

# Comparative Analysis on the Regulation of Substitute Heir's Position in the Civil and Islamic Inheritance Law Perspective

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## ABSTRACT

Inheritance law is part of family law that plays an important role, even determines and reflects the family system that applies in the society. Inheritance law is closely related to human life as it is related to property and human beings with one another. The study uses the normative juridical research method, namely a legal research performed or shown in the articles in the statutory provisions governing the issue, examining library materials or documents called secondary data, in the form of primary, secondary, and tertiary legal materials. In addition, this study also uses statutory, comparative, and conceptual approach. The legal position of substitute heirs in Islamic inheritance is formulated in Article 185 paragraph (1) of the KHI, namely the heirs who die before the testator are replaced by their children, except those who are mentioned in article 173 (commit serious persecution) and are Muslim while according to the civil inheritance law, it has been very clearly regulated regarding substitute heirs, their position, the range of the legal line and all the provisions in Articles 841-848 of the Civil Code, among others, in the acquisition of equal rights between substitutes and those who are replaced. Arrangements regarding substitute heirs, forms or replacement of place according to Islamic legal inheritance with civil law inheritance occur if an heir first dies before the testator then the child of the heir has the right to replace the heir's position. In the sense that the substitute heir receives the right to inherit when the person who connects them to the testator is no longer there, and the most important thing is that the substitute heirs and those who are replaced must have legal kinship relations (blood ties) to the testator.

**Keywords:** Comparative, Regulation, Substitute Heirs, Civil Inheritance Law, Islamic Inheritance Law

## 1. INTRODUCTION

Inheritance law is part of family law which has a very important role in determining and describing the family system that applies in society. The law of inheritance is closely related in human life because it relates to human property with each other. The deceased is known as the heir who leaves his family and property is called an inheritance and a way to resolve or divide the inheritance left by the heir and what laws will be used in dividing the inheritance. The law concerning the transfer of inheritance, management and continuation of the rights and obligations of a deceased person is stipulated in the inheritance law.

Inheritance law is part of the civil law as a whole and is the smallest part of family law. The law of inheritance is closely related to the scope of human life because every human being will experience a legal event called death. The consequences that arise when the occurrence of legal events of a person are among others a matter of how the management and continuation of the rights and obligations of a person who dies. [1]

Inheritance law is all the laws governing the transfer of inheritance due to death to the heir or the designated person. [2] It is this event of death that is the result of devolution as stated in Article 830 of the Civil Code that devolution only occurs because of death. [3]

System The western civil inheritance legal system contained in Burgerlijk Wetboek or Civil Law adheres to the individual system, in which the deceased heir must immediately be distributed to the heirs. Inheritance law in the Civil Code can be interpreted as all legal methods that govern the fate of a person's wealth after he dies and determine who can receive it. Inheritance is carried out after a person dies and leaves property. The existence of heirs who are entitled to the estate as Article 830 of the Civil Code says that inheritance only takes place because of death.

The inheritance system according to civil law follows the core family system with the division of property individually, the points of inheritance stipulated in civil law can be seen in Article 1066 of the Civil Law which reads

that no one who has a share in the estate is obliged to receive the estate in an undivided state.

Indonesia currently applies 3 inheritance legal systems, namely Islamic inheritance law, Civil inheritance law and Customary inheritance law. The three legal systems governing the inheritance have different legal resources from each other.

Islamic inheritance law in Indonesia is derived from the Qur'an whose application of the law is regulated in the Compilation of Islamic Law and the civil inheritance law is derived from civil law. Meanwhile, customary inheritance law is derived from the customs that make the rules in the division of inheritance. One of the things discussed in the inheritance law is the successor heir, the concept of the successor heir is based on the fulfillment of the sense of justice. The successor heir is the heir who becomes the heir because he replaces the position of another heir who died first.

Article 841 of the Civil Code recognises the existence of a successor heir in a devolution, which gives the person who replaces them the right to act in lieu of the degree and all rights of the person who is replaced. If you look at Article 841 of the Civil Code, it can be seen that there is a substitute heir recognized without any restrictions, but when referring to Article 843 of the Civil Code it is stated that there is no change to the blood family in the upward line. If you look at both Articles, it can be known that there is a conflict between Article 841 and Article 843 of the Civil Code. Other than that in Article 832 of the Civil Code it is stated that blood families belong to the group entitled to receive inheritance.

