

THE CONSTRUCTION OF COMPILATION OF ISLAMIC LAW PRINCIPLES IN DETERMINING THE CONDITION OF SUBSTITUTE HEIRS BASED ON JUSTICE VALUE

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Abstract: *The aim of the research is to study and to analyze the construction of the principles of compilation of Islamic law in determining the conditions of substitute heirs. This research used empirical Judicial Method. The results of the study found that substitute heirs in the Compilation of Islamic Law are closely related to the principles of inheritance of the compilation of Islamic Law which are ijbari (forcing, compulsory), bilateral, individual, balanced justice, inheritance due to death, and the principle of Islamic personality. The method of applying Article 185 KHI can be seen in terms of the substitute heirs, in terms of the nature of substitute heirs, in terms of the quality of the existence of substitute heirs, and in terms of groups and limitations of substitute heirs and the method of distribution.*

Keywords: *KHI, Substitute Heirs*

Introduction

Islamic law in Indonesia is divided into two periods, namely: The period of acceptance of Islamic law as a persuasive source and the period of acceptance of Islamic law as an authoritative source are sources that have authority¹. The legal system that colored national law in Indonesia so far has been formed or influenced by the three pillars of the legal subsystem, namely the Western legal system, the customary law system, and the Islamic legal system. From the three legal systems objectively, it can be assessed that Islam has a greater chance of contributing and contributing to national compilation.

The development of Islamic law in Indonesia is inseparable from the role of ulema and umara (government). This has been going on since the beginning of the development of Islamic law,

¹ Ismail Suny, *Kedudukan Hukum Islam dalam Sistem Ketatanegaraan Indonesia dalam Dimensi Hukum Islam dalam Sistem Hukum Nasional*, (Jakarta; Gema Insani Press, 1996) page. 133-134

now and in the future. The role of the ulema is to explain and study Islamic law, while Umara (the Government) with its majority can make policies on the enactment of a legal product.²

Inheritance law in Indonesia is growing very rapidly, marked by the emergence of regulations and opinions from several experts. The Compilation of Islamic Law (in Indonesia is known as *Kompilasi Hukum Islam* or abbreviated as KHI)³ is a codification and unification of the first inheritance law in Indonesia. Its existence as a formulation of renewal of Islamic law in Indonesia has reflected the dynamics of the development of Islamic inheritance law thinking, especially with the definition of Article 185 of the Compilation of Islamic Law on substitute heirs, which is very different and deviates from conventional fiqh. The article in question reads:

- (1) Heirs who die earlier than the inheritor then his position can be replaced by his son, except those in article 173.
- (2) The portion for the substitute heirs may not exceed that of the equivalent heirs to those replaced.

Substitute heirs in inheritance law to complete existing laws that aim to find a sense of justice for the heirs. Substitute heirs are basically heirs because of replacement, those who become heirs because their parents are entitled to inheritance died before the inheritor, so he appeared to replace him.

The provision of substitute heirs in the Compilation of Islamic Law breaks through the understanding of the Indonesian Islamic community, the majority of whom embrace Sunni fiqh⁴, because the form of substitution of heirs in Sunni fiqh is different from the formulation of article 185 of the Compilation of Islamic Law. The grandchildren of new sons can replace his parent, if the heir does not leave other boys who are still alive; while the granddaughter of a daughter cannot replace her parents⁵. On the other and, the compilers of the Compilation of Islamic Law dared to establish a legal provision that factually violated the convictions of the majority of the Indonesian Islamic community. This reality when examined from the theory of the ideal of law⁶, which states that the effectiveness of a rule of law will be more secure if the

² Abdul Ghani Abdullah, *Kuliah Hukum Perikatan Islam di Fakultas Hukum Universitas Indonesia, 1994*.

³ Compilation of Islamic Law is defined as a set and collection of fiqh that lives in the Indonesian Islamic community and is part of national law that aspires to legal codification in the form of law. Compilation of Islamic Law applied in Indonesia based on the legal instrument "Presidential Instruction" No. 1 of 1991, then anticipated organically by Decree of the Minister of Religion No. 154 of 1991. See: Abdul Gani Abdullah, Presence of Compilation of Islamic Law in Indonesian Law, Theoretical Approach, in *Islamic Ditbinbapera, Various Views on Compilation of Islamic Law*, (Jakarta: Al-Hikmah, 1993), cet. I, p.72. The Compilation of Islamic Law consists of three parts, namely: Book I concerning Marriage Law consists of XVII-chapter 170 article, Book II concerning Inheritance Law consisting of VI chapters 44 articles, and Book III concerning Marriage Law consisting of V chapters 15 chapters. See: *Ditbinbapera Islam, Kompilasi Hukum Islam*, (Jakarta: Ditbinbapera Islam, 2000), p. 184.

⁴ *Sunni is attributed to the Ahl al-Sunnah wa al-Jama'ah, a term used to designate the majority of Muslims, who follow and continue the tradition of the Apostles and Companions, as a reaction to the emergence of a minority that is more or less opposed to the majority, namely the Khawarij and Shia. see: al-Bahiy, Alam Pikiran Islam dan Perkembangannya*, alih bahasa al-Yasa Abu Bakar, (Jakarta: Bulan Bintang, 1987), p. 17.

⁵ Muhammad Amin al-Asyi, *Khulashah 'Ilm al-Faraidh*, (Mesir: al-Maktabah al-Asyi al-Kubra, 1937), p 25. See also Syamsuddin Muhammad al-Ramly, *Nihayat al-Muhtaj ila Syarh al-Minhaj*, (Mesir: Musthafa al-Babi al-Halabi, 1938), jilid VI, h. 17-18. Ismuha, *Penggantian Tempat dalam Hak Waris Menurut KUH Perdata, Hukum Adat dan Hukum Islam*, (Jakarta: Bulan Bintang, 1978), cet.I, p. 79-80.

