

# Analysis of *Maqâshid Shari'a* on Substitute Heir in Compilation of Islamic Law (KHI)

Nur Saniah<sup>1</sup>, Nawir Yuslem<sup>2</sup> & Hasan Matsum<sup>3</sup>

**Abstract:** *Analysis of Maqâshid Shari'a on Substitute Heir in Compilation of Islamic Law (KHI).* This study analyzes the application of *maqâshid shari'a* (objectives of shari'a) regarding substitute heirs as outlined in article 185 paragraphs 1 and 2 of the Compilation of Islamic Laws the research aims to find out the philosophical basis of *maqâshid shari'a* regarding the importance of giving inheritance to substitute heirs. This research is a normative legal research that uses a philosophical approach. Data were collected using literature techniques, then analyzed descriptively qualitatively through *maqâshid shari'a* theories. This study shows that the determination of inheritance for substitute heirs in Article 185 is important to realize because it contains many *maslahah* (benefits) both sociologically and psychologically. The philosophical foundation of *maqâshid shari'a* in inheritance for substitute heirs is not only limited to protecting assets (*hifzd al-mâl*) but also to improving their quality of life (*tanmiyah al-nasl wa al-mâl*). Substitute heirs are not enough just to be given assets, they also need care and affection from their extended family. Viewed from the *maslahah* position, giving inheritance to substitute heirs to improve their quality of life is included as *maslahah dharûriyah* (urgent needs).

**Keywords:** *maqâshid shari'a*, substitute heirs, Compilation of Islamic Law

**Abstrak:** *Analisis Maqâshid Syariah tentang Ahli Waris Pengganti dalam Kompilasi Hukum Islam (KHI).* Penelitian ini menganalisis penerapan *maqâshid syariah* (tujuan syari'at) tentang ahli waris pengganti sebagaimana termaktub dalam Kompilasi Hukum Islam pasal 185 ayat 1 dan 2. Tujuan penelitian adalah untuk mengetahui landasan filosofis *maqâshid syariah* tentang pentingnya memberikan harta warisan kepada ahli waris pengganti. Penelitian ini merupakan penelitian hukum normatif, menggunakan pendekatan filosofis. Data dikumpulkan dengan menggunakan teknik literatur, kemudian dianalisis secara deskriptif kualitatif melalui teori-teori *maqâshid syariah*. Penelitian ini menunjukkan bahwa penetapan bagian warisan bagi ahli waris pengganti dalam pasal 185 penting untuk direalisasikan karena mengandung banyak *maslahah* (manfaat) baik secara sosiologis maupun psikologis. Landasan filosofis *maqâshid syariah* dalam kewarisan bagi ahli waris pengganti bukan hanya sebatas perlindungan terhadap harta (*hifzd al-mâl*) tetapi juga untuk meningkatkan kualitas hidup mereka (*tanmiyah al-nasl wa al-mâl*). Ahli waris pengganti tidak cukup hanya diberikan harta, mereka juga membutuhkan kepedulian, dan rasa kasih sayang dari keluarga besarnya. Ditinjau dari posisi *maslahah*, pemberian harta warisan kepada ahli waris pengganti guna meningkatkan kualitas hidup mereka adalah termasuk *maslahah dharûriyah* (kepentingan yang mendesak).

**Kata kunci:** *maqâshid syariah*, ahli waris pengganti, Kompilasi Hukum Islam

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<sup>1,2,3</sup>Faculty Sharia and Law, North Sumatera Islamic State University, Indonesia

E-mail: <sup>1</sup>Saniah040488@gmail.com, <sup>2</sup>Nawir\_yuslem@uinsu.ac.id, <sup>3</sup>hasanmatsum@uinsu.ac.id

## Introduction

The Compilation of Islamic Law (KHI) is a collection of Islamic law materials consisting of three books, 30 chapters, and 229 articles.<sup>1</sup> The book contains provisions on marriage law consisting of 9 chapters, 170 articles; inheritance law; including wills and grants, which consists of 6 chapters, 43 articles, also several other provisions contained in 5 chapters, 12 articles, plus one article which is a closing provision.<sup>2</sup>

The desire for material law to be enforced within the Religious Courts has been around for a long time. However, this desire was only realized after the issuance of Presidential Decree No. 1 of 1991 which legalized the Compilation of Islamic Law as a material for religious court judges' consideration in deciding cases. Through this Presidential Instruction, the President encouraged the Ministry of Religion to socialize the Compilation of Islamic Law so that it can be used as needed, both by government agencies and individuals.<sup>3</sup>

The Compilation of Islamic Law is a collection of some opinions from *fiqh* experts, both classical and contemporary, as a result of comparative studies conducted in several Islamic countries having codified and unified family laws, such as Egypt, Morocco, and Turkey.<sup>4</sup> In the Compilation of Islamic Law, especially in the law of inheritance, several provisions are reformatory, which include substitute heirs, a bilateral inheritance distribution system,<sup>5</sup> mandatory wills for children and adoptive

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<sup>1</sup> The Compilation of Islamic Law is the only example of Indonesian Islamic law that directly labels itself as Indonesian Islamic Law. See Pagar, *Pembaharuan Islam Indonesia Kajian Terhadap Sisi Keadilan Ahli Waris Pengganti dalam Kompilasi Hukum Islam* (Bandung: Cita Pustaka Media Printis, 2007), p. 37.

<sup>2</sup> Mursyid Djawas and others, 'The Construction of Islamic Inheritance Law: A Comparative Study of the Islamic Jurisprudence and the Compilation of Islamic Law', *JURIS (Jurnal Ilmu Syariah)*, 21.2 (2022): 207–19.

<sup>3</sup> Puslitbang Kehidupan Keagamaan Badan Litbang dan Diklat Kementerian Agama, *Problematika Hukum Kewarisan Islam Kontemporer di Indonesia* (Jakarta: Badan Litbang dan Diklat Kementerian Agama, 2012), p. 3–4.

<sup>4</sup> Muzhar Atho' and Khairuddin Nasution, *Hukum Keluarga di Dunia Islam Modern* (Mimbar Hukum, 2003), p. 6.

