

The Position of the Successor Heir in the Distribution of Property Perspective KHI dan KUH Perdata

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Abstract

This study aimed to determine the system of surrogate inheritans according to the Compilation of Islamic Law and the Civil Law Book and to determine the comparison of the surrogate inheritans according to the Compilation of Islamic Law and the Civil Law Book. The research method used in this research was normative study. The results of this study are that: 1. The inheritance system in the perspective of Islamic law is based on the provisions Article of 185 in the compilation of Islamic Law, paragraph (1), said that a grandson can act as a surrogate inheritan to replace the position of his parents who have died more before the inheritan himself. In the inheritance system in the Civil Law Book, found the three types of place replacement systems, namely: downward line replacement, sideways line replacement, and deviated line replacement in which contained in the articles of 842-845 of the Civil Law Book. 2. The comparative law regarding to the surrogate inheritans according to the Compilation of Islamic Law: That children who take the place of their parents are sons and daughters from the male lineages whose parents have died earlier than the inheritan him/herself, while boys and girls from the female lineages are not entitled to replace their mother's position in obtaining the property of their grandfather. According to the Civil Law Book: That the child who replaces his father's position may be from the male lineages or from the female lineages. The most important thing is that the person that being replaced has passed away earlier than the inheritan and he (the person that being replaced) is the liaison between his son (who replaced his father's position) with the inheritan.

Keywords: Inheritance Law, Substitutive Heir

Introduction



The Republic of Indonesia adheres to three legal systems that and is an order in social life. The three systems are the Customary Law System, the Islamic Law System, and the Civil Law (BW) system which has been codified into National Law. In its implementation, the three legal systems have different rules based on different rules. In the customary law system, the form of the law is mostly unwritten, which is a rule of life that develops in the community, the pattern and growth are left to the awareness of the indigenous people themselves, in what and which cases are considered fair. In addition to customary law, Islamic law also applies in Indonesia because most of the Indonesian people embrace Islam. This is in line with the theory of "Receptio a contrario" pioneered by Hazairin. "In fact, the law of adat is the one that applies in Muslim society if the customary law does not contradict Islamic law".¹

Inheritance law is one part of civil law as a whole and is the smallest part of family law. The law of inheritance is very closely related to the scope of human life. Because all humans will experience a legal event called a person's death. R. Santoso Pudjosubroto, Definition of Inheritance Law is a law that regulates whether and how the rights and obligations regarding a person's property at the time of his death will be transferred to another person who is still alive.² Soepomo said that, the meaning of inheritance law is the regulations that regulate the process of passing and passing intangible goods (immaterielle goederen) from a human generation (génération) to its descendants.³

The history of the development of inheritance law in Indonesia began at the time before the Dutch rule, the Dutch rule (colonial), and the Indonesian rule. According to Gibb in his book *The Modern Trends In Islam* quoted by A. Rahmad Rosyadi and M. Rais Ahmad, Muslims obey Islamic law because it is commanded by Allah and His Messenger. Thus, if they have accepted Islam as their religion, then they will automatically

¹ Zainudin Ali. 1998. *Pelaksanaan Hukum Kewarisan di Kabupaten Donggala*. Yayasan Al-ahkamm. Ujung Pandang. hlm. 41

² Ariza Umami, dkk. 2020. *Hukum Waris*. Laduni Alifatama. Lampung. hlm.

³ Ibid

accept the authority of Islamic law against him. For Muslims at that time, Islamic law is the will of Allah and the tradition of the Prophet.⁴

Indonesia declared independence, on August 17 and On August 18, 1945, the results of the formulation of the Draft Constitution by the Indonesian Independence Preparatory Committee (Nine Committee) were ratified into the Constitution of the Republic of Indonesia in 1945. 1945. With the declaration of an independent Indonesia, it means that it affects the Indonesian legal system. Furthermore, Article II concerning the transitional rules of the 1945 Law emphasizes that the Dutch colonial heritage law is still valid as long as its soul does not conflict with the Constitution. In this case, Hazairin understands the article that Dutch colonial law which is considered the product of receptive theory is no longer valid must be expunged because it is contrary to the Qur'an and the Sunnah of the Prophet (receptive exit theory).⁵

The law of inheritance before Islam was greatly influenced by the social system which is embraced by the existing community. The Jahiliyah community with its social pattern is tribalism, has nomadic habits, likes to fight and plunder loot. ⁶

The law of inheritance is obligatory for Muslims to be obeyed, from the many mentions in the Qur'an about the law of inheritance in surah An-Nisa' ending with an affirmation in Surah An-Nisa' ayat 14.

