



Granting a compulsory will to grandfather and grandmother based on Aristotle's distributive theory

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Abstract

There is no legal basis for giving testament wajibah to a grandparent in Indonesia. However, the Religious Courts of Tarakan, in decision number: 610/Pdt.G/2014/PA.Trk. the judges gave testament wajibah portion of the inheritance to the grandparent because the heir's mother blocked their position and the parenting role carried out by the grandparent since the mother left the heir, and her existence was unknown. The judge's decision must consider the principles of legal certainty, benefits, and a sense of justice for the parties. Therefore, this research focuses on the judge's legal reasoning in decision number: 610/Pdt.G/2014/PA.Trk. and how the judge's decision is seen from the perspective of Aristotle's distributive justice theory. This research is juridical-normative with cases and conceptual approaches. The results showed that the judge's legal reasoning through the process of de heuristic and de legitimate, legal basis that judges used are the holy Qur'an, hadith, KHI, and Islamic law. The judges consider the role of grandparents during the heir to life. And giving testament wajibah to grandparents is considered fair based on Aristotle's distributive justice theory because they have fulfilled the proportional principle requirements.

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1. Introduction

Indonesia recognizes the existence of 3 (three) inheritance law regimes in the inheritance law system in Indonesia. Namely, Western/Continental Civil Inheritance Law regulated in the *Burgerlijk Wetboek* or Civil Code (BW), Customary Inheritance Law which is subject to customary law values in society, and Islamic Inheritance Law which is based on the Qur'an (Mochtar, 2020). Islamic inheritance law is an inheritance that, in its implementation, uses teachings and is adapted to the rules of Islamic teachings. There will be new heirs after the heir dies, which will later be related to the distribution of inheritance received by the heirs (Susanto, 2020). If there are problems or disputes regarding inheritance, the settlement is the authority of the Religious Courts (PA). In deciding inheritance cases, judges adhere to the Islamic inheritance system (*faraidh*) or those that have been codified into the Compilation of Islamic Law (KHI).

KHI is a collection of Islamic legal principles, which originate from *fiqh* books and the views of several scholars who use language and unification into one legal book formatted into a form like legislation. One of the inheritance problems is about the inheritance of grandparents. The provisions for the inheritance of grandparents in KHI need to be regulated in detail. Today's grandparents can have a large role in the upbringing of a child whose parents are busy working or have disappeared without a word for years. As in the case of a pair of grandparents who came to the Tarakan Religious Court and asked the judge to decide on the share of their grandson's (heir) inheritance to the grandparents and the heir's mother. Because as is known, grandparents have been veiled by their mothers, but they have a big role in raising their grandchildren.

When injustice occurs in society, there is an imbalance, and the judge must restore this balance. Asking the judge means asking for justice because being a judge means being the embodiment of what is. Applying the law in society is an important task assigned to judges as law enforcers. The position of the judge has a very important role and demands. Apart from having to act fairly, judges must be able to attempt to interpret laws appropriately based on the needs and developments that arise in society. The judge's efforts must still consider the value of legal certainty, its usefulness, and justice. (Massiare, 2017)

Decision number 610/Pdt.G/2014/PA.TRK regarding inheritance claims, the judge decided to give a share of the heir's inheritance to grandparents in the form of a mandatory will. The obligatory will is an alternative to dividing the heir's assets among the heirs, one of the causes of which is the existence of obstacles such as religious differences. The argument for the obligatory will is listed in QS. Al-Baqarah verse 180, which means: "It is obligatory upon you if death wants to pick up someone among you if he leaves wealth, make a will for both parents and close relatives in a good way, (as) an obligation for those who pious". According to most scholars, these verses have been sanctioned and are not valid since the revelation of the verse regarding inheritance. However, some still apply it to heirs who do not get a share because they are obstructed (Saiban, 2018).

