending line. While the Supreme Court on October 10th 1959, with Case Number: 141 K/Sip/1959, ordered that the replacement of inheritance in a straight line up is also possible if judged based on justice.[12]

Common law, in its development, may no longer be used as a reference by today's society. Since most of the people who draw their line of descent through these two sides (*bilateral descent)* (1991) are Muslims, the enactment of KHI (1991) among the indigenous people of Indonesia may be a solution in the application of the substitute heir case settlement.

Muslim *bilateral* custom society no longer needs to look for other legal channels such as KUH (the Civil Code) or their customary law. This is because the compilation of Islamic law in Indonesia has become a reference for substitute heirs to participate in inheriting the legacy of their grandparents.

Substitute Heirs in The Compilation of Islamic Law

The Quran and Hadith, the primary sources of Islamic inheritance law, have determined that among the inheritance requirements are "the heirs are still alive at the time of the testator's death."[13] Conditions like this cannot be realised in the case of *Plaatsvervulling* (in the *Budgerlijk Weetboek*) or Replacement (in the customary inheritance law).

Compilation of Islamic law with Article 185 facilitates equal inheritance rights over grandchildren whose parents died earlier than the testator. Although realistically, there may be other male children in the line of descent, the

[12] In this case, there is something that happens very rarely: the grandparents inherit from their grandchildren because they inherit based on replacement; that is, they replace the position of those who are the father of the inheritor. It is appropriate that they are jointly given a share, which originally fell to the father of the inheritor, half the share, so that each gets a quarter of the share.

[13] Muhammad bin Ismail Al Bukhari, *Shahih Al-Bukhari Jilid 5* (Jakarta: Pustaka As-Sunnah, 2010).

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grandchildren (male/female) of the child (male/female) will be given the equal position (rights/share), occupying the position of their parents.[14]

Further, regarding the replacement of heirs in Article 841 of the *Budgerlijk Weetboek*, it is stated that Representation grants a person the right to take place, be at the level and assume the rights of the individual represented". Article 185 of the KHI, although does not precisely coincide with the *Budgerlijk Weetboek*, has the same provision. In particular, paragraph (1) of the article states, "For heirs who die before the testator, their position can be replaced by their children, except those mentioned in Article 173".[15]

This issue becomes something that is seen as being "in opposition" to the concept of *farāiḍ*, which all this time *me-maḥjūb-kan* (literally translated as preventing the right to inherit) grandchildren (from the son) if there is still another son (uncle of the substitute heir) in the line of descent. This is because one of the conditions for the heir to inherit is that the heir must be (still) alive at the time of the testator's death.[16]

Even when the uncle (*'āmm*) is also deceased, these grandchildren appeared to inherit based on their status as *'aṣābah bi al-nafsih*. However, on behalf of themself, they become the heir of the residual beneficiary, not inheriting through the path of substitution. Due to such two ways of inheritance, the legal consequences will be different. Further understanding the purpose of Article (185) of KHI, it is a breakthrough in institutionalising the rights of grandchildren over the father's inheritance (if the father died before the grandfather).[17] This can be seen in this sentence (point 1): "the heir who died earlier than the testator, then his position can be replaced by their children." This means that the grandchildren (from the daughters or sons) have the right to inherit when their mother/father died earlier than the testator.

On this basis, the *żawil arḥām* heirs, such as granddaughters and sons (of daughters), are also given equal rights/share with grandsons (of sons). This will

[14] Abdullah Abdul Gani, "Kehadiran KHI Dalam Hukum Indonesia, Sebuah Pendekatan Teoritis," in *Berbagai Pandangan Terhadap Kompilasi Hukum Islam* (Jakarta: Yayasan Al-Hikmah Jakarta, 2018), 216.

