



## LEGAL PROGRESSIVENESS FOR HEIRS WITH DISABILITIES AS A FORM OF AFFIRMATIVE ACTION\*

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### Abstract

This study discusses the problem of the special inheritance section for heirs with disabilities as a form of legal progressiveness based on affirmative action. The distribution of inheritance based on needs provides a greater sense of justice because it aligns with the principle of proportionality. This study aims to determine and analyse the distribution of extraordinary inheritance for heirs with disabilities as a form of legal progressiveness based on affirmative action. The type of research used is normative juridical with a statute approach and a conceptual approach. The results of this study indicate that legal guarantees for heirs with disabilities are still very weak. However, the absence of the phrase heirs with disabilities and the inheritance section, in particular, indicates that the state does not guarantee the right to receive an inheritance and inherit. This study provides a solution by regulating a special section for heirs with disabilities as a form of progressive Indonesian law based on affirmative action. The existence of special treatment for vulnerable groups is in line with the mandate of the constitution and the principle of justice of John Rawls in the theory of Justice as Fairness. As a duty bearer, the government must continue to pay attention to people with disabilities by fully guaranteeing constitutional rights.

**Keywords:** Disabled Heirs; Legal Progressiveness; Affirmative Action

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## A. INTRODUCTION

People with disabilities or people with special needs are included in vulnerable groups who are often looked down upon and discriminated against by both family and society. The negative stigma that exists in the disabled group causes them to lack confidence in carrying out activities. As a result, it is not uncommon for people with disabilities to experience difficulties in terms of education and employment, which has an impact on their life needs not being met. People with disabilities also have an equal position with people who are not disabled; it's just that in carrying out their activities, they need the help of assistive devices or other people to achieve the same results. The state, as a duty bearer, must provide facilities and equal opportunities for people with disabilities to achieve prosperity.<sup>1</sup> Not only providing facilities, the state must also eliminate obstacles that prevent groups with disabilities from achieving happiness.

Recognition of disability groups is accommodated internationally through the Convention on the Rights of Persons with Disabilities (CRPD). The parent convention is based on the rights inherent in human beings, such as intrinsic dignity and worth, so there must be respect for the country. The concept of respect for disability groups is based on Article 3, letter (b) of the Convention on the Rights of Persons with Disabilities, concerning the principle of non-discrimination, which gives rise to the obligation of equality before the law (equal recognition before the law). This principle of equality before the law becomes the basis for ownership and inheritance rights, and acceptance of inheritance of property, so that the position of disability groups in terms of inheritance becomes clear and is not a reason to hinder the inheritance itself.

Indonesia, as a country that has ratified the Convention on the Rights of Persons with Disabilities, provides protection to groups of people with disabilities based on the mandate of the constitution, Article 28h Paragraph (2) of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945). This article is a basic milestone for equality for groups of people with disabilities to obtain their rights, by allowing special treatment to achieve equality and justice. This certainly does not conflict with Article 28i, Paragraph (2) of the 1945 UUD NRI, which prohibits discrimination and provides the right to receive protection from such discrimination. At first glance, Article 28h Paragraph (2) of the 1945 UUD NRI does require special treatment for groups of people with disabilities. Still, it

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<sup>1</sup> House of Representatives, "Academic Paper on Draft Law on Persons with Disabilities" (Indonesia, 2015).

should be noted that this provision is intended for vulnerable groups who certainly need more access to achieve the same rights. If there is no such special treatment, it will allow groups of people with disabilities to be trapped in inequality of rights due to limited abilities.

The constitutional mandate is confirmed through Law Number 8 of 2016 concerning Persons with Disabilities (Law on Persons with Disabilities), where Article 2 of the Law on Persons with Disabilities adheres to the principle of non-discrimination and the existence of special treatment and more excellent protection. Explicitly, the rights of persons with disabilities are stated in Article 5 of the Law on Persons with Disabilities, and explained in Paragraph 3 as an implementation of the constitutional mandate of Article 28h Paragraph (2) that special treatment and protection are permitted to achieve equal rights. Likewise, in the family sphere, inheritance rights should protect groups with disabilities in obtaining inheritance. Furthermore, it is accommodated through Article 9 of the Law on Persons with Disabilities, which provides the right to own and inherit property. Therefore, groups with disabilities are not a barrier to receiving inheritance, and special treatment and protection are needed to achieve fairness.

