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Reconstruction of Obligatory Bequest in the Perspective of the Objectives of Islamic Law: Contextualizing Islamic Law in a Case Study of The Secret Wife in Polygamous Marriage

Rusdi Rizki Lubis
Universitas Islam Indonesia, Indonesia
rusdi.lubis@students.uii.ac.id

Asmuni
Universitas Islam Indonesia, Indonesia
asmuni@uii.ac.id

Tamyiz Mukarrom
Universitas Islam Indonesia, Indonesia
914210102@uii.ac.id

Candra Boy Seroza
Ditjen Badan Peradilan Agama, Mahkamah Agung, Indonesia
serozacandraboy@gmail.com

Muhammad Irfan
Al Azhar University, Egypt
muhammadirfanrajudin94@gmail.com

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Abstract: The concept of obligatory bequest (*wasiat wajibah*) represents a significant development in the reform of Islamic family law in Indonesia. While normatively regulated in Article 209 of the Compilation of Islamic Law (KHI), which mandates obligatory bequests to adopted children and adoptive parents, recent jurisprudence and Supreme Court Circulars have broadened its application. Courts have extended obligatory bequests to include non-Muslim heirs, stepchildren, children born out of wedlock, and more recently, to *sirri* (unregistered) wives in polygamous marriages. This study employs a qualitative method with both normative-juridical and empirical-juridical approaches, using *maqāṣid al-sharīʿah* (the objectives of Islamic law) as the analytical framework. The key contribution of this research lies in its doctrinal and jurisprudential reconstruction of obligatory bequest to encompass *sirri* wives—a group previously excluded from formal inheritance rights. It argues that Religious Court judges may justifiably grant obligatory bequests to *sirri* wives under specific conditions: (1) the legally registered wife was aware of the *sirri* marriage yet chose not to report it; (2) the *sirri* wife demonstrably fulfilled her marital duties; and (3) the marriage lasted for more than five years and was characterized by harmony and mutual support. This study thus contributes to the ongoing reform of Islamic inheritance law by offering a more inclusive and justice-oriented interpretation aligned with contemporary social realities and *maqāṣid al-sharīʿah*.

Keywords: Obligatory Bequest, *Sirri* Wife, Legal Reconstruction, Polygamy, Jurisprudence

Abstrak: Konsep wasiat wajibah merupakan perkembangan signifikan dalam reformasi hukum keluarga Islam di Indonesia. Meskipun secara normatif diatur dalam Pasal 209 Kompilasi Hukum Islam (KHI), yang mewajibkan wasiat kepada anak angkat dan orang tua angkat, yurisprudensi terbaru dan Surat Edaran Mahkamah Agung telah memperluas penerapannya. Pengadilan telah memperluas pemberian wasiat wajib untuk mencakup ahli waris non-Muslim, anak tiri, anak yang lahir di luar nikah, dan baru-baru ini, kepada istri sirri (pernikahan tidak tercatat) dalam pernikahan poligami. Penelitian ini menggunakan metode kualitatif dengan pendekatan normatif-juridis dan empiris-juridis, menggunakan maqāṣid al-sharīʿah (tujuan-tujuan hukum Islam) sebagai kerangka analisis. Kontribusi utama dari penelitian ini terletak pada rekonstruksi doktrinal dan yurisprudensial wasiat wajib untuk mencakup istri sirri—kelompok yang sebelumnya tidak diakui dalam hak waris formal. Penelitian ini berpendapat bahwa hakim Pengadilan Agama dapat dengan sah memberikan wasiat wajib kepada istri sirri dengan syarat tertentu: (1) istri yang tercatat secara sah mengetahui pernikahan sirri namun memilih untuk tidak melaporkannya; (2) istri sirri secara jelas memenuhi kewajiban pernikahannya; dan (3) pernikahan tersebut berlangsung lebih dari lima tahun dan ditandai dengan keharmonisan dan saling mendukung. Penelitian ini dengan demikian berkontribusi pada reformasi hukum waris Islam yang sedang berlangsung dengan menawarkan interpretasi yang lebih inklusif dan berorientasi pada keadilan yang sesuai dengan realitas sosial kontemporer dan *maqāṣid al-sharīʿah*.

Kata kunci : *wasiat wajibah, istri sirri, rekonstruksi, poligami, yurisprudensi*

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Introduction

The development of Islamic law in Indonesia is constantly evolving with the emergence of new cases and the emergence of different perspectives in evaluating these new cases. The development of knowledge and social change will not make Islamic law stagnant. By following the comprehensive existence theory, the existence of Islamic law has its own strength, which can be implemented through legislation, jurisprudence (judges), and the legal consciousness of society.[1]

Islam is believed by its adherents to be a religion that is rahmatan lil alamin and shalih li kulli zaman wa makan. the implication is that various teachings and Islamic law must always respond and provide solutions to the problems faced by Muslims. Fazlur Rahman said that the existence of a people in the modern era is determined by how far it is able to face new challenges creatively.[2]

Legal Modernization is one of the inevitable things, especially Family Law in the Islamic world, covering aspects of marriage, divorce, and inheritance that have been initiated since the 20th century. In general, this renewal is done by modifying the fiqh law that has been applied for centuries. Tahir Mahmmod termed this as *the point of departure* from conventional (classic) fiqh to modern legislation.[3]

Social reality can influence the formation or change of law as the law is built for the benefit of the community. In this context, Ibn Qayyim al-Jauziy stated that 'changes in fatwa can occur due to changes in time, place and circumstances'. However, the formation of law in the context of changes and differences in social customs cannot be applied instantly or forced. It must go through a thorough study and various considerations, and most importantly is to ensure that the law has access to apply because it needs the existence of a legal reason.[4]

Modernization and reform were initiated by the Ottoman Law of Family Rights in 1917 in Turkey. According to Mohammad Atho Mudzhar and Muhammad Amin Suma, the reform in Turkey became a model for modernizing family law in other countries. From a substantive perspective, the reform of Islamic family law in the Muslim world can be categorized into two models: First, *intra-doctrinal reform,* which refers to the reform carried out by combining various opinions of the main schools of thought while simultaneously considering opinions outside of the main schools of thought; and Second, *Extra-doctrinal reform,* which is a renewal by providing a completely new interpretation of the existing *naṣh*.[5]

The Compilation of Islamic Law (KHI) through Presidential Instruction Number 1 of 1991 is an effort to enforce substantive Islamic law in order to achieve legal uniformity and create legal certainty. Although it has been unified, the opportunity for differences of opinion in *furu'iyah* (secondary issues) is still widely open, including an issue related to obligatory bequest.

KHI provides space in matters of *furu'iyah* (difference) for obligatory bequest

[1] Muchsin, "Masa Depan Hukum Islam Di Indonesia" (Jakarta: Untag Press, 2010), 42.

[2] Ramadhita Ramadhita, "Keadilan Proporsional Dalam Pembagian Waris Anak Angkat," *De Jure: Jurnal Hukum Dan Syar'iah* 4, no. 2 (2012): 123–35, https://doi.org/10.18860/j-fsh.v4i2.2982.