<sup>5</sup> Andi Sukmawati Assaad and others, 'Gender Equity in Inheritance System : The Collaboration of Islamic and Bugis Luwu Customary Law', *AL-IHKAM: Jurnal Hukum & Pranata Sosial*, 17.2 (2022): 458–79.

parents,<sup>6</sup> and inheritance in the form of agricultural land of less the two hectares and used as a collective inheritance.<sup>7</sup>

In the Compilation of Islamic Law, provisions regarding substitute heirs are regulated in article 185 which reads: (1) *Heirs who die earlier than their heirs can be replaced by their children, except for those mentioned in article 173;* (2) *the share of the replacement heir may not exceed the share of the heir who is the same as the person being replaced.* Based on this provision Article 185, grandchildren, both male and female, can inherit sons and daughters jointly and can also replace the position of their father or mother who died earlier.<sup>8</sup>

The existence of substitute heirs in the Compilation of Islamic Law is a new concept that previously did not exist in classical Islamic inheritance law. The origin of its existence is also a matter of difference of opinion among jurists in Indonesia. Some argue that the concept of substitute heirs in the Compilation of Islamic Law is based on customary law. While some others argue that the provision is based on jurisprudence determined by the judge through the court. Jurisprudence regarding substitute heirs is essentially based on living law, which has been practiced voluntarily for hundreds of years and satisfies the parties who carry it out.<sup>9</sup>

The provision of Article 185 of the Compilation of Islamic Law is a breakthrough to institutionalize the rights of children and grandchildren to inherit their father's portion if the father dies before his grandfather. The provision also includes a share for granddaughters when the mother dies before the grandfather. Such a rule did not exist in classical Islamic

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<sup>6</sup> Sayuti Thalib, *Hukum Kewarisan Islam di Indonesia, Edisi Revisi* (Jakarta: Sinar Grafika, 2018), p. 139.

<sup>7</sup> Bisri Cik Hasan, *Kompilasi Hukum Islam dan Peradilan Agama dalam Sistem Hukum Nasional* (Jakarta: Logos Wacana Ilmu, 1999), p. 12.

<sup>8</sup> Diana Zuhroh, 'Konsep Ahli Waris dan Ahli Waris Pengganti: Studi Putusan Hakim Pengadilan Agama', *Al-Ahkam*, 27.1 (2017): 43 <<https://doi.org/10.21580/ahkam.2017.27.1.1051>>. Compare Abdul Qodir Zaelani, "Kedudukan Ahli Waris Pengganti (Plaatsvervulling) dalam Kompilasi Hukum Islam dan Pemecahannya." *ADHKI: Journal of Islamic Family Law*, 2.1 (2020): 91-105.

<sup>9</sup> M. Hajar, 'Asal Usul dan Implementasi Ahli Waris Pengganti Perspektif Hukum Islam', *Asy-Syir'ah Jurnal Ilmu Syari'ah dan Hukum*, 50.1 (2016): 1-31.

inheritance laws, which, instead, stated that unmarried granddaughters could not replace their mothers if there were sons.<sup>10</sup>

The discussion of substitute heirs has attracted the attention of several researchers who studied it from various perspectives. Several previous studies that intersect with this research include the Pagar<sup>11</sup> research explains that replacement heirs, as stipulated in Article 185, fulfill a sense of justice and comply with Shari'a. With this replacement, a balanced and equitable system of acquiring assets will be created among all relatives of the heirs, including the protection of the rights and interests of the heirs. Another study was carried out by Habiburrahman<sup>12</sup> who concluded that the concept of substitute heirs in the Compilation of Islamic Law is a concept that is contrary to the Qur'an and hadith. In his view, citing Hazarin's opinion, the concept of substitute heirs in Indonesia is solely based on observations of the conditions of bilateral individuals in Indonesia. Meanwhile, on the other hand, it ignores the inheritance provisions that should be regulated in the Al-Qur'an and As-Sunnah. Similarly, Mukhtar Alamsyah's<sup>13</sup> research which explains that the practice outside the Bireuen Shari'a Court indicates substitute heirs is not acceptable to most people. They argue that the surrogate inheritance system does not have a clear legal source in the Qur'an or hadith. While Sukris Sarmadi's<sup>14</sup> research shows that based on progressive law, the substitute heir in the Compilation of Islamic Law is different from the inheritance system in the Civil Code as well as Hazairin's thinking of the inheritance system for substitute heirs.

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<sup>10</sup> Rafiq Ahmad, *Pembaruan Hukum Islam di Indonesia* (Jakarta: Gama Media, 2001), p. 11.

<sup>11</sup> Pagar.

<sup>12</sup> Habiburrahman, *Rekonstruksi Hukum Kewarisan Islam di Indonesia*. (Jakarta: Kencana, 2011), p. 135.

<sup>13</sup> Mukhtar Alamsyah, *Kedudukan Ahli Waris Pengganti dalam Pewarisan (Studi Pada Wilayah Hukum Mahkamah Syariah Bireuen)* (Bandung: Cita Pustaka Media Printis, 2008), p.120.

<sup>14</sup> Akhmad Sukris Sarmadi, 'Ahli Waris Pengganti Pasal 185 KHI dalam Perspektif *Maqāshid al-Syari'ah*', *Al-Manahij: Jurnal Kajian Hukum Islam*, *Al-Manahij: Jurnal Kajian Hukum Islam*, 7:1 (2013): 65–76.

The next research is Wahidah Ideham's research<sup>15</sup> on the judge's decision in the Banjar Muslim community regarding substitute heirs in the Compilation of Islamic Law from the perspective of gender equality. Furthermore, Khoirudin Hasbalah's study<sup>16</sup> discusses legal pluralism among the people of Aceh in the inheritance system, especially regarding the practice of giving inheritance to substitute heirs. Furthermore, Sukiati's research<sup>17</sup> on the practice of grants for substitute heirs in the Javanese community. Next, Fauzi's research<sup>18</sup> on the concept of "*patah titi*" in Central Aceh; and Haslinda's research<sup>19</sup> on the inheritance distribution system based on Hazairin's theory. Moreover, another research that also discusses the same topic is Armiadi's research<sup>20</sup> on the views of Dayah scholars regarding the legacy of "*broken titi*" in Aceh Besar District,<sup>21</sup> and Suwardi Bahtiar's research<sup>22</sup> on the application of substitute heirs in Bone District from the perspective of Compilation of Islamic Law and the Civil Code.