Ironically, even though the rights of people with disabilities have been accommodated in the Indonesian constitution and regulations under it, the derogation of their rights is still high. According to data from the National Economic Survey (Susenas), the number of people with disabilities in Indonesia is still quite large, around 28.5 million people, or equivalent to 10.38 per cent of the national population in 2020.<sup>2</sup> The lack of accessibility in various sectors, ranging from health, education, to public service sectors, is often felt by groups with disabilities, which has implications for the unfulfilled needs of life and leads to their low welfare. This causality is proven by the fact that 11.42% of people with disabilities experience poverty, while non-disabled people are only 9.63%. Groups with disabilities have extra costs of disability that must be borne in supporting their activities.

Given the high number of disabilities in Indonesia, which aligns with the high costs that must be incurred in supporting their activities, the state should guarantee special protection in various fields, including inheritance. The problem is that starting from the Civil Code, Law Number 1 of 1974 concerning Marriage (Marriage Law), to the Compilation of Islamic Law (KHI) and even classical fiqh do not accommodate the distribution of inheritance for disabled heirs. Therefore, it is not uncommon to question the position of disability in inheritance as stated

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<sup>2</sup> Central Bureau of Statistics, (2020). "National Economic Survey (Susenas)" Jakarta.

in Article 173 of the KHI regarding the obstruction of receiving inheritance. At the same time, a person under guardianship or in this case, a disabled heir, is not included in the things that prevent them from receiving inheritance. So, it is clear that disabled heirs still have the right to receive inheritance in line with the principle of non-discrimination.

Another problem arises from the high cost of care and support for activities for the disabled, which contrasts with the unequal inheritance. Based on affirmative action, heirs with disabilities should receive special treatment through a more excellent inheritance distribution. The distribution of inheritance is no longer focused on gender but prioritises equality and justice. In this case, heirs with disabilities must receive a special distribution.

## B. METHODS

This paper uses Juridical-Normative research, which focuses on the study of legal materials. This type of legal research is often referred to as legal science research. Peter Mahmud Marzuki defines normative legal research as searching for rules, principles, and legal theories to solve legal problems.<sup>3</sup> In this study, normative research is used through legal materials to solve problems in the field of inheritance for disabled groups. The approaches used in this study are the statutory approach and the conceptual approach.

## C. RESULTS AND DISCUSSION

### 1. Legal Guarantees for Disabled Heirs in Family Law in Indonesia

Legal guarantees for people with disabilities have been recognized by society and the government as a form of international and national human rights protection. Long before the CRPD was formed, the world had paid attention to the needs and rights of people with disabilities. The roots of protection for people with disabilities come from human rights, through Article 25 of the United Declaration of Human Rights (UDHR), which recognises that every human has the right to a decent life, including people with disabilities.<sup>4</sup> Then, the derivative international conventions such as the International Covenant on Civil and

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<sup>3</sup> Peter Mahmud Marzuki, (2008). *Penelitian Hukum*. Jakarta, Kencana.

<sup>4</sup> Janet Zandy, (2019). "Universal Declaration of Human Rights," *Radical Teacher*, vol. 113 Paris, <https://doi.org/10.5195/rt.2019.591>.

Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are recognised as human rights.<sup>5</sup>

International commitments prioritising respect for dignity, equality and non-discrimination became the forerunner to forming the CRPD. The CRPD is a global legal guarantee so that the rights of persons with disabilities can be appropriately protected. Article 12 of the CRPD guarantees the rights of persons with disabilities in the field of inheritance, namely the right to inherit and receive inheritance. In addition to legal protection for property ownership, the CRPD guarantees legal certainty in decision-making and prohibits exploitation. To achieve their rights, persons with disabilities must be given adequate access and facilities, including legal services.

The implementation of international recognition is manifested through the SDGS as a country's sustainable development goals. Goal 1 of the SDGS on poverty eradication explicitly guarantees the welfare of people with disabilities. In targets 1-3, the state seeks substantial social protection for all, including poor and vulnerable groups. Then in targets 1-4, the state guarantees that the community, especially the poor and vulnerable, has the same rights and access to economic resources, one of which is mentioned in terms of ownership and inheritance.

In addition to goal number 1 of the SDGS, goal number 10 is also relevant to the discussion of vulnerable people, namely, reducing inequality. In target 10-2.1, the country uses a measurement method to see the relative level of welfare of the population with income below half of the median income. One of the indicators of the disaggregation of these points is the disability status of a region. Then Target 10-3.1, the country monitors regulations or policies that contain discrimination to create legal guarantees for vulnerable people. Monitoring discriminatory policies comes from monitoring commissions (National Commission on Violence Against Women and the National Commission on Disabilities or KND), partner reports and studies, and media monitoring of verified strategic issues. The basis for the target of eliminating inequality is Law Number 39 of 1999 concerning Human Rights (HAM Law).

The founding fathers of Indonesia truly embody the protection of vulnerable groups that originates from human rights through the values of Pancasila. The fifth principle of the state philosophy, "*social justice for all Indonesian people*," is the fundamental pillar of establishing justice and equality in

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<sup>5</sup> International Covenant on Civil and Political Rights (ICCPR), 1966 dan International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966.