⁶ The meaning of the ideal of law, according to Ehrlich's theory, reaches out to the living law before being formally lifted in the norm instrument as it is called the living of law, where the law is formed based on norms that live and apply in the midst of society. see: Dennis Liyod, *The Ideal of Law*, (England: Penguin Book, Harmond Smoth, Middlesex, 1985), p209.

provisions that apply are sourced from the living law (law of the living) and the public is generally believed.⁷

Even in the methodology of Islamic law (*ushul fiqh*) it was determined that in order to strengthen one of several different opinions (*tarjih*), opinion must be considered in the majority⁸. From both sides, it turns out that the Compilation of Islamic Law violates it by setting new rules on substitute heirs as part of the positive law that must be applied in the Religious Courts and serves as a guideline for the Indonesian Islamic community.

More interesting than the concept of substitute heirs in the Compilation of Islamic Law is the rule of law that is facultative⁹, so that the consequences and consistency of the application of the law (*tathbiq al-hukm*) are very dependent on the credibility of the judge. Whereas the concept of Sunni inheritance—even including the Compilation of Islamic Law—recognizes and adheres to the principle of compulsion, which *qadha'i* emphasizes more on legal certainty. This difference in formulation raises a variety of interpretations, both among practitioners and academics. Furthermore, the application of the concept of substitute heirs in the Compilation of Islamic Law will also be closely related to the concept of *hijab* and *mahjub*¹⁰ and the concept of *ashabah*¹¹ which is definitively regulated in the Compilation of Islamic Law.

After tracing the development of the thought of inheritance law in Indonesia, the concept of substitute heirs appeared before the Compilation of Islamic Law. Indonesian law experts who are known as the originators of the birth of the rule are Prof. Dr. Hazairin¹². He analyzed the social forms in relation to the inheritance system by making anthropology a frame of reference. Through his research on the texts of the Koran and Hadith, he finally concluded that the texts of the Koran and Hadith contain a bilateral inheritance system¹³. Based on these conclusions, he then interpreted the pronouncement of *al-mawali* in Surat *al-Nisa* 'verse 33 as the heir of the substitute. On the other hand, the early scholars interpreted the pronouncement with ordinary heirs or *'asabah*.¹⁴

⁷ The study of legal effectiveness in legal sociology is an activity that shows a general problem formulation strategy, which is comparing the legal reality with the legal ideal. In particular, shows the level between Law in Actions and Law in Books, also describes the community's perception of the law that is influenced by the consequences to whom the law is applied. Read: Donald Black, *Batas-batas Sosiologi Hukum*, dalam Mulyana W. Kusumah dan Paul S. Baut (ed.), *Politik dan Perubahan Sosial*, (Jakarta: LBHI, 1988), p. 27., see also: Soerjono Soekanto, *Efektifitas Hukum dan Peranan Sanksi*, (Bandung: Remaja Karya, 1988), p. 62.

⁸ This opinion was expressed by the experts of *ushul fiqh* when talking about *tarjih*. see: Syaifuddin al-Amidi, *al-Ihkam fi Ushul al-Ahkam*, (Beirut: Dar al-Kutub al-'Ilmiyyah, 1983), jilid. III, p. 180 dan seterusnya.

⁹ This is indicated by the phrase "can" in Article 185 of the Compilation of Islamic Law.

¹⁰ *Hijab in inheritance terminology means heirs that prevent other heirs from receiving inheritance. Whereas mahjub means heirs who are obstructed receive inheritance.*

¹¹ *Ashabah is an heir who has the right to spend all assets or all remaining inheritance after being given the heirs zawi al-furudh.*

¹² Hazairin was named Datuk Pangeran, born in Bukittinggi on November 28, 1906 and died in Jakarta on December 11, 1975. He is the only son of a Bengkulu-born father and a mother born in Bukittinggi. He is well-known as a customary law expert but his expertise in Islamic law is also undoubted by other Islamic law experts.

¹³ Bilateral inheritance is inheritance which places heirs of male and female heirs in equal inheritance rights. This bilateral inheritance differs from patrilineal inheritance, which gives the heirs a greater proportion of inheritance rights than the heirs of the female offspring; so also different from matrilineal inheritance, as contained in the Minangkabau customary inheritance law, which gives inheritance rights to female offspring. The concept of bilateral inheritance was put forward by Hazairin in several of his books: *Hukum Kewarisan Bilateral menurut al-Quran dan Hadis*, (Jakarta: Tinta Mas, 1982), cet. IV., *Hendak Kemana Hukum Islam*, (Jakarta: Tinta Mas, 1976), dan *Hukum Kekeluargaan Nasional*, (Jakarta: Tinta Mas, 1982).

¹⁴ Al-Yasa Abu Bakar, *Ahli Waris Sepertalian Darah*, (Jakarta: INIS, 1998), p. 6.

The reinterpretation by Hazairin of the al-Quran letter al-Nisa 'verse 33 has opened a new discourse in the development of Islamic legal thought in the field of inheritance. There are some opinions, including Roihan A. Rasyid, stating that the rules of substitute heirs in the Compilation of Islamic Law are the result of Indonesian scholars' ijtihad influenced by Hazairin's opinion¹⁵. While others argue, for example M. Yahya Harahap, that the basic thinking of Indonesian Islamic law experts in determining a substitute heir is merely considering maqashid al-shari'ah¹⁶. Even so, to trace the true existence of substitute heirs in the Compilation of Islamic Law, it is necessary to conduct a scientific study which is the purpose of this study.

In addition, there are also indications that the methodology of Islamic Law Compilation is considered to have utilized many talfiq and takhayur institutions¹⁷, even though the methodology of usul fiqh such as bayani, ta'lili and istishlahi reasoning appears simultaneously and synergistically applied in the articles.¹⁸

Compilation of Islamic Law relating to inheritance as stipulated in article 185 states:

- 1) Heirs who die earlier than the inheritor, then their position can be replaced by their children, except those in article 173.
- 2) The portion of the substitute heir may not exceed the equivalent heirs to those replaced.