[3] Badan Peradilan Agama, "Majalah Peradilan Agama: Penegakan Hukum Keluarga Di Indonesia," *Badan Peradilan Agama* (Jakarta, 2015).

[4] Munadi Usman, "The Legality of Mandatory Testaments for an Adopted Child in the Perspective of 'Urf Principle," *De Jure: Jurnal Hukum Dan Syar'iah* 11, no. 2 (2019): 76–89, https://doi.org/10.18860/j-fsh.v11i2.6614.

[5] Badan Peradilan Agama, "Majalah Peradilan Agama: Penegakan Hukum Keluarga Di Indonesia."

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provisions that differ from other countries, the provisions of obligatory bequest matters are regulated in Article 209 of the Indonesian Compilation of Islamic Law (KHI). In that article, it is explained that the obligatory bequest is addressed to adopted children and adoptive parents.[6] In essence, making a will is a voluntary act (*ikhtiyari*), that is, an act done on one's own initiative. However, the authorities or judge have the authority to enforce the implementation of the obligatory bequest.

The obligatory bequest given to adopted children and adoptive parents is a reform and renewal of Islamic family law that can be categorized as an *intra-doctrinal reform* model. This means a reform that is not entirely new but repeats and develops the opinions of previous scholars on the obligation of bequest, in this case the opinion of Ibn Hazm that obliges bequest to both parents and relatives.[7]

Until now, KHI remains the only material law that regulates inheritance. In the development of obligatory bequest, it has been found that there are many different judgments from the concept of obligatory bequest in KHI. Some judgments of the Supreme Court have shown that there is an expansion of the scope of obligatory bequest to non-Muslim relatives and adopted children.

The expansion of the obligatory bequest testament norms has been accommodated by two different legal sources. The obligatory bequest testament for relatives or non-Muslim heirs is accommodated by jurisprudence. The obligatory bequest testament for stepchildren and biological children performed according to Islamic law but not registered is regulated by the Supreme Court Circular Letter (SEMA) regarding the Implementation of the Formulation of Plenary Session Results as a Guideline for the Implementation of Tasks for the Judiciary.

The development of the concept of obligatory bequest is increasingly widespread with the decision of the Religious Court which stipulates that the secret wife of polygamous marriage also receives the obligatory bequest from the heir (husband whose marriage is not registered). Decision Number 547/Pdt.G/2023/PA.Utj and Decision Number 183/Pdt.G/2023/PA.Mbl have accommodated the determination of obligatory bequest to the secret wife.

The position of a wife as the recipient of an obligatory bequest certainly raises pros and cons. From a fiqh perspective, the position of the wife is clearly that of an heir because of the marital relationship. However, based on Article 2 paragraph 2 and Article 3 paragraph 2 of Law Number 1 of 1974 concerning Marriage, which essentially states that all marriages must be registered and all polygamy must be through court permission, the position of the secret wife will reap problems. Whether or not the sirri wife of a polygamous marriage is still a wife when her husband's inheritance is distributed.[8]

The main focus of this research is to analyze the religious court's decision to grant inheritance to the wife of a polygamous marriage based on the maqashid shari'ah approach. The relevance of this case is made clear by the fact that

[6] M. Fahmi Al Amruzi, "Rekonstruksi Wasiat Wajibah Dalam Kompilasi Hukum Islam" (Yogyakarta: Aswaja Pressindo, 2014), VII.

[7] Alyasa Abubakar, "Ahli Waris Sepertalian Darah: Kajian Perbandingan Terhadap Penalaran Hazairin Dan Penalaran Fikih Mazhab" (Jakarta: INIS, 1998), 191.

[8] Mukhtaruddin Bahrum, "Problematika Isbat Nikah Poligami Sirri," *Al-Adalah: Jurnal Hukum Dan Politik Islam* 4, no. 2 (2019): 194–213, https://doi.org/10.35673/ajmpi.v4i2.434.

during 2023, the Religious Courts have received and resolved 55553 cases of isbat nikah/marriage registration.[9] By looking at this fact, an initial hypothesis has been formed that until now there are still many unrecorded marriages in Indonesia.

This research will examine how the fundamental basis of the emergence of obligatory bequest has empirically expanded much further than its normative basis, so the expected result is the reconstruction of the legal provisions of obligatory bequest to prevent further expansion and bias in their interpretation.

Method

This research was a qualitative study that combines the normative and empirical legal approaches, and used objectives of Islamic law (maqashid syari'ah) as its analytical tool. Normative legal research was a legal study that treated law as a system of norms, while empirical legal research was a legal study that examined human behavior.

In the context of this research, normative juridical aspects consisted of laws derived from Islamic law, customary law, and the Compilation of Islamic Law. On the other hand, empirical juridical aspects consisted of judicial decisions at the first instance, appellate, or cassation levels related to obligatory bequests.

In this study using literature study techniques in data collection or known as the library research method, namely research techniques on library materials or legal materials.[10] The purpose of conducting a literature study is to collect information that is relevant to the problem or legal issue being studied. Manual and online library research is carried out by examining laws and regulations, decisions of the Religious Court and literature related to obligatory bequest in the Religious Court.After collection, the data is processed using data editing techniques, organizing data and presenting data, namely in the form of descriptions arranged systematically. The data that has been processed is analyzed through several stages, namely collection (data collection), reduction (selecting and sorting data), display (presenting in the form of a brief description pattern) and conclusion (drawing conclusions).[11]

This research has limitations on the development of obligatory bequests from both normative and empirical perspectives to date. The study used a descriptive analysis technique that attempted to clearly describe the arguments about the development of the implementation of obligatory bequests in the religious court environment.

Obligatory Bequest according to KHI

The Compilation of Islamic Law (KHI) was compiled based on the scholars' ijtihad (independent reasoning) using 13 books including Al-Bajuri, Fathul Mu'in, and others.[12] One of the goals is legal uniformity for the creation of legal certainty.[13] Although they have been united, the possibility of differences of opinion in *furu'iyah* matters is still wide open, one of which is an issue related to an obligatory bequest that is not known in classical fiqh book.

The obligatory bequest is regulated in

[9] Ditjen Badilag and Mahkamah Agung, "Laporan Pelaksanaan Kegiatan Tahun 2023 Direktorat Jenderal Badan Peradilan Agama," 2024.

[10] Soerjono Soekanto dan Sri Mamudji, "Penelitian Hukum Normatif: Suatu Tinjauan Singkat" (Jakarta: Raja Grafindo Persada, 2015), 41.

[11] Mathew B. Miles dan Michael Huberman, "Analisa Data Kualitatif: Buku Sumber Tentang Metode-Metode Baru" (Jakarta: UI Press, 2007), 20.

[12] Warkum Sumitro, "Perkembangan Hukum Islam Di Tengah Kehidupan Sosial Politik Di Indonesia," (Malang: Bayumedia Publishing, 2005), 178.