[15] Muhammad Aini, Anis Mashdurohatun, and Fahmi Al Amruzi, "The Ideal Concept of The Provision of Substitute Heirs in Inheritance Law According to Compilation of Islamic Law Based On The Justice Value," *International Journal of Business, Economics and Law* 19, no. 5 (August) (2019): 250–57.

[16] Grandchildren whose parents died earlier than the testator (in *farāiḍ*), he can not replace the position of his father / mother to inherit the legacy of his grandparents. Because he will *maḥjūb* if it is still shared with a brother by his parents.

[17] Baharuddin Ahmad, "Konsep Keadilan Dalam Kompilasi Hukum Islam di Indonesia, Analisis Keadilan Hukum Dalam Kewarisan," *Jurnal Hukum dan Kemasyarakatan* 6, no. 1 (2006), p. 54.

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prove that inheritance in Islam is gender-responsive and refute allegations that the concept of *farāiḍ* is incomplete in managing this problem. However, due to different understandings of the meaning of this substitute heir, Article (185) of KHI often becomes a contentious issue amid gender equality discussions; it is also considered open *to multiple interpretations* even by Religious Courts judges.[18]

However, this replacement system seems more appropriate than *wasiat wajibah* (the obligatory bequest) to resolve this case. This is because the emergence of Article 185 KHI has contributed to the settlement of Islamic inheritance cases against "two main issues at once." That is, for grandchildren whose parents died earlier than the testator and for children/adoptive parents.[19]

Substitute heirs and children/foster parents already have a 'legal standing' related to their rights to the *tirkah* (inheritance). Therefore, this article regarding substitute heirs is a reformative aspect that is purely a renewal of the KHI, in case it is inaccurate to say it is a reinterpretation of existing *treasures* in the general provisions of *farāiḍ*.[20]

Grandchildren (male/female) whose parents died earlier than the testator has received legal protection under the rules of the article, and it also dismissed the assumption that Islamic inheritance is *Patrilineal*. This is because the two parties account for the grandchildren as a substitute heir here without distinguishing their gender (as has been alleged so far), and *żawil arḥām* is detrimental to the women's side.

Legal formulation through the plenary meeting of the Religious Chamber of the Supreme Court (*Kamar Agama Mahkamah Agung*) [21] has resulted in an agreement (among others): that (according to the results of RAKERNAS 2010 in Balikpapan) substitute heirs are only limited to grandchildren,[22] if the testator has no children but has a sibling who died first, then the son of the sibling becomes

[18] Bunyamin Alamsyah, "Filosofi Ahli Waris Pengganti dan Implementasinya di Peradilan Agama, PTA JAMBI," n.d., http://pta-jambi.net/ index.php?option=com_content&view=article&id-134&1 Itemed=324.

[19] M Fahmi Al Amruzi, *Rekonstruksi Wasiat Wajibah dalam Kompilasi Hukum Islam*, II (Yogyakarta: Aswaja Pressindo, 2014).

[20] Tengku Muhammad Hasbi Ash-Shiddieqy, *Fiqh Mawaris Hukum Pembagian Warisan Menurut Syariat Islam* (Semarang: Pustaka Rizki Putra, 2010).

[21] Supreme Court of the Republic of Indonesia "SEMA Number 03 of 2015" (2015).

[22] M Rasyid Ariman, *Hukum Waris Adat dalam Yurispudensi* (Jakarta: Ghalia Indonesia, 1988). In contrast to the other two systems of inheritance law (*BW* and customary inheritance law.

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the heir, while the daughter of a sibling is given a share with *wasiat wajibah* (the obligatory bequest).[23]

All this time, the heirs of the *żawil arḥām* group, initiated by *fuqahā'*, is a very controversial issue of Islamic inheritance law and is considered gender biased. This group of heirs is created based on the paradigm of thinking of Arab society that tends to be patrilineal. This kind of inheritance system is considered very irrelevant to the sense of justice in modern society.