Islamic law is still valid and enforced in Indonesia, especially for Muslims is the law of inheritance or so-called "Faraid". Islamic inheritance law is considered an obligation that must be carried out by every Muslim and considered as compulsory law (*dwingent recht*) which is an absolute and standard law. [4]

The replacement position (*Plaatsvervulling*) according to the inheritance law is strictly stipulated in the Civil Law while the successor heirs according to the Islamic inheritance Law are regulated in the Compilation of Islamic Law, but in the Qur'an the term successor heirs is not known but their position as heirs is known through the understanding of direct heirs described in the Qur'an. As to the extent of their position as heirs in relation to the direct heirs with whom they replaced both in terms of the part they received and in terms of the strength of their position there is no definite guidance in the Qur'an or a strong hadith. In this case God left it to human to determine the law.

The application of Islamic inheritance law formil does not mean that there is no allowed distribution of Muslim family inheritance outside the Non-Litigation Religious Court because Islamic inheritance law is considered as laws governing private or civil. The emergence of problems in the Court of Religion only occurs if the disagreement of Muslim families in the distribution of heirs that have been received or one of the parties between them does not want to carry out Islamic inheritance law. The Religious Court determines the part of each heir based on the guidelines of judicial documents in the form of Compilation of Islamic

Law contained in Chapter II provisions of the Inheritance Law. There are 22 Articles containing the provisions of inheritance law, namely Article 171 to Article 193.

While the Article that is closely related and has the effect of calculation with inheritance law is about wills namely Article 193 to Article 209. While about grants starting from Article 210 to Article 214. The compilation of Islamic law containing family law for Muslims is still a small part of the pros and cons. One of them concerns the issue of Successor Heirs or Replacement of The Position of Heirs who in Legal Science known as *Plaatsvervulling* contained in Article 185 compilation of Islamic Law. [5]

This study discusses the Juridical Analysis of The Comparison of The Position of Heirs In Lieu on Civil Inheritance Law and Islamic Inheritance Law. With the Identification of problems raised in this study, how does the arrangements to the position of the successor heir between Islamic inheritance law and civil inheritance law compare?

## 2. METHOD

Research methods are processes, principles and procedures used to study and find answers to a problem. [6] The research method used by the author is a normative juridical research method that is a legal study conducted or shown in the Articles in the legislation governing the problem, researching library materials or documents called secondary data, in the form of primary, secondary and tertiary legal materials.

The approaches used in this study is the approach of the Law (statute approach) is an approach that examines all laws and regulations related to legal issues handled, comparative approach is a research method used to know the differences and similarities in the law with each other law. Conceptual approaches move from several views and doctrines that grow in the science of law.

The type and source of data used in the research can take the form of a data required writing in this study is then analyzed in accordance with the problem so that the results are obtained in accordance with the purpose of the research. Secondary data is data that supports the information or supports the completeness of primary data obtained from libraries and collections of private libraries conducted by means of literature or library studies, the secondary data includes primary legal materials, secondary legal materials and tertiary legal materials.

In terms of collecting legal materials, from primary legal materials as well as secondary legal materials are collected according to the subject matter by carrying out literature studies. Library legal materials are inventoried using the way of clarifying such materials derived from laws dan regulations, books, official documents, publications and research results are then divided and systematized by taking legal materials that have relevance to the material discussed. Juridical analysis of legal materials used in this study, compiled in the ways described above and systematically compiled.

The method of data analysis used in analyzing and processing the collected data is qualitative analysis of research that refers to the legal norms contained in the laws and regulations. The purpose of using this method is to give an idea of the problem based on the normative juridical approach. [7]

Data processing is data that is inventoried / collected and then grouped and then analyzed and systematized in a description that is descriptive analysis. Descriptive analytical is a prevailing legislation and is associated with legal theories and everything related to the comparison of surrogate heirs between Islamic inheritance law and inheritance law according to the Civil Code.