[13] Amir Mu'allim, "Studi Pemikiran Tentang Latar Belakang Dan Usaha Pemasyarakatan Kompilasi Hukum Islam" (Yogyakarta: UII Press, 1999), 204.

Chapter II of The Compilation of Islamic Law (KHI). KHI allocates the obligatory bequest to adopted children and adoptive parents. Meanwhile, other countries such as Egypt, Jordan, and Iraq apply the obligatory bequest to orphaned grandchildren who are covered by their uncle, while in the KHI, this condition is applied to the concept of substitute heirs.[14]

The substitute heir in the compilation of islamic law provides assurance to the grandchildren that their inheritance will not be obstructed by anyone, on the condition that they are not disqualified as heirs[15] and his portion cannot exceed the portion of the equivalent heir who is being replaced.[16] Civil Code Article 841 to 848 also accommodates substitute heirs, even the provisions for substitute heirs also apply to collateral and cross heirs.[17]

In theory, an obligatory bequest is defined as an action taken by an authority or judge as a state apparatus to enforce or issue an obligatory bequest for a deceased person, given to a specific person in a specific situation.[18]

The obligatory bequest is regulated in Article 209 of the Compilation of Islamic Law (KHI), which states that an adoptive parent or adopted child who does not receive a bequest can be given an obligatory bequest of up to one-third of the inheritance. In practice, many religious court decisions have exceeded the limits of these normative provisions, even though the only substantive legal basis for Islamic inheritance law in Indonesia is the KHI.[19]

The obligatory bequest construction in the Islamic Law Compilation can be categorized as a legal reason (*'illat* hukum) taken through the method of istihsan (to consider something good or to approve). By prioritizing benefits and avoiding harm, it also applies the exception of specific law (hukum juz'i) from general law (hukum kulli) or general rule based on specific evidence that supports it.

In the compilation of Islamic law (KHI), the specific conditions of the obligatory bequest are not discussed in detail, which leaves room for interpretation by the judge. Theoretically, the obligatory bequest is defined as an action taken by a public official or judge as a state apparatus to enforce or issue the obligatory bequest for a deceased person, given to a specific person in a specific situation.[20]

Obligatory Bequest In Other Muslim Countries

Indonesia through the KHI has established rules regarding obligatory bequest, which in principle provide part of the inheritance from the deceased to someone who does not get a share in accordance with the Islamic inheritance system (*faraidh*). However, there are differences in the objects that are given

[14] Khotifatul Defi Nofitasari, "Wasiat Wajibah Kepada Anak Angkat, Non Muslim Dan Anak Tiri (Formulasi Hukum Wasiat Wajibah Dalam Pasal 209 Kompilasi Hukum Islam Di Indonesia Dan Perkembangannya)," *Al-Syakhsiyyah: Journal of Law & Family Studies* 3, no. 2 (2021): h. 34, https://doi.org/10.21154/syakhsiyyah.v3i2.3370.

[15] Direktorat Pembinaan Peradilan Agama Islam and Ditjen Pembinaan Kelembagaan Islam Departemen Agama, "Kompilasi Hukum Islam" (2001).

[16] Direktorat Pembinaan Peradilan Agama Islam and Agama.

[17] Pemerintah Indonesia, "Kitab Undang-Undang Hukum Perdata Buku Kesatu Orang," n.d., 841–45.

[18] Abdul Manan, "Beberapa Masalah Hukum Tentang Wasiat Dan Permasalahannya Dalam Konteks Kewenangan Peradilan Agama," *Mimbar Hukum Aktualisasi Hukum Islam*, 1998.

[19] Erna Wati and Tiara Rettina, Inheritance Rights of Stepchildren in the Perspective of Compilation of Islamic Law. (2022). *MILRev: Metro Islamic Law Review*, *1*(2), 188-202. https://doi.org/10.32332/milrev.v1i2.6208

[20] Oemara Amiroel Syarief, "Kewenangan Hakim Pengadilan Agama Dalam Menetapkan Wasiat Wajibah Bagi Pewaris Yang Tidak Menetapkan Wasiat," *Tahkim* 17, no. 2 (2021): h. 210.

obligatory wills according to Indonesian law with the laws that apply in other countries.[21]

In the book of Egyptian Testament Law Number 71 of 1336 AH/1946 AD in Egypt, among others, it contains: "*If the testator does not bequeath to the descendants of his sons who have died first, or died simultaneously, then the grandchildren of these sons must receive a obligatory bequest from the testator's estate in the amount of the son of the testator's share, but may not exceed one-third of the estate on the condition that the grandchildren are not heirs and there is no share for him through other means (grant). If the grant is less than the obligatory bequest share, then the shortfall must be added*".[22]

When analyzing the substance of this Law, which gives inheritance to a grandson who does not get a share of his grandfather's estate, because his father died first, then given an inheritance, it is actually not a new problem. The results of the ijtihad of classical scholars there are those who determine the share of inheritance to distant relatives or relatives who are prevented from getting a share of inheritance. In fact, they consider this to be sunnat law in order to strengthen the relationship of silaturrahim, as mentioned earlier. So the inclusion of the provision of obligatory bequest that provides a share for a grandson who is prevented from getting a bequest from his deceased grandfather in the Egyptian Law, may be said to be set to legitimize it only. But it must be recognized that this is a step forward in accordance with the times.[23]

This provision applies not only to male grandchildren, but also to female grandchildren. Furthermore, the Egyptian obligatory bequest law states, "*Such wills are given to the first-degree class of sons of daughters, and to the children of sons from the male line and so on downwards, provided that each parent veils his child*."[24]

According to J.N. Anderson as quoted by Ratno Lukito, by providing appropriate rules in the law of inheritance for orphaned grandchildren through the institution of obligatory bequest, the reform carried out by Egypt represents a twentieth century phenomenon in the Islamic world. Understandably, this reform has attracted a great deal of attention from other Islamic countries. Despite differences in the details, various countries in the Middle East regulate the issue of obligatory bequest.[25]

Jordan and Syria have similar provisions regarding obligatory bequest bequests. Both countries only give it to male descendants. In Syria and Jordan the will is given to the grandchildren of sons only, while the grandchildren of daughters are not given. [26] The reason is that the grandchildren of girls are classified as dzawil arham. Their position is in line with the rules of inheritance law adopted by the sunni fiqh madzhab al-Shafi'i that dzawil arham is not entitled to inherit as long as there are fard heirs and 'ashabah.[27]

Kuwait implemented the law of obligatory bequest probate in Qanun al-Washiyah al-Wajibah 1971 which applies the same construction of obligatory bequest

[21] Erniwati, "Wasiat Wajibah Dalam Perspektif Hukum Islam Di Indonesia Dan Komparasinya Di Negara-Negara MusliM," *Jurnal Ilmiah Mizani: Wacana Hukum, Ekonomi Dan Keagamaan* 5, no. 1 (2018): 71, https://doi.org/10.29300/mzn.v5i1.1437.