The Settlement of Substitute Heirs Cases in The Banjar South Kalimantan Community

In Hulu Sungai Tengah regency, South Kalimantan, an heir died in 2015, and his inheritance was estimated to be more than 25 billion rupiahs. One of his daughters (who died two years before him) had three daughters and one son. To this day, no decision has been made on whether this substitute heir will get a share of their mother's inheritance.

Various attempts by these substitute heirs have been made. Still, no decision was made because the family (uncles and aunts) stated that "their nephews will be given a modest share of inheritance later", not in a fixed part as in the provisions of substitute inheritance law. They seem unwilling to give the inheritance rights of their sibling (who died earlier) to their children (their nephews and nieces).[24]

In Banjarmasin city, one of the heirs, the eldest son, died earlier than both parents (2008),[25] and he left two daughters. The uncle and aunt of the two nephews, who are the substitute heirs, will later give them an inheritance as they deserve. He has also been allotted land ownership (certified) by his parents, including five other children still alive.[26]

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[23] The Supreme Court of The Republic of Indonesia, *Compilation of The Results of The Plenary Meeting of The Chamber of The Supreme Court of The Republic of Indonesia*, 4th ed., 2019.

[24] As is the case with heritage assets whose value reaches more than tens of billions of rupiah. At the beginning of 2020, officials (regional heads) in Hulu Sungai Tengah district plan to buy it because it will be used as a shopping area in Barabai. But the latest information (dated May 24, 2021, at 14.20 WITA.) from one of the successor heirs, that "their uncles and aunts" do not want to solve this inheritance problem anymore, because all the assets of the heir are not sold at all.

[25] The other heirs are one son and four daughters

[26] In addition, another reason is, that when Fad died, his mother's death was also not given a share / inheritance rights. According to Fad's wife. the house is dedicated to his sons (grandchildren also). It is the same with the case of the Hbh family. in Banjarmasin, one of the aunts of Nhy's substitute heirs. who died first, he stated that until now "our family has not talked about Nhy's children, whether they will be given inheritance rights as Nhy's mother. or at least

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If the settlement of the division of inheritance is illustrated by referring to the provisions of article (185) of KHI regarding substitute heirs, then each heir, in this case, should receive a share as shown in the following table:

No.	Heirs	*Fardh*	*Ashal Masahlah* = 10 Acquisition
1	4 sons, & 2 daughters	*Ashobah bi al-ghair** *Each son gets two parts and one part for each girl.	
2	4 sons 2 daughters	8 2	Everyone gets 2/10 Everyone gets 1/10
3	Because one of the sons had died earlier than his parents, the right/share, which is 2/10 x the inheritance, is given to the granddaughter as much as 2/3. Using the concept of *farâidh*, the remaining 1/3 submitted to the brothers as *ashobah bi al-ghair*, with the division pattern (1/3 X inheritance: 8).		

Until this research was conducted, according to information from four Martapura, Banjar Regency practitioners (Religious Court judges), they had never received or examined this inheritance case during their time as judges. Even though confronted by this case, they stated they could not also ensure that they would apply the substitute heir article according to the provisions of KHI Article (185). This is more of a casuistic case, and they will adjust to the facts in the trial.[27]

In other words, they admit that Article 185 of KHI can sometimes be a guideline in one case rather than in others. The judge has the freedom to do *ijtihād* (logical reasoning) according to their own opinion. So, according to them, the application of this article of substitute heir depends mainly on the judge's opinion. Naturally, there will be a distinction of opinions in a decision and order.

Even though the Martapura Religious Court has never examined the case of this substitute heir, these problems can be found in the Kertak Hanyar community of Banjar Regency, with cases processed through the help of lawyers.

with haha." Information of live interview on October 3, 2021, at 10:30-12.30 WITA, at the writer's residence, who had previously contacted via his cellphone line.

[27] In line with what was expressed by Erliyani Khairin in her writing regarding this issue (pages 97-98), the interpretation of the Banjarmasin Religious Court judge in his decision relating to this substitute inheritance and its application resulted in different decisions because it was casuistic.