### 3. DISCUSSION

#### 3.1. Overview of Islamic Inheritance Law

Islamic inheritance law is the rule that governs the transfer of property from a deceased person to his heir. This means determining who is the heir, the portion of the heirs, determining the inheritance and inheritance for the deceased. [8]

Islamic inheritance law according to the Compilation of Islamic Law in Article 171 letter (a) is the law that governs the transfer of ownership rights of inheritance "tirkah" heirs, determining who is entitled to be the heir and some parts of it respectively. Islamic inheritance law is a set of rules concerning the process of distribution of the estate of the deceased and determine which heirs are entitled to obtain inheritance and their respective share of the estate in accordance with the provisions of Islamic teachings.

The term inheritance comes from the Arabic "al-irts" meaning the transfer of something from one person to another. The word "al-irts" is a masdar form of the word "waratsa, yaritsu, irts". Other masdar according to sharaf science there are still some forms, namely "wirts, wiratsan, mirats". According to the word "waratsa" has the meaning of replacing starting from this basic meaning, then in terms of the broader meaning, the word "al-irts" means the transfer of something from one person to another or the transfer of something from one people to another, whether in the form of wealth, knowledge or glory.

Al-faraidh etymologically derived from the word "faraid" is a jama of "furud" with the meaning "ma'ful mafrud" means something determined by number. In terms called inheritance rights that have been determined definitively in the Qur'an and Sunnah of the Prophet. [9] "Al-tirkah tarikah" or "tirkah" is the same as "mirats" or property left behind by a property owner "mawarits" after his death, the property left by a property owner "mawarits" after his death for his inheritance is called pull of the dead "tarikatul mayiti". [10] Warits are the inheritors. Muwarits is the one who gives the heir "mayit". "Al-irts" is an inheritance that is ready to be shared. Waratsah is an inheritance received by the heirs. "Tirkah" is all the treasures of the dead.

Islamic inheritance law is the ruling on something that concerns the transfer of rights or obligations on a person's

property after death to his heirs. Thus, in the law of inheritance there are 3 main elements that are interrelated, namely heirs, inheritance and heirs. Inheritance is essentially an integral part of the law while the law is part of the basic aspects of Islamic teachings. [11]

#### 3.2. Overview of Civil Inheritance Law

Inheritance law is the rules governing how the various rights and obligations about a person's wealth at the time of his death will be transferred to another person who is still alive. [12] According to Vollmar, the inheritance law is a transfer of a property entirely, so the entire rights and obligations of the person bequeathed to his heir. [13]

Civil law in Indonesia to date still uses the provisions contained in the Civil Code "Burgerlijk Wetboek". According to the Civil Code the inheritance law is part of the law of property so that legal arrangements are contained in the second book of the Civil Code on Objects.

The inheritance law in BW (Burgerlijk Wetboek) has a valid principle that only the rights and obligations in the law of property can be inherited. In other words, only rights and obligations can be assessed with money. Therefore, the rights and obligations in the field of family law or in general personality rights and obligations, such as rights and obligations as a husband or as a father cannot be inherited, as well as the rights and obligations as a member of a society. According to Article 830 of the Civil Code devolution only takes place due to death. The inheritance will be exposed if the heir has passed away and the heir is still alive when the inheritance is open.

The successor heir in civil inheritance law is known as the place replacement which in Dutch "Plaatsvervulling". This is stipulated in Articles 841 to 844 of the Civil Code. The existence of these Articles indicates that the Civil Code recognizes and recognizes the existence of Plaatsvervulling or reimbursement of heirs.

Reimbursement entitles the person who replaces to act as a substitute in the degree and in all rights of the person he replaces as stipulated in Article 841 of the Civil Code "A grandson who replaces his parents who died first as the child of the heir, is entitled to all those rights. Replacement in a straight line down the legal, continues indefinitely (Article 842 paragraph 1 of the Civil Code)." In the event that such reimbursement is forever permitted, both in the right of some inherited children, to inherit together with each other in different family relationships of different degrees (Article 842 paragraph 2 of the Civil Code).