Shaykh Abdurrahman bin Nashir as-Sa'di's interpretation of this verse is that it falls under the category of immorality, namely disbelief and other disobedience that is lighter than it, so that there is not a single syubhat in that verse for the khawarij who thinks that the perpetrators of immorality are disbelievers, because Allah has prepared a paradise for those who obey Him and His Messenger, then whoever obeys Allah with perfect obedience, he will enter Paradise without torment, and whoever disobeys Allah with perfect iniquity and includes shirk or otherwise, he will enter Hell and he will remain in it, while whoever mixes disobedience and obedience with it, then he has the cause of reward and torment according to what is in him from that obedience and disobedience. And

⁴ A. Rahmad Rosyadi dan M. Rais Ahmad. 2006. *Formulasi Syariat Islam Dalam Perspektif Tata Hukum Indonesia*. Ghalia Indonesia. Bogor. hlm. 74.

⁵ Ibid

⁶ Ahmad Rofiq. 2012. *Fiqh Mawaris*. Raja Grafindo Persada. Jakarta. hlm. 7



Actually, there have been many nash-nash mutawatir that show That those who practice monotheism do not remain in Hell, and whoever has monotheism, then he becomes a barrier for him from eternity in Hell.⁷

In the Compilation of Islamic Law, the law of inheritance or faraid is a person who at the time of death has a relationship and marital relationship with the heir, is a Muslim, leaves behind the heirs and the estate of the legacy. Thus, what is meant by heirs is those who clearly have the right of inheritance when the heir dies, there is no obstacle to inheritance (there is no mawani'al-irts). The Islamic Inheritance Law in Indonesia contained in the KHI (Compilation of Islamic Law) has also introduced the existence of a surrogate heir institution in terms of handling the case of a child whose father died before his grandfather.

The reality that is often seen is that children whose father's death preceded their grandfather's lives in poverty, while their father's siblings live in poverty. This condition caused the orphan to suffer because of the loss of his father as well as lose the right to inherit because he was hijab by his father's brothers. Indeed, among the many cases there are several dispensations where a grandfather makes a will for the orphaned grandson. But often a grandfather also dies before doing so.

Overview of Inheritance Law in Indonesia⁸

The definition of inheritance law according to Gregor Van Der Brught is that inheritance law is a set of rules, which regulate the legal consequences of property upon death, the transfer of property left by the deceased person and the legal consequences that this transfer causes for the beneficiary both in the relationship and balance between them and with third parties.⁹ R Wirjono Prodjodikoro according to the law of inheritance as a matter of whether and how various rights and obligations regarding a person's wealth when they die will be transferred to the person

⁷ A. Khisni. 2013. *Hukum Waris Islam*. Unissula Press. Semarang. hlm. 5

⁸ Fatimah Zuhrah. 2017. *Ahli Waris Pengganti Dalam Pembaharuan Hukum Kewarisan Islam Indonesia*. hlm. 3- 4

⁹ Gregor van der Brought. 1995. *Hukum Waris*. PT Citra ADITYA Bakti. Bandung



who are still alive. In other words, the law of inheritance can be formulated as One of the legal regulations that regulates the transfer of inheritance from the heir due to death to the heir.¹⁰