[22] Habiburrahman, "Rekonstruksi Hukum Kewarisan Islam Di Indonesia" (Jakarta: Kencana, 2011), 167.

[23] Erniwati, "Wasiat Wajibah Dalam Perspektif Hukum Islam Di Indonesia Dan Komparasinya Di Negara-Negara Muslim."

[24] Habiburrahman, "Rekonstruksi Hukum Kewarisan Islam Di Indonesia."

[25] Ratno Lukito, "Hukum Islam Dan Realitas Sosial" (Yogyakarta: Fakultas Syariah UIN Sunan Kalijaga, 2008), 107.

[26] "The Syirian Law of Personal States" (1953).

[27] Hisyam Qublan, "Washiya Al-Wajibah Fi Al-Islam" (Beirut: Mansyurat Bahr al-Mutawassith, 1971), 60.

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probate as in Egypt. The provision of obligatory bequest in Syria is codified in the Law of Syria (Syirian Law of Personnel States 1952 Book IV and V) where it is stated that obligatory bequest applies to direct descendants through the male line who died before the testator (his father) and does not apply to direct descendants through women. This means that there is a difference in the object of the recipient of the obligatory bequest in Egypt and Syria, the Syrian Law only designates the obligatory bequest for orphaned grandchildren from the male side and does not give it to orphaned grandchildren from the female side. Just like the Syrian state, the Jordanian state also adheres to the same provisions that only provide obligatory bequest to male descendants. These two countries argue that the grandchildren of girls are still classified as dzawil arham, their position is in line with the rules of inheritance law adopted by the Shafi'i school of thought that dzawil arham are not entitled to inherit as long as there are fard and 'ashabah heirs.[28]

For Morocco as regulated in the Moroccan Code of Personal Status 1958 Books IV and V refers to the Maliki school of thought. Morocco also uses the principle of obligatory bequest from Egypt but there are some changes. Obligatory bequest in Morocco can be applied to children regardless of how low the decline, but only from the side of the son who dies before the dead. Meanwhile, Tunisia regulates obligatory bequest in the 1956 Personal Status Law in Article 191 which states the ability of children of sons or daughters who die first to receive their parents' share if they are still alive with a maximum of one third of the inheritance. The provisions regarding obligatory bequest are only intended for orphaned grandchildren of the first generation.[29]

In Pakistan, a radical change can be found in the inheritance system of Islamic law that has been applicable so far, both for the Sunni and Shi'ah groups, namely introducing the doctrine of representation, or what is commonly known as the obligatory bequest. Regarding the inheritance stipulated in the Muslim Laws Ordinance 1961, a provision regarding the right of inheritance of grandchildren that if the death of the testator's male or female children before the distribution of the inheritance, then the testator's grandchildren get the amount of inheritance of their respective father or mother's share as if they were still alive.[30]

Obligatory bequest is a phenomenon of contemporary Islamic law development in the Islamic world. Starting from Egypt, which stipulates the legal product of obligatory bequest through the Obligatory bequest Law No. 71 of 1946 which gives inheritance rights to grandsons and granddaughters whose father has passed away from the testator (grandfather). Other Islamic countries have followed suit by enacting exactly the same provisions as Egypt such as Kuwait. There are also those that adopt limited wills by only giving obligatory bequests to grandchildren of sons such as Morocco, Jordan and Syria. In fact, there are also those who do not follow the provisions of obligatory bequest like in Egypt such as Iraq and Iran, these two countries regulate obligatory bequest based on the syi'ah school based on *itsna 'ashariah* and sunni based on the Hanafi school of thought.

[28] Qublan.

[29] Abdullah Siddik, "Hukum Warisan Islam Dan Perkembangannya Di Seluruh Dunia Islam" (Jakarta: Penerbit Wijaya, 1984), 21.

[30] Tohir Mahmood, "Famili Law Reform in the Muslim World" (Bombai: N. M. Tripathi, 1972), 252.

The Jurisprudence of Obligatory Bequest

Sudikno Mertokusumo stated that basically, legislation is not complete because it will always lag behind the times. Therefore, there will always be legal renewal, one of which is through the discovery of law by judges, known as "rechtsvinding," which is a characteristic of the *civil law* system.[31]

One of law sources in religious courts is jurisprudence, which is a systematic collection of Supreme Court decisions followed by other judges in making the same social decisions.[32] However, judges are not bound by jurisprudence decisions because Indonesia does not adhere to the principle of "The binding force of precedent", so that judges are free to choose whether to use jurisprudence or not.[33]

The development of regulations on obligatory bequest in period of 1995 up to 2012 is the expansion of the provision about the parties that could receive obligatory bequest. specifically related to heirs that has a different religion with the deceased. Differences of religion in Islamic inheritance law is a prohibitive factor for someone to become the heir and receive the distribution of property of inheritance. In this period, this provision was excluded through jurisprudence in some Religious Court's decision.

So far, there have been many precedents from the Supreme Court that have granted obligatory bequest to non-Muslims. Although this deviates from the normative provisions in the Islamic Law Compilation, this legal breakthrough has provided a new contribution to the renewal of Islamic law in Indonesia, albeit in a limited way. This situation further explains that normative law always lags behind development. [34]

The KHI prohibits the inheritance relationship between Muslims and non-Muslims as stated in Article 171. However, Article 173 of the KHI does not mention religion as one of the factors that prevent inheritance.

Several decisions of the Supreme Court that have become jurisprudence include Decision Number 368K/AG/1995, which provides obligatory bequest to non-Muslim children, Decision Number 51K/AG/1999, which provides obligatory bequest to nieces and non-Muslim relatives, Decision Number 16K/AG/2010, which provides obligatory bequest to non-Muslim wives, and Decision Number 721K/AG/2015, which provides obligatory bequest to non-Muslim children.

Obligatory bequest to non-Muslim heirs according to the opinion of Ibn Hazm is a means to bridge the gap between Islamic law and customary law that cannot be separated in most Indonesian societies.

The majority of Islamic scholars in the field of jurisprudence agree that religious differences are a barrier to inheritance. However, it is also necessary to consider a sociological approach in making court decisions. Changes in the law in a country can affect social changes in society, and likewise, social changes in society can lead to changes in the law in a country, as explained by Ibn Qayyim al-Jawziyya.[35]

Not only through jurisprudence, the provision that granted obligatory bequest

[31] Sudikno Mertokusumo, "Penemuan Hukum : Sebuah Pengantar" (Yogyakarta: Liberty, 2001), 7.
[32] Lilik Mulyadi, "Hukum Acara Perdata Menurut Teori Dan Praktik Peradilan Di Indonesia" (Jakarta: Djambatan, 1999), 14.
[33] Abdul Manan, "Hukum Acara Perdata Di Lingkungan Peradilan Agama" (Jakarta: Kencana, 2008), 7.
[34] Abdul Gafur, "Analisis Konsep Wasiat Wajibah Dalam KHI Dan Putusan MA," *Al-Mazaahib: Jurnal Perbandingan Hukum* 10, no. 1 (2022): 21, https://doi.org/10.14421/al-mazaahib.v10i1.2483.
[35] Syamsulbahri Salihima, "Perkembangan Pemikiran Pembagian Warisan Dalam Hukum Islam Dan Implementasinya Pada Pengadilan Agama" (Jakarta: Prenadamedia, 2016), 18.