Indonesian society. The values of the fifth principle of Pancasila related to respect for people with disabilities are, first, equality of rights. The fifth principle emphasises that all citizens, including people with disabilities, have the same right to live in prosperity. This means that they have the right to equal access to education, employment, and health services.

Second, Protection and Support. Exceptional protection and support exist for people with disabilities in providing disability-friendly facilities, such as wheelchair ramps, accessible transportation services, and supportive technology. Third, empowerment and participation. The fifth principle encourages the empowerment of people with disabilities to participate in society fully. This can be done through training programs, providing employment opportunities, and support for small and medium enterprises managed by people with disabilities.

Fourth, the elimination of discrimination. Social justice also means eliminating all forms of discrimination against people with disabilities, including ensuring that they do not experience unfair treatment in their daily lives. In other words, the fifth principle of Pancasila requires Indonesian society and government to ensure that people with disabilities receive fair and equal treatment in all aspects of life, so that they can live with dignity and contribute fully to national development.<sup>6</sup>

Indonesia is a country of law that contains elements of the rule of law, according to AV Dicey, namely the supremacy of law, equality before the law, and the guarantee of Human Rights in the constitution (a constitution based on human rights).<sup>7</sup> The guarantee of human rights in the Indonesian constitution has been accommodated through Chapter XA of the 1945 Constitution of the Republic of Indonesia, especially in Articles 28a to 28j. However, there is a difference between human rights and Citizens' Rights (HAW) or the constitutional rights of citizens. According to Mahfud MD, human rights are understood as fundamental rights humans have by nature, not given to them by society based on positive law.<sup>8</sup> This differs from HAW as rights are only obtained because of a person's citizenship status.

Based on Mahfud's opinion, legal guarantees for people with disabilities that are implicitly stated in Article 28D Paragraph (1), 28H Paragraph (2), and 28I Paragraph (2) of the 1945 NRI Constitution are included in human rights as well

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<sup>6</sup> Darji Darmodiharjo, (1991). *Santiaji Pancasila*, Surabaya, Usaha Nasional.

<sup>7</sup> Sri Soemantri, (2006). *Prosedur Dan Sistem Perubahan Konstitusi*, Bandung, Alurni.

<sup>8</sup> Moh. Mahfud MD, (2003). *Demokrasi Dan Konstitusi Di Indonesia: Studi Tentang Interaksi Politik Dan Kehidupan Ketatanegaraan*, Jakarta, Rineka Cipta.

as the constitutional rights of citizens that the state must protect. The principle of equality before the law, as one of the elements of the rule of law, is embodied in Article 28d Paragraph (1) of the 1945 NRI Constitution without exception for people with disabilities. Then Article 28h Paragraph (2) and 28i Paragraph (2) of the 1945 NRI Constitution accommodate legal guarantees for vulnerable groups, in this case disabilities, not to receive discriminatory (negative) treatment and have the right to receive affirmative action to achieve equality.<sup>9</sup>

In understanding the phrase "every person" in Article 18H Paragraph (2) of the 1945 Constitution of the Republic of Indonesia, three decisions of the Constitutional Court provide an interpretation, namely Constitutional Court Decision Number 10-17-23/PUU-VII/2009; Constitutional Court Decision Number 143/PUU-VII/2009; and Constitutional Court Decision Number 16/PUU-VIII/2010. According to the Constitutional Court, the constitutional rights contained in the article are guarantees for those who experience continuous structural and socio-cultural discrimination, such as marginalisation, backwardness, exclusion, restrictions, differentiation, and gaps in participation in politics and public life, both formally and informally, in the public and private spheres, or what is known as affirmative action.<sup>10</sup>

The interpretation of the Constitutional Court's decision is only a form of affirmation because the community agrees that the state should view citizens as equal entities. In addition, special treatment is needed for disadvantaged communities or vulnerable groups to fulfil their constitutional rights. Therefore, the law must be proportional and professional when dealing with the majority community or the disabled community as a minority group, which is often excluded.

The constitutional mandate to protect vulnerable groups is implemented through the Human Rights Law and the Law on Persons with Disabilities. Article 5 Paragraph (3), Article 41 Paragraph (2), and Article 42 of the Human Rights Law more clearly regulate the rights of persons with disabilities. Although the regulation phrase still uses the word "disabled", protection for them still exists. Articles 28h and 28i of the 1945 Constitution of the Republic of Indonesia are the basis for forming the Law on Persons with Disabilities, which is currently a special regulation for persons with disabilities in guaranteeing their rights. The

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<sup>9</sup> Arie Purnomosidi, (2017). "Inklusi Penyandang Disabilitas Di Indonesia," *Jurnal Refleksi Hukum* 1, p.164.

