

ISLAMIC LAW REVIEW ON THE DETERMINATION OF SURROGATE HEIRS

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Abstract

The surrogate heirs position on Islamic laws in Indonesia reflects a justice form in the inheritance distribution, and constitutes a relief to the inheritors of inheritance, which is called the pre-emptive policy i.e., in the testator's life by distributing his property to the heirs or heirs substitute. In accordance with the objectives of Islamic law (maqashid al-syari'ah) is intended for the benefit of the ummah and the theorem of Al-Maslahah Al-Mursalah which is necessary for caution, avoid following harmful lusts. Then the problem is: What underlies the surrogate heirs position in Islamic law and how it relates to the Maslahah Mursalah's theory in Islamic law. The result of the research shows that, the substitute heirs position in Islamic law is based on the Article 185; Islamic Law Compilation in Indonesia by adhering to the principle of monotheism, an obedience to God's rule by not forgetting Ijtihad. And the relationship with Maslahah Mursalah theory which is tied to Tawheed is the basis of this theory, i.e.: seeking the benefit for Allah SWT. there are benefits that are covered in the objectives of syara, so regarding to the surrogate heirs is done by giving priority to the benefit.

Keywords: Islamic Law; inheritance; surrogate Heirs;

A. INTRODUCTION

Islamic Law Compilations (KHI) Inpres number 1 Year 1991, is the result of the individual interpretation (ijtihad) of the jurist (mujtahid) i.e.: Joint Decision dated March 21, 1985 a Justice Chief of the Supreme Court and the Religion Minister of Indonesian Republic who's formed the committee to collect materials and design a Compilation of Islamic law, concerning marriage law, Inheritance and representation which will be used by the Religious Courts in carrying out its duties and authorities (Abdurrahman, 1992, p. 18). The nature of the President Instruction (Inpres) is an application of the verse (QS.4:59) states that the Islamic law sources consists of Kitabullah, As-Sunnah, and Ijtihad, mentioned with:

يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولِي الْأَمْرِ مِنْكُمْ فَإِن تَنَزَعْتُمْ فِي شَيْءٍ فَرُدُّوهٗ إِلَى اللَّهِ
وَالرَّسُولِ إِن كُنتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ذَلِكَ خَيْرٌ وَأَحْسَنُ تَأْوِيلًا

O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result.

From this verse, emerges the theory of law is obedience, because, Muslims are obliged to obey Allah and Rasulullah Saw, and follow the rules which was made by the country. According to Ichtijanto, in Praja, that an obedient to Allah SWT and obedient to His Messenger describes the obediences to the Islamic Shari'ah and

follows *ulil amri* is to describe the obedience of a Muslim; *ijtihad* that was done by *ulil amri* to answer need challenges caused by an alteration and development (Prajna, 1991, p. 103).

The origin word of "Waris" (inheritance) is derived from the Arabic word "inheritance" gramitically means "the dwelling" hence thereby when connected with the question of inheritance law, the word of the inheritance means the persons who are entitled to receive the heirlooms of the treasure abandoned by the dead, and popularly termed the "heirs. And the basic principle of Islamic inheritance law is contained in (Q: 4: 7) mentioned as follows" (Lubis & Simanjuntak, 2000, p. 52): "For men, there was a right part of the parent treasures (mother of the father and his relatives), and for the daughters there was a part right (also) from the parents treasures (mother's father and his relatives), whether little or much according to the section that has been established".

The verse above is a rule that regulates the existence of the right heirs of both men and women over the distribution the estate of the deceased heirs, based on the decree of Allah SWT. Regarding with the inheritance matter of the heirs in the form of his property or his possession then, may be inherited to his heirs in accordance with the applicable provisions (Lubis & Simanjuntak, 2000, p. 35). In inheritance of Islamic heredities law, there are three causes of inheritance, ie: (a) by marriage; (b) the relationship of consciousness; (c) because *wala* or "guardianship" of kinship that arises frees slavery (Suryana, 1997, p. 144), because of a legal marriage creates inheritance relationships.