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The testator's family has made an agreement (based on subpoena)[28] which until now has still not been approved by the uncle or aunt of the substitute heir.

In the Banjarmasin Religious Court, there are several examples of applying substitute heir regulation. Three peaceful appeals resulted in decisions, and two contentious lawsuits resulted in verdicts. Four cases were settled under Article 185 of KHI, and one other was determined under Islamic inheritance law (*farahidh*).[29]

Five cases of the substitute heirs are applications and lawsuits processed by the Banjarmasin Religious Court from 2009 to mid-2012. Their respective number is: 0264/Pdt.P/2008/PA.Bjm.; 0084/Pdt.G/2011/PABjm.; 0250/Pdt.P/2011/PA.Bjm.; 189/07/2011/PA.BMJ.;and 0090/Pdt.G/2012/PA.Bjm.[30]

Substitute Heirs in Different Perspectives

Provisions for completing the distribution of inheritance according to the rules of the Compilation of Islamic Law are highly anticipated by the parties, especially those who have experienced being heirs but cannot share the inheritance. In addition to grieving over the death of their parents earlier than the heir, who should be able to get a share of their parents ' inheritance, they also feel there is a kind of "injustice" if the rules do not cover their rights as substitute heirs as in Article 185 of this compilation of Islamic law.

Dozens of centuries ago, since *farāiḍ* became Islamic inheritance law until the birth of the Compilation of Islamic Law through a Presidential Instruction in 1991, it has become a legal awareness for the Indonesian Muslim community to resolve this "*patah titi*" case through an "*obligatory bequest*"[31] Islamic inheritance law as well as the provisions of jurisprudence was a natural law for Arab society at that time. Therefore, there may have been many rules of inheritance law that are no longer relevant to Indonesian culture today. However,

[28] This subpoena consists of six pages with letterhead, reads Advocates & Legal Consultants Office: Jl. Ahmad Yani Km. 15.200 Rukun Tetangga 023, Rukun Warga 008 Kel. Gambut, Kec. Gambut, Kabupaten Banjar Hp/Wa: 085248841138, e-mail: law.arifin@yahoo.co.id

[29] Khairin, "Penyelesaian Kasus Waris Pengganti di Pengadilan Agama Banjarmasin." p. 97.

[30] In 2018, at the Banjarmasin religious court, there was one PA determination related to the settlement of this successor heir case. Namely based on the directory of decisions of the Supreme Court of the Republic of Indonesia, determination number: 432 / Pdt.P/2018 / PA.Bjm.

[31] Khairuddin Hasballah et al., "Patah Titi and Substitute Heirs: A Study of Legal Pluralism on the Inheritance System in Aceh Community," *AHKAM: Jurnal Ilmu Syariah* 21, no. 2 (2021): 299–324, https://doi.org/10.15408/ajis.v21i2.22792.

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in this case, the necessary *tajdīd* (law reform) is continuous, parallel to the demands of local justice due to socio-cultural changes in society.[32]

Regarding the current development of Islamic inheritance law in Indonesia, KHI, especially in Book II, is a realistic law. Because many absorb customary law in force in Indonesia, it contains a sense of justice for a universal society. One of them is about the problem of substitute heirs.

The term *Mawahli* is a name given to a substitute heir, as Hazairin thought. As a concept of bilateral inheritance,[33] *Mawnahli* is considered to meet the standards of gender justice because it is referred to as the reduction of male dominance in the previous Islamic inheritance law.