Before the Dutch rule, the application of Islamic law had been carried out by many Islamic kingdoms in the archipelago such as the kingdoms of Pasai, Demak, Cirebon, Buton and Ternate. In general, the understanding that is embraced is mahzab Shafi'i. In the implementation of Islamic law in these kingdoms it is not partial. According to Gibb in his book *The Modern Trends In Islam* quoted by A. Rahmad Rosyadi and M. Rais Ahmad, Muslims obey Islamic law because it is commanded by Allah and His Messenger. Thus, if they have accepted Islam as their religion, then they will automatically accept the authority of Islamic law over themselves. For Muslims at that time, Islamic law was the will of Allah and the tradition of the Apostles.¹¹ Furthermore, in a theory of krido, which is a theory that requires the implementation of Islamic law by those who have pronounced two sentences of the shahada as a logical consequence of the pronouncement of their creed.¹²

Pemberlakuan hukum Islam di Indonesia pada saat itu Berdasarkan pada The mahzab embraced by the sultans, Islam has changed the mindset and perspective of the Indonesian people's consciousness so that it becomes a custom and daily behavior.¹³ Usually the application of Islamic law in Islamic kingdoms has a great influence on the mahzab embraced by the Sultans, for example, the people of Aceh state that Islamic law is their custom, the custom is Islamic law. In the Minangkabau society, there are rules, the custom of sharia', syara' sharia', kitabullah. Likewise, on the island of Java, the influence is so strong that the Qur'an, As-Sunnah, ijma', and qiyas have been used as a measure of scientific truth and guidelines for behavior.¹⁴

At the end of 1989, the House of Representatives and the Government's commitment fought hard to make the religious courts have the same position, duties and functions as other courts stipulated by Law Number 7 of 1989

¹⁰ Wirjono Prodjodikoro, S.H. 1980. *Hukum Warisan di Indonesia*. Sumur Bandung. Bandung

¹¹ A. Rahmad Rosyadi dan M. Rais Ahma. 2006. *Formulasi Syari'at Islam Dalam Perspektif Tata Hukum Indonesia*. Ghalia Indonesia. Bogor. hlm. 74

¹² Imam Syaukani. 2006. *Rekontruksi Epistemologi Hukum Islam Indonesia Dan Relevansinya Bagi Pembangunan Hukum Nasional*. PT RajaGrafindo. Jakarta. hlm. 67

¹³ A. Rahmad Rosyadi dan M. Rais Ahma. 2006. *Formulasi Syari'at Islam Dalam Perspektif Tata Hukum Indonesia*. Ghalia Indonesia. Bogor. hlm. 74

¹⁴ Ibid

about the Religious Court, by having authority in the case marriage, inheritance, will, waqf and grants based on Islamic law, and sadakah (Article 49). Furthermore, based on Law No. 3 of 2006 concerning the amendment of Law No. 7 of 1989, the word based on Islamic law is eliminated, then the religious court has authority in cases of marriage, inheritance, will, grants, waqf, zakat, infaq, shadakah and sharia economics.

In the development of Islamic law in Indonesia, the Compilation of Islamic Law (KHI) was born. The main companion of the preparation of the KHI is to positively apply Islamic law in Indonesia, which is used as a guideline by judges in carrying out their duties so that there is a guarantee of unity and legal uncertainty. Because for Islamic law to be enforced in Indonesia, there must be clear laws that can be implemented by law enforcement officials and the community. With the birth of KHI, all judges in the religious court environment were directed to the same perception of law enforcement. KHI consists of three books, namely: Book I on Marriage, Book II on Inheritance, Book III on Waqf.

Classification and Position of Heirs

The Compilation of Islamic Law has determined who is entitled to be the heir and determined his class. Article 174 paragraph (2) of the KHI explains that heirs consist of: Male heirs, namely father, son, brother, uncle, grandfather and husband. Female heirs, namely mother, daughter, sister, grandmother and wife.¹⁵ The Civil Code has determined the family or who is entitled to be the heirs, including the wife or husband who is left behind and the legal or illegitimate family of the heir. Legal heirs or abintestato heirs Based on blood relations, there are four groups, namely:¹⁶

The first group is the family in a straight line downwards, namely their children and descendants and the husband or wife who is left behind or who lives the longest. Therefore, if there are four children and widows, then they each get the right to 1/5 of the inheritance.¹⁷