This research is different from previous studies because the discussion is focused on the philosophical basis of determining inheritance for substitute

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<sup>15</sup> Wahidah Ideham, 'Substitute Heirs in the Compilation of Islamic Law: An Overview from Gender Equality Perspective Case Study of the Religious Courts in Banjarmasin', *Samarah*, 6.2 (2022) <<https://doi.org/10.22373/sjhk.v6i2.12466>>.

<sup>16</sup> Khairuddin Hasballah, Ridwan Nurdin, and Muslim Zainuddin, '*Patah Titi* and Substitute Heirs : A Study of Legal Pluralism on the Inheritance System in Aceh Community', *Abkam: Jurnal Ilmu Syariah*, 21.1 (2021): 299–324.

<sup>17</sup> Sukiati, Sukiati. "The Practice of Hibah as a Substitute Heir Among the Javanese Family." *MIQOT: Jurnal Ilmu-ilmu Keislaman*, 42.1 (2018): 59-78.

<sup>18</sup> Fauzi, 'E Concept of Patah Titi: E Problem of Inheritance and Its Solution in Aceh Tengah', *Studia Islamika*, 26.1 (2019): 33-73 <<https://doi.org/10.15408/sdi.v26i1.6529>>.

<sup>19</sup> Haslinda Sabdah and Supardin Supardin, 'Analisis Hukum Islam Terhadap Teori Hazairin Tentang Penetapan Ahli Waris Pengganti dalam Sistem Hukum Kewarisan Islam', *Shautuna: Jurnal Ilmiah Mahasiswa Perbandingan Mazhab dan Hukum*, 2021 <<https://doi.org/10.24252/shautuna.v2i1.17434>>.

<sup>20</sup> Suwardi Bahtiar, 'Penerapan Ahli Waris Pengganti Menurut KHI Dan KUHPerdara di Kabupaten Bone (Studi Kasus di Pengadilan Agama Watampone', *Jurisprudentie : Jurusan Ilmu Hukum Fakultas Syariah dan Hukum*, 5.1 (2018): 266-277 <<https://doi.org/10.24252/jurisprudentie.v5i1.4594>>.

<sup>21</sup> Armiadi Armiadi, Edi Yuhermansyah, and Arifa Santi, 'Pandangan Ulama Dayah Terhadap Warisan Patah Titi Ditinjau dalam Perspektif Hukum Islam (Studi di Kecamatan Kuta Baro Kabupaten Aceh Besar)', *El-USRAH: Jurnal Hukum Keluarga*, 3.2 (2020): 211-226 <<https://doi.org/10.22373/ujhk.v3i2.7697>>.

<sup>22</sup> Bahtiar.

heirs from the perspective of *maqâshid sharî'a*. This research is important to answer doubts about the legal basis for substitute heirs in the Compilation of Islamic Law since the concept of substitute heirs is a series of legal reforms that are not explained explicitly in the Qur'an and hadith.

## Research Methods

This type of research is called normative legal research or doctrinal legal research. The approach used in this study is a philosophical, normative approach. The normative approach is used to analyze aspects of legal legitimacy regarding substitute heirs in the Compilation of Islamic Law regulated in Article 185 Paragraphs 1 and 2. Meanwhile, the philosophical approach uses *maqâshid sharî'a* theory to analyze in depth the impact of problems in determining inheritance for substitute heirs.

The data source used in this study is secondary which consists of primary legal materials, namely Compilation of Islamic Law Book 2 concerning inheritance, coupled with secondary legal materials in the form of books, journals, dissertations, classical and contemporary *ushûl fiqh* books, and other literature related to Islamic inheritance law. Apart from that, this study also uses tertiary legal materials in the form of legal dictionaries and encyclopedias. The collected interpretation of the data juxtaposed with the *maqâshid sharî'a* theory.

## Results and Discussion

### The Concept of *Maqâshid Sharî'a* among the Classical and Contemporary Scholars

According to Imam al-Shâtibi, *maqâshid sharî'a* exists to bring about the benefit of mankind both in this world and in the hereafter. The benefit plays an important role, especially, in two aspects, namely: first, to achieve a good life in this world and the hereafter; and secondly, to avoid harm in this world and the hereafter. Thus, if there a rule of law creating problems or even causing harm, then it is away from the goal of shari'a (*maqâshid sharî'a*).<sup>23</sup> As for *maslahah* (benefit) itself, it is

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<sup>23</sup> Zulkarnain Abdurrahman, 'Teori *Maqâshid* al-Syatibi dan Kaitannya dengan Kebutuhan Dasar Manusia Menurut Abraham Maslow', *Al-Fikr*, 22.1 (2020): 52–70.

something that is understood as caring for creatures to get goodness and rejecting harm. Law is established not only based on reason but also religious teachings. However, if shari'a does not accept the idea it will be rejected according to the agreement of Muslims.<sup>24</sup>

*Maslahah* is the opposite of *mafsadah*. Etymologically, *maslahah* means benefit and goodness.<sup>25</sup> *Maslahah* can simply be interpreted as fulfilling needs, protecting interests, bringing benefits to individuals and society, and avoiding harm. While the meaning of *maslahah* in terminology, as put forward by Ramadhan al-Bûthi, is everything that brings benefits, which includes various kinds of efforts to achieve positive things or otherwise reject and avoid negative things.<sup>26</sup> Meanwhile, Imam al-Shâtibi argues that *maslahah* is the fulfillment of the needs of human life and obtaining things demanded by emotional and intellectual qualities in an absolute sense.<sup>27</sup>

Al-Ghazâli defines *maslahah* with *al-muhâfazhah 'ala maqshûd al-shar'i* (maintaining the goals of *shari'a*). The *shari'a* objectives for humans include five protections, namely maintaining and protecting human needs in the fields of (a) religion, (b) soul, (c) reason, (d) offspring, and (e) property. Everything that can protect the main thing is called *maslahah*, while everything that can damage the five things is called *mafsadah*.<sup>28</sup> According to Ziyad Muhammad Ahmadan, not all *maslahah* can be determined by humans, some have to go through *shari'a* stipulations whose provisions can be found in al-Qur'an, Sunnah, or Ijma'.

