

Concept of Substitute Heirs in the Province Of Aceh

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Abstract: In Acehnese community, the existence of substitute heir concept has not been well accepted because the people still hold classical jurisprudence which considers that the concept of substitute heirs does not meet the obligatory bequeathing requirements, i.e. the heir is alive when the deceased dies. On the other hand, Sharia Courts recognizes the existence of substitute heirs based on Article 185 in Islamic Law Compilation.

Keywords: substitute heir concept, Islamic Law Compilation, and Aceh

Date of Submission: 01-06-2018

Date of acceptance: 18-06-2018

I. INTRODUCTION

Explicitly, Islamic law (Sharia Law), both from Quran and Hadeeth, are silent on the concept of substitute heirs. Quran and Hadeeth only rigidly determine who are the heirs and the share of inheritance to each rightful heir or *zawil furudl* receives. The term has been discussed in legal reasoning by Islamic expert scholars. The law resulted from the discussion is dynamic because it is based on legal reasoning.

The Islamic Law is different to customary law and western civil law, in which substitute heirs are recognized. If a child dies while his parents live, the child replaces his father for the estate owned by his grandparents¹. Legal Dictionary of Dutch – Indonesian defines substitute heir as *plaatsvervulling* meaning replacement, the replacement of heirs².

Acehnese people question the existence of substitute heirs because classical Islamic jurisprudence which provides requirements to receive inheritance states that the heir must live when the deceased dies, both based on fact and law. On the other hand, in practice in Sharia Courts, the heirs are determined based on Article 185 of Islamic Law Compilation, which states that heirs who die before the deceased can be substituted by their children to receive the share of inheritance, where the share shall not exceed the proportion of that equal to the substitute.

Some Islamic law experts consider that the substitute heirs, who are not entitled to the inheritance, are called *patah titi* heirs or disconnected heirs³. In more extreme idea, paragraph (1) in Article 185 of Islamic Law Compilation is against the inheritance law in Aceh.

The current research was intended to comprehensively analyze the existence of substitute heir concept in Aceh. This research used socio-legal approach supported by primary and secondary data⁴. The primary data were collected by distributing a set of questionnaires to the respondents and interviewing selected respondents. The secondary data were obtained through documentation study and legal materials related to substitute heirs⁵.

II. DISCUSSION

Principles and Requirements of Inheritance

Principles of inheritance include a deceased, an heir, and inheritance. According to Usman, there are three elements of inheritance, i.e. a deceased, an heir, and inheritance⁶. The three elements cannot be

¹ R. Soepomo, *Bab-Bab Tentang Hukum Adat*, PT. Pradya Paramita, Jakarta, 2003, p. 90.

² Marjanne Termorshizen, *Kamus Hukum Belanda Indonesia*, Djambatan, Jakarta 1999, p. 311.

³ Muchtar Alamsyah, *Kedudukan Ahli Waris Pengganti dalam Pewarisan*, Ciptapustaka Media Perintis, Bandung, 2008, p. 17.

⁴ *Ibid*, p. 16.

⁵ Soejono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif, Suatu Tinjauan Singkat*, PT Rajawali, Jakarta, 1986, p. 14-15.

⁶ Rachmadi Usman, *Hukum Kewarisan Islam dalam Demensi Kompilasi Hukum Islam*, CV. Mandar Maju, Bandung, 2009, p. 62.

separated because the absence of one element dismisses the process of inheritance. In the point of view of people in Aceh, the three elements are considered the keys to inheritance⁷.

A deceased is a person who has died and left something which can be transferred to living relatives based on the principle of that the deceased has died. The use of the word "inheritance" to mean transferring estate and effects belonging to a living owner is inappropriate (See Quran, surah Al-Baqarah, verses 180, 240, and surah An-Nisa, verse 176). Islamic Inheritance Law in Indonesia based the perspective of Islamic Law Compilation requires that one needs to be a Muslim when he or she dies. Therefore, the death of the deceased is an indispensable and essential situation for the availability of inheritance, because the death of the deceased shall be factually. If the death is not apparent although there is no proof of living, the person's estate still belongs to the person as he is alive⁸. Ramulyo divides death into natural death, legal death, and presumptive death⁹.