¹⁵ Kompilasi Hukum Islam

¹⁶ Eman Suparman. 2005. *Hukum Waris Indonesia*. PT Refika Aditama. Bandung. hlm. 30

¹⁷ Zainudin Ali. 2008. *Hukum Islam*. Sinar Grafika. Jakarta. hlm. 83



Golongan kedua adalah keluarga dalam garis lurus keatas, meliputi orang elders and brothers, both men and women and their descendants. For parents there is a special rule that guarantees that their share will not be less than 1/4 of the inheritance, even if they inherit together with the heir's siblings. Therefore, if there are three sisters who are heirs together with father and mother, then father and mother will each receive 1/4 of the entire inheritance, while half of the inheritance will be inherited by three brothers who each receive 1/6 share.

The third group is the heirs which includes grandparents, and ancestors and the next generation of heirs. The third group of heirs consists of families from a straight line upwards after the father and mother, namely the grandparents and continuing up indefinitely from the heirs. This happens if the heirs do not leave the first and second group heirs at all. The heirs of the fourth group include members in the sideways line and other relatives up to the sixth degree. What is meant consists of the side line family, namely uncles and aunts and their descendants, both from the paternal line and the maternal line. The descendants of uncles and aunts up to the sixth degree are counted from the deceased (who died). If part of the mother's line has no heirs at all until the sixth degree, then part of the mother's line falls to the heirs of the father's line. And vice versa.

Kedudukan Ahli Waris Pengganti

Surrogate heirs are people whose relationship with the heir is interspersed with the heir, but has died before the heir. Because if the heir is still alive, of course the presence of the successor heir is not taken into account. For example, the relationship between grandparents and grandchildren is interspersed with children. The grandchild will be the successor if the child has died before the grandchild. If the child is still alive, then the grandchild will not be an heir. You cannot be the heir in place of your father, because he is the direct heir.¹⁸

The idea of a surrogate heir was first put forward by Hazairiin, an Indonesian scholar. Hazairin divided the heirs into *zul-faraid*, *zul-qarabah* and *mawali*. This *mawali* group replaced the position of his father who died before

¹⁸ Eman Suparman. 2007. *Hukum Waris Indonesia dalam Perspektif Islam, Adat, dan BW*. Refika Aditama. Cet.II. Bandung. hlm. 27



heir. In the concept of a surrogate heir / mawali, Hazairin Revealing the use of the word substitute heir as the equivalent of mawali is actually not so appropriate. However, the term is still used because the word surrogate heir is contained in customary law.¹⁹

Hazairin took the surrogate heirs found in the customary law in Indonesia and the Civil Code as his *ijtihad*, he termed it mawali and based it on *surah an-Nisa'* (4) verse 33. Hazairin's interpretation of the above verse is: And for each of them I (Allah) have made a mawali for the inheritance of father and mother and for the inheritance of the immediate family, as well as the inheritance for your covenant bearing, therefore give him his inheritance.²⁰

Hazairin concluded that the substance of the mawali is not the child or brother who is the heir but the mawali, so the child or brother must have died before the heir, because if the child or brother is still alive, then he himself is the heir. What is meant by holding a mawali for the fulan is that the part of the fulan that he would have obtained if he had lived, from the inheritance is distributed to his mawali, not as his heir but as the heir of the heir to his mother or father who left the property. Hazairin concluded that the mawali are the heirs due to the succession, that is, the people who become the heirs because there is no longer a link between them and the heirs. In addition, those who are the mawali that the Qur'an verses want are those who are related through birth or those who are related by blood side.