In a distorted line, Article 844 of the Civil Code reimbursement is permissible for the benefit of children and descendants of brothers and sisters who have died first, either inherited together with their uncle or aunt together with the descendants of that uncle or aunt, even though they are in unequal degrees. The replacement of the place "Plaatsvervulling" then the descendants of a person enter into the same legal relationship as the person he replaced, in case the person who was replaced is still alive. Then the Law says that who replaces the place will obtain the rights

and also obligations of the person he replaced, if he does not die before the heir dies. [14]

### ***3.3. Legal Analysis of Judge Considerations establishing Successor Heirs in the Determination of the Central Jakarta Religious Court Number 455/Pdt.P/2020/PA.JP***

Compilation of Islamic Law and Law Number 7 of 1989 on Religious Justice as amended by Law Number 3 of 2006 on Religious Justice and the second amendment of Law Number 50 of 2009 on Religious Justice explains that The Religious Justice is one of the implementers of judicial affairs for people seeking justice who are Muslims regarding certain civil cases stipulated in this Law. The task and authority of the religious court is to examine, decide and resolve matters at the first level between people who are Muslims in the field of marriage, inheritance, wills, grants, zakat, infaq, waqf and sadaqah and sharia economy. From some of the duties and authorities of the Religious Court and the object of study is in the field of inheritance, especially regarding the successor heirs in the Central Jakarta Religious Court.

The Religious Court resolves cases that occur in the community based on its decision on the rules contained in the Compilation of Islamic Law. Although it is only a Presidential Instruction, but the provisions in the Compilation of Islamic Law have been used such as the Law. Like the general judiciary, a claim for rights that can be filed in a Religious Court can be an application and can also be a lawsuit. In this case, the claim of rights submitted is the right to bequeath from the heir in the form of an application for the determination of a replacement heir.

The position of grandchild can replace the position of his parents in full, namely as heirs and the position of grandparents, both from the father's side and from the mother can also replace the position of his child as a successor heir. The grandson can take his father's place, even if the heir has another surviving son. The grandson is not distinguished whether he is a boy or a girl, either from a boy or from a girl.

In a civil case the priority is how then the parties to the dispute can reconcile. The judge said he always sought peace between the two sides of the dispute and if the case continues, then the judge seeks a win-win solution so that no party feels harmed. This is no exception in the case of inheritance.

The arrangement of the successor heirs in Article 185 of the Compilation of Islamic Law must be optimally applied to realize justice as one of the purposes of the law. By giving inheritance to heirs who were previously considered not entitled to then replace the position of parents is a very commendable act as well as an adhesive in the family to maintain a friendly relationship so that familiarity remains intact. In addition, it is also intended as an expression of humanity, moreover it has become *ijma'* ulama di Indonesia. The smallest share that the successor's heir will receive is determined by the gender of the replaced heir who originally received inherited from the heir. The heir who is

replaced is a woman who dies earlier than the heir, then the share given to the heir who replaces her according to the part that will be accepted by the heir's daughter even though the successor heir is a man. Such a way that other effective heirs do not feel harmed his rights.

### ***3.4. Comparative Analysis of Arrangements for the Position of Surrogate Heirs between Civil Inheritance Law and Islamic Inheritance Law***

Groups of heirs with a certain position and a part that has been detailed in the Qur'an are called direct heirs consisting of children, fathers, mothers, brothers are heirs because of blood relations, also husband and wife are heirs because of marital relations. And if you are ill, or on a day whereby you will have a share in it, then bequeathed to her. They are the the successor, and they are the successor. [15]

The scholars argue that a close family that does not have an inheritance is obliged to make a will, this is based on Sura al-Baqarah verse 180 which reads when one of you comes (signs) of death, if he leaves a lot of wealth, bequeaths to his parents and relatives in a ma'ruf, duty to his pious. The implementation of compulsory wills in the patrilineal inheritance system was affirmed by the issuance of Egyptian Will Law Number 71 of 1946. The law affirms that "the amount of a compulsory will is as large as it should be accepted by the parent of the will if it is still alive provided it cannot exceed one-third of the inheritance. [16] The position of the heir according to the Civil Code that switches to "the heir of the deceased shall encompass all the rights and obligations of the deceased. Thus, it is natural that the Civil Code recognizes three kinds of attitudes of heirs to inheritance.

Article 848 of the Civil Code does not have the right of the parents to represent them, but a person can represent a person who does not want to receive his/her inheritance. Article 840 of the Civil Code stipulates that the children of a person who has been declared unworthy of inheritance, upon themselves have a call to be an heir, then it is not because the fault of the parents was excluded from inheritance This determination also applies whether the children are in exchange for an heir (*plaatsvervulling*) to be the heirs, on the grounds that a child is not worthy to be harmed by the wrong deeds of his parents. [17]

Comparison of surrogate heirs between islamic inheritance law and inheritance law of the Civil Code in principle the successor heir in the sense of the two laws is the same, i.e. a person who replaces the position of the heir who died first from the heir who should have obtained the inheritance and the heir who is replaced is the liaison between the person who replaced with the heir, and there was at the time of the heir's death, such as the child who succeeded his father.