Islamic Law Compilation does not mention further who is the deceased. According to Quran, the deceased includes parents (Surah 4, verse 11); children (Surah 4, verse 11); spouse (Surah 4, verse 12); and siblings (Surah 4, verse 76). The definition of the deceased is extended by Hadeeth by including father's relatives and grandfathers' relatives. The extension of the meaning suggests that one becomes the deceased for his or her siblings' children and his or her uncles¹⁰.

In addition to the deceased, another element is heir, who is a group of individuals or relatives who are related to the deceased and are entitled to receive estate left by the deceased. The heir includes the children and descendants, parents, siblings, spouse, grandparents (if the deceased does not have any living children, parents, relatives, or spouse), grandparents' descendants (if there is no other heir), and those who does not have any heir at all, the estate is managed by *Baitul Mal* (inheritance management body)¹¹.

An heir is the person who usually receives the share of inheritance¹². According to Saebani, heirs are those who are entitled to receive inheritance due to cognation or relations by marriage, and *wala* (the right of inheriting the estate of a granted emancipation slave died by the one who set him free when no other rightful heirs were present)¹³. For people in Aceh, an heir is the descendants of the heirs as regulated in Islamic inheritance law, which is based on the Quran and Hadeeth. This regulation has been implemented since the era of Iskandar Muda¹⁴. The proportion of inheritance is based on Islamic inheritance law. However, the proportion of inheritance in Aceh is based on the result of deliberation of heirs.

The other element of inheritance is estate which is usually termed in Arabic as *irts*, *mirats*, *mauruts*, *turats* dan *tirkah*¹⁵. Estate is all properties left by the deceased, be it inherited from his parents or obtained with his own efforts. Ali ash-Shabuniy called it *harta pusaka* or *harta peninggalan*¹⁶.

In more detail, the inheritance can be prenuptial property and property obtained after marriage. Personal property is the property obtained before marriage, from parents or relatives, or from grant. Lidien, who conducted a research study in Aceh, called three types of property as *jinamee* (obtained by husband/wife), *areuta jeumurang* or *harta peunulang* (inherited from parents). The term *jinamee* as proposed by Lidien was not very accurate because *jinamee* in Acehnese commonly means dowry paid by a man to marry a woman before the marriage. In addition, the property of a wife obtained from her parents is called *areuta tuha*¹⁷. In Gayonese community, the shared property between husband and wife is called *harta pohroh*, which is the property obtained from the efforts of both husband and wife after marriage, although the wife does not literary work side by side with the husband. However, in Pidienese and Greater Aceh community, the property called *areuta peunulang* is considered a grant. It is given in front of the village leader when she and her husband leave the

⁷Syahrizal, *Hukum Adat dan Hukum Islam di Indonesia, Refleksi Terhadap Beberapa Bentuk Integrasi Hukum dalam Bidang Kewarisan di Aceh*, Yayasan Nadiya (Nadiya Foundation, Lhokseumawe Nanggroe Aceh Darussalam, 2004, p.212.

⁸Idris Djakfar dan Taufik Yahya, *Kompilasi Hukum Kewarisan Islam*, Pustaka Jaya, Jakarta, 1995, p. 52.

⁹M. Idris Ramulyo, *Hukum Kewarisan Islam*, Ind-Hill-co, Jakarta, Tanpa Tahun, pp. 51-52.

¹⁰Amir Syarifuddin, *Pelaksanaan Hukum Kewarisan Islam dalam Lingkungan Adat Minangkabau*, PT. Gunung Agung, Jakarta, 1984, p. 52.

¹¹Ilyas, *Tanggung Jawab Ahli Waris Terhadap Hutang Pewaris Berdasarkan Hukum Islam*, Kanun Jurnal Ilmu Hukum Nomor 55Tahun XIII, Fakultas Hukum Universitas Syiah Kuala, Banda Aceh, 2011, pp. 354-355.

¹²*Loc. Cit*

¹³Beni Ahmad Saebani, *Fiqh Mawaris*, CV. Pustaka Setia, Bandung, 2009, p. 129

¹⁴Syahrizal, *Op. Cit.* p. 214.