Heirs in the KHI are mentioned in article 171 paragraph (c): "Heirs are people who at the time of death have a blood relationship or marital relationship with the heir, are of Islamic faith and are not prevented by law from becoming heirs". The heirs found in the KHI are basically the same as the heirs in Islamic fiqh books, with the exception of men and women who freed slaves, because in Indonesia there is no slavery. However, it is possible that there will be additional surrogate heirs such as grandsons and daughters of girls and boys, where the daughter has died before the heir. In Islamic inheritance law, it is also known that there is a *mahjub* (the closure of experts)

¹⁹ Hazairin. 1982. *Hukum Kewarisan Bilateral Mmenurut al-Qur'an dan Hadith*. Tintamas. Jakarta. Cet. V I

²⁰ Ibid



heirs). Not blocked, but closed. For example, a grandchild can't inheritance if there are children. Then the grandfather also did not get an inheritance if his father was still alive. So, in Islamic inheritance law, it is known *ashabul furudh*, that is, those who are entitled to receive an absolute share of the inheritance or will not be covered by anyone. *Ashabul furudh* is the first husband or wife who is left to die by his wife or husband. This husband or wife absolutely gets the inheritance of the heir (the deceased) and cannot be hindered by anyone. However, if the heir has children, then his children (both female and male) also get the inheritance.²¹

Conclusion

The position of the surrogate heir in the perspective of Islamic law, at first the surrogate heir was not known in the concept of inheritance law in the books of *fiqh* which then this could cause a sense of injustice for the surrogate heirs, so on this basis *ijtihad* was carried out in order to solve various new problems that emerged, including the surrogate heirs. The position of the surrogate heir in the perspective of Islamic law If you look at the provisions of Article 185 KHI paragraph (1), it can be said that a grandchild can act as a surrogate heir to replace the position of his parents who have died before the heir. However, in the Compilation, the share of the surrogate heirs is limited, it must not exceed the share of the heirs that is equivalent to the successor heir. The position of the surrogate heir in civil law (BW) is called *plaatsvervulling*. Replacement of place in inheritance law is called heir replacement, which is the death of a person by leaving behind a grandchild whose parents died first. This grandson takes the place of his deceased parents to inherit from his or her grandparents.

The meaning of the successor heir includes a straight line down and also from a sideways line. So this article, in addition to being able to accommodate the grandchildren of the heirs, both boys and girls, can also accommodate the children (descendants) of brothers who died first while still paying attention to the *hijab* rules between the higher and lower degrees. If

²¹ Mardani. 2015. *Hukum Kewarisan Islam di Indonesia*. Raja Grafindo. Jakarta. hlm 27



The deceased is a wife and has no children, so the husband get half of the inheritance, while if you have children the husband gets 1/4. If the deceased is a husband and has no children, then the wife gets 1/4 of the inheritance of the heir, while if she has children, the wife gets 1/8. If the heir's parents are still alive, then the heir's father and mother also get inheritance and cannot be covered by anyone. So there is *ashabul rufuj* that goes up (i.e. parents), sideways (i.e. husband or wife), and downwards (i.e. children). Siblings can get an inheritance if the heir has no children.²² The Gospel of Jesus Christ

According to the Civil Code (BW), there are three types of substitution of places (representation or *bij – plaatsvervulling*), namely: substitution in the line downwards, side and deviant lines.²³ He explained that a child born after his father had died was entitled to an inheritance. This is regulated in Article 836, "Bearing in mind the provisions in Article 2 of this Book, in order to act as an heir, a person must have existed at the time the inheritance falls away". There are three types of succession in the law of inheritance, namely: *the first* is in article 842 where the succession in a legal straight to down line, continues without end. In all cases, such a substitution is permissible, both in cases where several of the children of the deceased inherit together with the descendants of a child who has died first, or where all their descendants inherit together, each other in family relations of varying degrees.

Second, article 844 whereby in the deviating line the succession is allowed for the benefit of all the children and descendants of brothers and sisters who have died first, whether they inherit together with their uncle or aunt, or the inheritance after the death of all the relatives of the deceased must first be divided among all their descendants, each of whom is related to each other in different families. *Thirdly*, article 845 explains that the change in the deviating line is also permissible for inheritance for nephews, that is, in the case if, in addition to his nephew who is related to the deceased's closest blood relatives, there are still children and descendants of brothers or sisters from whom the relatives have died first.

²² Ibid

²³ M Idris Ramulyo. 2004. *Perbandingan Hukum Kewarisan Islam dengan Kewarisan Kitab Undang-undang Hukum Perdata*. Sinar Grafika. Jakarta. hlm. 104



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