Article 173 The Compilation of Islamic Law states that a person is prevented from becoming an heir if the decision of a judge who has permanent legal force is punished for:

- a. Being blamed has killed or tried to kill or severely torture the heir.
- b. Defamed falsely has filed a complaint that the heir has committed a crime that is threatened with a sentence of 5 years imprisonment or a heavier sentence.

From the description above, it is taken the understanding that heirs can be replaced by their children if the heir first dies from the inheritor, while the portion may not exceed the heirs he replaces. The problem of inheritance in the midst of the community is mostly due to the lack of housing from the community in looking carefully which includes the category of inheritance, distribution and those entitled to the inheritance. What incomprehension is inheritance, division and who has the right to receive inheritance, or each party involved in the inheritance feels that the share is more than the other party while the other party will increase the complexity of the problem of the division of the inheritance.

¹⁵ Roihan A. Rasyid, *Pengganti Ahli Waris dan Wasiat Wajibah*, dalam Jurnal Dua Bulanan Mimbar Hukum No. 23 Thn. VI 1995 November-Desember, (Jakarta: al-Hikmah, 1995), p. 64.

¹⁶ M. Yahya Harahap, *Informasi Materi Kompilasi Hukum Islam: Mompositifkan Abstraksi Hukum Islam*, dalam Mimbar Hukum No. 5 Th. III, 1992, (Jakarta: al-Hikmah, 1992), p. 55.

¹⁶ Ahmad Rofiq, *Kritik Metodologi Formulasi Fiqh Indonesia*, dalam Anang Haris Himawan (Peny.), *Epistemologi Syara'*, (Yogyakarta: Pustaka Pelajar, 2000), h. 121-124. *Talfiq is the incorporation of the use of several different opinions of the school. While takhayur is selecting several opinions and holding one that is considered stronger.*

¹⁷ Al-Dawalibi stated this similar grouping in his book *al-Madkhal ila Ilm Ush al-Fiqh*, (Beirut: Dar al-Kitab al-Jadid, 1965), cet. V, h. 389-422. He divided it into: (1) al-Ijtihad al-bayani, 2) al-Ijtihad al-qiyasi, and (3) al-ijtihad al-istishlahi. But Al-Yasa Abu Bakar shared it with: (1) bayani reasoning, (2) ta'lili reasoning, and (3) istishlahi reasoning. This grouping according to him avoids the indecisiveness of the criteria put forward by al-Dawalibi, where istihsan from one side can fall into the category of qiyasi, but from the other side may also be included in the istishlahi category. Lihat: al-Yasa Abu Bakar, *Ahli Waris Sepertalian Darah, Kajian Penalaran Hazairin dengan penalaran Mazhab Fiqh*, (Jakarta: INIS, 1998), p. 7-9.

Research Methods

The research method is used in a scientific study. Scientific research is reasoning that follows a certain path of thinking or logic and which combines induction (empirical) methods, because scientific research always demands empirical testing and verification and hypotheses or theories compiled deductively.¹⁹ The method used in this study was normative juridical. The nonnative research method is also called doctrinal research, which is a study that analyzes the law both written in the book (law as it is written in the book), as well as the law decided by the judge through the court process (law is decided by the judge through judicial process)²⁰. Nonnative legal research is based on secondary data and emphasizes theoretical speculative steps and qualitative nonnative analysis.

The data used in composing this paper were obtained from library research as a data collection technique by utilizing various literatures in the form of regulations, Compilation of Islamic Law, legislation, scientific books, lecture materials, court decisions and data sources and secondary data discussed by researchers.

Research Results and Discussion

Construction of Principles of Compilation of Islamic Law in Determining Provisions for Substitute Heirs

Inheritance Principles in the Compilation of Islamic Law

Principle of Ijbari (Force, Compulsory)

The principle of ijbari means that the transfer of property from someone who dies to his heirs applies naturally according to the provisions of Allah SWT. without being dependent on the will of the inheritor or his heir.²¹

The principle of ijbari in the Compilation of Islamic Law can be seen from various aspects including: a) from the aspect of the transfer and transfer of property which must occur after someone dies. This is reflected in the general provisions concerning inheritance legal formulation, inheritor, and heirs in article 171 letters (a), (b), and (c)²² and article 187 paragraph (2) Compilation of Islamic Law reads: is an inheritance that must be distributed to entitled heirs. Words must in this article clearly show the principle of inheritance. b) From the aspect of the magnitude of the portion of the property that has been determined for each heir. This is contained in Articles 176 to Article 182 of the Compilation of Islamic Law. c) From the aspect of the recipient of inheritance (heirs), which has also been determined with certainty, namely those who have blood relations and marital ties with the testator, as stated in article 174

¹⁹ Sunaryati Haryono, *Penelitian Hukum di Indonesia pada Akhir Abad ke-20*, Bandung Rineka Cipta, 1994, p 105.

²⁰ Amiruddin dan Zainal Asikin, *Pengantar Metode Penelitian Hukum*, Jakarta Grafiti Press, 2006, p 118.

²¹ Amir Syarifuddin, *Pelaksanaan Hukum Kewarisan Islam dalam Lingkungan Adat Minangkabau*, (Jakarta: Gunung Agung, 1984), p. 18.

²² Article 171 Compilation of Islamic Law reads: What is meant by: a. Inheritance law is a law that regulates the transfer of inheritance rights (tirkah) of the testator, determines who has the right to be heirs and how many of them are each. b. Heir is a person who at the time of death or who is declared dead based on a Muslim court decision, leaves heirs and inheritance. c. heirs are, people who when the testator dies has a blood relationship or marital relationship with the heir, is Muslim and is not obstructed because the law becomes heir.

paragraphs 1 and 2 Compilation of Islamic Law.²³ The formulation of the articles of the Compilation of Islamic Law is based on and derived from the text of al-Quran surat al-Nisa '11²⁴. Therefore, in accordance with the principle of jurisprudence that the transfer and transfer of inheritance is compelling in the sense that since the inheritance is open, the division must be carried out to the heirs who are entitled and the distribution must be guided by the stipulated provisions.