If a husband dies, then his wife or widow inherits her husband's property, so if a wife dies, then her husband inherits his wife's property. What is meant by a kinship here is the family relationship, this kinship giving rise to inheritance rights if one dies. for example, between a child and his parents. "Wala" is a *hukmiyyah* relationship, a relationship established by Islamic law. Because the master / master has given pleasure to live freely and restore human rights to his slave, he asserted if a master freed his slave, then there was a family relationship called *wala'ul ' itqi*, in the presence of that relationship an heir of the freed slave, on condition that the slave does not have heir at all, either because of kinship or marriage. But the present "wala" in Indonesia does not exist.

Article 171 Chapter 1 the intent of inheritance law shall be the law governing the transfer of ownership rights of the heirs, determining who is entitled to become a citizen and respectively, respectively, then, the heir, who is a person who at the time of death or who is declared to have died based on a court decision Moslem, leaving the heirs and treasures of the relics, the expert, the person who at the time of death of the world has a blood relation or marriage relationship with the heir of various islam and is not hindered because of the law to be the heirs, the treasure of heritage is left by the good heirs in the form of property be his or her own rights.

Regarding the position of successor heirs to the nature of justice in Islamic law, which includes various aspects of life, including in family law and inheritance, Allah Almighty commands human beings to be fair in all things, fair command applies to everyone indiscriminately, division of inheritance. In the Islamic heritage experienced the development of the inheritance law as proposed by Munawir Sjadzali, the growing spirit of return to religion among the Islamic community in Indonesia, but must be acknowledged still quite a lot of "ambiguous" attitude in the observance of Islamic law, meaning not consistent (Sembodo, 2005).

On the justice principle terms, it can be seen Munawir's opinion that, many families who take the policies pre-emptiv, (preceding) in the lifetime of distributing most of the wealth to his children with equal parts regardless of gender, as grants, or in South Kalimantan is better known as "mandatory will" so that when the heirs die, the wealth is low or almost exhausted, in that case there is no deviation, but whether the adherence of Islamic law or the implementation of religious teachings with such spirit is correct? (Sembodo, 2005).

B. METHOD

This article is written by applying the theory of al-Mashlahah al-Mursalah. The occurrence of deviation from *faraid* is not always caused by the lack of belief in religion but can also be caused by consideration for the good in the future, but is expected to fulfill the principle of justice in Islamic law, which brings the good of the hereafter. From the description there are several issues to be researched such as the successor heirs in Islamic law of inheritance, whether there is a relationship of heirs' standing with the principle of justice in Islamic law, both in terms of principles of justice and the law. The identification of the problem is What underlies the position of successor heirs in Islamic law and how it relates to al-Maslahah al-Mursalah's theory in Islamic law.

C. RESULT AND DISCUSSION

1. Legal Foundation of Substitute/surrogate Heirs

Legal Foundation of Substitute Heirs can not be separated from the main issues that are about the law of successor heirs and to arrive at the position of surrogate heirs. It's need to be seen that the existing inheritance law and applies in Indonesia nowadays was still a legal unification (Barlinti, 2014). On the basis of inheritance laws is still pluralistic, consequently until now the legacy of the inheritance in Indonesia there was still no uniformity. The form of inheritance legal system is closely related to the form of society and kinship, while the familial system in Indonesian society stems from the system of drawing the lineage (Lev, 1962).

In connection with this matter as it is known in Indonesia in general there are at least three kinds of legal system of heredity (Barlinti, 2014), ie: Patrilineal system / nature, Matrilineal system / maternal nature. Bilateral System or parental, Pluralistically inheritance law in Indonesia caused by custom the varied customs of Indonesian society, and complemented by the legal system of Islam inheritance, sourced from the Qur'an, As-Sunnah. And Ijtihad. This legal system is quite dominant in the Muslim community in Indonesia. Then the law of western heritage relics of the Dutch East Indies which originated in BW / Burgerlijk Wetboek (Al-Mabruri, 2017).