¹⁵A. Rachmad Budiono, *Pembaharuan Hukum Kewarisan Islam di Indonesia*, PT. Citra Aditya Bakti, Bandung, 1999, p. 9.

¹⁶Muhammad Ali ash-Shabuniy, *Al-Mawarits fi asy-Syari'at al-Islam*, 'Alam al-Kutub, Bairut, 1405 H, p. 32.

¹⁷Syahrizal, *Op. Cit.* p. 217.

parents' house to live on their own. It is given in the form of land, house, rice field, plantation, etc. The share should not exceed that of the mail heir¹⁸.

In Gayo area, the property given by parents to their daughter in the marriage is called *tempah*. In Gayonese community, the such property cannot be sold or exchanged by the husband after the wife dies without concern from the wife's family. The property should be inherited to the wife's children¹⁹.

According to Acehnese custom, the shared property is separated between husband and wife before dividing the heritance. Each party (husband and wife) obtains a half of their shared property. It is this part which will be divided as inheritance. *Ismuha* includes salary, and pension, and other income into shared property as long as they are obtained after marriage. It is contrary to the Gayonese ethnic, where the property is rarely divided between husband and wife. The division of shared property is only conducted if a wife has her own children, or a husband has divorced wife or his first wife has died. Granted property received after the marriage is usually considered shared property²⁰.

In addition to the principles, the inheritance should meet some requirements. According to Rahman, the requirements include (1) the deceased has died, (2) at least one heir is alive when the deceased has died, (3) there is no obstacles to receive the inheritance²¹. The death of the deceased is divided into three categories, i.e. natural death, legal death, and presumptive death.

In addition, the heir needs to be alive when the deceased has died. The heirs who live at the time of the death of the deceased, either natural death, legal death, or presumptive death, are entitled to the heritance left by the deceased. The requirements also result in some problems, i.e. for *mafqud* (lost person) inheritance, which is the share of the inheritance for an unborn child or inheritance of people who die at the same time. There are some problems which need to be solved, where there is a confusion between their death and living at the time of the deceased death. The first problem involves a *mafqud*, i.e. if the death of a *mafqud* has not been proven by the time of the deceased death. To anticipate the fact that he is still alive, the inheritance should be reserved for a certain period to time. If the *mafqud* return alive before the decided time, the reserved share should be given to him. However, if he is proven death or decided death by a judge, the reserved share is given to the rightful heirs based on their shares²². Another problem involves an unborn child. An unborn child is entitled to receive the reserved proportion if the child is born alive within the period of time determined by the law. Being born alive is a legal proof that the child lives at the time the deceased died. If the child is born dead or if it is presumed that the death was caused by violence experienced by the mother, according to Hanafiyah's opinion, the child is entitled to the inheritance. The third problem involves people who die at the same time. For example, a father dies with his son, drown together in an ocean or burned death by a fire in a house, so each cannot inherit another's inheritance because each is not known to live when the other dies. In other word, we do not know who dies first. Therefore, their properties are inherited by the living heirs.

The last requirement is that there is no obstacle in receiving the estate. Although the two requirements have been met, one of the heirs might not be able to inherit the estate of the deceased if there is one of the four obstacles, i.e. slavery, murder, different religion, and different nationality²³.

The Rejection of the Concept of Substitute Heirs as Rightful Heirs

The majority of people in Aceh embrace Islam, and Islamic Law is used as a guideline for inheritance, and there are commonly different interpretations of the guideline. The different interpretations include the concept of substitute heirs, which most of people in Aceh do not implement because they follow Shafi'i school of thought which does not recognize this concept. The reasons for rejecting to implement the concept of substitute heirs are presented in the following table.

Table 1. Reasons for rejecting the concept of a substitute heir as a rightful heir

No	Reasons	Responses from public persons	Percentage
1.	People follow classical jurisprudence.	10	55.6
2.	There is no solid proof from Quran or Hadeeth which supports it.	5	27.8

¹⁸*Ibid*, p. 217.

¹⁹*Ibid*, p. 217-218.