For this reason, article 188 of the Compilation of Islamic Law also affirms: "Heirs either jointly or individually can submit requests to other heirs to divide inheritance. If any of the heirs do not approve the request, then the person concerned can file a lawsuit through the Religious Court for the distribution of inheritance. "

Thus, the heirs with the "right to sue" can divide the inheritance through a coercive system based on formal law enforcement.²⁵

However, the application of this principle of *ijbari* has been carried out in several respects and softening by the Compilation of Islamic Law, including:

First: Provisions in article 183 Compilation of Islamic Law opens opportunities and possibilities for the distribution of inheritance through peace, stating that: "Heirs can agree to peace in the distribution of inheritance, after each has realized its share".

The provisions of this article indicate that the distribution through peace can still hold on the division that has been determined or may deviate from these provisions; with the condition before the deviation is discussed, the distribution to all rightful heirs is explained in advance by the actual part according to the provisions of Islamic inheritance law²⁶. If the peace agreement contains a defect of coercion, deception and misconception about *furudh al-muqaddarah* (the specified part) referred to, then the agreement on the distribution is invalid and not binding and parties who feel aggrieved can demand the cancellation of the opportunity for distribution.²⁷ Thus, even though the Compilation of Islamic Law allows the settlement of division through a method of peace, in its implementation it must be truly purely based on the agreement of free will of all entitled heirs.

²³Article 174 The Compilation of Islamic Law reads: (1) The heir groups consist of: a. According to blood relations: the male group consists of: father, son, brother, uncle and grandfather; women consist of: mother, daughter child, sister and grandmother. b. According to the marriage relationship consists of: widower or widow. (2) if all heirs are present, then those who are entitled to inheritance are only; child, father, widow or widower".

²⁴ Al-Quran surat al-Nisa' ayat 11 berbunyi:

"Allah makes it clear to you about (the division of inheritance for) your children. That is: the part of a boy is the same as the part of two daughters, and if the child is all more than two girls, then for them two thirds of the assets left behind, if the girl is one, then she gets half the wealth. And for two mothers-fathers, for each one sixth of the assets left behind, if the deceased has children, if the deceased does not have children and he is inherited by his father's mother (only), then the mother gets a third; if the deceased has several siblings, then his mother receives one sixth (the divisions above) after being fulfilled by the will he made or (and) after the debt was paid. (About) your parents and your children, you do not know who among them are the closest (many) benefits to you. This is God's decree. Verily Allah is All-knowing, All-Wise".

²⁵ Idris Djakfar dan Taufiq Yahya, *Kompilasi Hukum Kewarisan Islam*, (Jakarta: Pustaka Jaya, 1993), cet.I, p. 30.

²⁶M. Yahya Harahap, *Pokok-pokok Materi dalam Kompilasi Hukum Islam*, Medan: Makalah UISU tanggal 28 Januari 1993, h. 31.

²⁷ *Ibid.*

Second: The provisions of article 189 of the Compilation of Islamic Law prohibits the distribution of inheritance in the form of agricultural land covering an area of less than 2 hectares, which reads:

If the inheritance will be divided in the form of agricultural land with an area of less than 2 hectares, in order to maintain its unity as before and be used for the mutual benefit of the heirs concerned.

If the provisions in paragraph (1) of this article are not possible, because among the heirs concerned there are those who need money, then the land can be owned by one or more heirs by paying the price to the heirs who have the right to suit with their respective parts.

Such flexing and softening in the literature of agrarian law is called the prohibition of fragmentation. Prohibition of fragmentation, meaning that the land becomes an economic asset of the state and provides welfare for themselves and their families and for the community, the land can no longer be divided, so it is no longer economical.²⁸ This prohibition aims to prevent agricultural land from decreasing in size, and prevent the emergence of poverty and the inability of farmers as part of the majority of Indonesia's population in general.

Another aspect, the provisions of article 189 of the Compilation of Islamic Law are in anticipation of the provisions of article 9 paragraph (1) of the Government Regulation in Lieu of Law No. 5 year 1960 concerning the Application of Agricultural Land Areas. These provisions read:

"The transfer of rights to agricultural land unless the distribution of inheritance is prohibited if it results in the emergence or the ownership of land which is less than 2 hectares. This prohibition does not apply if the seller only has land which is less than 2 hectares and the land is sold at once".

With the provisions of article 189 of the Compilation of Islamic Law, the exception in article 9 paragraph (1) of the Government Regulation in Lieu of Law does not apply and at the same time extends the scope of the ban on fragmentation of agricultural lands in the distribution of inheritance. It's just that from the aspect of legislative order, the provisions of article 189 of the Compilation of Islamic Law have weaknesses, because a Presidential Instruction cannot abolish a provision of Government Regulation in lieu of a formal Law.

Nonetheless, what is clear is article 189 of the Compilation of Islamic Law which stipulates that agricultural land with an area of 2 hectares or less than 2 hectares is not permitted to be partially diverted, because it will result in the split of agricultural land so that each heir is less than 2 hectares. And if they want to be transferred entirely, the agricultural land can be owned by one or more heirs, by paying the rightful heirs according to their share. Through the way of releasing rights followed by compensation, the integrity of the agricultural land can still be maintained by one or more heirs.

²⁸ A.P Perlindungan, *Bunga Rampai Hukum Agraria serta Land Reform*, (Bandung: Maju Jaya, 1988), p. 24.