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for different religious heir is also reinforced by the Fatwa of Indonesian Council of Ulama No. 5/MUNASVII/MUI/9/2005 concerning Inheritance different religion. The provisions in this fatwa strengthens provisions regarding the regulation in KHI about the religion requirements for an heir, and at the same time also implements the jurisprudence of the Supreme Court regarding the provision obligatory bequest for heirs who are not muslims.[36]

The Supreme Court's decision on the obligatory bequest to non-Muslims has sparked pros and cons. Those who disagree argue that the method of ijtihad in legal discovery is not appropriate because it is clear that non-Muslims are included in the category of heirs who are blocked (mawani'ul irtsi).

In the opinion of the author, the decision of the Supreme Court to grant a will to non-Muslims is appropriate. First, non-Muslims are not included in the reasons for the prohibition of inheritance in Article 173 of the KHI, so the granting of a bequest to non-Muslims does not violate the written law that exists. Second, the purpose of the law is justice and fairness, which is the best way to achieve a just and fair decision in granting a bequest to non-Muslims who, biologically, still have a harmonious relationship and the heir is never disinherited by the non-Muslim relatives of the deceased. Therefore, the jurisprudence of the obligatory bequest to relatives or non-Muslim heirs is an accommodative decision towards the democratic atmosphere in living in society and state, and relevant to Islamic law in Indonesia.

Obligatory bequest in Circular Letter of the Supreme Court (SEMA) Regarding the Results of the Plenary Session of the Religious Chamber

The Supreme Court plays a significant role in legal reform, including through the doctrine of the formulation of the results of plenary chamber meetings. Since 2012, the Supreme Court has consistently held plenary chamber meetings aimed at maintaining the consistency of the application of the law and the consistency of court decisions.[37]

SEMA (Circular Letter of the Supreme Court) can be used as a a source of law in the Religious Court. SEMA contains procedural law and substantive civil law.[38] Although it is not binding on the judges, for the sake of legal certainty, SEMA is recommended to be adhered to and applied.

The development of the obligatory bequest (wasiat wajibah) for non-Muslims in Indonesia, as regulated by the Supreme Court Circular Letter No. 7 of 2012 (SEMA Number 7 Year 2012), has introduced the nomenclature regarding the obligatory bequest for stepchildren.

The obligatory bequest to a stepchild accommodated by the Supreme Court Circular Letter is a new breakthrough that is able to accommodate the diverse family conditions in Indonesian society. Basically, the legal reasoning method used is *qiyas*,[39] that is, equating something that has no legal text (*nash*) with something that has a legal text because of the similarity of its legal

[36] Haniah Ilhami, "Development of the Regulation Related To Obligatory Bequest (Wasiat Wajibah) in Indonesian Islamic Inheritance Law System," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 27, no. 3 (2016): 559, https://doi.org/10.22146/jmh.15884.

[37] Mohammad Kamil Ardiansyah, "Pembaruan Hukum Oleh Mahkamah Agung Dalam Mengisi Kekosongan Hukum Acara Perdata Di Indonesia," *Jurnal Ilmiah Kebijakan Hukum* 14, no. 2 (July 24, 2020): 370, https://doi.org/10.30641/kebijakan.2020.v14.361-384.

[38] Abdul Manan, "Pengadilan Agama Cagar Budaya Nusantara Memperkuat NKRI," 1st ed. (Jakarta: Kencan, 2019), 271.

[39] Nofitasari, "Wasiat Wajibah Kepada Anak Angkat, Non Muslim Dan Anak Tiri (Formulasi Hukum Wasiat Wajibah Dalam Pasal 209 Kompilasi Hukum Islam Di Indonesia Dan Perkembangannya)."

cause (*'illat*).[40] In performing qiyas, there are essential elements, namely: 'asl (the root), far'u (the branch), hukum 'asl (the ruling of the root), and 'illat (the cause).[41]

One of the cassation decisions that grants an obligatory bequest to a stepchild is Decision Number 489K/AG/2011. In its legal considerations, the judge opined that even an adopted child can be given the obligatory bequest, so it would be illogical if the biological child of the wife does not receive a share of the inheritance. This decision establishes the position of a stepchild of the deceased (the biological child of the deceased's wife) to be the same as that of an adopted child of the deceased, meaning both are equally entitled to a 1/5 share of the inheritance through the obligatory bequest[42]

In the cassation decision Number 489K/AG/2011, the legal reason (*'illat*) for the emotional proximity between the adoptive or stepfather and the adopted or stepchild is used, so their position is equated. This emotional proximity is formed because the adopted or stepchild is part of a family that has lived together in harmony and peace.[43]

It should be noted that the cassation decision Number 489K/AG/2011 was made before the existence of the Supreme Court Regulation Number 7 of 2012, meaning that there were no substantive rules regarding obligatory bequest for stepchildren. According to the author, this cassation decision is one of the backgrounds for the birth of the aforementioned Supreme Court Regulation. It is appropriate that in this decision, the cassation level judges have clearly pursued the legal objective of seeking justice by conducting legal discovery, as mandated by Article 5 paragraph 1 of Law Number 48 of 2009 concerning Judicial Power.

After the enactment of SEMA Number 7 of 2012, there was a cassation decision Number 733K/AG/2016 which actually annulled the bequest of obligatory bequest to a stepchild. However, this cassation decision does not materially cancel the law of giving the obligatory bequest to a stepchild, but this decision cancels the obligatory bequest to a stepchild due to formal errors in the procedural law at the first or appellate level.

If we examine the entire series of decisions in Case Number 192/Pdt.G/2015/PA.Sgt at the first level, Case Number 03/Pdt.G/2016/PTA.Jb at the appellate level, and Case Number 733K/AG/2016 at the cassation level, none of them bases the designation of obligatory bequest for stepchildren on Circular Letter of the Supreme Court (SEMA) Number 7 of 2012. The legal considerations underlying the decision are solely the judge's obligation to explore legal principles and a sense of justice, as well as considerations from a sociological perspective.

Consideration of obligatory bequest for stepchildren is based on consideration, the legal relationship of rights and obligations as the basis of the inheritance, the consideration that obligatory bequest is as a method to achieve the justice in Islamic inheritance law, and the application of qiyas for determining the position of stepchildren. Related to the consideration of the legal relationship of right and the obligations as the basis for the inheritance, the real position of stepchildren is that they do not have any blood-relations with his stepparents. However, because in the factual conditions those stepchildren have

[40] Abdul Wahhab Khallaf, "Ilmu Ushul Al-Fiqh" (Kairo: Darul Hadits, 2003), 48.
[41] Ahmad Masfuful Fuad, "Qiyas Sebagai Salah Satu Metode Istinbāṭ Al-Ḥukm," *Mazahib* 15, no. 1 (2016): 42–60, https://doi.org/10.21093/mj.v15i1.606.
[42] Rahmat Arijaya dan Muhamad Isna Wahyudi, "Wasiat Wajibah," *Alqalam*, 2013, https://doi.org/10.32678/alqalam.v25i1.1670.
[43] Wahyudi.