In Indonesia, the rules regarding obligatory wills are only regulated in article 209 KHI, which explains the relationship between adopted children and adoptive parents. In other provisions, jurisprudence issued by the Supreme Court of the Republic of Indonesia NO. 16K/AG/2010 discusses the provisions for obligatory wills for non-Muslim husbands/wives. This decision is based on justice for the husband/wife who has accompanied,

cared for, and served the heir throughout his life (Ismail, 2020).

Provisions regarding granting obligatory wills to grandparents have yet to be found clearly in various legal bases in Indonesia. Even so, the judge in decision number 610/Pdt.G/2014/PA.TRK decided to give a part of the obligatory will to grandparents because of their mother's hijab position and her role in caring for and caring for the heir throughout her life. Every judge's decision must go through a legal reasoning process to provide strong considerations.

Consideration of justice in terms of inheritance is an important consideration in achieving benefit. One of the famous theories is the theory of distributive justice by Aristotle. This theory argues that giving each something that is his right is equivalent to the effort and achievements he has made or based on proportional equality (Tanya, 2019). The choice of this theory is not without reason. Aristotle was a figure who purely used logical reasoning and was the first scientist to design the concept of justice (Darmodiharjo, 1995).

Gaining a mandatory will to grandparents based on Aristotle's references to distributive justice is still very rare. Related research that has been carried out is regarding the obligatory will to heirs of different religions, which Iin Mutmainnah researched in the Journal of Diktum: Sharia and Law in 2019 entitled "Muhambah Wills for Heirs of Different Religions (Analysis of Supreme Court Decision Number: 368K/AG/1995)", the obligatory testament to adopted children by Nadya Faizal and Asni Zubir in the 2019 al-Risalah Journal entitled "Hajibah Wills for Adopted Children (Review of Islamic Law Philosophy Article 209 Compilation of Islamic Law)", and research using Aristotle's distributive theory knife by Arhamu Rijal in 2021 in his thesis entitled "Division of In-

heritance for Heirs Who Contribute More to Heirs from the Perspective of Aristotle's Theory of Distributive Justice (Study of Decision No. 03/Pdt.G/2017/PA.Skg and 521 K/Ag/2016)".

Based on the description above, the researcher is interested in examining the granting of a mandatory will to grandparents and maternal heirs at the Tarakan Religious Court based on Aristotle's Distributive Theory. There are two problems in this research; namely, how is the legal reasoning of judges in deciding the obligatory will to grandparents? Moreover, how is the judge's decision based on Aristotle's theory of distributive justice?

As a supporter of this writing, there are many writings related to obligatory wills and inheritance, but each has different characteristics. Based on the articles by Oemar Moechtar, Baren Valentino, and Denita Cahyanti Wahono in the Cakrawala Hukum Journal, the substance raised is a comparative study of inheritance rejection institutions from the perspective of customary and Islamic inheritance law. Therefore, this study will specifically examine the analysis of the granting of Obligatory Wills to Grandparents based on Aristotle's Distributive Theory.

2. Methods

This research uses normative-judicial research or library research. This research requires descriptive data from official public documents, namely official data from the Tarakan Religious Court. Furthermore, the researcher uses a case approach, the major study of which is the ratio decidendi in Decision Number 610/Pdt.G/2014/PA.TRK, and a conceptual approach using the concept of distributive justice by Aristotle.

3. Result and Discussion

3.1 Wajibah Wills

A mandatory will is a testament intended for heirs or relatives who do not get a share of the inheritance from a person who died due to an obstacle to syarak. Another definition of *obligatory will* is the distribution that must be given to the family or heirs, especially grandchildren whose inheritance is hindered because their mother or father had died before their grandparents died or died together. Based on the law of inheritance, grandchildren are hindered because there are heirs of uncles or aunts to these grandchildren (Setiawan, 2017).