When we observe carefully, what is stipulated in article 189 of the Compilation of Islamic Law is based on the fact in society that it is almost evenly distributed throughout the archipelago. The poorer class of farmers on average only have agricultural land with an area of less than two hectares. The absence of a ban on the distribution of inheritance or agricultural land in question will exacerbate their socio-economic life and the benefits will be less meaningful.²⁹ Thus the flexing and softening of the principle of *ijbari* in article 189 of the Compilation of Islamic Law is rational, juridical and aspirational and well-founded, as a manifestation of the *ushuliyah* rule which states that refusing and avoiding a damage (*mafsadat*, danger) must be done and take precedence over attracting a *mashlahat* (benefit).³⁰

Third: Provisions in article 185 Compilation of Islamic Law concerning substitute heirs, stating that: (1) Heirs who die earlier than the inheritor "can" be replaced by their children, except those in article 173 ". Words in the provisions of this article are facultative and not imperative (*ijbari*), as stipulated in article 171 letters a, b, and c and article 187 paragraph (2) Compilation of Islamic Law and other articles. This means that in certain circumstances where mutual benefit requires, the existence of substitute heirs is enforced; but if certain circumstances require otherwise, then the provisions of the substitute heirs are not enforced. So the provision of substitute heirs in article 185 of the Compilation of Islamic Law is facultative and conditional; at the same time it is a stretching and softening of the principle of *ijbari* in the Compilation of Islamic Law.

Bilateral Principles

Bilateral principles mean that a person receives and obtains rights or parts of inheritance from both parties, both from male relatives and from female offspring relatives. This bilateral principle in the Compilation of Islamic Law is stated in the grouping of heirs: article 174, reads:

- (1) The heir group consists of:
 - a. According to blood relations:
 - male class consists of: father, son, brother, uncle and grandfather.
 - women class consisting of: mother, daughter, sister and grandmother.
 - b. According to marital relations, widower or widow.
- (2) If all heirs are present, then those who are entitled to inheritance are only: children, father, mother or widower ".

The explicit formulation of male and female groups simultaneously as heirs in the article referred to, is the implementation and realization of bilateral principles. This is based on the provisions of al-Quran surat al-Nisa 'verses 7, 11 and 12, and 176; which contains the meaning and understanding that between parents and children, between men and women have the same status in family and inheritance.³¹ So between man and woman in inheriting inheritance, their

²⁹ Idris Djakfar dan Taufiq Yahya, *op.cit.*, p. 32.

³⁰ The term is:

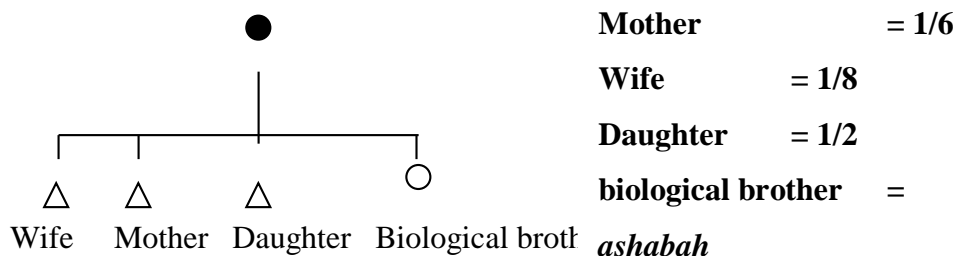
درء المفساد مقدم على جلب المصالح

"Refusing damage (*danger*) takes precedence over drawing (*taking*) *mashlahat* (*goodness*) ".

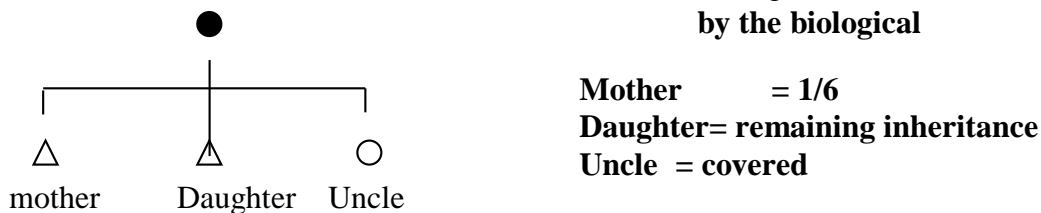
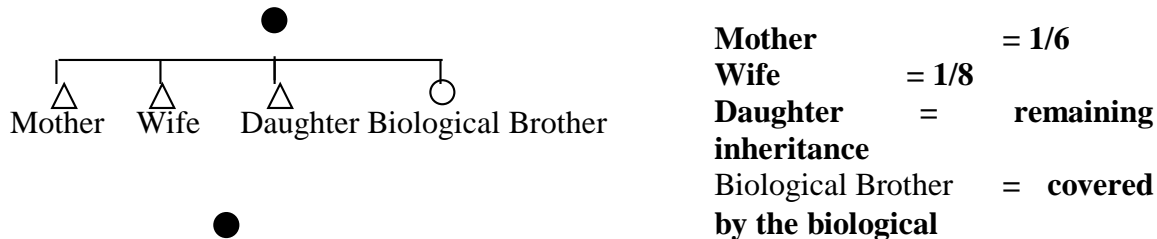
³¹ Abdullah Syah, *Keharusan membagi Harta Pusaka Menurut Hukum Islam dan a Zaman*, Medan: Makalah, UISU, 28 Januari 1993, p. 2.

parents have equal status with each other. In addition, in article 174 paragraph 2 the Compilation of Islamic Law the words "children" are called absolutely without the statement of men or women. This means that if there is a child, both male and female, he can hijab hirman (complete closure) against the heir's sadra or siblings, whereas according to Sunni jurisprudence, if the child can only hijab nuqshan (reduce part of the heirs of ashabah). For example, comparisons can be described in the diagram as follows:

a. According to fikih *Sunni*:



b. According to Compilation of Islamic



The formulation of the Compilation of Islamic Law in this issue seems to follow the interpretation of Ibn Abbas against the words of the child (walad) in al-Quran surat al-Nisa 'verse 176, which includes both boys and girls. Whereas according to Sunni jurisprudence, the words of the child (walad) in this verse only mean boys.