Najmuddin al-Thûfi has a different view on defining *maslahah* from the scholars above. Imam al-Thufi defines *maslahah* as something that can be achieved by reason by itself.<sup>29</sup> Al-Thûfi chooses an extreme view

<sup>24</sup> Abu Ishak al-Shatibi, *Al-Muwafaqat Fi Usûl as-Shari'ah* (Beirut: Dar al-Kutub al-Arabi), p. 6.

<sup>25</sup> Nirwan Nazaruddin and Farhan Kamilullah, 'Maqâshid As-Syariah Terhadap Hukum Islam Menurut Imam As-Syatibi dalam *al-Muwafaqat*', *Jurnal Asy-Syukriyyah*, 21.1 (2020): 106–23 <<https://doi.org/10.36769/asy.v21i1.101>>.

<sup>26</sup> Ahmad Faidy Haris, *The Spirit of Islamic Law: Membongkar Teori Berhukum Statis Menuju Hukum Islam Dinamis* (Yogyakarta: SUKA Press UIN Sunan Kalijaga, 2012), p. 64.

<sup>27</sup> al-Shatibi, p. 29.

<sup>28</sup> al-Gazali, *Al-Mustashfa Min Ilmi al-Ushûl* (Kairo: Maktabah al-Jundi, 1971), p. 251.

<sup>29</sup> Najamudin Sulaiman, *Syarah Muhtashar al-Raudhah* (Markaz al-Harf, 1989), p. 59.

of *maslahah*, where according to his view, *maslahah* is a source of law that is above texts. So if there is a conflict between *maslahah* and the texts, the *maslahah* must be prioritized. Al-Thûfi categorizes *maslahah* in two ways: (1) *maslahah* where *shari'a* purpose is in itself, such as worship; and (2) *maslahah* where the purpose of *shari'a* is not contained in it, such as in the matters of muamalah and custom.<sup>30</sup>

According to Imam al-Shâtibi, the human benefit can be realized if the five basic elements of human life, namely religion or belief, soul, mind, lineage, and wealth, can also be realized and maintained. Within this framework, Imam al-Shâtibi divides the order and priority scale of *maslahah* into three ranking orders, namely *darûriyat*, *hâjiyat*, and *tahsîniyat*.<sup>31</sup> *Maslahah darûriyat* is the primary *maslahah* for human life, both in this world and in the hereafter, that must exist as an absolute condition for the realization of life itself. Imam al-Shâtibi emphasized that the main benefit is the core of all teachings in Islam. *Maslahah hâjiyat* is everything that becomes a secondary human need for human life to be happy and prosperous and to avoid various miseries. While *maslahah tahsîniyat* is a complement to the secondary needs of life to improve the welfare of human life.<sup>32</sup>

Contemporary scholars studying *maqâshid shari'a* seek to revitalize and reformulate the concept so that it becomes relevant and responsive to solve the increasingly complex problems of Muslims. In the view of contemporary Islamic scholars such as Jaser Auda,<sup>33</sup> Thahir Ibnu Asyur, and Yusuf al-Qardhawi,<sup>34</sup> the concept of *maqâshid shari'a* put forward by classical scholars is still general in nature and does not include specific goals rule of law in detail. According to them, classical *maqâshid shari'a* is still limited to individual life-individual self-esteem and property-not

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<sup>30</sup> Al Yasa' Abubakar, *Metode Istislahiah "Pemanfaatan Ilmu Pengetahuan dalam Ushul Fikih* (Jakarta: Kencana, 2016), p. 36.

<sup>31</sup> al-Shatibi, p. 8.

<sup>32</sup> al-Shatibi, pp. 9-11.

<sup>33</sup> Jasser Auda, *Maqashid As-Shariah as Philosophy of Islamic Law : A Systems Approach* (London: The International Institut of Islamic Thought, 2007), p. 54.

<sup>34</sup> Yusuf al-Qardawi, *Keluasan dan Keluwesan Hukum Islam* (Semarang: Dinautama, 1993), p. 43.

to society. Therefore, in this contemporary era, the concept of *maqâshid shari'a* needs to be deconstructed by orienting it toward people's lives in general which includes national pride, state wealth, and the national economy.<sup>35</sup>

Meanwhile, the rapid development of science and technology has affected lifestyles and patterns of social interaction, so that there are no boundaries between one area and another. This rapid development requires that Islamic law change significantly to keep pace with the times, without having to abandon the basic principles that already exist. The rule of fiqh says "*maintaining old principles is good, but adopting new ideas is better*".<sup>36</sup>

Contemporary scholars develop the concept of *maqâshid shari'a* with a wider scope and conclude it directly from the Qur'an and Hadith, not from classical fiqh literature. In this way, it is hoped that the *maqâshid shari'a* produced will not only be limited to the five main points, as stated by the classical scholars but also develop to include issues of human dignity and worth, including women's rights and freedom of religion.<sup>37</sup>

Classical *maqâshid shari'a* has a different character from contemporary *maqâshid shari'a*. Classical *maqâshid shari'a* tends to be personal and preventive in nature, while contemporary *maqâshid shari'a* is more social, progressive, and accommodating in protecting human rights. Apart from that, conceptually, classical and contemporary *maqâshid shari'a* can be identified through their two pressure points, classical *maqâshid shari'a* places more emphasis on aspects of protection and maintenance, while contemporary *maqâshid shari'a* places more emphasis on development and rights. The following table illustrates the differences:<sup>38</sup>

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<sup>35</sup> M. Burhanuddin Ubaidillah and Alfin Laili Nuril, 'Teori *Maqâsid Syari'ah* Perspektif Ulama Modern dan Kontemporer', *JAS MERAH: Jurnal Hukum dan Ahwal Al-Syakhsyiyah*, 1.1 (2021): 1-15.

<sup>36</sup> Muhammad Aziz, 'Reconstruction of *Maqashid Shari'ah* Perspective Muhammad Thahir Ibn 'Assyria: Efforts to Re-Discuss Shar'ia with Reality Sholikah STIT Makhdum Ibrahim Tuban', *Jurnal Hukum Islam*, 17.2 (2019): 231-249.

<sup>37</sup> Auda, p. 135.

<sup>38</sup> Auda, p. 136.