The Law of Inheritance can be said to be an ideal law if the law is in accordance with the law that is alive and well accepted in the community so that its existence can create order and peace in the community, has consistency, clarity, firmness and high rationality so that it is easy to understand and applied in all spaces and times, especially by law enforcement officials and has a great opportunity to carry

out its enforcement and have a power that mengi for all parties so that the legal awareness of the people and the nation of Indonesia can be relatively realized.

Compilation of Islamic Law in Indonesia is a series of follow-ups in the efforts to present references to uniform Islamic law material for all judges in the Religious Justice and related agencies, especially in the field of Marriage Law, Inheritance Law and Law of Self-prudence. With the Compilation of Islamic Law, all legal products that come out of the Religious Justice environment must be guided and refer to the Compilation of Islamic Law. [18]

Article 185 is introduced a provision on an unknown successor heir in the book of jurisprudence that can replace the position of his parents who have died earlier than the heir. The concept of reassignment is also called plaatsvervulling or substitution actually adopts the provisions in the Civil Code (Burgerlijk Wetboek). The concept of reassignment has similarities to the concept of compulsory wills, namely in the event of the death of the person who is replaced that precedes the death of the heir, and that the part of the person who replaces is no greater than the part of the person who is replaced. However, there are fundamental differences between the two concepts. If in the will of the obligatory, which is replaced his position is the right to receive his parents share with a limit not exceeding 1/3 (one-third) of the inheritance. While in the concept of changing the position it replaces is the place, degree and rights, and its part is not limited to the maximum. Furthermore, if in the will of the obligatory, who can replace the position is only the special grandchildren, both male and female, whose parents died first from the heir. While in the replacement of positions, who can be the successor heirs are grandchildren who are not limited to the level down, children of the descendants of the family of the deviant line (nephew), and the legitimate children of natural children whose parents died. [19]

Regarding the heir, the mother who passed away and did not leave any will. And at this time there is a piece of land owned by the parents of the mother that will be sold and will be distributed to her children. And those who have been appointed by their parents shall take his mother's place in the place of his mother. This is expressly stipulated in the Compilation of Islamic Law Article 185 paragraph (1) states, the heir who died earlier than the heir of his position can be replaced by his son. But the share of the heir shall not exceed that of the part that should be obtained by the heir who is replaced in Article 185 paragraph (2). Mother is the heir who is entitled to the distribution of inheritance based on the existence of blood relations with grandmothers (Article 174 paragraph (1) Compilation of Islamic Law). However, because the mother dies first, her position can be replaced by her children.

The law regulates several matters concerning heirs. The provisions concerning the heirs are contained in the provisions of Article 832, Article 833, Article 834, Article 837 and Article 1066 of the Civil Code. [20] The substitute place can only occur after death means that the living cannot be replaced. This is explained in Article 847 of the Civil Code which reads that no one is allowed to act for a living person as his successor. [21] Compilation of Islamic law

this provision is in Article 185 paragraph (1) which reads the heir who died earlier than the heir then his position can be replaced by his child, except those in Article 173. In Article 847 of the Civil Code where people are replaced the place must have died. In "a contrario" people cannot take the place of a living person. Some even argue that people cannot take place through the living. [22].

As described earlier, so that the provision is included in the Compilation of Islamic Law. Article 185 paragraph (1) reads the heir who died earlier than the heir then his position can be replaced by his child, except those who are in Article 173 paragraph (2) which reads the part of the successor heir must not exceed the share of the heir equal to the replaced. Research tracing the origins of the successor heirs in the Compilation of Islamic Law comes from Hazairin's thinking is sufficient evidence and Hazairin's efforts to make his opinions derived from verses of the Qur'an interpreted according to the terms of customary law in order to adjust the content of the Qur'an with indigenous peoples in Indonesia (receptie theory). Whereas customary law should conform to the content of the Qur'an (receptie a contrario).