²⁰*Loc. Cit.*

²¹Fachur Rahman, *Ilmu Waris*, PT. Alma'arif, Bandung, 1971, p. 79.

²²*Ibid*, p. 80.

²³*Ibid*, p. 82.

3.	It is influenced by previous custom.	3	16.6
	Jumlah	18	100

Guide in the Quran and Hadeeth

The term of substitution or *plaatsvervulling*, as termed in Indonesian Civil Code, is not recognized in Islamic jurisprudence. There is no Islamic scholar's opinion which shows that there is a substitute heir in inheritance. There is a consensus among *mujtahid* Islamic scholar, Islamic scholars who are competent to interpret sharia by *ijtihad*, that there is no substitute heir in Islamic law. According to **Prodjodikoro**, the existing interpretation of Islamic law confirms that there is no substitute heir²⁴. Such view applies to almost all areas where Islamic influence is strong, such as Aceh and Minangkabau; however, it is also implemented in a number of areas in Java²⁵.

Ismuha states that there is a term of heir substitute in Islamic jurisprudence books; however, it is different to how it works in the customary law, and the proportion of a substitute heir is not similar to that of an heir, i.e. Amin al-Asyi in *Khulasah Ilmu Faraidh* by Amin Al-Asyi and *Nihayat al-Muhtaj* by ar-Ramliy. In *Khulasah*, a male child of a male child (a grandchild) has the same position as a male child, but his share is not twice as much as a female child. A female child of a female child has the same position as the female, except that there is a male child²⁶. In *Nihayat al-Muhtaj*, ar-Ramliy states that a male grandchild (from a son) can be a substitute for his father if his father has passed away before the deceased. A male grandchild can only be a substitute to his father if the deceased does not have any living male son at the time of his death; however, if there is another male son, the grandchild is not entitled to any proportion of the inheritance²⁷. The positions of male and female grandchildren also apply to grandparents. A grandmother has the same position as a mother, but the proportion is not one third or one third of the rest. The same applies to a grandfather, except that he cannot be a hindrance for the deceased siblings on father's side or both sides. Therefore, the substitution according to Islamic law applies to in a direct line downwards and that upwards.

The substitution of an heir is not similar to that in Indonesian Civil Code or in customary law. Therefore, the substitution of heir in Indonesian Civil Code or in customary law is regulated in Islamic law.

There is only one opinion stating that Islamic law allows heir substitution, i.e. Hazairin. Hazairin's interpretation of the substitute heir in Islam was a state of the art interpretation which has not been used by previous *mufassirin* (the writer of a commentary on the Quran) or Islamic jurists. The guide used as the consideration for the existence of substitute heir in Islamic inheritance law was Quran surah an-Nisa' verse 33, which means "And for all, We have made heirs to what is left by parents and relatives. And to those whom your oaths have bound [to you] - give them their share. Indeed Allah is ever, over all things, a Witness."²⁸

Hazairin explained that the meaning of verse 33, Surah an-Nisa that Allah created heirs for *a person* for estate left by the parents and relatives (as well as for those whom their oaths have bound), so give them their share. That *person* is considered as the heir because it follows the words *walidan* (parents) and *aqrabun* (relatives) as the heirs. If the heirs are the parents, according to Hazairin, the heirs are the children and/or the children's heirs. If the children live, they are entitled to the inheritance based on verse 11 or Surah an-Nisa'. In verse 33, the children have the heirs who are the rightful heirs for the children. The heirs here might have been considered the heirs of the deceased children because mentioning the parents automatically makes the children heirs. There is no other possibility but to define heirs as the offspring of the deceased children. Only in this situation will the position of the father as the deceased not be disordered.

Hazairin interpreted the word *mawali* as grandchildren whose father has passed away at the time his grandfather or grandmother dies. The grandchildren replace (substitute for) their fathers to inherit the estate of their grandfather or grandmother. In fact, if their parents' siblings live, the grandchildren are not entitled for any estate because their uncles are rightful relatives for their grandfather or grandmother. This interpretation is supported by the fact that, in verse 33 of Surah an-Nisa, Allah used the word *ja'la* which has similar meaning to *khalafa* to establish *mawali* (heirs), that is to create what has not existed to exist²⁹. In inheritance, the creation

²⁴ R. Wirjono Prodjodikoro, *Hukum Warisan di Indonesia*, Sumur, Bandung, 1991, p. 55.