The inheritance laws as one of the law areas which were outside the field that is difficult to be renewed by the legislation ways or codification in order to achieve a legal unification. This is due to efforts to make the inheritance law in accordance with the needs and awareness of the community will always get into trouble, given the diversity of cultural, religious, social, and customs and kinship systems that live and thrive in Indonesian society. Therefore the inheritance law applicable in Indonesia depends on the law of the heir, meaning "the inheritance law which applies to the deceased", meaning that the heir of the Indonesian people then the law of inheritance is customary law, if heirs of the European population, or the Foreign Orient China, for them to apply the west law of inheritance (Sutantio, 1979, p. 84).

Whereas if the heir of the Muslim population of Indonesia usually use the law of inheritance based on Islamic inheritance law, and for heirs of other foreign population groups such as Arab, Pakistani or Indian, then against them apply their respective laws. According to Eman Suparman, from the pluralistic principles of inheritance of Indonesia's pluralistic inheritance it would be understandable how difficult it is to unify the inheritance law system in the form of an aspired national Indonesian legal system (*Ius Constituendum*) (Djarmiko, 2018). Islamic inheritance laws is based on the Qur'an; as the highest law sources then As-Sunnah as the second source and jurists results of Islamic jurists as it was outlined in a compilation through the government's decision, such as Presidential Instruction No. 1 of 1991 Compilation of Islamic Law.

Q.S. An-Nisa (4): verse 7, "For men there is a right of a portion of the treasury as long as the mothers, and their relatives, and for women there are also the treasures of the fathers, and the relatives, whether little or more according to which has been set"; verse 11, "Allah has made it your intention for her (division of inheritance) for your children, that is, the portion of a boy is equal to the share of two daughters. And if the child is more than two women, then for them two-thirds of the property left behind, if the daughter is one, then he gets half the treasures. And for two mothers-each man gets one-sixth of the abandoned property if the deceased has a child, and if the deceased has no children and is inherited by his mother, his mother gets a third if the heir has several brothers, his mother gets one-sixth (those divisions after the bequests he made, or after paid the debt; verse 12 "And for (husbands) half as long, from the treasures left by wives, otherwise they have no children. If the wives have children, they get a quarter, from the property left behind, after the wills, if they make or (and) after it is paid the debt. Wives have a quarter of what you leave behind if you have no children, if you have children, then the wives earn eighth of the property you left behind after the wills you made, or (and) after being paid your debts ... "

So, In the Qur'an concerning the law of inheritance such as: men and women have a part of their inheritances; regarding inheritance child divisions, mother's part, and father (parents), as well as will and debt of the testator; and part widower and widow section. The inheritance forms or treasure relics according to the Islamic law is different from the inheritance of Western law as well as customary law of inheritance. Inheritance according to the Islamic law is "a certain amount of property and all the rights of the dead in a clean state" means the property of inheritance inherited by the heirs is a number of property and all rights, "after deducting the payment of the debts of the testator and the payments another caused by the death of the heir" (Prodjodikoro, 1991, p. 17).

According to Hazairin, "the Islamic inheritance system is a bilateral individual system" Qur'an mentions in the An-Nisa verse: (7), (8), (11), (12), (33), and (176). This is a feature or specification legal system of Islamic inheritance according to the Qur'an. Heir is a deceased person, both male and abilities who abandon any property or rights acquired during his life, whether by will or by no will, and on which to inherit according to the Qur'an that are: because of blood relationship; relationship *semenda* or marriage; brotherhood relationship, because the religion prescribed by Al-Qur'an is not more than one-third of the heirs of QS.A-Ahzab: (6); and the relatives relation due to movement (*hijrah*), the first era at the beginning of Islamic development, although no blood relation QS.Al-Anfal: (75) (Suparman, 2007, pp. 16–17).