<sup>10</sup> A N Huda, (2018). "Studi Disabilitas Dan Masyarakat Inklusif: Dari Teori Ke Praktik (Studi Kasus Progresivitas Kebijakan Dan Implementasinya Di Indonesia)," *Jurnal Kajian Islam Interdisipliner* 3, no. 2: 245–66.

two derivative regulations, namely the Human Rights Law and the Law on Persons with Disabilities, are a form of respect and legal guarantee for vulnerable groups in Indonesia.

In addition to international and national recognition, Islam has long implicitly guaranteed the existence of people with disabilities in the Qur'an. There is even a chapter that makes people with disabilities the *asbabun nuzul*, namely QS 'Abasa. Abdullah bin Ummi Maktum, a friend who was active in worship despite his limited vision. One day, the Prophet Muhammad was sitting with the leaders of Quraysh then Abdullah came and said, "O Messenger of Allah, teach me what Allah taught you."<sup>11</sup> However, he did not know that the Messenger of Allah was busy with the leaders of Quraysh. Then, there was a look of displeasure on the face of the Messenger of Allah because his conversation was disturbed. Therefore, the Messenger of Allah SAW looked sour and turned away Abdullah bin Ummi Maktum. After discussing with the leaders of Quraysh, the Prophet Muhammad rushed home, and then the Prophet felt pain as the revelation came down. At that time, the Word of Allah in the form of QS 'Abasa verses 1 to 16 came down, explaining human equality.

Equal status for people with disabilities must also be obtained in the realm of inheritance as regulated in Article 9 of the Law on Persons with Disabilities. *Lex specialis*, the right to receive inheritance, is implicitly accommodated through the Civil Code for non-Muslim heirs and the KHI for Muslim heirs. Although neither has explicitly mentioned the division of heirs for disabilities, people with disabilities are not included in the group that is prohibited from receiving inheritance.

The phrase disabled person is not found in the Civil Code or the KHI. There are only a few articles that guarantee disabled people definitely. Article 452, Paragraph (1) of the Civil Code states that every person who is under guardianship has the same status as a minor. Where in this case, a guardian is allowed to carry out his actions if the disabled person cannot do it himself. Then, in Article 1330 of the Civil Code, the category of legally incompetent includes those who are minors and under guardianship. Akhmad Budi Cahyono, a civil law researcher, thinks that disabled people who cannot carry out their actions independently can be categorized as people under guardianship.<sup>12</sup>

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<sup>11</sup> Al-Qhurtubi, (2009). *Tafsir Al- Qurthubi*, Jakarta, Pustaka Azzam.

<sup>12</sup> Akhmad Budi Cahyono and Surini Ahlan Sjarif, (2008). *Mengenal Hukum Perdata*, 1st ed. Jakarta, CV Gitama Jaya.



Similarly, in the KHI, the phrase "persons with disabilities" has not been explicitly mentioned in the distribution of inheritance. Persons with disabilities are not included in the group that is prohibited from receiving inheritance, so it is clear that their rights remain the same as those of non-disabled people. The implicit and definitive mention of persons with disabilities is stated in Article 184 of the KHI. Article 184 of the KHI states that for heirs who are not yet adults or cannot carry out their rights and obligations, a guardian is appointed to carry out their affairs.

Mutatis mutandis, the meaning of disabled heirs in both the Civil Code and the Islamic Law Code is considered a minor or under guardianship and is not included in the group prohibited from receiving inheritance. Likewise, regarding its distribution, Indonesia's two family law regulations have not regulated it. So when talking about legal guarantees for disabled heirs, in fact family law in Indonesia is still not comprehensive. It has indeed been stated in the Law on Persons with Disabilities regarding the rights of persons with disabilities to obtain inheritance and inherit. However, the section or even the phrase disabled heirs alone is not in any regulation.

The absence of the phrase disabled people as heirs in family law in Indonesia indicates that the legal guarantees provided by the state are not optimal. According to Fitzgerald, legal guarantees mean providing certainty and legal protection for the rights of the parties to a contract or the state.<sup>13</sup> The Civil Code and the Compilation of Islamic Law have not guaranteed the rights of disabled people in the field of inheritance because there is no legal certainty regarding their position. Returning to the previous discussion, the position of disabled heirs is still in the grey area. Disabled heirs are not explicitly listed in the regulations, but are not included in the prohibited groups. This proves that the seriousness of the state in providing legal protection for disabled people is still minimal.