As for the magnitude of the portion of boys and girls still maintaining the provisions of al-Quran surat al-Nisa 'verse 11 which is a standard in Islamic inheritance law. This is reflected in the formulation of article 176 of the Compilation of Islamic Law, which reads:

"Daughter if only one person gets half the share, if two or more people together get two thirds of the share and if the daughter together with the boy, then the boys' part is two to one with the daughter "

According to Yahya Harahap³², there are several reasons that are used as a basis for consideration to keep confirming the standard of furudh al-muqaddarah contained in faraidh law in the Compilation of Islamic Law, among others:

1. Nash Surat al-Nisa 'paragraphs 7 and 11 concerning the determination of a 2: 1 portion between boys and girls have been interpreted (detailed) and sharih (clear, bright) so that the values set forth in it are qath'i (surely)
2. Determination of the comparison of furudhul muqaddarah between boys and girls is considered objective, realistic and rational in accordance with the value of compensation between the rights of girls and the obligations of boys:
 - i. girls have the right to get a dowry, a living, a place to live and furniture.
 - ii. on the contrary, boys are burdened with the obligation to pay dowry, provide a living, provide a place to live and furniture.
3. Apart from that, the formulator of the Compilation of Islamic Law which retains furudhul muqaddarah, after approaching the doctrine of opinion of the schools of thought, coupled with the results of the opinions of ulema respondents and scholars throughout Indonesia.

Precisely because of that, Abdullah Syah stated that according to a simple calculation, it turned out that women were fortunate, because their lifetime income was the responsibility of men. When he was a child, he was responsible for his father's; if she has a husband, her husband is the responsibility of her husband; and if you have become a mother (already old) her living is the responsibility of her son.

However, if observed in the provisions of the articles of the Compilation of Islamic Law, there is a path of "peace" as stated in article 183 of the Compilation of Islamic Law, which opens the opportunity to deviate from the stability of the norm al-Quran surat al-Nisa 'verse 11. Thus, if the article 176 The Compilation of Islamic Law is linked to the solution outlined in article 183 of the Compilation of Islamic Law, the reference to the application of the amount of inheritance between boys and girls, which is normatively two to one, but through peace (ishlah) can be applied deviate from the predetermined part.

The aforementioned bilateral principle is also seen in article 179 and 180 of the Compilation of Islamic Law which gives reciprocal rights and positions between husband and wife to inherit each other. Where widowers get half the share if the heir does not leave the child; and if the heir leaves the child, the widower gets a quarter of the portion. On the other hand, the widow receives a quarter of the share, if the heir does not leave the child and if the heir leaves the child, the widow obtains an eighth part. Likewise, the inheritance of grandfather and grandmother is developed from the word "abun" (father) and the word "ummi" (mother) in the Koran, which is also included in the bilateral principle which gives parents the rights and position to inherit their children. Article 177 Compilation of Islamic Law states:

"Dad gets a third of the share if the heir does not leave the child, if there is a child, the father gets one sixth of the share".

But the formulation of this article needs to be perfected because the father as zawi al-furudh is only entitled to one sixth if there is a child and if there is no child, the heirs only consist of

³² M. Yahya Harahap, *op.cit.*, p. 27.

father and mother, then the father gets two thirds.³³ And if the inheritor does not leave the child, the heir consists of father, husband and mother, then the father gets a third part; and dad gets a second, if there are no children, while heirs only consist of father, wife and mother.

As for the mother stated article 178 of the Compilation of Islamic Law, reads:

1. Mother gets one sixth part, if there are children or two siblings or more, if there are no children or two brothers or more, then she gets a third part.
2. The mother gets a third of the remainder after being taken by a widow or widower when together with father.

From the expansion and development of such understanding, the application of the bilateral principle includes the line of kinship to the top, both through men and through the women.

The inheritance principle of the two kinship lines also applies to the side line relatives, that is, brothers and sisters inherit in a state of reconciliation, ie someone who dies without leaving a child (children) and parents.³⁴ This principle is contained in article 181 and article 182 of the Compilation of Islamic Law.³⁵ The formulation of these two articles is guided by al-Quran surat al-Nisa 'verses 12 and 176; where in verse 12 surat al-Nisa 'establishes the inheritance of brothers and sisters with different divisions with the rights or parts obtained by you in the same letter al-Nisa' verse 176.³⁶ The difference shows that there is a difference in terms of people who entitled to receive inheritance. Because the rights of brothers both men and women in verse 12 of Surat al-Nisa 'are one-sixth or one-third, the same as the distribution of mothers, a conclusion can be drawn that what is meant by the brothers in verse 12 of the letter al-Nisa' is mother line brother; while the brothers in verse 176 of Surat al-Nisa 'are brothers of the father line or father and mother line.

Thus, the sideways line applies also the principle of two-way (bilateral) inheritance through the direction of the father and mother's direction.³⁷

Individual Principles

Individual principles mean that inheritance must be distributed to heirs to be owned individually. This principle is directly related to the principle of jurisprudence that if an inheritance is open, the inheritance must be immediately made to each heir according to the prescribed portion. In its implementation all inheritance is stated in a certain value which is then distributed to each heir who has the right to receive it. Every heir is entitled to the portion he gets without being tied to other heirs because each part has been determined.³⁸ This individual principle has been reflected in articles 176 to article 182 of the Compilation of Islamic Law.

³³ Muhammad Ali al-Shabuni, *Hukum Waris dalam Syari'at Islam*, (Bandung: Diponegoro, 1988), p. 36.

³⁴ *Ibid.*

³⁵ Article 181 The Compilation of Islamic Law reads: "When a person dies without leaving a child and father, the brothers and sisters each receive one-sixth of each. If they are two or more people together they get a third of the share".

³⁶ Article 181 The Compilation of Islamic Law reads: "When a person dies without leaving a child and father, the brothers and sisters each receive one-sixth of each. If they are two or more people together they get a third of the share".