The concept of inheritance as a model offered Hazairin, looking at boys and girls having the same position as heirs. Both stand-alone without any interdependence with one another. This thought seems to have clashed with the concept of inheritance Shafi'i model. Because in this *Mawnahli* concept, grandchildren were appointed as *aṣḥāb al-furū*, which in Shafi'i inheritance had been harmed by the testator's brother. They were a substitute heir who got a share to replace the position of the father or mother.[34]

In addition, the concept of inheritance Shafi'i assessed gender bias is related to differences in ability *menghijab -translated to prevent-* between men and women. For example, men can become *hijab* brothers and sisters from all majors; both men and women, grandparents' heir, has the capacity to do it.[35] While in the concept of inheritance *bilateral*, sons and daughters have the same capacity in terms of *hijāb-maḥjūb*. For some people, this form of inequality between men with women is perceived as fair. This is not only in the inheritance

[32] Fatum Abubakar, "Pembaharuan Hukum Keluarga: Wasiat Untuk Ahli Waris (Studi Komparatif Tunisia, Syria, Mesir, Dan Indonesia," *HUNAFA: Jurnal Studia Islamika* 8, no. 2 (2011): 233–61.

[33] The bilateral inheritance that became "ijtihad" Hazairin related to his belief that inheritance according to the Qur'an and Hadith, is related to the pattern of Islamic inheritance. This is contradicted by the reality in Indonesian society, which varies in the way they draw lineages. So in certain patterns, make men or women more prominent in receiving their inheritance rights. Even though this is not something "that is approved by Islam." Because Al-Quran (An-Nisa':4/7) clearly states that men and women have equal rights to the inheritance of parents and relatives.

[34] Maryati Bachtiar, "Hukum Waris Islam Dipandang Dari Perspektif Hukum Berkeadilan Gender," *Jurnal Ilmu Hukum* 3, no. 1 (n.d.): 1–43.

[35] This view can actually be refuted because the grandparent can inherit with relatives (*without restrictions*) in the chapter "Jad wa Akawatuha."

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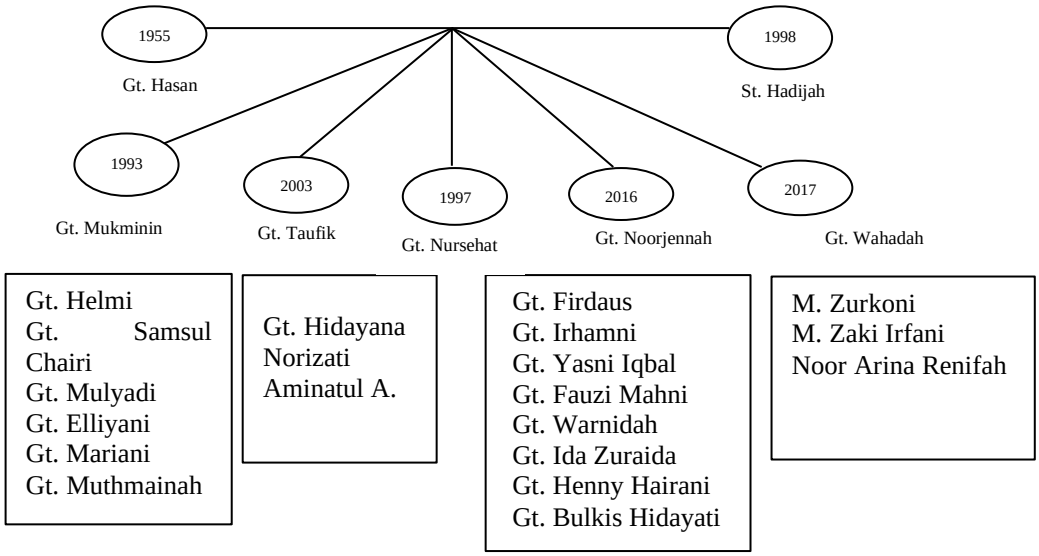
of Islam. Even some other researchers, such as Crosby (1982), Feather (1990) Jacson et al. (1992), also considered it a form of Justice.[36]