²⁵ *Ibid.*, pp. 54 – 57

²⁶ Muhammad Amin al-Asyi, *Khulasah Ilmu Faraidh*, Muktabah al-Asyi al-Kubra, Kutaradja, 1973, p. 25.

²⁷ Muhammad Syamsuddin ar-Ramliy, *Nihayat al-Muhtaj*, Musthafa al-Babiy al-Halabiy, Mesir, 1938, Vol. 6, pp. 17-18.

²⁸ Hazairin, *Hukum Kewarisan Bilateral Menurut Qur'an dan Hadits*, Tintamas, Jakarta, 1982, pp. 8, 14 and 29.

²⁹ *Ibid.*, p. 31.

can only be interpreted as a birth, so that there is a relation between who are entitled *mawali* and those who become heirs. This creation cannot be interpreted in any other ways but an entitlement.

To support the opinion described above, Hazinin tested it with Quran verses on inheritance, i.e. verses 11, 12, and 176 of Surah an-Nisa. Based on these verses, if a person left grandchildren from male children who have died with all their siblings, the grandchildren will not be entitled to inherit any estate from their fathers and their fathers' siblings. According to Hazairin, this similar situation is against all primordial human nature granted for all humankind.

This situation was tested for all other heirs. If a deceased is a relative, the heirs are his siblings and siblings' heirs, that is the offspring of the siblings. Meanwhile, his father and mother are moved upwards, that is the parents of his father and those of his mother (1st degree ascendents) and their offspring, who are relatives of the second direct line. Hazairin did not consider relatives as the heirs of the father or mother as determined by the Quran which makes them the direct lines whose priority is under the parents. Therefore, should there be no any living parents, the relatives become the heir for themselves.

In short, the heirs of the parents will only be considered if there is no any descendant or relative. If the ascendants or others in the same position, the heirs of the parents move one level upwards to second level ascendants and their relatives (third direct line level) and the next one to one level upwards. According to Hazairin, the provision of parents' heirs is based on verse 33 of Surah an-Nisa' but without any detail explanation.

The interpretation provided by Hazairin is completely different to those proposed by exegetical scholars such as al-Qurtubiy, who interpreted the word *mawali* (heirs) in verse 33 of Surah an-Nisa as *ashabah* (heirs) who inherit estate of the deceased³⁰. His interpretation is based on the word of the Prophet, that is the rest of the share is intended to male *ashabah*. It is also supported by Hadeeth narrated by Bukari from Zaid bin Sabit. Zaid said that "A male grandchild takes the position of a male child of there is no other living male children, male grandchildren are similar to male children and female grandchildren are similar to female grandchildren, they inherit as the children do, they prevent inheritance as the children do, and there is no share for both male grandchildren together with male children"³¹. This hadeeth clearly confirms that the male children of the deceased do not take the position of their fathers.

This view was not favored by Hazairin because the distribution of inheritance to orphan grandchildren through the concept of a substitute position and bequest is supported by Islamic ideal value which restricts the principle of inheritance to only the most direct relatives of the deceased. In other word, the only way of reforming the position of orphan children is through the concept of substitute position and bequest. Consequently, this will restrict their share to the maximum of only a third of all estate because the bequest cannot exceed a third of the inheritance.

A number of contemporary Islamic scholars such as Islamic scholars in Greece have the point of view which represents the 21st century phenomena in Islamic world. Syria and Morocco have passed law which allows grandchildren from deceased male children to inherit the estate of their grandparents³². Tunisia follows Greece to pass the law which allows children of the deceased male and female children to receive the shares of their parents from their deceased grandparents with the maximum share of a third of the estate. Pakistan took a different approach, that is by adopting systematic and comprehensive schemes of substitute heirs. The grandchildren of deceased male or female children are allowed to receive similar share intended for their parents³³.