**Table 1. Differences in Concepts of *Maqâshid* in the View of Classic and Contemporary Scholars**

Classic scholars	Contemporary Scholars
<i>Hifzd al-dîn</i> (Maintaining Religion)	Protecting freedom of religion and belief
<i>Hifzd al-nafs</i> (Nurturing the Soul)	Protecting human dignity, respect, and rights
<i>Hifzd al-aql</i> (Nurturing Mind)	Optimizing the use of thought through scientific research and academic activities
<i>Hifzd al-nasl</i> (Caring for offspring)	Maintaining and sustaining family institutions
<i>Hifzd al-mâl</i> (Maintain property)	Prioritizing social care and sensitivity

The development of *maqâshid* concept carried out by contemporary ulema cannot be separated from the background of thought which considers that the current condition of the Muslim Ummah is very concerning, so that it requires serious efforts to increase its human potential. Jaser Auda emphasized that the development of human resources is an important issue (*maslahah 'amm*) that must receive attention from contemporary Islamic law. Every rule of law that has a positive impact on the development of human resources must be maintained and improved; Conversely, if it tends to undermine human resources then the legal order must be abolished or rejected.<sup>39</sup> It should be noted that Jaser Audah does not reject or ignore the *maqâshid* of classical shari'a. He only criticizes and, later, develops the concept into a more universal, holistic, and humanistic one. In essence, the core teachings of classical *maqâshid shari'a* are still used but are developed according to the current situation.<sup>40</sup>

### Substitute Heirs' Inheritance in Compilation of Islamic Law

The term "substitute heir" can be interpreted as a replacement in the distribution of inheritance when the heir dies earlier than the heir.

<sup>39</sup> Ubaidillah and Nuril.

<sup>40</sup> Fahrudin, 'Nalar Konstruktif Maqashid Syariah dalam Studi Hukum Islam (Sebuah Studi Pengantar dalam Ilmu *Maqâshid Syariah*)', *Al-Ahkam Jurnal Ilmu Syari'ah dan Hukum*, 6.1 (2021) <<https://doi.org/10.22515/alakhkam.v6i1.3744>>.

In this situation, the children of heirs, who died first, can receive an inheritance that previously belonged to the direct heirs, namely their dead parents. Heirs were not originally heirs but because of certain circumstances became heirs.<sup>41</sup> Another definition of a substitute heir is a person whose relationship with the heir is interrupted by another heir but has died earlier than the heir. For example, if the grandfather and grandson relationship is broken by the child, then the grandson will become the successor heir. If the child dies before the grandfather, or if the child is still alive, then the grandson can not become the successor.<sup>42</sup>

The Compilation of Islamic Law does not provide a special meaning that can be used as a reference in its implementation, both in general and in detail in the elucidation of article by article. Provisions for substitute heirs in the Compilation of Islamic Law are regulated in Article 185 which reads:<sup>43</sup>

Paragraph 1; *Heirs who die before becoming heirs can be replaced by their children, except for those mentioned in Article 173;*

Paragraph 2; *The share of heirs for the replacement may not exceed the share of the heirs who are the same as those being replaced.*

Based on these articles, grandchildren, boys or girls, can inherit jointly. They are not hindered by sons because of their status to substitute their fathers or mothers who have died earlier. As stated by Yahya Harahap, a professor and expert in the field of civil law as well as one of the drafting teams of the Compilation of Islamic Law, the determination of substitute heirs regulated in Article 185 of the Compilation of Islamic Law is based on considerations of a sense of justice and humanity. It is unfair and inhumane to stipulate that a person is not entitled to receive an inheritance that should have been obtained by his father or his mother just because his father or mother happened to die before his

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<sup>41</sup> Sarmadi, p. 20.

<sup>42</sup> Musa Musa, 'Ahli Waris Pengganti dalam Tinjauan Kompilasi Hukum Islam dan Hukum Perdata', *Isti'dal : Jurnal Studi Hukum Islam*, 7.1 (2021): 53-78 <<https://doi.org/10.34001/istidal.v7i1.2154>>.

<sup>43</sup> A. Malthuf Siroj, Moh. Zainuddin Sunarto, and Ismail Marzuki, 'Analisis Hukum Terhadap Kedudukan Ahli Waris Pengganti, Anak Hasil Zina, dan Anak Hasil Luar Nikah', *Jurnal Ilmu Teknologi, Kesehatan, dan Humaniora*, 3.1 (2022): 38-47.

grandparents. As stated by Hazairin, the determination of substitute heirs for children whose parents have died earlier than the heirs (grandparents) is not regulated in the Qur'an and hadith, nor is it based on Surah an-Nisa verse 33. Thus, the concept of substitute heirs is more based on mere rational and humanitarian considerations.<sup>44</sup>

### The Concept of *Maqâshid Sharî'a* on the Inheritance of Substitute Heirs in the View of Classical and Contemporary Scholars

The concept of substitute heirs, if analyzed through the perspective of *maqâsid shari'a* and *maslahah*, as formulated by Imam al-Ghazâli, al-Juwaini, Imam al-Shâtibi, and others, has a very strong interrelation with the five elements of *maqâsid shari'ah*, namely *hifzd al-dîn*, *hifzd al-nafs*, *hifzd al-aql*, *hifzd al-nasl*, and *hifzd al-mâl*.

On the one hand, the concept of substitute heirs can be included in the category of property protection (*hifzd al-mâl*), because this concept strives for the heir's grandchildren to continue to receive a share of the assets that should have been shared by the parents who died first.<sup>45</sup> On the other hand, however, if the rights of the substitute heir, who is an orphan, to inherit part of his parents who died earlier, are not fulfilled, then this can also threaten the principle of maintaining his religion (*hifzd al-dîn*). This is because, in many cases, poverty can plunge people into disbelief. Therefore, by giving them wealth, the orphans can carry out their religious teachings perfectly.

Furthermore, when studied further, the concept of maintaining the property and maintaining religion can also be closely related to the concept of *hifzd al-nafs* (caring for the soul). A healthy and strong body must of course be filled with nutritious food and vitamins. This can be realized if there are treasures that can be utilized. This means that giving the inheritance to substitute heirs is as important as fulfilling one of the *maqâshid shari'a* elements namely, taking care of the soul.<sup>46</sup>

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<sup>44</sup> Aang Abdul Aziz, 'Analisis Kritis Hukum Terhadap Kedudukan Ahli Waris Pengganti dalam Hukum Keluarga Islam di Indonesia', *Asy-Syari'ah*, 19.1 (2019): 1-14 <<https://doi.org/10.15575/as.v19i1.3506>>.