It has to do with the statement that fairly gives different meanings according to the context in which it is intended to be used.[37] Concerning material rights, especially with inheritance issues, the word fair can be interpreted as a form of balance between rights and obligations. The balance between the acquired and the needs and uses.[38] By the principles of Islamic law (*farâidh*), gender justice in the context of the settlement of the substitute heir case, as has been accommodated by KHI in the provisions of Article (185), can be illustrated as an example of a case[39] below:



[36] Maryati Bachtiar, "Hukum Waris Islam Dipandang dari Perspektif Hukum Berkeadilan Gender," *Jurnal Ilmu Hukum* 3, no. 1 (2012), https://doi.org/http://dx.doi.org/10.30652/jih.v3i01.1026. If gender justice is meant as the view of the speaker here, it should be verified again with an in-depth review of some concrete case examples from *faraidh*, which proves that men are not always understood to earn more than women. In addition to gender couples, it should also not be understood to be limited to children with children only. Because there are still some other gender couples such as seibu brothers and seibu Sisters (The Inheritance is the same), the father and the mother of the testator, which is precisely the mother gets twice as much as the father (in the case of *gharadwaian*/ 'umrahyatain), or a biological brother who does not get any part when together *żawil furūḍ* saaibu brother or sister. The relationship between men and women (*farāiḍ*).

[37] Amir Syarifuddin, *Hukum Kewarisan Islam* (Jakarta: Prenadamedia Group, 2011).

[38] Bachtiar, "Hukum Waris Islam Dipandang dari Perspektif Hukum Berkeadilan Gender," 2012.

[39] Based on the results of determination Banjarmasin Religious Courte. number: 432 / Pdt.P/2018 / PA.Bjm.

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As in the case above, the grandchildren of the son and daughter of the son (children Gt. Believers), together with the grandchildren of the sons and daughters of the daughters (Sons of Gt. They inherited their grandparents ' wealth. Hasan and St. The reward (should) be according to the portion that (should) be received by their parents. Their inheritance rights (by gender) are no longer distinguished by *di-maḥjūb*, the structure of the case; there are other sons of the testator (Gt. Taufik). Because during this time, the children/descendants (male and female) of the heir, including heirs *żawil arḥām.*[40]

The fact of the settlement of the substitute heirs of this compiled Islamic law (KHI) version is seen as something that is far more "advanced" than the provisions in the Book of Bequest Law (KUHW) in Egypt, which only provide part of the substitute heirs through the way of an *obligatory bequest.* Moreover, because in addition to the substitute heirs are already guaranteed their inheritance rights through Article (185), *obligatory bequests* are also intended for adoptive children and foster parents.[41]

Therefore, it is seen that the principle of justice in settlement of the division of inheritance is in Islamic law. Fundamentally, it can be said that gender differences do not determine inheritance rights. This means that men and women have equal rights to inheritance (Quran Chapter 4. An-Nisa' verse 7). In detail, it is also explained the principle of the equal right to receive the inheritance, whether male or female (children and parents, married couples, half-siblings and biological siblings) through three verses inheritance (Quran Chapter 4. An-Nisa' verses 11, 12, and 176).

The context with the benefit of which Allah determines the size. In the form of "the way of salvation," which is for human happiness, the presence of a substitute heir article based on Article (185) KHI has at least given joy to grandchildren whose parents died earlier than the testator. Therefore, this article is a form of Islamic legal policy while still paying attention to the more significant benefit that can be achieved with it because grandchildren who are "grieved" by the death of their parents before their grandparents at least can be helped by being given inheritance rights in replacing their parents.

Stick to the principle of *tawḥīd*, which is a form of obedience to the rules of Allah, and do not forget the *ijtihād* in it because it is a necessity at all times. Efforts to reform the law as the provisions of the article on the substitute heir at least it meets five kinds of *Shari'a* objectives are summed up in five aspects of

[40] The proposition (legal basis) that the judge considers in examining and resolving the case of the substitute heir (as determined above by the Banjarmasin religious court) is the reason for the application submitted by the applicants, in accordance with Article 171 letters (b) and (c), Article 174 paragraph (1) and Article 185 compilation of Islamic law.