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nurtured since his childhood and also get a livinf from their stepchildren, therefore their position may be equated with the biological children.

The application of qiyas for determining the position of stepchildren shows in determining the position of stepchildren as the legatee of obligatory bequest. The method of qiyas compares the position of adopted children, on the basis of similarities between the two, which are: a) both do not have a blood-relation with the adopting parents or step-parents; b) both are not an heir because they do not meet requirements of heir; c) in factual conditions in our society, both are be accepted and treated the same as biological children. For the similiarities, then the position of stepchildren can be equated with the postion adopted children so as to it may also be given the same rights of the obligatory bequest.[44]

SEMA 3 of 2023 further expands the scope of obligatory bequests that can be granted to legitimate children born out of unregistered marriages. Normatively, legitimate children are regulated in Article 42 of Law Number 1 of 1974 concerning Marriage, and Article 99 of the Compilation of Islamic Law (KHI) states that a legitimate child is one born within or as a result of a valid marriage. On the other hand, the terminology for children born out of wedlock refers to those born to a woman not in a valid marriage with the man she engages in sexual intercourse with. The definition of extramarital is a relationship between a man and a woman who can produce offspring and their relationship is not in a legal and religious marriage bond according to the positive law and religion they embrace.[45]

A child born within an unregistered marriage is considered as a child born outside of marriage, as an unregistered marriage is a marriage that is only valid religiously or has fulfilled the Sharia requirements as intended in Article 2 paragraph 1 of the Marriage Law but is not recognized by the state or does not meet the provisions of paragraph 2 of the said Article in conjunction with Article 10 paragraph 3 of Government Regulation Number 9 of 1975.[46]

In general, an unregistered marriage refers to a marriage that is not registered by the Marriage Registrar. A marriage that is not under the supervision of the Marriage Registrar is considered valid religiously but lacks legal force because it does not have evidence of a valid marriage according to the applicable laws and regulations.[47]

Based in this research, consideration of granting obligatory bequest fir a child born within unregistered marriage or even in cases children born out of wedlock using the same reasons: 1). The relation between legal right and legal responsibilities as the basis of inheritance and 2). The Development status of children that born out of wedlock through constitutional court decision No. 46/PUU-VIII/2010.[48]

The relation of rights and obligations is a form of relationship that is based on the principle of responsibility. Principle of responsibility in Islamic law commands that any person who performs any kind of acts shall be liable for any form and the consequences of his actions. Related to the provisions obligatory bequest for children

[44] Ilhami, "Development of the Regulation Related To Obligatory Bequest (Wasiat Wajibah) in Indonesian Islamic Inheritance Law System."
[45] Abdul Manan, "Aneka Masalah Hukum Perdata Islam Di Indonesia" (Jakarta: Kencana, 2006), 81.
[46] Rifqi Qowiyul Iman dkk, "Anak Luar Kawin: Status Dan Perlindungannya Dalam Tinjauan Hukum Islam" (Malang: Literasi Nusantara Abadi, 2023), 104.
[47] Iman dkk.
[48] Ilhami, "Development of the Regulation Related To Obligatory Bequest (Wasiat Wajibah) in Indonesian Islamic Inheritance Law System."

born out of wedlock, the if a man a woman performed any sexual actions which caused a children from those actions, at the same time, the responsibilities of parents arised, although formally, there were no any legal relations between them. The same consideration alse performed for children who were born in unregistered marriage. Any parents who have children, remains bound on the obligation to provide a living and raise her children, even though they are not legally binding as husband and wife.

Whle Constitutional Court through its decision created a new norm that regulated the status of children born outside of marriage. Based on this decision, when previously children born outside of wedlock is not an heir of their biological father, currently they can be considered as the heirs and received the distribution of preperty of inheritance of their biological father, as long as it meet the requirements of proving the existance of a blood relationship.

The provisions of SEMA Number 3 of the year 2023 constitute one form of legal protection for every child born into the world, ensuring that they are not treated discriminatively, unfairly, and are positioned in accordance with their nature. Providing protection for children born out of wedlock and not registered does not mean endorsing widespread promiscuity, but it also requires considering concepts that can address such behavior through guidance and religious education. Therefore, providing legal protection for children born out of wedlock should also be accompanied by providing guidance and religious education to the community.[49]

The SEMA (Circular Letter of the Supreme Court) on obligatory bequest to stepchildren and natural children born outside of registered marriages has shown that legal updates play a crucial role in implementing the values of Shariah maqasid. According to the author's opinion, updates like those carried out by SEMA are very commendable. Besides ensuring normative legal certainty, they also serve to safeguard the basic rights of individuals, such as legal protection and the elimination of normative legal vacuums.

Obligatory Bequest of a Secret Wife in Polygamous Marriage

The formation of dynamic law, both horizontally and vertically, is not possible without the constancy and relative dynamism of the principles of substantive law. It is the constitutive and regulatory principles of substantive law that continuously drive the process of law formation, while conversely, these principles will develop juridical meanings in the formation of dynamic law. In all of this, there must always be a harmonization between the relative constancy and relative dynamism of the formations of law.[50]

In examining and deciding cases, judges face the reality that written law may not always resolve the problems at hand.[51] Often, judges have to discover the law (rechtsvinding) themselves and/or create law (rechtsschepping). Courts must not dismiss cases on the grounds of the absence of law, incompleteness, or legal ambiguity.[52]

In the process of legal discovery, a judge can employ various methods, namely interpretation, analogy, and argumentum a contrario. These methods of legal discovery

[49] Andi Bahri Sekolah Tinggi Agama Islam Negeri, "Perlindungan Anak Di Luar Nikah Dalam Hukum Negara Dan Hukum Islam (Perspektif Hakim Pengadilan Agama Parepare)," n.d., 57.

[50] "Mahkamah Agung RI Badan Penelitian Dan Pengembangan Hukum Dan Peradilan," *Jurnal Hukum Dan Peradilan* 02 (2013): 20.

[51] Mertokusumo, "Penemuan Hukum : Sebuah Pengantar."

[52] Mertokusumo.