<sup>45</sup> Abdurrahman.

<sup>46</sup> Abdurrahman, p. 57.

Having an impact on the maintenance of reason, of course, substitute heirs, who are orphans, must receive education, both religious and general education, to maintain the existence of reason and a better future. Education is very urgent in our lives today, but education is rarely obtained for free, there is a fee to be paid. Therefore, giving an inheritance to a substitute heir will help maintain reason by providing good religious education and helping the general public improve their future.<sup>47</sup> Finally, there is also another effect of giving assets to substitute heirs for the maintenance of offspring. If the substitute heir has assets, it will be easier for him to get married and protect his offspring. Since marriage requires a lot of money, giving inheritance to substitute heirs, then, will make it easier for them to maintain offspring.<sup>48</sup>

Substitute heirs, to survive humanely, really need the care and protection of the five things above. If one of them is not realized, then their life will be threatened and can bring great and prolonged difficulties which may end in misery. Giving inheritance to substitute heirs can provide protection and maintenance. Judging from the hierarchy, this form of *maslahah* is included in the category of *maslahah dharûriyyah* (a very urgent need). For now, *dharûriyyah* cannot only be interpreted as a minimum protection but must be extended at least to a certain level that fulfills the need of a person to live properly and to be able to compete with other parties.<sup>49</sup> This is what is needed by the substitute heirs, who incidentally are orphans, so that they can live a decent life, at least at a standard level. Substitute heirs who are given full rights to receive inheritance will be able to compete with other people, and not be crushed by the progress of time. Continuous improvement in their quality of life will enable them to move faster in competing with others to produce better and more useful things.<sup>50</sup>

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<sup>47</sup> Siti Mutholingah, 'Relevansi Pemikiran *Maqashid al-Syari'ah* Jasser Auda terhadap Sistem Pendidikan Islam Multidisipliner', *Journal TALIMUNA*, 7.2 (2018): 90-111 <<https://doi.org/10.32478/talimuna.v7i2.183>>.

<sup>48</sup> al-Gazali, *Menyingkap Hakikat Perkawinan* (Bandung: Kharisma, 1997), p. 26.

<sup>49</sup> Abu Bakar, p. 85.

<sup>50</sup> Abubakar, p. 93.

The concept of *maslahah* (goodness) and *maqâshid shari'a* (the objective of Islamic law) aims to protect and fulfill human needs so that their human interests can be properly protected. By giving assets to substitute heirs, the goal is to help them live a more decent life and get out of the difficulties and tribulations of life can be realized. To test the feasibility of the concept of substitute heirs as stipulated in Article 185 of the Compilation of Islamic Law, one can do this by using the concept of *maqâshid shari'a* and *maslahah*.

There is no pure *maslahah* in this world. In every *maslahah* (virtue) there must be an element of *mafsadah* (vices). Similarly, in every *mafsadah* there must be an element of *maslahah*. Thus, something is called *maslahah* in *maqâshid shari'a* if the *maslahah* element is more dominant than the *mafsadah* element. If it is associated with the position of substitute heirs, the purpose of determining the rule regarding the matter is to create benefits as well as save them from difficulties because those responsible for fulfilling their needs (parents) have died when they were not yet adults.<sup>51</sup> Under such difficult conditions, it would be unfair if they were declared not to have the right to inherit their parent's portion simply because their parents have died; while the grandsons of heirs whose parents are still alive can receive benefits from the inheritance of their parents, but also receive love and meeting the needs of life ideally. This means that granting rights to substitute heirs is a form of justice and benefit for substitute heirs. Although, it must be admitted, that the granting of these rights on the one hand will reduce the share of the main heirs, and the impact of the *maslahah* (benefit).

Determination of the substitute heir will cause conflict between two *mafsadah*, on the one hand reducing the portion of the main heir, and on the other hand, it will cause injustice and misery to the substitute heir if this status is not realized. To reconcile conflicts between the two *mafsadah*, a fiqh rule can be used, saying that *if two mafsadah collide then choose the lightest one*.<sup>52</sup> If examined in more depth, of the two

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<sup>51</sup> Pagar, p. 130.

<sup>52</sup> Abdul Aziz Muhammad Azam, *Qawâidul Fiqhiyah* (Kairo: Darul Hadist, 2005), p. 25.

*mafsadah*, the lighter one is the first, namely reducing the portion of the main heir and dividing it with substitute heirs. Granting the right to the substitutive heirs, on the one hand, will indeed reduce the share of the main heir; but on the other hand, the *maslahah* (benefit) will be greater than the *mafsadah*, namely creating justice, and conform with the *dharûriyah* (emergency) needs of substitute heirs.

One thing that needs to be considered is that *maslahah* cannot be determined simply by following one's desires, but must be in line with the general standards and provisions of the shari'a.<sup>53</sup> The use of reason to produce laws relating to matters of benefit cannot stand alone and be separated from *naql* (textual) argument. Granting inheritance rights to substitute heirs is one way to fulfill aspects of sharia justice as mandated by *maqâshid shari'a* or *maslahah* to create a balanced and equitable inheritance distribution system for all heirs and relatives. With this provision, the rights and the interests of the substitute heirs can be protected and fulfill the *dharûriyah* need of substitute heirs.<sup>54</sup>

If related to *'urf* (community custom), the concept of substitute heirs can also be found in practices that develop in society. According to Imam al-Shâtibi, customs that live in society and contain great *maslahah* and are in line with the shari'a can be justified as legal evidence. Therefore, in this sense, a tradition of Acehness, known as "*patah titi*", is valid and can be accepted as law.<sup>55</sup>

*Maqâshid shari'a* is one of the important instruments to test a law whether it is following the *shari'a* or not. The law should not be concluded solely based on its source (*mashâdir al-ahkâm*). One must also consider the aspect of its legal objectives (*maqâshid shari'a*), that is to realize good for all mankind. If a law is held only based on sources alone, the understanding of what is called Islamic law will become very narrow. Whereas the aspects of *maqâshid shari'a* and *maslahah* according to Imam Mâlik in his concept of *maslahah mursalah*, are more important

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<sup>53</sup> Muchamad Coirun Nizar, 'Literatur Kajian *Maqâshid Syari'ah*', *Jurnal Ulul Albab*, 3,5 (2016): 155.