[41] Amruzi, *Reconstruction of The Will of Wajibah In The Compilation of Islamic Law*.

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ḍarūriyyāt.[42] First, the settlement of cases, as provided in Article (185) KHI, remains within the scope of religious maintenance. As a universal religion, Islam has regulated all aspects of life in human life, including the issue of inheritance. Therefore, Muslims no longer have to seek other channels of inheritance law to settle the substitute heir case.

In addition, maintaining the soul in the context of the benefits is related to psychological problems. Substitute heirs feel treated equally and fairly when they can inherit along with their parents' siblings, who are none other than their uncles/aunts within the same blood family. So it is logical that they are given the same rights as the acquisition that their parents should have received. Because, after all, the substitute heirs are also (*nasabiyyah* heirs) whose inheritance rights must still be considered. Therefore, to keep the family member in maintain kinship *furū' al-mayyit* aspects. The property is distributed to those who have *aṣḥab al-irṡ* with the estate's owner (the inheritor), namely the heir.

Obligation to complete the division of inheritance is an aspect of *ḍarūriyyāt*, and the necessity of fulfilling all requirements, such as the death of grandparents and the life of heirs, as well as an inheritance that has been "clean", is an *ḥājiyyāt* aspect. While giving the right to a substitute heir to get a share (replace their parent's position) is a *taḥsīniyyāt* aspect. The settlement of the case of the substitute heirs in the Banjar community of South Kalimantan (as designated in the sample cases in the three regencies/cities) describes that there are still many people who do not (want) to settle according to the provisions of Article (185) KHI. Therefore, the custom of the community only gives the right (part of the inheritance) to them with the pattern of "*sapambari haja*" not with the provisions of a definite part that calls with numbers (fractional numbers).

This fact is motivated by the fact that there is still an understanding that *żawil arḥām* does not have the right to inherit, assuming the grandson is hindered by another son (another) of the surviving heir. In addition, the substitute heirs also "know themselves," so they feel reluctant to convey the desire to their uncle/aunt to ask for the share of their parents who died earlier than their grandparents. When the initiative for the settlement of the division of the inherited property is passed on to the whole family, the substitute heirs also (impressed) want to avoid being involved in the deliberations of the testator's family because they are already considered not included in the rightful person.

This substitute heir comes to question regarding the inheritance rights of their mother/father, the family, especially the uncle or aunt, responds with a statement as above. Even the nephews or nieces whose parents died earlier were

[42] Wahbah al-Zuhaylī, *Fiqih Islam Wa Adillatuhu Jilid 7*, ed. Abdul Hayyie Al-Kattani and Arif Muhajir, 2nd ed. (Jakarta: Gema Insani Press, 2011).

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considered too presumptuous. If legal remedies have been taken by going to authorised institutions such as religious courts, this problem also sometimes requires much time for the resolution process. It may not even be resolved because the deliberation process cannot produce a consensus. Including must be preceded by a subpoena process involving many parties. Such as lawyers, mediators, or other people who are considered capable of "mediating" the settlement of this case.

Sociologically, this fact shows the existence of a kind of insincerity (especially uncle/aunt of the substitute heir) to give this substitute heir rights as provided in Article (185) compilation of Islamic law (KHI). This is because it is understood that they will affect their inheritance rights (the share becomes reduced). Whereas if viewed from the psychological aspect, the uncle/aunt of the substitute heir should not feel "disadvantaged "because of the presence of the substitute heir, which is none other than their nephews who have become" orphans" because of the death of their brother (preceding the death of the heir).

The fresh air of joyful news for the substitute heirs. Precisely, it can not be obtained because the actions of the family hinder it in the name of the Islamic inheritance law (*farāiḍ*), which does not regulate this issue, especially if it is considered to have added new laws that are not in the provisions of the *syarī'ah*. Although this reason is actually not precede by their deep understanding of Islamic inheritance law. KHI has been present in Indonesia, and they have also understood that the substitute heirs now (through KHI) have been "protected by law" related to the right of substitute heirs to participate and get part of the inheritance of the heir.