The initiative taken by Pakistan has influenced jurists in Indonesia. In line with studies on obligatory bequest conducted by Islamic jurisprudence scholars in some Islamic countries since the second half of the 20th century, Indonesia has played an active role in reforming this law by establishing a different law to that in other Islamic countries. Indonesia is primarily influence by Pakistan in establishing share to orphan grandchildren through the concept of substitute share. The decision made in terms of relatives who receive the share of the estate both through the concept of obligatory bequest and substitute heirs is seen as Indonesian-specific legal decision.

However, the existence of substitute heir concept is rejected by most people in Aceh because it is not clearly regulated by the Quran and Hadeeth, and it is against the terms of inheritance.

In addition, the existence of substitute heirs is still in debate in the society because there is no guide for it in either Quran or Hadeeth as discussed above. Besides reason, people in Aceh also think that the rejection is motivated by the guardians of the grandchildren as the direct heirs. To obtain more share for themselves, the

³⁰ Al-Qurtubiy, *Al-Jami' li al-Ahkam Qur'an*, Dar al-Fikr al-'Arabiy, Mesir, 1348 H, p. 167.

³¹ Imam Bukhariy, *Shahih al-Bukhari*, Dar al-Marthba'ah al-Sa'bi, Kairo, t.t., p. 166.

³² Tahir Mahmood, *Personal Law in Islamic Countries*, Academy of Law and Religion, New Delhi, 1987, pp. 148-150

³³ *Ibid*, p. 245; J.N.D. Anderson, "Recent Reforms in the Islamic Law of Inheritance," in *International and Comparative Law Quarterly* 14, 1965, pp. 349-365.

guardians ignore the share of grandchildren, which usually creates disputes in the family when the shares of the estate are decided. People who facilitate the dispute resolution regarding the share of inheritance could rarely be able to allow grandchildren receive the share of inheritance.

Following in Classical Jurisprudence

Respondents follow Islamic classical jurisprudence books which consider that Islamic law is static, that is it cannot be reformed through human's critical thinking. This view ignores human's critical evaluation of Islamic law on inheritance.

This view is in line with opinions proposed by some Islamic scholars in Aceh who explain that people in traditional who are against substitute heir system because they strongly adhere to Syafi'i school of thought.

Regarding the existence of share to secondary heir for the estate of the share such as the share for substitute heirs, some Islamic jurists in Aceh consider the heirs who are not entitled for any share as *patah titi* (disconnected or indirect) heirs.

The reasons for the concept of *patah titi* heirs is in line with requirements of receiving inheritance as regulated in classical jurisprudence books. The requirements include the death of the ascendants, the living condition of heirs, and no obstacles to receive the inheritance at the time to the deceased death³⁴. Therefore, the existence of substitute heirs is against the second requirement, i.e. the heirs live when the deceased dies. This suggests that died heirs cannot receive share of inheritance and cannot be substituted by their descendants.

The influence of Previous Customs

The idea of *patah titi* heirs is motivated by Islamic jurists who previously regulated principles and requirements of inheritance. The principles previously regulated include estate, the deceased, and heirs while the requirements include (1) the deceased has died, (2) at least one heir is alive when the deceased has died, (3) there is no obstacles in receiving the share of inheritance. Based on the second requirement, i.e. the heirs live, Islamic jurists in Aceh consider that if the heirs have died at the time of the deceased dies, the heirs are not entitled to become the rightful heirs, and they cannot be substituted by their offspring. This idea underpins the concept of *patah titi* heirs.