## **2. Progressiveness of inheritance law for people with disabilities as a form of affirmative action**

The purpose of law is essentially to achieve order. Gustav Radbruch argues that law has at least three fundamental values: to achieve justice, benefit, and certainty.<sup>14</sup> Radbruch Formula, as a legal philosophy view of Gustav

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<sup>13</sup> Satjipto Rahardjo, (2000). *Ilmu Hukum*, Yogyakarta: Citra Aditya Bakti.

<sup>14</sup> Gustav Radbruch, (1950). *Legal Philosophy (First Publ. 1932)*, Trans. Kurt Wilk, in: *The Legal Philosophies of Lask, Radbruch, and Dabin*, Cambridge, Mass.: Harvard University Press.

Radbruch states "*extreme injustice is not law*" or extreme injustice is not law.<sup>15</sup> The validity of law from Gustav's perspective closely links morals and law so that the law must have a just purpose and must not conflict with fundamental moral principles. Radbruch believes that a very unfair law should not be considered a valid one. That means, if a law is very unjust, then the law does not have actual legal force, even if the law has been formally ratified and implemented.<sup>16</sup>

The concept of justice put forward by Gustav Radbruch sees law as not just a standard regulation, but also prioritizes morality. The law must provide justice, including for vulnerable groups or people with disabilities. Laws that do not offer justice cannot be said to be valid. If the existing law cannot provide a sense of justice and benefits for people with disabilities, then it can be said to be an injustice. That means there needs to be a reconstruction of regulations to achieve the Law Triad, as Radbruch stated.<sup>17</sup>

In contrast to the legal positivism school, John Austin sees law as rigid and made by the government. In a narrow sense, law is a statutory regulation. Austin, on the other hand, argues that law must be separated from moral values to create greater legal certainty.<sup>18</sup> In viewing the priority of legal objectives between Radbruch and Austin, they differ; Radbruch emphasises justice more and places it first place, while legal certainty is last. In contrast, Austin prioritises legal certainty by removing the element of morality because it is considered more rational and objective. Because the authority institution that makes the law, the legal positivism school adheres to the principles of command, sanction, duty, and sovereignty.<sup>19</sup>

Let's look at the Law on Persons with Disabilities in guaranteeing the rights of persons with disabilities from the perspective of legal positivism. It has achieved the desired legal certainty. This is based on the criteria of legal positivism, namely that it is made by an authoritative institution and contains orders. However, if we examine it more deeply, the guarantee of the share of

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<sup>15</sup> Ian. Ward, (1992). "Radbruch's 'Rechtsphilosophie': Law, Morality and Form.," *ARSP: Archiv Für Rechts- Und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy* 78, no. 3: 54, <http://www.jstor.org/stable/23679995>.

<sup>16</sup> M. Borowski, (2024). "Gustav Radbruch's Theory of Legal Obligation. In: Beyleveld, D., Berteau, S. (Eds) *Theories of Legal Obligation*," *Law and Philosophy Library* 146, [https://doi.org/https://doi.org/10.1007/978-3-031-54067-7\\_55](https://doi.org/https://doi.org/10.1007/978-3-031-54067-7_55).

<sup>17</sup> Robert Alexy, (2021). "Gustav Radbruch's Concept of Law," *Law's Ideal Dimension* 26, no. 1946: 107–18, <https://doi.org/10.1093/oso/9780198796831.003.0008>.

<sup>18</sup> John Austin, (1885). *Lectures on Jurisprudence: Or The Philosophy of Positive Law*, London: London: John Murray.

<sup>19</sup> C.S.T. Kansil, (2002). *Pengantar Ilmu Hukum*, Jakarta, Balai Pustaka.

heirs of disabilities has not been accommodated in the Law on Persons with Disabilities, KHI, or KUHPer. Not yet reaching the level of inheritance distribution, the phrase heirs of disabilities in existing regulations has not been found. The rules that are currently in place do not provide legal certainty due to the absence of the phrase heirs of disabilities and their share of inheritance.

However, the legal positivism school is not always fixated on positive law and denies the existence of non-legal elements.<sup>20</sup> The legal positivism school also recognises the existence of law outside the law, but with the condition that the law must be designated or confirmed by law.<sup>21</sup> This is different from Satjipto Rahardjo's view that law is not merely what is written in legislation. Rather, law is understood in a social context to achieve a deeper meaning than just what is regulated in positive law and logic alone. Law should be present for society, not society for law.<sup>22</sup>

Based on this thinking, Satjipto Rahardjo calls it progressive law. Satjipto's thinking began with his concern about positive law that failed to provide a sense of justice for society. Law is indeed present as a solution to problems, but it can become a problem itself if not implemented properly. As a result, the goal of law, which should humanise humans, is not achieved properly.<sup>23</sup> Satjipto Rahardjo sees the law experiencing a decline in achieving its goals. Therefore, the law must escape the static circle or status quo. Legal texts contained in laws and regulations, which have been deified, must be torn down if they do not prioritise humanity. In his book entitled "Progressive Law Enforcement", he mentions the term breaking the law: if the law can no longer present justice and a sense of humanity, then the law must be torn down.