³⁷ Muhammad Daud Ali, *Asas-asas Hukum Kewarisan dalam Kompilasi Hukum Islam*, tulisan dalam: *Berbagai pandangan Terhadap Kompilasi Hukum Islam*, (Jakarta: Yayasan al-Hikmah, 1993/1994), p. 91.

³⁸ Idris Djakfar dan Taufiq Yahya, *op.cit.*, p. 36.

Especially for heirs who obtain a portion of inheritance before he is an adult or unable to act to carry out his rights and obligations to the property he obtained from inheritance, he is appointed guardian based on a judge's decision on the suggestion of his family member. Article 184 Compilation of Islamic Law confirms:

"For heirs who are not yet mature or unable to carry out their obligations, then he is appointed guardian based on a judge's decision on the suggestion of family members".

The formulation of this article is based on the word of Allah SWT. Surat al-Nisa 'verse 5 which reads: "And do not surrender to those who are not yet perfect in the minds of their possessions in your power which is made by Allah as a means of life. Give them shopping (income) and clothing (from the results of the property) and say to them good words. "

Trusteeship for heirs who are not yet mature or not yet capable of acting to carry out their rights and obligations over property acquired from this inheritance, applies to children who have not reached the age of 21 years or have never married. Article 107 Compilation of Islamic Law states:

Paragraph (1): Trusteeship only for children who have not reached the age of 21 years and / or have never held a marriage.

Paragraph (2): Trusteeship includes guardianship of self or property.

Even so, the individual principle is still prioritized by calculating the assets of each heir, maintaining the assets of others (heirs) who are not suitable (capable) of seeking it and returning or surrendering the property to him when he is capable of acting on part of his property.³⁹

The Principle of Balanced Justice

The principle of balanced justice means that there must always be a balance between rights and obligations, between the rights obtained by a person and the obligations that must be carried out and fulfilled.⁴⁰

The reflection of this principle is stated in the articles concerning the large portion of each heir in article 176 to article 182 of the Compilation of Islamic Law. This principle is also developed in the settlement of acquisition carried out at the time of distribution of inheritance through a solemn resolution (aul)⁴¹, by imposing a shortage of assets to be shared with all eligible heirs according to their respective levels. Article 192 Compilation of Islamic Law formulates:

"If in the division of inheritance among zawi al-furudh heirs shows that the numerator number is greater than the denominator, then the number of the denominator is increased according to the numerator number and only then will the inheritance be divided according to the numerator number".

Example:

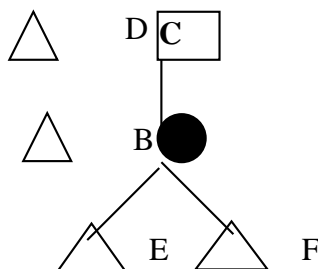
³⁹ *Ibid.*, p. 37.

⁴⁰ *Ibid.*, see also: Muhammad Daud Ali, *op.cit.*, p. 93.

⁴¹ *In the division of inheritance, the meaning is the reduction of each part of the heirs equally because the numerator is greater than the denominator.*

Someone (A) died leaving his wife (B), two daughters (E, F), mother (D) and father (C). The inheritance which will be divided after the issuance of debt, will and the cost of organizing the corpse is Rp. 540,000,000.00.

In the diagram can be seen as follows:



Calculation:

Heirs	Share	Tashihih	Each share according to aul (the divider is increased to 27)
Wife	1/8	3/24	3/27 x 540.000.000,00= 60.000.000,00
Father	1/6	4/24	4/27 x 540.000.000,00= 80.000.000,00
Mother	1/6	4/24	4/27 x 540.000.000,00= 80.000.000,00
Two daughters	2/3	16/24	16/27x 540.000.000,00=320.000.000,00
Total		27/24 (there is a lack of assets)	27/27x540.000.000,00=540.000.000,00

Apart from that, to realize the principle of balanced justice, at the time of completing the division of inheritance, a rad⁴² solution is also done, namely returning the remaining (surplus) assets to the heirs in accordance with their respective parts. Article 193 Compilation of Islamic Law states:

"If in the division of inheritance among zawi al-furudh heirs shows that the numerator is smaller than the denominator, while there is no heir heir, then the division of inheritance is carried out rad, that is in accordance with the rights of each heir, while the rest is divided equally between them ".⁴³

One thing that must be observed is that the formulation of this article does not differentiate between heirs due to blood relations with heirs due to marital relations in the distribution of inheritance rad; the jumhur among the scholars made a distinction. This means that there is an expansion and development, that widowers or widows get a portion (portion) in the case of rad distribution.

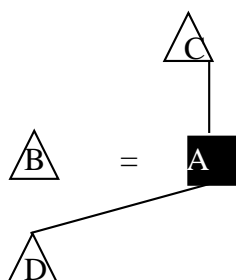
Example:

A (A) dies leaving an inheritance of Rp. 80,000,000, and his heirs: wife (B), mother (C), and a daughter (D).

⁴² Radd in the division of inheritance means that there is more left after inheritance is distributed to each entitled heir. These advantages, according to the Compilation of Islamic Law, are returned to each heir without distinguishing between heirs due to blood ties with heirs due to marriage.

⁴³ Departemen Agama, *Himpunan Peraturan Perundang-undangan dalam Lingkungan Peradilan Agama*, (Jakarta: Proyek Ditbinbapera, 2001), p. 364.