Considering the history of substitute heir concept, it was pioneered by Hazairin. Hazairin established the theory of *receptie exit* for his jurisprudent opinion on Islamic inheritance law bilaterally based on Quran and hadeeth. The theory of *receptie exit* was established based on a series of critical observations of guides related to inheritance law by his students who are also his colleagues and assistants, i.e. Sayuti Thalib who later developed a new theory known as *receptie a contrario*. According to Jahja, in Temporary People's Consultative Assembly Decree No 1/MPRS/1960 regarding politic manifesto of the Republic of Indonesia as Broad Outlines of State Policy (LN 1960 – 138) in the area of law, one of which is the instruction to establish national law. Hazairin had taken an initial step by writing books on inheritance in Islam, which adopts three legal systems recognized in Indonesia, i.e. western law, customary law, and Islamic law. Jahja disagreed with Hazairin's opinion because description on pages 1 – 9 in *Hukum Keluarga Nashsional* (National Law of Household) written by Hazairin is against the Broad Outlines of State Policy. It is written on page 402 C under subheading 4 regarding inheritance law, which is made to be one of the legal principles described to bilateral concept. The concept suggests the establishment of new jurisprudent school of thought called national school of thought or Indonesian school of thought, to replace Syafi'i school of thought, or *ahl al-sunnah wa al-jamaah* school of thought, or school of thoughts held by the Prophet's companions or other scholars who have been well-known since the era of the Prophet. The new school of thought was established by Hazairin in his work (*Hukum Kekeluargaan Nashsional*) on pages 17 – 75³⁵.

A number of positive efforts have been made by the National Law Development Agency to establish national law for various laws including inheritance law. However, the reformation of Islamic inheritance law established in Indonesia has not been satisfactory. In addition, law reinforcement officials in the Supreme Courts and the Ministry of Religious Affairs who were involved in the drafting Islamic Law Compilation failed to prevent the adoption of Hazairin's thought into the Islamic Law Compilation, which has been approved in a presidential instruction.

In addition, the background of the presidential instruction explains that the Islamic Law Compilation is the results of deliberation involving Islamic scholars, and the results have been approved by the jurisprudence of the Religious Courts and Supreme Courts. A crucial regulation for inheritance law is the inclusion of a clause on the existence of substitute heirs, which have been claimed to have become a concept and a consensus among people for the last 25 years.

³⁴Fachhur Rahman, *Ilmu Waris*, PT. Alma'arif, Bandung, 1971, p. 79.

³⁵ Majelis Ilmijah Islamijah, *Perdebatan Dalam Seminar Hukum Nashsional tentang Faraidh Antara: Hazairin, H. Mahmud Junus, dan H. Thoha Jahja Omar*, Tintamas, Djakarta, 1964, p. 12.

In article 185, paragraph (1), of Islamic Law Compilation, it is regulated that the heirs who die before the deceased can be replaced by their children, except for those referred to in paragraph (2) of Article 173. Meanwhile, it is stated in the paragraph (2) that the share for substitute heirs should not exceed those for the heirs who have similar position of substituted heirs.

The inclusion of substitute heirs into Islamic Law Compilation is one of the examples of the customary laws which have been accepted as Islamic law as has the theory of *receptie a contrario* proposed by Thalib. He criticizes with a question: "Since when has an adopted child included into a customary law?" The correct answer should be "since Snouch Hurgronje and van Vollenhoven established customary law." At that time, customary law was established solely to dismiss Islamic law, and it was created for the interest of the Dutch East Indies. It was inserted to the hearts of Indonesian people through continuous education³⁶.

Hazairin states that Islamic jurists who accepted the customary law may defend themselves, but there is only one history of how customary law was introduced to Indonesia. Thus, the implementation of the customary law should be reconsidered because its implementation is motivated by the Dutch East Indies politic. Therefore, Hazairin and Thalib tend to disprove mix the implementation of customary law with that of Islamic law.

Customary law in Islamic point of view is defined some sources. There a principle in *qawa 'id al-fiqhiyyah* which states that customs and habits can be considered as law. This conclusion is based on the word of Allah (The most glorified, the most high) in Surah al-'Araf verse 199, and the meaning of the verse is: "Hold to forgiveness, enjoin what is good, and turn away from the ignorant."

The word *al-'urf* is similar to the word *ma'aruf*, which means something known or decided right by people, which is similar to customary law which makes sense and which does not against the Islamic teaching³⁷. This is a good deed, known to all people, and accepted by normal human beings. There is a consensus regarding its good status, and thus no further discussion or debate is required.

'*Urf* is a source of law adopted by Hanafi and Maliki school of thought, considered outside the scope of the Islamic scholar opinions. '*Urf* or tradition is a type of law related to interactions among humans which have taken place in society. It is used as a source of law from the principle of jurisprudence. Generally, Islamic jurists' opinions always consider '*urf* in society. In this case, there is no Islamic scholar opinion on this matter.