As it is known that heirs in Islamic law, is a person or a few people who are entitled to part of the estate, the outline of the heir class can be divided into three groups, there are: The heirs prescribed in the Qur'an are called *dzul faraa'idh*, ie the direct heirs who must always receive certain fixed parts which are unchanging, this is contained in the Qur'an of An-Nisa: *ayar* 11,12,176 and Komar Andasasmita, describes the number of heirs based on the Qur'an which consists of twelve types (Andasasmita, 1987, p. 29), In the downward line: daughter; daughters of sons (QS.IV: 11): In the upward line: father, mother, grandfather of the father line, grandmother either from the father line or from the mother line (QS.IV: 11); in the sideline: a half-sister and a thousand from the father's line, half-sister of the father's line (QS.IV: 176), half-brother of the mother's line (QS.IV: 12), stepparent's brother (*halfzuster* from maternal line (QS.IV 12), widower, and widow (Surah IV: 12)

The heirs drawn from father lines, called the *Ashabah*, which in Arabic means "son or relatives of the father" of *Ashabah* in the patrilineal discipline of Shafi'i are the heirs who have an open part or part of the remainder. *Ashabah* used to issue as *dzulfaraidh* and the rest is given to *Ashabah*. According to Hazairin (Hazairin, 1981, p. 15). *Ashabah* is divided into three groups: *ashabah bi nafsih*; *ashabah bi al-ghayr*, and *ashabah ma'a al-ghayr*. According to M. Ali Hasan *ashabah* consists of (Hasan, 1973, p. 26): *ashabah binafsihi* i.e. : *ashabah*

entitled to get all the treasure or all the rest, the order as follows: sons, grandson of the sons and descendants of the sons; father; grandparents from the father and continue to the top has not been broken from the father; siblings; brother as father; son of the biological brother; son of a brother as father; uncle as the father; uncle who is father with father; uncle's son with father; and uncle's son who is father with father. *Ashabah bi al-ghayr* are *ashabah* with the cause of others, ie a woman who became *ashabah* because drawn by a men, those are who including *ashabah bi al-ghayr*, this is as follows: daughters who are accompanied by sons; and a sister accompanied by a male sister. *Ashabah ma'a al-ghayr*: sister who inherited gathered the inheritance of the testator, they are: siblings, and sister as father

The heirs according to the mother lines, called *dzu al-arham*. The meaning of *dzu al-arham* isa person who has blood relation with heir through the woman it selves. Hazairin mentioned details about *dzu al-arham*, i.e. all those who are not *dzu al-fara'id* and not *ashabah*, which generally consists of persons belonging to members the patrilineal family of the son-in-law or the paternal and paternal family members (Hazairin, 1981, p. 16).

Each part of the heirs *dzu al-fara'id*, among the heirs who are determined in his part in the Qur'an are only heirs *dzu al-fara'id*, their part forever remains certain and unchanged. In contrast to the heirs of *ashabah* and *dzu al-arham*. Their remaining portion after being issued the right of the heirs *dzu al-fara'id*. The part of the heirs *dzu al-fara'id* are as follows:

- a. Those are who Got $\frac{1}{2}$ of the treasure;there was five groups :
 1. A daughter if there was no sons. (Al-Quran, An Nisa's Surah 11)
 2. A daughter (of a boy) if there was no grandson.
 3. A sister, if there was no brother (Al-qur'an, Surahs An Nisa, 176)
 4. A sister of a sister, if there was no brother (Al-Quran, An Nisa's Surah; 176)
 5. Husband if the wife who died did not leave a child or grandchild (Al-Quran, An Nisa's Surah, 12)
- b. Those are Who gets $\frac{1}{4}$ of the estate there are two categories:
 1. Husband when the deceased wife has children or grandchildren (Al-Quran, An Nisa's Surah, 12)
 2. Wife if the husband who died did not leave a child or grandchild (Al-Quran, An Nisa's Surah, 12)
- c. Heirs who get from the treasure relics only one group that is: Wife if the husband who died by leaving a child or grandchild (Al-Quran, An Nisa Surah; 12)
- d. Heirs who get $\frac{1}{8}$ part of the estate, only the wife (*zaujah*) either one or more, the heirs who got $\frac{1}{6}$ of the treasure there are two groups, i.e.:
 1. Mother if the deceased is not a child or grandchild or two or more brothers (Al-Quran, An Nisa's Surah 11)
 2. Two or more siblings, both male and female, with equal shares.
- e. Heirs who earn $\frac{2}{3}$ of the estate there are 4 (four) categories:
 1. Two or more girls, if there are no sons (Al-Quran, An Nisa's Surah 11)
 2. Two grandchildren or more than a boy if there are no grandchildren, daughters;
 3. Two siblings or more if there are no brothers (Al-Quran, An-Nisa's Surah: 176)
 4. Two or more sisters if there are no brothers (Al-Quran, An-Nisa's Surah: 176)
- f. The heirs who died received $\frac{1}{6}$ Of the treasure there are seven groups:

1. Mother if the deceased leave a child or grandchild (Al-Quran, Surat An-Nisa: 11)
2. Father if the deceased has children or grandchildren (Al-Quran, Surah An-Nisa: 11)
3. Grandmother mother father father
4. A granddaughter of a boy together with a daughter (H.R. Buchori)
5. Grandfather father from father together with grandchildren when father is not there
6. A brother of mother, man or woman (Al-Quran, Surah An-Nisa: 12)
7. Sister, one or more of the siblings.

Eman Suparman mentions the virtue of the heirs or substitutory heirs according to the Qur'an is, in the legal system of inheritance of Islam according to the al-quran which is a bilateral inheritance system, known the heirs *dzul faraa'idh* whose part is fixed, certain and not changing, there are also *asherher* heirs and heirs of *dzu al-arham* (Suparman, 2007, p. 22).

The two kinds of heirs or surrogates obtain the remaining portion of the estate after deducting the debts of the testator, including the costs of death, testament, and the heirs *dzu al-fara'id*, besides it is also known that the heir prioritized to inherit from another heir group called the group of virtues consisting of:

- a. First priority is:
 1. The child, whether male or female, or the successor to the position of the deceased child;
 2. Father, mother, and widower or widow. If there is no child.
- b. The second virtue is:
 1. Brothers, whether male or female, or the successor to your position;
 2. Father, mother and widow or widower, if no brother.
- c. The third virtue is:
 1. Mother and father if there was a family, mother and father if one, if no children and no relatives;
 2. Widows and widowers.
- d. The fourth virtue is:
 1. Widows and widowers;
 2. Heirs substitute of motherhood and heirs substitute of father (Article 185, Compilation of Islamic Law, concerning the successor/surrogate heirs).

Regarding the division of Islamic heritage it's based on the Al-Quran ie, the individual interpretation guidance of jurist judgement, as in Indonesia, *ijtihad* is compiled into a regulation compiled in compilation of Islamic law is reinforced by an instruction of President No. 1 of 1991 (Abdurrahman, 1992, p. 53). According as to Ismail Sunny, that in the field of marriage law, inheritance law, and wakaf law for Muslim adherents stipulated by the applicable law is Islamic law, the Compilation of Islamic law containing its matrix law can be determined by Presidential Decree or Presidential Instruction (Abdurrahman, 1992, p. 53).

2. The Relation of Successor/Surrogate Heirs to the Theorem

Maslahah Mursalah is that the theory of Islamic law is in harmony with the objectives of Islamic law that focuses on three things: first, more priority *kemadforotan* than *kemadhorotan*, second, *prinsif* goal of Islamic law is nourish Din, soul, intellect, descent, wealth, and ummah. Then the third, that the purpose of Islamic law is related to the existence of the highest lawmakers and the existence of human beings as the executor of the law. In *Al-Maslahah Al-Mursalah*, *ushul* scholars give *alpha al-maslahah al-mursalah* by "giving *shara'* law to something

that is not contained in texts or ijma on the basis of maintaining the benefit (Djazuli, 2010, p. 86). Regarding this benefit according to A. Djazuli, there are three kind :

1. Welfare affirmed by Al-Quran or As-Sunnah, this is agreed by scholars, such as hifdzu nafsi, hifdzu mall and others.
2. Benefit contrary to the *shara'* which *qoth'i*, but *jumhur ulama* refuse this benefit except Najmudin al-Thufi from Maliki school.
3. Welfare not spoken by *sshara'*, but there is no argument that rejects it, this is what is meant by Al-Mursalah. But this form is not all scholars can accept it.