Substitute heir can be understood as a legal event on the succession of heirs that has a sociological, philosophical characteristic, dividing assets between parties who have *aṣḥab al-irṡ* (lineage and marriage) relationships.). The asset becomes the life protector among people with this inherited relationship. Sociologically, it can also be understood as an appreciation of genetic and logistic elements of feelings towards close people who are left behind.[43]

The application of the substitute heirs law, juridically, will be able to maintain feelings between a person and between kinship and social relations. The rule of law against it will eliminate the "fighting each other" over the property in society. Based on philosophical meaning, *nasab*-genetical is a fundamental formulation of the inheritance system. The discussion about the reasons why people have the right to inherit (in *farāiḍ* Islamic inheritance law), one of which

[43] Sofyan Mei Utama, "Islamic Law Review on The Determination of Surrogate Heirs," *International Journal of Nusantara Islam* 6, no. 2 (2018): 133–143.

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is because of blood relations, and the grandchildren (substitute heirs) are *furū' al-mayyit* heirs.[44]

If they are not given their rights, then propriety/legal justice does not appear to be "in direct contact" with a sense of justice for them (substitute heirs). It is the same with *farāiḍ*, which in its normative sacred text still gives a possible chance for the inheritance of the grandson of this substitute heir. In the classical interpretation, these grandchildren (from daughters) are then set aside by sons' descendants. On this basis, Islamic jurists in Indonesia have made efforts the deconstruction what is improper from a classical interpretation to a more progressive philosophy of Justice.[45]

The focus of the problem is that Article (185) of the compilation of Islamic law (KHI) is very short to allow for Juridical interpretation (continued) to open vast opportunities for *discretion* law against him. Therefore, should be interpreted as *Plaatsvervulling* in the provisions of the *KUH Perdata* (BW), or *Mawālī* as the concept of Hazairin (which has been opposed by Habiburrahman), or there is another concept that can parse the meaning of Article (185) compilation of Islamic law.[46]

Conclusion

As a breakthrough in the context of Islamic inheritance, the substitute heir, as stipulated in the compilation of Islamic Law Article (185), seems to have some pros and cons concerning the application in some concrete cases that occur in Muslim communities. Especially the Banjar Muslim community of South Kalimantan.

Regarding the issue of this substitute heir, the Banjarmasin Religious Court has issued a legal product in the form of four determinations and two decisions. In its consideration, the judges could have argued otherwise by not making Article 185 KHI a useful article. Including when assigning nephews/nieces with the status of substitute inheritance to their late parents (brothers) who died earlier than the testator. Even though this has "deviated" from the resulting legal formulation (SEMA Number 03/2015).

In accordance with Islamic law principles (*farāiḍ*), gender justice in the context of settling cases of substitute heirs has been accommodated by the

[44] *Nasabiyah* heirs inherit because of the relationship of relatives (family) such as children, grandchildren, and so on down by the testator.

[45] Putri Larasati, M. Darudin, and Sirman Dahwal, "Dispute Resolution of Inheritance Distribution for The Substitute Heir In Terms Of Islamic Law," *Bengkoelen Justice: Jurnal Ilmu Hukum* 11, no. 1 (2021): 97–109.

[46] A Sukris Sarmadi, *Dekonstruksi Hukum Progressif Ahli Waris Pengganti dalam Kompilasi Hukum Islam* (Yogyakarta: Aswaja Pressindo, 2021).

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compilation of Islamic law through Article (185). Therefore, this article is a form of Islamic law policy (farâidh) with due regard for the benefit of all heirs in a family bond nasabiyah which is the most substantial element in the context of *aṣḥab al-irṡ*.

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