The argument for the obligatory will is listed in QS. Al-Baqarah verse 180, as previously stated. Scholars debate about the validity of this verse because the verse about inheritance has been scripted this verse. Some scholars interpret the verse about wills, especially to relatives and parents, as mandatory and are still valid today. In the book written by Usman and Soemawinata, it is stated that scholars who think so consider the obligatory will given to parents and relatives (aqrabin) from the portion of the heir's inheritance can be carried out and applied (Ismail, 2020).

The opinion still enforces that the will is aimed at heirs who do not get a share because they are obstructed. In addition to husband and wife who have different religions, adopted children can also get a mandatory will. This is based on the results of Indonesian ulama' ijtihad to achieve the benefit and is regulated in Article 209 KHI. (Saiban, 2018)

Then in KHI, the obligatory will is regulated in Article 209, which explains the relationship between adopted children and adoptive parents in terms of mutual wills; they cannot get inheritance rights because they are not heirs. Adopted chil-

dren get a maximum of 1/3 of the inheritance from their adoptive parents and vice versa. (Setiawan, 2017)

The hadith reinforce the obligatory will of 1/3 of the total assets about the story of Sa'ad bin Abi Waqash who was sick and was visited by Rasulullah SAW. In this hadith, the Prophet explained that one-third of the assets included a large amount to bequeathed.

Obligatory wills can be certain actions that judges decide to force or give obligatory wills to people who have died because of certain considerations, namely the loss of the element of endeavor for the giver of the will and the element of obligation arises through a rule contained in KHI so that for this it can be decided by a judge (Amruzi, 2014).

3.2 Judge's Legal Reasoning

Legal reasoning for judges is a process of thinking logically and analytically based on a certain pattern carried out by judges to generate legal opinions that originate from concrete cases faced by referring to the positive legal system (Mappiasse, 2021). Judges' understanding of this reasoning process is crucial when working on legal considerations (*ratio decidendi*) (Taqiuddin, 2017).

Legal reasoning by judges based on legal theory is carried out through two stages: *de heuristic* and *de legitimate*. The judge carries out the *de-heuristic* stage by formulating the subject matter of the dispute based on the arguments obtained during the trial, which will then be proven according to the evidentiary law. Then the *de legitimate* stage uses deductive logic by determining and analyzing legal provisions to be used as consideration for decisions (Mappiasse, 2021).

A *good decision* is a decision that contains the value of legal certainty, benefit, and justice (Mappiasse, 2021). If the decision only focuses on justice aspects and overrides benefits and legal certainty, then the law cannot be implemented properly. Because legal certainty plays a juridical role, aspects of sociological benefit and justice as basic philosophical values in law enforcement must be perfectly combined (Moho, 2019).

3.2 Aristotle's Theory of Distributive Justice

As a scientist, Aristotle has written various books. His work became a source of knowledge that was quite influential and was also developed by the next generation of scientists. Some of his works, namely the *Nicomachean Ethics*, *Eudemian Ethics*, *Magna Moralia*, and *Nicomachean Ethics*, are his writings that describe ethics and morals. Then there is the *Politics* book which discusses quite close to ethics but focuses more on discussing the rule of law (Ginsberg, 2003).

Aristotle is known to be the first figure to put forward the concept of justice (Darmodiharjo, 1995). Aristotle's justice has a concept closely related to morals, and he positions justice as part of goodness. According to Aristotle, justice is marked by a good relationship between one another, not prioritizing oneself but also not prioritizing other parties, as well as equality. This is the basis of social ethics. Aristotle determined the formulation of justice to the three essences of natural law: living honorably, not disturbing others, and giving everyone their share (Tanya, 2019).

Aristotle is a figure who sparked the concept of justice based on equal status, equality of rights, and obligations proportionally to the concept of distributive justice, which was further developed by Thomas Aquinas (Aldhiyanti, 2019).

Aristotle has described this concept of distributive justice in his work entitled *Nicomachean Ethics*. Aristotle explained that justice could arise if people obey the law because the law appears for the sake of people's happiness. In other words, behavior done for the sake of the happiness of society is fair. Justice can emerge if there is happiness for oneself and also for society.