<sup>54</sup> Nazaruddin and Kamilullah.

<sup>55</sup> Muhammad Azam.

than just protecting the source. As emphasized by Ibn Asyûr, the highest goal of sharia is the realization of justice (*maslahah*) and the rejection of evil (*mafsadah*).<sup>56</sup>

To realize this idealism, we can utilize various sources in formulating laws without having to force explicit explanations from the Qur'an and hadith. This has been done by many scholars and legal experts in Indonesia, including in formulating the concept of substitute heirs in the Compilation of Islamic Law, which was formulated from various legal sources including customary law, civil law, and legal opinions from experts. It should be remembered that the Al-Quran and Hadith, as the main sources of Islamic law, have a limited number of legal verses, so they cannot answer all legal questions that arise in society. For this reason, as long as the law formulated is following the framework of "realizing good and rejecting evil", then this provision can be recognized and seen as fulfilling the element of public legal awareness.<sup>57</sup>

### Analysis of Contemporary Ulama *Maqâshid Sharî'a* Regarding the Inheritance of Substitute Heirs

The *maqâshid sharî'a* approach of contemporary scholars is very relevant to be applied in analyzing the rules regarding substitute heirs. Substitute heirs are legal provisions that are formulated not only based on valid arguments in the Qur'an or hadith but also based on *maslahah*.<sup>58</sup>

Contemporary *maqâshid sharî'a* that is relevant as an analytical tool to protect the rights of substitute heirs is *hifzd al-nasl*, or maintaining and developing the role of the family institution. The nuclear family is the smallest unit in society consisting of a father, mother, and children. The extended family includes grandparents and siblings.<sup>59</sup> When one of the

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<sup>56</sup> Nizar.

<sup>57</sup> Erfina Fuadatul Khilmi, 'Peran *Maqâshid Syariah* dalam Pembentukan Peraturan Daerah (Studi Pendekatan Sistem Jasser Auda)', *Jurnal Justiciabelen*, 1.2 (2019): 219-233 <<https://doi.org/10.30587/justiciabelen.v1i2.829>>.

<sup>58</sup> Aang Abdul Aziz.

<sup>59</sup> Rahayu Puji Lestari, 'Hubungan Antara Pernikahan Usia Remaja dengan Ketahanan Keluarga', *JKKP (Jurnal Kesejahteraan Keluarga dan Pendidikan)*, 2.2 (2015): 84-91 <<https://doi.org/10.21009/jkkp.022.04>>.

heirs dies in the nuclear family, the extended family plays an important role in maintaining the integrity of the nuclear family, including by continuing to provide inheritance rights that should have existed from the start. This is following the goal of realizing a prosperous family, namely a family that can meet the needs of its members, clothing, shelter, food, education, religion, and social family. In family life, every member wants harmony, happiness, and balance in the family, this can only be realized if there is a balance between family income and the number of family members.<sup>60</sup>

The family has several functions, namely:

- a) Religious function. First place for a child to know, instill, grow, and develop religious values so that he becomes a human being who is religious, has a noble character, and has faith and devotion to God Almighty.
- b) Socio-cultural function. The family provides opportunities for all family members to develop their diverse potential in one unit.
- c) The function of love and affection. Family becomes the main place for a life full of love. This function is very important as the basis and foundation of the relationship between husband and wife, parents and children, children and their siblings, and also kinship relations between generations.
- d) Protection function. This function mandates that the family is a place of refuge for its members and a center for security and peace for every member of the family.
- e) Reproductive function. This function is natural for the continuity of human offspring from one generation to the next.
- f) Socialization and educational functions. The family is the first and foremost place for children to get a good education. This function also provides a role and direction for the family in educating their offspring so that they can adapt their lives to a very complex future.

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<sup>60</sup> Wirda Wiranti Ritonga, 'Peran dan Fungsi Keluarga dalam Islam', *Islam & Contemporary Issues*, 1.2 (2021): 47-53.

- g) Economic function. Almost all activities of the family and its members require financial support, therefore the family must be an important pillar of economic support for the survival of the family and its offspring.
- h) Environmental development function. This function provides support for each family member so that they can position themselves in a harmonious and balanced manner according to the carrying capacity of nature and the environment which can change at any time.

Efforts to realize *hifzd al-nasl* can be done by carrying out these family functions properly. The measure of successful family functioning is how the family operates as a unit and how family members interact with one another. Above all, family functions must comply with *maqâshid shari'a*.<sup>61</sup>

*Maqâshid shari'a* thinking with a multidisciplinary system approach is very relevant in analyzing the inheritance rules for substitute heirs. This is because the rules regarding the inheritance of substitute heirs are also a system consisting of various elements that are interrelated with each other. The system of surrogate heirs is not only supported by the core elements of the family, namely the father, mother, children, and grandparents but also related to society and the state. To examine this problem, it should not only be seen from one perspective, for example, only from a normative aspect but must also be analyzed from various perspectives.

Scholars and legal experts in Indonesia have made rules regarding substitute heirs to uphold justice for those who are orphans. According to Jaser Audah, in formulating law, the ultimate goal is the most important thing. This is because the legal system was created basically to realize the goal. Likewise with Islamic law, *maqâshid shari'a*, which is the core of Islamic law, includes five characteristics of the Islamic legal system, namely cognitive, holistic, openness, inter-level linkages, and multi-dimensional.<sup>62</sup>

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<sup>61</sup> Ritonga.