Usefulness of *Al-Maslahah Al-Mursalah* is necessary for caution because if it will not lead to tend to follow the lust, therefore required certain conditions *maslahah mursalah* such as: According to Abd. Al-Wahab's greedy, and Abu Zahrah, these requirements are:

1. *Al-Maslahah Al-Mursalah* does not contradict Muqashid al-Shari'ah, the arguments of *kulli* are spirit of Islamic teachings and the arguments of *juz'i* or *qath'i wurud* (concrete reason) and it's destination.
2. The benefit must be convincing, in the sense of having to discuss and research a rational and deep, so sure will provide benefits or refuse deterioration.
3. The benefits are general.
4. Its implementation does not cause any reasonable difficulties.

Of these requirements, it occurs in inheritance, and it is seen in the distribution of inheritance, in a way that is *maslahat* or even *madharat*, depending on the heirs in it's behave. an inheritance laws devolevement of Islam in Indonesia is one of the legal system of three systems, two other systems is customary law and Western law. The development of Islamic law and Islamic inheritance law can not be separated from the presence of Muslim society, and in a Muslim there is an obligation to be obedient to Islamic law, that is obedient to Allah SWT and His Apostle (Q.S4:59). Hence, when he embraced Islam automatically Islamic law applies to him (Praja, 1991, p. 100). In Indonesia The existence and enforcement of Islamic law is guaranteed by the laws and regulations as contained in the Jakarta Charter of 22 June 1945 which animates the 1945 Constitution (Anshari, 1983, p. 101). Constitutionally, articles 29 (1) and (2) of the 1945 Constitution constitute the recognition of the existence of Islamic law in Indonesia as follows:

1. The State which based on the One Godhead; and
2. The State Ensures the independence of every citizen to embrace his or her own religion and to worship according to his religion and belief.

Belief in the One Supreme Being the basis of the State is the first principle and Pancasila (Article 1 Paragraph (3) of the Decree of the People's Consultative Assembly of the Republic of Indonesia No.III / MPR / 2000 About the Sources of Law and Order of the Regulations of the Laws shall determine that the source of the national law is Pancasila as written in the Preamble of the 1945 Constitution). Belief in the One God also animates the other precepts. From the order of hierarchy and pyramidal Belief in the One Supreme Being the basis of other principles of Pancasila (Notonagoro, 1988, p. 60). Hazairin interprets Article 29 Paragraph (1) of the 1945 Constitution with several possibilities (Hazairin, 1990, p. 34):

1. In the state on Indonesian republic that shall not occur or apply the rules of Islam for Muslims or contrary to Christianity for Christians or those opposed to Balinese Hinduism for Hindu Balinese or contrary to Buddhist sulawesi for various Buddhists;

2. The state of Indonesian Republic shall be obligated to enforce the Islamic Shari'a for various Islamic, as well as the Shari'a for other religions according to their religious beliefs; and
3. the Shari'a which does not require the assistance of the State to carry it out and therefore can stand up for the sake of being executed by every member of the religion concerned into a personal obligation to Allah SWT and according to their religion respectively.

Islamic law is applicable to Indonesian Muslim society, whether normative and some have become positive law. Among which has become a positive law is a law of inheritance that has received the recognition of the state with the guidance of the instruction of the President of the Republic of Indonesia. Inheritance is a service of devotion to Allah SWT and is a container in the life of society that can be an alternative to the development of family welfare, Al-Qur'an Surah An Nahl (16): 71 explains "And Allah exaggerates some of you from others in terms of sustenance "

Regarding the provisions of the surrogate Islamic laws that a part of the girls inheritance gets a half of the boys, in the Surah An-Nisa: 11 that if there is only a girl, then she gets one part. If there are two or more daughters, then they get two-thirds. If the daughter inherits as an asabah (asabah bilghairi). The provisions of the daughter's inheritance section as half-sons of a boy. The position of daughters as heirs is essentially classified as dhawul faraidh, whose inheritance rights have been determined in certain numbers according to the Qur'an. but if the girl is with the boys then become asabah bilghairi participate to spend the inheritance so that she gets 1/3 part. If heirs of a daughter alone do not have a son, then she gets half. But if the heirs are some girls and no man then girls get 2/3 of the part that is shared among them equally. If there are girls and some boys, the other heirs do not exist. So every daughter gets half of the boys. So every boy gets 2 (two) parts while every daughter gets one part. In addition to the heirs of daughters, there are sons and there are other heirs, the other heirs are given the first part, then the rest is given to the boys and girls (Hazairin, 1990, p. 34). And summarized as follows:

1. If the sole heiress is a woman, gets half of the part;
2. If the heirs of some female children without heirs then the female children get 2/3 parts;
3. If the heirs there are some women and some men without the other heirs, then every woman gets 1 part and heirs get 2 parts; and
4. If the heirs and heirs together with other heirs, then every heiress gets 1 part and heirs get 2 parts.