Distributive justice is synonymous with justice based on proportional equality according to its contribution. A fair share must be given based on what one deserves, although not everyone will name the same measure of acceptance. Moreover, corrective justice is tasked with rebuilding equal rights if a problem occurs (Tanya, 2019).

The essence of Aristotle's description of distributive justice is as a grant of equal rights but not equalization. He distinguished his equal rights according to proportional rights regardless of their mathematical value. Proportional equality gives each individual the share of his right equal to the contribution (benefit) he has made. Inequality occurs when people whose contributions are not the same are given the same share, and people whose contributions are the same get different shares (Adlhiyati, 2019).

The granting of proportional rights must be by the obligations someone has carried out. This is based on the principle mentioned by Aristotle, "according to merit" or "to each according to his part" (Aristotle, 1999). The requirements for fulfilling this proportional principle depend on the problems and other problematic conditions.

In granting a mandatory will to grandparents, the fulfillment of the rights and obligations of the child is used as a proportional condition for the fulfillment of justice in the distribution of the heir's inheritance. The rights and obligations of

children according to the law are regulated in Law Number 23 of 2002 concerning Child Protection from Article 4 to Article 18. Some of the rights listed in these articles are that children have the right to live, grow, develop, worship, be cared for and raised, and others.

3.4 Analysis of Granting Wajibah Wills to Grandparents Based on Aristotle's Theory of Distributive Justice

The judge's reasoning is done through 2 stages: de heuristic and de legitimate. Judges practice the de heuristic stage by carrying out the evidentiary process determined in the Civil Procedure Code law. So that at this stage, the proof by the judge was based on documents from the Plaintiffs, mostly in the form of authentic deeds with very strong legal force and one private deed; then, the statements of two witnesses were by the existing process and without any errors.

Furthermore, in the de-legitimate stage, the judge examines the plaintiffs' position as grandparents to become heirs of the heirs. It is known that the Heir's inheritance relationship only applies to the mother and her family because her mother's marriage is done in series and has no legal force according to the state. So, according to Article 186 KHI, those entitled to inherit the inheritance are the mother and the mother's family, while the grandparents are the parents of the Heir's mother.

However, the position of the mother is not known with certainty, which is still in the territory of the Unitary State of the Republic of Indonesia, so in the faraidh and hadith narrated in Sunan Abu Dawud No 2508 and Jurisprudence book II, 2010 edition concerning Guidelines for the Implementation of Duties and Administration of

the Religious Courts of 2010 page 168 number 5 letter (c) the position of grandparents is hindered or veiled because of the presence of the mother. Even though the position of the mother's whereabouts is not known for sure, the position of the grandparents is still veiled, so they cannot become the heirs of the Heir.

In his consideration, the judge provided the basis for Islamic law that the purpose of (shari'a) Islam is to provide benefit and reject harm. The judge also mentioned five objectives of Islamic law, according to Abu Ishaq al-Syatibi. Then the ownership of assets that are not absolute for someone because absoluteness only belongs to Allah SWT so that property rights can be considered for legal certainty in society and guarantee peace in life together. Moreover, finally, the judge considers the position of the Defendant, whose whereabouts are unknown, and therefore, the responsibility for caring for the Heir when left moves to the Plaintiffs, who bear all costs and other obligations. Thus, the Plaintiffs get part of the obligatory will.