Therefore, a *mufti* (an Islamic scholar who interprets and expounds Islamic law) should have knowledge of '*urf* in the society. A jurist Abidin states that "it is a must for a judge to possess knowledge on jurisprudence and understand the nature of a case and the condition of society. Therefore, he can discriminate between truth and lies, then matches one case to another, thus he can give a fair verdict"³⁸.

A *mufti* who passes a formal legal opinion based on '*urf* should understand the situation and condition of the society in the era and should know that '*urf* is specific or general, whether it is the '*urf* is valid or misleading, whether it violates other Islamic scholar opinions. In addition, a *mufti* should have learned from expert teachers. Therefore, good behaviors or prevailing laws which have been implemented in society and which is in line with the interest of the society are also considered laws.

Based on the opinion above, the concept of *patah titi*, which is known as '*urf* in Acehnese society should be reconsidered because many Islamic scholars consider that it is not fair for grandchildren to not receive any share because their fathers die before the death of their grandparents. The concept of *patah titi* is considered as misleading '*urf*. The characteristics of misleading '*urf* are (1) it is not fair, (2) it oppresses other heirs, and (3) it does not give any benefit to the grandchildren of the deceased or other heirs³⁹.

'*Urf* is a source for law adopted by Hanafi and Maliki school of thought, which is outside the scope of Islamic scholar opinions. '*Urf* or tradition is related to the results of human interaction or human's interest which has become customs in the society. '*Urf* is included as one of the sources for law in the concept of jurisprudence. Generally, formal legal opinions passed by Islamic jurists considered '*urf* implemented in the society. In this case, there is no Islamic scholar opinion related to the matter.

³⁶ H. Habiburrahman, *Rekonstruksi Hukum Kewarisan Islam di Indonesia*, Kencana Prenada Media Group, Jakarta, 2011, p. 63.

³⁷ T.M. Hasbi Ash Shiddieqy states that any event which can be categorized into the above definition can be established as law or can be used as a source for law, as long as it does not violate Islamic scholar opinions or background of law establishment. One example that violates Islamic scholar opinions or background of law establishment is the act of dismissing the right for female child to inherit. T.M. Hasbi Ash-Shiddieqi, *Qawa'id al-Fiqhiyyah*, Bulan Bintang, Jakarta, 1999, p. 32.

³⁸ Habiburrahman, *Op. Cit.*, p. 64.

³⁹ Syahrizal, Islamic scholar/Teaching staff at Doctoral program of the Faculty of Law, Syiah Kuala University, *Interview*, 23 June 2017.

III. CONCLUSIONS

The rejection of substitute heir concept in Aceh is motivated by three reasons. The first reason is that the people in Aceh follow classical jurisprudence. The majority of people and religious figures in Aceh follow classical jurisprudence laws established by previous Islamic scholars in solving problems related to inheritance. They do not consider the reformation of Islamic inheritance law. They believe that Islamic law is static and consider that there is no more room for Islamic jurist opinions. Second, there is no laws in Quran or Hadeeth which regulates such heir. Islamic Law does not recognize substitute heirs as in Indonesian Civil Code or Western Code because neither Quran, Hadeeth, nor Islamic jurist opinion explains the concept of substitute heirs. In addition, no Islamic scholar opinion addresses the existence of substitute heir concept in inheritance. The third reason involves the existing *'urf* (similar to customary law). Some Islamic jurists consider that the heirs who are not entitled to receive inheritance of the deceased are the grandchildren whose fathers have died at the time of the death of the deceased. The heirs are called *patah titi* (disconnected) heirs in Aceh customary law. Islamic jurists in Aceh argue that if an heir dies before the deceased, the heir cannot inherit from the deceased and the heir's position cannot be replaced by his descendants. This opinion creates the concept of *patah titi* heirs.

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Ilyas, Syahrizal Abbas "Concept of Substitute Heirs in the Province Of Aceh." IOSR Journal Of Humanities And Social Science (IOSR-JHSS). vol. 23 no. 06, 2018, pp. 34-41.