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can be applied to achieve three legal objectives: justice, utility, and legal certainty.[53]

The third legal objective cannot always be achieved in a court decision, especially in the process of discovering the law. This is because the judge performs this process due to the lack of law or because it is not clear or no longer in line with the values of society. Therefore, in such a situation, the realization of legal certainty must be set aside for the sake of achieving justice and fairness.[54]

It should be noted that the judge's efforts in making legal findings should be seen as an attempt to create legal certainty about a substantive matter, as legal certainty is fundamentally not something static but dynamic, following the flow and changes in the dynamics of society. Therefore, a court decision that includes a legal finding should be regarded as an effort to achieve the goals of the law, namely legal certainty, justice, and utility, as long as it is based on adequate legal considerations and carried out with an appropriate method of finding.[55]

In resolving legal cases that do not yet have a codified source of material law, judges are required to conduct legal discovery throught legal excavation and understand and follow the legal values and sense of justice that live in society. The result of creativity of judges in conducting legal discovery with various methods allow for decisions that contain legal discretion in order to realize progressive law. Legal discretion, hereinafter referred to as judge discretion, can occur when judges are faced with cases that, if based on existing legal norms, appear to be legal injustice, do not have complete legal norms or even the case at hand no legal norms at all.[56]

Judges are juridically given the legal freedom to adjudicate independently in accordance with their own convictions with the assistance of extra-judicial parties. It is forbidden for other parties outside the judiciary to be involved in judicial affairs except in matters permitted by law.[57] Being law enforces, judges have a crucial position and also have a vey heavy burden of duty. This is because it is through judges that legal products are created through which all forms of injustice can be prevented and minimized so as to ensure public peace.[58]

With various methods and judicial authority to make breakthroughs and legal discoveries, the construction of rules regarding obligatory wills has also expanded with the existence of religious court decisions that establish the secret wife from a polygamous marriage as entitled to an obligatory bequest from the deceased (a husband whose marriage is not registered). The decisions in question are Number 547/Pdt.G/2023/PA.Utj and Decision Number 183/Pdt.G/2023/PA.Mbl.

Through the approach of the objectives of Islamic law (maqashid shariah) and legal discovery through interpretative methods

[53] Lintong O. Siahaan, "Hal-Hal Yang Harus Diketahui (Proses Berfikir) Hakim Agar Dapat Menghasilkan Putusan Yang Berkualitas Pendahuluan," *Jurnal Hukum Dan Pembangunan* 11 (1950): 38.

[54] Ardiansyah, "Pembaruan Hukum Oleh Mahkamah Agung Dalam Mengisi Kekosongan Hukum Acara Perdata Di Indonesia."

[55] M. Natsir Asnawi, "Hermeneutika Putusan Hakim" (Yogyakarta: UII Press, 2014), 125.

[56] Yusna Zaidah, "Judicial Discretion in Inheritance Case Resolution: Towards Progressive Legal Justice in Indonesia," *Syariah: Jurnal Hukum Dan Pemikiran* 24, no. 1 (2024): 136–47, https://doi.org/10.18592/sjhp.v24i1.13012.

[57] M Syamsudin, "Understanding The Typology Of Judges' Behaviour In Handling Corruption Cases," *Integrity* 1, no. 3 (2013): 136–41, https://www.academia.edu/download/53374899/ASEAN_Conference_Ebook.pdf#page=441.

[58] Musda Asmara, Rahadian Kurniawan, and Linda Agustian, "Teori Batas Kewarisan Muhammad Syahrur Dan Relevansinya Dengan Keadilan Sosial," *De Jure: Jurnal Hukum Dan Syar'iah* 12, no. 1 (2020): 17–34, https://doi.org/10.18860/j-fsh.v12i1.7580.

and sociological values, the judge determined that under certain conditions, obligatory wills can also be granted to the secret wife of a polygamous marriage. In the case of Decision Number 183/Pdt.G/2023/PA.Mbl involves a legal fact stating that the legitimate wife has left the heir (legitimate husband and registered) for 10 years and has not fulfilled her obligations as a wife. The second marriage of the heir to his secret wife is also known to the first wife (legitimate wife and registered). During the second marriage, the first wife never cared for the heir. Even at the end of his life, the second wife (the secret wife) was proven to have taken care of and looked after the heir.

In another case, Decision Number 547/Pdt.G/2023/PA.Utj with the sitting of the case the heir during his lifetime had been married three times. The first marriage ended in divorce, the second marriage was conducted siri which was then registered through isbat nikah and the third marriage was a siri marriage of polygamy outside the court. When he died, he had left heirs, namely two wives (1 wife is a siri wife from an unregistered marriage), children from the first, second and third marriages and the biological mother.

In his consideration, the judge considered that the third marriage of the testator with his siri wife from a polygamous marriage in 2003 was an act that did not have legal force because the marriage was carried out without permission from the religious court based on Article 56 paragraph 3 KHI. The testator's marriage also could not be legalized through isbat nikah based on SEMA Number 3/2018. However, the judge in his consideration stated that the siri wife of the testator was considered a relative (close family) who could not inherit but deserved to receive inheritance from the testator's estate through a obligatory bequest based on the opinion of *Ibn Hazm, at-Thabari* and *Abu Bakar bin Abdul Aziz* in the book *Mausu'ah al-Fiqhu al-Islamy wa al-Qadhaya al-Mu'ashirah karya Wahbah Zuhaily,* juz 9 page 120, to realize a sense of justice.

The judge considered that the testator's step-wife had a very large service and a very strong emotional relationship with the testator because they had lived together for a long time. In fact, the testator spent more time with his wife than with his other wives. The first wife of a polygamous marriage gets the smallest share of the other heirs, which is equal to the share of the second wife of the testator. This decision has provided a legal breakthrough on the provisions of SEMA Number 2 of 2019 which states that marriage with a second, third and fourth wife conducted without court permission and not in good faith, does not have legal consequences for property rights between husband and wife including inheritance. This means that the basis of the judge's consideration is the benefit based on maqashid sharia, not just applying normative law.

Based on Decision No. 547/Pdt.G/2023/PA.Utj and Decision No. 183/Pdt.G/2023/PA.Mbl, the judge has carried out legal construction to provide a share of the heir's inheritance to the siri wife of a polygamous marriage through a obligatory bequest. The judge considers in his decision based on the emotional, sociological and service relationship of the siri wife while living with the testator who is longer than the other wives.

Table 1. Judicial Considerations in Granting Obligatory Bequest to a Secret Wife in a Polygamous Marriage

Consideration Aspect	Brief Explanation
Method of Legal Discovery	Argumentum per analogiam (analogy) based on Article 209 of the Compilation of Islamic Law (emotional relationship basis).
Sociological	The secret wife was proven to have

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Consideration Aspect	Brief Explanation
Basis	taken care of the heir longer and more intensively than the legal wife.
Jurisprudential Basis	Refers to Decision No. 547/Pdt.G/2023/PA.Utj and Decision No. 183/Pdt.G/2023/PA.Mbl
Maqashid Shariah Approach	Benefit (maslahah) and justice are prioritized over rigid legal certainty.
Fiqh References	Opinions of Ibn Hazm, al-Thabari, and Abu Bakr ibn Abdul Aziz as cited in Wahbah al-Zuhaily's book.
Ethical-Sociological View	The secret wife is regarded as a close relative deserving of an obligatory bequest.
Social Risk	Potential for indirect recognition of unregistered polygamous marriages.