Therefore, if there is a female heir, then the one who is hindered is the brother of a thousand with the beneficiary who has no part. Likewise, if there are two or more heirs then the one who is prevented from getting a share is the granddaughter of the girl, except in addition to the granddaughter there is a grandson of men, then the grandchildren become asabah. Unlike the heirs of the boys, the heirs of the daughters do not preclude other heirs, it's just because of the part for the girls that the part for the father and mother becomes lessened. The provisions governing the distribution of inheritance to girls according to Islamic law, which is contained in the Surah An-Nisa: 11 mentioned: If there was only a girl, then she gets one part. If there were two or more girls, they get two-thirds. If the daughter inherits as asabah (asabah bilghairi). But the division of girls with boys can be applied.

Furthermore, a President instruction of Indonesian Republic No. 1 of 1991 on the Compilation of Islamic Law Book II on the Law of Inheritance. For example: In the Islamic law the position of girls in article 176 KHI i.e.: "A daughter, if she only one, she gets half, if two or more of them together get two-thirds, and if the girl is with the boy, then the son's share is two to one with the daughter". As contained in article 183 KHI i.e.: "The heirs agree to make peace in the inheritance of the estate, after each is aware of his"

The article is a form of Islamic legal policy by taking into account its goodness, giving the right of inheritance in a balanced manner without distinguishing between small and large, male or female, as well as substitute heirs, which is clearly his right. This is in accordance with the theory of *Al-Maslahah Al-Mursalah*, a theory that gives syara law to something that is not contained in the texts or ijma, on the basis of maintaining the benefits (Thalib, 1984, p. 56). Nevertheless al-mursalah require requirements to avoid the nature of lust (Thalib, 1984, p. 56). And remain in the values of shari'ah. Imam As-Syatibi, affirmed by Abd. Wahab Khallaf seta Abu Zahrah, provides the requirements of *Al-Maslahah Al-Mursalah*, i.e. (Khallaf, 1977, pp. 86–87):

Al-Maslahah Al-Mursalah should not conflict with *maqhashid al-shari'ah*, kulli's arguments, the spirit of Islamic teachings and the arguments of the qoth'i juzi'i and the dalalah. The benefit must be convincing in the sense that there should be reinforcement or rejects conscience. The common good is unfulfilled. *Al-Maslahah Al-Mursalah* as a way of giving ijihad has a strength that emphasizes comfort to all parties. By using this theory, it is understandable that the principle of the law of the law of the secret of the law. legal awareness and patience.

Al-Maslahah Al-Mursalah theorem, in its application was in line with the wisdom of Islamic law in which Ictyanto stated: tasyrik wisdom and taklif wisdom. Tasyrik's wisdom concerns the enactment of a rule of law of Allah and the Messenger according to the circumstances of society. If the society is not mature to accept Islam a legal provision, then made a light law provisions. If society has accepted by Islamic law with awareness, then improved the provisions of the law in accordance with the nature of human beings. For example: regarding the law of prohibition of liquor, the first revelation says that *khamr* is useful, and there is sin (*madharat*), but the sin is greater (Q.S. 2: 219). The ease after the shahabat's legal consciousness increased, the second revelation that contained the provision that if do prayers do not drink. (QS 4: 43) The third revelation falls after the shabat's legal consciousness is high enough, it is said that the drinking of drinking is *haram* (Q.S. 5: 90-91).