<sup>62</sup> Auda

In contemporary *maqâshid shari'a*, as stated by Jaser Audah, the rules regarding substitute heirs can be comprehensively covered by *hifzd al-nasl*, or concern for and development of the role of family institutions. The family has a very important role in the formation of individual character as well as being the most important agent of socialization. In other words, the family has a great influence in internalizing the values and character needed for the nation's future.<sup>63</sup> By applying one of the elements of *maqâshid shari'a*, which in this case is *hifzd al-nasl*, in the form of an effort to maintain and develop the role of family institutions as well as realizing family functions properly and correctly, then the essence of *maqâshid shari'a* according to the classical concept can be achieved. As an example of the religious function, where the family is the first place to introduce, instill, grow, and develop religious values in children so that they can become human beings who are religious, have noble characters, believe in and fear God, which, at the same time, is the realization of the concept of *hifzd al-dîn* (guarding religion).<sup>64</sup>

The realization of *hifzd al-nafs* is a manifestation of the protection function. Here, the family is a place that can provide a sense of security and peace for every member of the family. Whereas, in the context of realizing *hifzd al-aql*, the function of the family is the first and foremost place for the process of socialization and education. This function is also a manifestation of the role of the family in educating offspring so that they can adapt to a very dynamic future life. Moreover, in the context of *hifzd al-nasl*, a family functions as a vehicle for reproduction, which is very important for the continuity of human offspring and supporting the welfare of humanity.<sup>65</sup> Finally, concerning the concept of *hifzd al-mâl*, the family also has an economic function as almost all activities of the

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<sup>63</sup> Mujibburrahman Salim, 'Konsep Keluarga *Mashlahah* Perspektif Lembaga Kemaslahatan Keluarga Nahdlatul Ulama (LKK NU)', *Al-Mazaahib: Jurnal Perbandingan Hukum*, 5.1 (2017): 81–94 <<https://doi.org/10.14421/al-mazaahib.v5i1.1392>>.

<sup>64</sup> Afida Lailata and Malik Ibrahim, 'Konsep Keluarga Masalah dalam Pandangan Nyai Muda Pondok Pesantren Ali Maksum Krpyak Yogyakarta', *Al-Mazaahib: Jurnal Perbandingan Hukum*, 2.2 (2014): 405–26 <<https://doi.org/10.14421/al-mazaahib.v2i2.1376>>.

<sup>65</sup> Meraj Ahmad Ahmad, 'The Importance of Marriage in Islam', *International Journal of Research -Granthaalayah*, 6.11 (2018): 1–6 <<https://doi.org/10.29121/granthaalayah.v6.i11.2018.1082>>.

family and its members require financial support. In other words, the family must be an important pillar of economic support for the survival of its members and offspring.<sup>66</sup>

Family is the main socialization agent in shaping the character of each individual. This is because the family has a very big role in internalizing the values and character of each individual. The role of the family in protecting children, especially in this case the substitute heirs who are orphans, is very important for them. Psychologically, children whose parents have died have far greater trauma than children whose parents are complete. Orphans generally feel very lonely and afraid, which then causes feelings of depression, sadness, confusion, and uncertainty about the future of their lives.<sup>67</sup> Therefore, families need to pay more attention to them, including protecting them by giving them rights that should be part of their parents, by making them substitute heirs. Paying attention to and defending the rights of substitute heirs is ideal, not only for their interests but also for the interests of society and the nation. The family, as the smallest social institution, has a very big role in the development of a country. This is because one of the important elements of a country is society, which is an entity that is formed from a family, a society to a nation.<sup>68</sup>

From a sociological perspective, the existence of individuals in three social spheres, namely the smallest units (micro), medium units (meso), and the largest units (macro), have a large contribution to the development of a country. Humans in the smallest social sphere (individuals), to the largest unit (society, state, or even the world) will go through a series of intermediary units, which include groups or organizations (meso). This gives the meaning that building a quality family is the same as efforts to form qualified individuals, which is the smallest unit, to sustain the country.<sup>69</sup>

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<sup>66</sup> Ujang Ruhyat Syamsoni and M. Syukri Ismail, 'Penerapan *Maqāshid Ayy-Syari'ah* Pada Sistem Ekonomi Syariah', *Istikhlaf: Jurnal Ekonomi, Perbankan dan Manajemen Syariah*, 3.1 (2021): 80-89. <<https://doi.org/10.51311/istikhlaf.v3i1.295>>.

<sup>67</sup> Riswan Tati Duha, Otoriteit Dachi, and Suryani Waruwu, 'Pendampingan Psikososial Terhadap Anak Yang Kehilangan Orang Tua', *SUNDERMANN: Jurnal Ilmiah Teologi, Pendidikan, Sains, Humaniora dan Kebudayaan*, 15.2 (2022): 78-88.

<sup>68</sup> Khilmi.

<sup>69</sup> Syamsul Arifin, 'Kajian Sosiologis dalam Hukum Keluarga Islam', *IJLIL: Indonesian Journal of Law and Islamic Law*, 2.1 (2020): 197-215.

From a psychological perspective, the family has a very large role in an individual's life. The family has some functions such as religious, socio-cultural, love and affection, protection, reproduction, socialization, education, economy, and environmental development functions which must be realized properly. This is because these functions will affect the character and ability of individuals to interact with the environment. Through these functions, it can be seen whether the role of parents in a family has been carried out properly or not. In the case of orphans, whose parents have passed away, the attention of the extended family to realize the above functions is urgently needed. This is because children who do not get good attention from the family will have problems in regulating and expressing their emotions.

The position of individuals in a family, including those who become substitute heirs, is very important. In various sociological and psychological discussions, it is stated that the family has an important role in forming individuals as the smallest unit of society. Families can also give birth to superior generations who can continue the nation's struggle. To realize these ideals, Indonesian Ulemas and legal experts strive to pay attention to the welfare of substitute heirs, who are mostly orphans, and who have been abandoned by their parents. It is hoped that by utilizing the *maqâshid shari'a* approach in implementing the provisions of Article 185 of Compilation of Islamic Law, substitute heirs may become qualified individuals, having the opportunity to manage their physical and psychological resources as well as be able to manage the problems that occur in their lives.

## Conclusion

*Maqâshid shari'a*, which is applied in analyzing the inheritance of these substitute heirs, combines the concept of *maqâshid shari'a* formulated by classical scholars with the concept of *maqâshid shari'a* formulated by contemporary scholars. Classical *maqâshid shari'a* places more emphasis on aspects of protection and maintenance (*al-hifzd wa al-'ishmah*), while contemporary *maqâshid shari'a* focuses on development and rights (*al-huqûq wa al-tanmiyah*). So the findings in this study of inheritance for substitute heirs are not only limited to protecting assets (*hifzd al-*

*mâl*). But more than that, namely, developing the quality of individual substitute heirs through family institutions by fulfilling inheritance rights for substitute heirs (*tanmiyah al-nasl wa al-mâl*). Judging from the position of *maslahah*, if its position is in *maslahah dharûriyah*, then the implementation of the law to improve the quality of life of substitute heirs by handing over the inheritance to them, is mandatory.

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