After knowing that the judge decided to give a mandatory will to grandparents, it will be analyzed whether the judge's decision has met the distributive justice initiated by Aristotle or not. As stated earlier regarding the requirements for applying the proportional principle in justice, Aristotle will use the fulfillment of children's rights and obligations. Children's rights and obligations are listed in Law Number 23 of 2002 concerning Child Protection from Article 4 to Article 18; there are approximately 15 indicators. The analysis was carried out using six of 15 indicators of fulfilling children's rights and obligations because not all indicators can be found in Decision Number 610/Pdt.G/2014/PA.Trk. The analysis is outlined in table form as follows:

The six indicators that are used as a requirement for the proportional principle in Aristotle's theory of distributive justice, the grandparents, fulfill all indicators; this shows that the grandparents make a full contribution to fulfilling the heir's rights as children, while the mother only fulfills the three indicators and even then it is not carried out optimally. Even though, as the mother should have carried out the parents of the heir, all of these conditions it was her duty, what happened was

that grandparents played a more important role in this matter.

Distribution of inheritance to each party, namely grandfather gets 1/3, grandmother 1/3, and mother 1/3. Grandparents get the obligatory will, where the obligatory will is supposed to be 1/3 of the total portion of the property. However, the judge decided to give each grandma and grandpa 1/3 share. Based on the perspective of Aristotle's theory of distributive justice, such a

Table 1 Analysis of the Requirements for the Proportional Principle of Aristotle's Theory of Distributive Justice for Decision Number 610/Pdt.G/2014/PA.Trk

No	Requirement	Grandfather and Grandmother	Mother
1	The right to live, grow, develop, and participate fairly following human dignity.	Yes, because since the age of six months and even before that, he has been taking care of her.	Yes, because the mother has given birth but only cares for the child until the age of six months.
2	Get identity in the form of name and citizenship status.	Yes, because it is stated in the family card, that the grandfather is the head of the family	Yes
3	Raised, raised by parents.	Yes, based on the testimony of two witnesses	Yes, only up to the age of six months
4	Get teaching and education to develop their personality and intelligence according to their talents and interests.	Yes, based on the testimony of Witness II, a teacher, that the grandparents registered the heir to go to school.	No
5	Rest, use free time, make friends with children of the same age, be creative, play, and develop themselves according to their talents, interests, and level of intelligence.	Yes, based on the testimony of Witness II, a teacher, that the grandparents registered the heir to go to school. Same with indicators of friends with children of the same age, being creative and developing themselves.	No
6	Obtain protection from neglect, discrimination, cruelty, violence, persecution, economic or sexual exploitation, injustice, and others Obtained part	Yes, because he has been protected since his mother left him. Grandfather 1/3 (obligatory will) Grandmother 1/3 (obligatory will)	No, because leaving from the age of six months. 1/3 part (heir does not have children)

division is fair because, in addition to giving 1/3 share for the total share of grandparents, the judge gives each grandparent 1/3 share. The services of a mother who gives birth to heirs and the rights of heirs are mostly fulfilled by grandparents.

4. Conclusion

The judge gave legal reasoning in Decision Number 610/Pdt.G/2014/PA.Trk. Through de heuristic and de legitimate stages. The de-heuristic stage formulates events based on trial arguments which are then proven through the evidentiary process. The proof is made based on an authentic deed, a private deed, and the testimony of two witnesses. Then the de legitimate stage of the judge uses legal provisions based on verses of the Koran, hadith, doctrine, KHI, and Islamic (classical) law. The responsibility of grandparents in caring for the heir since being left by the mother is very large, so the judge thinks to give the grandparents a mandatory will. The judge's decision to grant a mandatory will to grandparents based on Aristotle's theory of distributive justice is fair. This is because grandparents fulfill the six requirements of the proportional principle, namely the fulfillment of the heir's rights as a child, compared to the biological mother of the heir. Giving each 1/3 share has also fulfilled distributive justice because the obligatory will that should be in faraidh science is 1/3 of all inheritance.