According to the provisions of the Civil Code the substitution in "the case where some children of the deceased inherit together with the descendants of a deceased child first, as well as all their descendants inherit together, each other in different family relationships of different degrees. While according to Article 185 paragraph (1) Compilation of Islamic Law it is stated that the successor heirs are only limited to grandchildren, but in practice most judges on religious courts do not restrict or in other words follow the rules of civil law.

Article 841 of the Civil Code reads a change of the right to a person who replaces, to act as a substitute, in a degrees and in all rights of the person who is replaced. Article 842 of the Civil Code reads a change in the right straight-down line, continuing in the absence of the Compilation of Islamic Law. In the case of change as above is forever permissible both in the case when some of the children of the deceased bequeath together with the descendants of a child who has died first, and all their descendants bequeathed together, each other in different family relationships.

In the Islamic inheritance system, the amount of the share that must be received by the successor heir, and distinguish the female successor heir. The male successor heir gets a greater share than the female successor heir. Meanwhile, according to the inheritance law of the Civil Code, the amount of the replacement heir that must be received is equal to the amount of the part that will be received by the successor heir and in the inheritance of the Civil Code does not distinguish the successor heirs of all women are entitled to the same. Inheritance must be divided between all descendants of deceased relatives first even though the descendants are of an unequal degree there is Article 844 of the Civil Code and in Article 845 of the Civil Code governs the replacement in a deviant line for nephews who are related to the closest blood family to the heir, there are still children and descendants of uncle or aunt for the heir. [23]

The principles of inheritance law that apply in Indonesia both civil inheritance law and Islamic inheritance law there are similarities although there are also differences, therefore in achieving the unification of inheritance law needs to be taken approaches while maintaining the belief in the truth of the teachings of the law of each inheritance and the provisions of the religion it adheres to. The Islamic inheritance legal system in its development may be reconciled to the forms of principles and thoughts in the preparation of national inheritance law by using the systematics of western civil inheritance law or the book of inheritance in the Civil Code.

The provisions in Article 185 of the Compilation of Islamic Law above, as if mawali is not a necessity that states that the position of the heir "can" be replaced by his children. However, in practice since the Compilation of Islamic Law was issued, we have not found a ruling of the Court of Religion that does not give part to the successor heirs, especially in the descendants of children.

The successor heir aims to maintain the right of the heir who should receive the share of the heir who is passed to his successor, namely his child so that the survival of the family goes on and also strengthen the fraternal ties between the heir and the successor heir. Civil inheritance law has institutionalized the successor heirs into the Civil Code and Islamic inheritance law has also implemented it although not yet in the form of law, new in the form of Compilation of Islamic Law. There are similarities in terms of surrogate heirs between the inheritance law of the Civil Code and hazairin teachings with the successor heirs who adhere to bilateral inheritance only in the matter of the accepted part is different.

#### **4. CONCLUSION**

Comparison of the position of the successor heir in Islamic inheritance law is formulated in the Compilation of Islamic Law Article 185 paragraph (1) namely the heir who died earlier than the heir of his position replaced by his child while according to the law of civil inheritance has been regulated very clearly in Article 841-848 of the Civil Code among others in the acquisition of the same rights between the successor and the replaced. The difference between the successor heirs according to Islamic inheritance law, one of which is that the right obtained by the successor's heir is not necessarily the same as the right of the person who is replaced and also should not exceed the share of the heir who is equal to the one who is replaced but may be reduced. According to civil inheritance law the part that will be obtained by the heir who replaces his father's position is exactly the same as the part that his father should have obtained if his father were still alive. The ideal arrangement regarding the position of the successor heir in the Indonesian national legal system is the form or system of the replacement of the place according to the inheritance of Islamic law with the civil inheritance law occurs if a person's heirs first die from the heir, then the child of the heir is entitled to replace the position of his parents who

have died first. The successor and successor heirs must have a valid relationship of nasab (blood relation) to the heir. The ideal arrangement of inheritance law in Indonesia is through the formation of legislation and through the decisions of judges (jurisprudence). The decision (jurisprudence) of judges of the Court of Religion occupies a very important place because in the ruling (jurisprudence) one can find a concrete form of legal rules, in addition to the function of the judge through the ruling (jurisprudence) it is possible to adjust the rule of law by setting changes, both changes in circumstances and changes in the sense of justice in order to realize the ideal arrangement of national inheritance law in Indonesia.

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