When associated with regulating heirs of disabilities in both the KHI and the KUHPer as positive law in Indonesia, seen from the perspective of progressive law, it has not been able to provide justice. Currently, the phrase heirs of disabilities is not included in the KHI or the KUHPer, as is the inheritance section. In addition to not guaranteeing legal certainty, the absence of this phrase also does not create justice. The reason is that the distribution of inheritance for both people with disabilities and non-disabilities is still based on gender and

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<sup>20</sup> Johni Najwan, (2010). "Implikasi Aliran Positivisme Terhadap Pemikiran Hukum," *INOVATIF: Jurnal Ilmu Hukum* 2, no. 3: 17–31.

<sup>21</sup> Darji Darmodiharjo and Shidarta, (2006). *Pokok-Pokok Filsafat Hukum: Apa Dan Bagaimana Filsafat Hukum Indonesia*, Jakarta, Gramedia Pustaka Utama.

<sup>22</sup> Satjipto Rahardjo, (1980). *Hukum Dan Masyarakat*, Bandung, Angkasa.

<sup>23</sup> Tuti Haryanti, (2014). "Tahkim," *Tahkim* x, no. 2: 160–68.

kinship. This means the inheritance section of heirs with disabilities is still equated with non-disabled heirs.

Disabled heirs are still treated the same as other heirs, which indicates a form of discrimination in the context of inheritance. Discrimination is not only giving different treatment to the same conditions, but also equalising treatment to different conditions, including harmful discrimination. Seeing the needs of the disabled that are greater than those of the non-disabled, it is necessary to consider a special division in terms of inheritance. This is in line with John Rawls' difference principle in his theory of justice as fairness, which states that social and economic inequality must be regulated in such a way as to achieve equal rights and welfare for the least advantaged people. In this case, disabled heirs are included in marginalised communities so that they are allowed to receive affirmative action to achieve justice.

Progressive law uses a legal method that focuses on community interaction, thus creating interactional law. Interactional law, or law in a substantial way, does not require a special body to make laws intentionally (hierarchical norms); rather, the law grows immediately. The law is present based on the wishes of the community that are to be achieved, so the law is used as a tool to change society's behaviour as desired. Thus, the law is a tool to change society (as a social engineering tool).<sup>24</sup> One of them is through the Law on Persons with Disabilities, KHI, and KUHPer, which are tools and blueprints for guaranteeing the rights of persons with disabilities in Indonesia.

Rusli Effendi argues that law has at least active and passive working power. Law functions passively when it only maintains the status quo, known as the social control function. Law can function actively when reconstructing the existing order to shift to the desired order. The active function of law is called law as a tool of social engineering.<sup>25</sup> This means that when making laws, law enforcers must also consider the social impact of each rule applied. So, legislators should consider the needs of disabled heirs and include their part in the regulation to achieve holistic justice.

The antithesis of substantive law is an artificial way of law. Satjipto said that law by focusing on laws and regulations is an artificial way of law, meaning that law enforcers are not free to interpret a law and its reality in society. As a

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<sup>24</sup> Achmad Ali, (2002). *Menguak Tabir Hukum, Suatu Kajian Filosofis Dan Sosiologis*, Jakarta, PT. Toko Gunung Agung.

<sup>25</sup> Rusli Effendy, Achmad Ali, and Poppy Andi Lolo, (2008). *Teori Hukum, Ujung Pandang: Hasanuddin University Press.*

result, the law focuses more on structural relationships, not genuine relationships with social instruments. Therefore, Satjipto places more emphasis on substantive law by first fixing the behaviour of society itself. Exemplified by Sang Begawan, behaviour distinguishes one judge from another among thousands of judges. Therefore, judges are not limited to schemes but also to behaviour.

Satjipto's opinion on substantive law does not deny or eliminate the existence of artificial law. Satjipto also argues that the existence of artificial law is important because the state's conditions support the existence of written law. However, in order to revive the essence of law in laws and regulations that tend to be rigid, a new legal approach is needed in the form of substantive law – the need for progressive law to interpret the law more effectively. Interpreting regulations by reading society's reality is one way to ground the law itself.