Reference

- Adlhiyati, Z., & Achmad. (2019). Melacak Keadilan dalam Regulasi Poligami: Kajian Filsafat Keadilan Aristoteles, Thomas Aquinas, dan John Rawls. *Undang: Jurnal Hukum*, 2(2), 409-431. DOI: <https://doi.org/10.22437/ujh.2.2.409-431>.
- Al Amruzi, M. F. (2014). *Rekonstruksi Wasiat Wajibah dalam Kompilasi Hukum Islam*. Sleman: Aswaja Pressindo.
- Aristoteles. (2004). *The Nicomachean Ethics*. terj. Embun K. Jakarta: Mizan Publika.
- Aristoteles. (1999). *Nicomachean Ethics*. terj. W.D.Ross. Kitchener: Batoche Books.
- Darmodiharjo, D. (1995). *Pokok-Pokok Filsafat Hukum: Apa dan Bagaimana Filsafat Hukum Indonesia*. Jakarta: Gramedia Pustaka Utama. <https://books.google.co.id/books?id=Xa22DeTfZ60C>.
- Ginsberg, M. (2003). *Keadilan dalam Masyarakat*. Bantul: Pustaka Jogja Mandiri.
- Ismail, A. H. (2020). Pemberian Wasiat Wajibah Kepada Istri Non Muslim Menurut Putusan Mahkamah Agung RI NO. 16K/AG/2010. *Jurnal Mercatoria*, 13 (2), 131-142. DOI: <https://doi.org/10.31289/mercatoria.v13i1.4060>.
- Kompilasi Hukum Islam.
- Mappiasse, S. (2021). *Logika Hukum Pertimbangan Putusan Hakim (Pertama)*. Jakarta: Kencana.
- Massiare, M., & Yasen, S. (2017). Analisis Putusan Pengadilan Agama Tentang Pembagian Warisan Terhadap Kesejahteraan Keluarga. *Jurnal Hukum Ekonomi Syariah*, 1(2), 210-222. DOI: <https://doi.org/10.26618/j-hes.v1i2.1654>.
- Moechtar, O., Valentino, B., & Wahono, D. (2020). Kajian komparatif lembaga penolakan waris dalam perspektif hukum waris adat dan Islam. *Jurnal Cakrawala Hukum*, 11(3), 291-301. DOI: <https://doi.org/10.26905/idjch.v11i3.4225>.
- Moho, H. (2019). Penegakan Hukum di Indonesia Menurut Aspek Kepastian Hukum, Keadilan, dan Kemanfaatan. *Jurnal Warta*, 13(1), 138-149. DOI: <https://doi.org/10.46576/wdw.v0i59.349>.
- Putusan Pengadilan Agama Tarakan, Nomor 610/Pdt.G/2014/PA.Trk.
- Saiban, K. (2018). *Hukum Kewarisan dalam Islam*. Malang: Unmer Press.
- Setiawan, E. (2017). Penerapan Wasiat Wajibah Menurut Kompilasi Hukum Islam (KHI) dalam Kajian Normatif Yuridis. *Jurnal Muslim Heritage*, 1(2), 43-61. DOI: <https://doi.org/10.21154/muslimheritage.v2i1.1045>.
- Susanto, C., Siti Hamidah, S., & Rachmi Sulistyarini, R. (2020). Kedudukan hukum dan hak waris anak

hasil inseminasi buatan dari ayah yang telah meninggal. *Jurnal Cakrawala Hukum*, 11(3), 302-312. DOI: <https://doi.org/10.26905/idjch.v11i3.5475>.

Tanya, B. L., Simanjuntak, Y. N., & Hage, M. Y. (2019). *Teori Hukum Strategi Tertib Manusia Lintas Ruang dan Generasi*. Yogyakarta: Genta Publishing.

Taqiuddin, H. U. (2017). Penalaran Hukum (Legal Reasoning) Dalam Putusan Hakim. *Jurnal Ilmu Sosial Dan Pendidikan*, 1(2), 191-199. DOI: <https://doi.org/10.36312/jisip.v1i2.343>.

Undang-Undang Republik Indonesia Nomor 23 Tahun 2002 *Tentang Perlindungan Anak*.