Taklif policy of an Islamic legal policy in the legal provision applications into a man as mukallaf, (legal subject) by looking at the circumstances and conditions of the human person, ie seeing to the physical and spiritual ability (adult), has freedom and common sense, in addition to having a very special private condition exists therein. Therefore in the tactless wisdom, the law of a deed for a person may be different from that law of action to another person. For example stealing, the law stipulates that a thief or a man is cut off his hand, (Q.S.5 : 38). but in Umar Bin Khattab era, cutting hands was not carried out, because of the circumstances, the theft of hunger, and the situation of poverty. These two ideals in inheritance law are developed for law purposing, and it was accordance with islamic objectives that developed by Imam al-Syatibi, that the purpose of Islamic law is (*maqashid al-syari'ah*), known by the five things or *al-maqashid al-khamsah* (five purposes) (Djazuli, 2010, p. 27):

1. Religion Protection (Hifdz al-Din) , is in the narrow sense or worship *mahdah*; a human relationship with Allah SWT, in which there is a rule of law concerning human relationship with Allah SWT, and it's prohibition.
2. Self Protecting (Hifdz al-Nafs), keep yourself from doing harm to yourself and others, the law is mandatory.
3. Protection of the offspring (Hifdz al-nasl) such as the rules about marriage, adultery prohibition, and prioritize deliberation.
4. Maintaining properties (Hifdz al-mal) including the prohibition to steal and stealing property of others.
5. Maintaining reason (Hifdz al-Aql), including to mantained non-alcoholic drinks and the obligation to study.

Five things were added by A. Djazuli. certainly there must be a nurturing nature of the people (Hifdz al-ummah) ie (Djazuli, 2009, p. 4): maintaining the harmony of family life and society, because this is the spearhead of law enforcement inheritances. In relation to the position of the successor heirs is the lawful or proper thing to obey the clergy, in law enforcement, because there were *ijtihad* door/way that provide a solutions without having to violate the rules of the Qur'an. It is seen in terms of life will bring a good, good benefits in terms of its influence on the life of mankind, in the bonds of family and brotherhood or benefit in terms of its relationship with the interests of the public and individuals in society, and / or even the benefits of a universal and collective interests (*kulliyah*) and the benefit of the individual interest (*fardiyyah*), it is based on a general principle of Islamic law, namely that all human beada in a same provision, namely the determination of Tawheed is expressed in the sentence *laa ilaaha illallah*, there is no god but Allah (Praja, 1991, p. 100).

Based on tawhid principle, the implementation of Islamic law is a worship, worship in the sense of human servitude and surrender himself to Allah SWT as a manifestation of recognition of His royalty and the manifestation of gratitude to Him. This principle requires and requires people to establish the law in accordance with what Allah revealed by the Quran, this is when viewed from *illat* Islamic law which means wisdom, or benefits that refuse violence, it relates to the rule of law: "The law alterations is happens because there was an alteration on time and space, intentions and also benefits" (al-Indunisiy, 2013, p. 159; al-Sadlan, 1417, p. 426).

D. CONCLUSION

A substitute/surrogate heirs position in Islamic law is based on the Article 185 Compilation of Islamic Law in Indonesia by adhering to the principle of monotheism, an obedience to the rules of God by not forgetting *ijtihad*, because it is one mentioned by tafsir in Al-Quran; al-Nisa: (59). Regarding the necessity of obedience to the law of God cannot mutual either men or other fellow creatures including the treasure of property, but is required to maintain property, maintain good relations in inheritance devisisons. The relationship with the justice principle in Islamic law exists, in order to obtain justice with wisdom, and contains aspects of benefit, or in accordance with the rule of law (*fiqh*) that: "the alteration laws due to changes in space time, intentions and benefits" and become a responsibility of state to regulate it, in realization the state has arranged with the presence of KHI. Part of it ". *Tawheed* principles is the basis of *Al-Maslahah Al-Mursalah* theorem that was, seeking benefit only caused of God. There were the benefits which included on the shara' aims, so the substitute heirs are to give priority into the family life prosperity and keeping *al-arham* (the relationship), the law of the Koran is not rigid. *Al-Maslahah Al-Mursalah*; a way of *ijtihad al-'ulama* has a strength that emphasizes comfort to all parties.

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