Likewise, in interpreting the distribution of inheritance for disabled heirs, a substantial legal approach can be used. Although there are regulations that protect the rights of disabled people, such as the Law on Persons with Disabilities and the Human Rights Law, as well as in terms of inheritance through the KHI and the Civil Code, their implementation is not always based on positive law. Because, substantially, the four regulations have not provided a sense of justice as intended by John Rawls. There is still an imbalance in the sense of justice in the distribution of inheritance between disabled and non-disabled heirs. If the law is substantial, it should prioritise a sense of justice even if it has to go beyond the provisions of the rules and regulations.

This idea is in line with the opinion of former Supreme Court Justice Bismar Siregar that the text is only a supporter. Therefore, the judge must decide based on the law. But in the end, behaviour brings the regulation text to life. In conclusion, by enforcing the law substantially, it does not ignore enforcing the law artificially, but so that the goal of the law in the form of welfare can be achieved more effectively. In addition, Satjipto added a definition of enforcing the law holistically.<sup>26</sup> Enforcing the law involves looking at many aspects in a comprehensive or holistic manner. What is meant is that enforcing the law holistically also pays attention to economic, political, and other aspects that are united into one whole.

Satjipto Rahardjo's thoughts on law and public order gave birth to progressive law, which is increasingly cited by legal academics. Law as a breakthrough, law for humans, not humans for law and good law is born from

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<sup>26</sup> Satjipto Rahardjo, (2009). *Hukum dan Perubahan Sosial; Suatu Tinjauan Teoretis Serta Pengalaman-Pengalaman Di Indonesia*, Yogyakarta, Genta Publishing.

good behaviour does Satjipto put forward the foundations regarding human values. The common thread of Satjipto's thoughts is that society continues to develop dynamically. At the same time, the law is rigid and static. In contrast, law enforcers are fixated on this rigidity; a law is needed that can destroy this rigidity and get out of the static zone to achieve the essence of legal order.

Legal progressiveness in the discussion of heirs of disabilities can be used in terms of explicitly including the phrase heirs of disabilities and special inheritance sections. The inclusion of the phrase heirs of disabilities along with special divisions is said to be legal progressiveness because, in reality, until now, there has been no regulation governing it. A deeper meaning is related to a sense of justice and welfare, namely, proportional distribution. Inheritance division should no longer be based on gender and kinship alone; instead, it should consider the needs of an individual, where the inheritance section is adjusted based on John Rawls' principle of proportionality. This legal breakthrough is meant to be a form of legal progressiveness for heirs of disabilities as a form of affirmative action in laws and regulations.

Disabled heirs who are included in the vulnerable group, unfortunately, their existence has not been explicitly regulated in the laws and regulations in Indonesia. Their existence alone has not been controlled, let alone the distribution of their inheritance. It can be concluded that in terms of the distribution of inheritance, disabled heirs are still treated the same as ordinary heirs. In fact, by the constitution, the Human Rights Law, the Law on Persons with Disabilities and a set of other regulations, affirmative action is needed. This special treatment can be in the form of a special section for disabled heirs.

The theological argumentation basis for the distribution of inheritance specifically for people with disabilities is the principle of inheritance law. The principle of prioritizing deliberation as the most essential principle in inheritance law reflects the nature and characteristics of inheritance. Viewing inheritance law as a civil law scope prioritizes the path of agreement between the parties in its resolution. This can be interpreted as the justice felt by each heir without exception, including heirs with disabilities, being more guaranteed through the principle of agreement between the parties. Another interpretation is that if an agreement has been reached, these overly rigid and static inheritance provisions can be set aside.

Through the parties' agreement by setting aside the provisions of standard inheritance law, this is supported by the opinion of Muslim Ibrahim, a contemporary cleric and professor in the field of comparative fiqh of the school of thought, who stated that the characteristics of faraid science are alternative.

Prof. Muslim said that inheritance law, with its alternative characteristics, is interpreted as a reference in the distribution of inheritance if no mutual agreement is found.<sup>27</sup> The opposite understanding is that if an agreement is reached in the distribution of inheritance, then the inheritance law that has been determined is no longer an absolute reference. The provisions of inheritance law are present as a solution to resolving inheritance disputes so that Muslims are not divided only over worldly wealth. In conclusion, the reasons for Western and Islamic arguments are in harmony in viewing the distribution of inheritance law, which aims to achieve justice and harmony for the parties.