The diagram looks like this:



Calculation:

Heirs	Share	TASHIH (24)	Initial share
Wife	1/8	3/24	$3/24 \times 9.120.000.000, = 1.140.000.000,$
Mother	1/6	4/24	$4/24 \times 9.120.000.000, = 1.520.000.000,$
1 daughter	1/2	12/24	$12/24 \times 9.120.000.000, = 4.560.000.000,$
Total		19/24, there is residual property = $5/24 = 1.900.000.000,oo$. (returned to each heir with the number 19 used as a divider)	
DISTRIBUTION EACH ACCORDING TO RADD			
wifei	1/8	$3/19 \times 5/24 = 5/456$ $1/8 + 15/456 =$ $57/456 + 15/456 =$ $72/456$	$72/456 \times 9.120.000.000,oo =$ $1.440.000.000,oo$
Mother	1/6	$4/19 \times 5/24 = 20/456$ $1/6 + 20/456 =$ $76/456 + 20/456 =$ $96/456$	$96/456 \times 9.120.000.000,oo =$ $1.920.000.000,oo$
Two daughters	2/3	$12/19 \times 5/24 = 60/456$ $1/2 + 60/456 =$ $228/456 + 60/456 =$ $288/456$	$288/456 \times 9.120.000.000,oo =$ $5.760.000.000,oo$
Total		$456/456 = 1$	$456/456 \times 9.120.000.000,oo =$ $9.120.000.000,oo$

The realization of this principle of balanced justice is also given the opportunity to settle the division of inheritance by takharruj⁴⁴ or tashaluh (peace) based on an agreement with the heirs. Article 183 Compilation of Islamic Law states:

"The heirs can agree to make peace in the distribution of inheritance, after each is aware of its share".

Inheritance Principle Due to Death

⁴⁴ Takharruj is an agreement held by heirs to issue (resign) some of those who receive inheritance shares in return for certain goods from inheritance or other property. (see: Muzakkir AS., *Fikih Sunnah*, alih bahasa dari, al-Sayyid al-Sabiq, *Fiqh Sunnah*, (Bandung: al-Ma'arif, 1988), p. 288.

This principle states that inheritance exists and is open if someone dies. This means that inheritance is solely as a result of someone's death⁴⁵. This principle is reflected and is enshrined in Article 171 of the Compilation of Islamic Law which formulates the notion of inheritance law, heirs, heirs and inheritance, as well as articles 181 and 182 of the Compilation of Islamic Law. This gives the understanding that the property of a person cannot be transferred to another person and is called inheritance, as long as the person who owns the property is still alive, and all forms of transfer of property of someone who is still alive to another person, either directly or will be carried out later after his death, not included in the inheritance category according to the Compilation of Islamic Law.

Based on the provisions of the aforementioned articles, it can be stated that the Compilation of Islamic Law only recognizes inheritance due to death alone (*ab intestato*) and does not recognize inheritance on the basis of a will made by someone at the time he was alive (*testament inheritance*). This principle has to do with the principle of *ijbari* that one cannot at all determine the use of property after he dies, because the transfer of his property after he dies to his heirs applies naturally according to the decree of Allah SWT. without being suspended from the will, both the inheritor and heir.

Principles of Islamic Personality

This principle means that the transfer of inheritance only occurs if between the heirs and their heirs both adhere to Islam. This principle is reflected in the articles of the Compilation of Islamic Law, including:

1. Article 171 letter b reads: "The inheritor is a person who at the time of death or who is declared dead based on the decision of a Muslim court, leaves heirs and inheritance".
2. Article 171 letter c reads: "Heirs are people who at the time of death have a blood relationship or marital relationship with the heir, are Muslim and are not obstructed because the law becomes an heir".
3. Article 172 reads: "Heirs are considered to be Muslims if known from their identity cards or recognition or practice or testimony, while for unborn babies or children who are immature, religious according to their father or environment".

Precisely because of that, in the event that the heir does not have any heirs who are Muslim; Article 191 The Compilation of Islamic Law⁴⁶ provides a settlement by submitting the control of inheritance to the decision of the Religious Court to the Baitul Mal which will channel the use and use of its property for the benefit of the Islamic religion and general welfare.

However, so that the meaning of "equal to the one replaced" as referred to in the formulation of article 185 paragraph (2) the Compilation of Islamic Law becomes clearer, it needs to be associated with the successor heir group stated earlier. That is, that one degree is derived from one *jihat*, whether *jihat* (blood connection) *bunuwwah* (children), *jihat ukhuwwah* (brothers), *ubuwwah* (father) and *umumah* (mother)⁴⁷. Thus, what is meant by the same as the heirs who are replaced are those who have the same kinship and are connected by the same parents.

⁴⁵ *Ibid.*, p. 94.

⁴⁶ Article 191 The Compilation of Islamic Law reads: "If the heir does not leave the heirs at all or the heirs are unknown or not, then the assets of the ruling of the Religious Court will be handed over to the Baitul Mal for the sake of Islam and general welfare.

⁴⁷ Muhammad ibn Umar al-Bakriy, *Hasyiyah Syarh Matan al-Ruhbiyah*, (Surabaya: Dar al-Nasyr al-Mishriyah, 1146 H.), p 24.

The words "must not exceed" contained in article 185 paragraph (2) Compilation of Islamic Law is an imperative (forcing, *ijbari*) limitation, meaning that if the provision of a part that exceeds the smallest part of the direct heirs or according to the term Islamic Law Compilation equal heirs to those replaced; without an agreement among fellow heirs as stipulated in article 183 the Compilation of Islamic Law is null and void.

Conclusion

Construction and foundation of thinking the formulator of Islamic Law Compilation of Substitute Heirs ... The word "mawali" in al-Quran surat al-Nisa 'verse 33 contains several possibilities (*ihthimal*, probability). One possibility can be interpreted and directed to the understanding of substitute heirs (multilevel inheritance due to replacement). This is based on the verse's relationship with other inheritance verses, the rules of interpretation and the *ushuliyah* rules (*'ibarat al-nash*) and is supported by the hadith Huzail ibn Syurakhbil relating to and concerning the position of a granddaughter who starts off with a son (his father who has passed away). This was further reinforced by the Ahl-tanzil School of Hanafi School and Mutaakhhirin scholars in the Malikiyah and Syafi'iyah schools following Ibn Mas'ud's opinion that he was given the right to take the shares of the person above him (the last heir) as his successor.

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