The idea of legal progressiveness for heirs of disabilities based on affirmative action can be described in the following table:

**a. Special provisions for disabled heirs in the Civil Code and its legal progressiveness**

No.	Position of Heirs	Heirs' Share	Progressiveness of inheritance law
1.	Group I: Husband or wife who lives the longest and their children or descendants	1. Longest living husband/wife a. All inherited assets (if there are no children) b. $\frac{1}{2}$ inheritance (if you have children, and $\frac{1}{2}$ for children) 2. Children a. All parts of the inheritance (if single) b. Equal shares (if more than 1)	1. Longest living husband/wife All inherited assets if AW is disabled 2. Children $\frac{1}{2}$ (if AW is disabled)
2.	Group II: Parents and siblings of the testator	1. Parents a. all sections if there is no AW Gol. 1 b. $\frac{1}{2}$ (if there are siblings. The remaining $\frac{1}{2}$ is for siblings. 2. Siblings a. $\frac{1}{2}$ (if there is no AW group 1) b. Equal shares (if more than 1)	1. Remaining parents (if AW is disabled) 2. Siblings remainder (if AW is disabled, even though there is AW Gol. 1)

<sup>27</sup> Ismail. Hasani et al., (2007). *Hak Waris Perempuan & Perwalian Anak*, Aceh: Komnas Perempuan.

3.	Group III: The testator's family in a straight line upwards (after the testator's mother and father or parents)	all parts of the inheritance (if there are no AW Goals. 1 and 2	remainder (if AW is disabled, even though there are AW Gol. 1 and 2)
4.	Group IV: Uncles and aunts of the testator from both the father's and mother's side, descendants of uncles and aunts up to the sixth degree counted from the testator, siblings of grandparents and their descendants, up to the sixth degree counted from the testator.	get inheritance if there is no AW Gol. 1,2 and 3	Remainder (if AW is disabled, even though there are AW Gol. 1,2, and 3)

## 2. Special section regulations for disabled heirs in the KHI and its legal progressiveness

No.	Position of Heirs	Heirs' Share	Progressiveness of law
1.	Dzawil furudh	<p>Husband <math>\frac{1}{2}</math> if you don't have children, <math>\frac{1}{4}</math> if you have children</p> <p>Wife <math>\frac{1}{4}</math> if you don't have children, <math>\frac{1}{8}</math> if you have children</p> <p>Boy 2:1 with daughter</p> <p>Girl <math>\frac{1}{2}</math> if alone <math>\frac{2}{3}</math> if more than one woman <math>\frac{1}{2}</math> when with a man</p> <p>Parent <math>\frac{1}{6}</math> if you have children</p> <p>Mother gets <math>\frac{1}{3}</math> and Father gets the rest if there are no children, grandchildren</p> <p>The amount replaces a deceased child if a grandchild replaces the child</p> <p>Siblings</p> <p>Just like the division of boys and girls when there are no children and parents.</p>	<p>1. Husband <math>\frac{1}{2}</math> if AW is disabled, even though he has children</p> <p>2. Wife <math>\frac{1}{4}</math> if AW is disabled, even though he has children</p> <p>3. Boys Ashabah if alone or AW is disabled</p> <p>4. Daughter Ashabah if AW is disabled</p> <p>5. Parents' remainder if AW is disabled</p>
2.	Dzawil Arham	Still get a share if AW is disabled even though there is dzawil furudh. However, the share is not greater than AW dzawil furudh.	



Based on the urgency of implementing a special section for people with disabilities as a form of affirmative action, strong guarantees are needed through laws and regulations. Therefore, a solution is proposed in the form of:

1. Revision of the Civil Code with provisions for heirs with disabilities and their specific inheritance portions
2. The ratification of the KHI into law with the provisions for heirs with disabilities and their special inheritance portions

As a form of legal certainty and progressiveness of inheritance law in Indonesia.

#### **D. CONCLUSION**

Legal guarantees for heirs with disabilities in family law in Indonesia are still in a grey area and therefore not comprehensive. Although the Human Rights Law and the Law on Persons with Disabilities have recognised their rights to inherit and receive inheritance, the Civil Code and the Compilation of Islamic Law, as the legal umbrella for families, have not explicitly regulated heirs with disabilities. Therefore, it can be concluded that legal guarantees for heirs with disabilities are still weak, and have not even been comprehensively guaranteed, especially in family law in Indonesia. The lack of comprehensiveness of these regulations has implications for the weak enforcement of inheritance law in Indonesia, especially for vulnerable groups.

The progressiveness of the law on the distribution of heirs to disabled people as a form of affirmative action has not been found in the rules and regulations in Indonesia. If implementing John Rawls' opinion regarding justice as Fairness, special treatment in the distribution of inheritance must be present to achieve equality of individual rights. Through affirmative action, legal progressiveness is created by breaking down existing laws because they do not achieve the objectives of the law itself. To policy makers or legislators (House of Representatives/DPR), to create comprehensive policies by including legal guarantees for heirs of disabilities and special inheritance sections as a form of affirmative action. To all stakeholders, provide legal guarantees by including the phrase heirs of disabilities in legislation. For heirs and the general public, an understanding is needed regarding the existence of special needs that underlie the special distribution of heirs with disabilities.

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