The table outlines the multifaceted judicial considerations in granting an *obligatory bequest* (*wasiat wajibah*) to a secret (unregistered) wife in a polygamous marriage. Legally, judges employed *argumentum per analogiam* by referring to Article 209 of the Compilation of Islamic Law, emphasizing emotional ties between the heir and the claimant. Sociologically, the secret wife was found to have provided longer and more intensive care to the deceased compared to the legal wife, strengthening her claim. Jurisprudentially, this decision is supported by similar rulings, such as Decisions No. 547/Pdt.G/2023/PA.Utj and No. 183/Pdt.G/2023/PA.Mbl. The Maqashid Shariah approach underlines the preference for public benefit (*maslahah*) and justice over strict normative legal certainty. From the perspective of classical fiqh, the court referred to the views of Ibn Hazm, al-Thabari, and Abu Bakr ibn Abdul Aziz. Ethically and sociologically, the secret wife was considered a close relative worthy of inheritance through an obligatory bequest. However, this decision carries the social risk of potentially legitimizing polygamous marriages conducted outside of court procedures.

The judge's efforts in providing justice in a decision by carrying out a legal construction using the argumentum per analogian (analogy) method, namely applying a more general essence of a concrete event that has not been regulated in law that has similarities with events regulated in law. As the provisions in Article 209 KHI which if we explore the essence ('illat hukum) of the provisions of the article is the emotional closeness between the adopted child and the adoptive parents. It is this emotional closeness that is most likely to be the essence of giving a share of the inheritance through the obligatory bequest between the adoptive parents and the adopted child. The essence ('illat hukum) of emotional closeness can also be found in the case of the relationship of a siri wife from a polygamous marriage, so that the judge considers that the siri wife is also entitled to a share of the testator's estate through a obligatory bequest as in the case of an adopted child According to the author, the judge in deciding this case has considered legal objectives with a sociological approach through the method of legal discovery. The judge's ijtihad (independent legal reasoning) has sought to apply the law to a specific event. After observing the conditions and dynamics present in the case, the judge then establishes the law to make it effective. The effectiveness of a law, besides being influenced by legal substance, is also influenced by the culture or environment in existence. Ijtihad with a model like this is called ijtihad fi tathbiq al ahkam and is considered most relevant to the current legal needs.

One of the implications that arises with the decision of the obligatory bequest to the siri wife of a polygamous marriage is a social symptom that recognizes the position of the siri wife of a polygamous marriage. With the granting of obligatory bequest to siri wives, it will certainly create a paradigm that polygamy outside the court is something

right. Whereas it is clear that the rules regarding marriage registration and polygamy permit mechanisms must go through permission from the court as accommodated by the marriage law.

With the expanding interpretations of obligatory bequests, the author believes that it is time to clarify and limit the nomenclature of obligatory bequests. One of the academic concerns of the author is that if obligatory bequests to secret wives from polygamous marriages are applied in all conditions, it will violate the rights of individuals. This includes the reduction of inheritance rights for the first wife or the legitimate wife due to the obligatory bequests commonly granted by judges, which are limited to a maximum of 1/3 of the inheritance, in accordance with Article 209 of the compilation of islamic law (KHI).

A benefit to be achieved by giving a obligatory bequest to the wife of a polygamous marriage must not cause new mudharat. Therefore, the author has a recommendation through the reconstruction of the obligatory bequest law so that in implementing the construction of the obligatory bequest it is not wrong in applying it. The author agrees not to close the door tightly to the granting of obligatory bequests because in the context of maqashid sharia it can be the only way out to benefit. However, the provision that is not strictly regulated can also lead to biased implementation because judges are given the authority to interpret themselves.

In the case of a siri wife from a polygamous marriage, the author agrees that she can be given inheritance through obligatory bequest because it is based on considerations of benefit, but the siri wife must have met several criteria, namely:

1. In a polygamous marriage, the legal wife must be proven to have known about the polygamous marriage but chose not to report the act of polygamy outside the court to the realm of law, even though it is clear that the act of polygamy without the permission of the wife is subject to criminal sanctions as stipulated in Article 279 of the Criminal Code. So one form of punishment for a legal wife who does not report her husband's actions even though she is aware of the existence of an out-of-court polygamous marriage is to give a obligatory bequest to the siri wife;
2. The fulfillment of the rights and obligations of a siri wife must be proven to have been carried out perfectly. This can be proven during the trial process in court. Siri wives in the category of only wanting to take property from their husbands (heirs) are not entitled to inheritance through obligatory bequest. Then the implementation of rights and obligations as befits a husband and wife must be proven to have been carried out perfectly;
3. The length of the marriage period is also included in the category that must be fulfilled. The marriage of a siri wife of polygamy that has lasted more than 5 (five) years and is proven in court to have never been separated (divorced) and always lived in harmony can be one of the requirements that must be met to obtain a obligatory bequest for a siri wife.

These are the 3 (three) criteria that must be met by a siri wife from a polygamous marriage to be categorized as a recipient of a obligatory bequest. Although they get inheritance property from the testator, the position of a siri wife still cannot be equated with the position of a legal wife (registered). This means that in the distribution, the legal wife (registered) must still be more than the siri wife. Because after all, what has been done by the siri wife

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has been a real form of violation of the law and the legal wife (registered) is still considered as someone who has been wronged because her husband (the testator) has committed polygamy without a court process.

Maqasid Shari'ah in Religious Court Decisions

According to Imam Syatibi, Allah revealed the sharia (legal rules) solely for the purpose of seeking benefits and avoiding harm. In simpler language, the legal rules that Allah has set are only for the benefit of humanity itself.[59]

One of the important and fundamental concepts discussed in the philosophy of Islamic law is the concept of maqasid al-shari'ah, which emphasizes that Islamic law is legislated to realize and preserve the welfare of the human community. This concept calls for the emergence of a proportional thought about justice in human life, meaning how to shape and implement laws as an effort to realize the well-being of humanity in a broad sense.[60]

This concept has been acknowledged by scholars, and therefore, they formulated a fairly popular principle: "where there is the benefit, there is the law of Allah." The concept of benefit here, according to Masdar F. Mas'udi, is equivalent to the theory of social justice in the terminology of legal philosophy.[61]

The boundaries that have been elaborated by scholars such as Ramadan al-Buthi or Syatibi, according to the author, are related to benefits in a very broad sense. However, as Syaltut pointed out, mutual interest (maslahat) are similar to ijtihad, which always changes to adapt to the conditions of the time and era that require legal solutions. This means that the boundaries for benefits also need to be made more specific according to the needs in which those benefits will be applied. In the context of Indonesia, the boundaries of benefits based on Indonesian culture are absolutely necessary to be implemented.[62]

So it is clear that the fundamental aspect of the Islamic legal thought framework is the concept of "mutual interest (maslahat)," the universal welfare of humanity or social justice. Any juristic proposal, whether supported by textual evidence or not, that can ensure the realization of human welfare is considered valid in the Islamic perspective, and Muslims are bound to adopt and implement it. Conversely, any theoretical proposition that convincingly does not support the guarantee of welfare, especially those that may lead to harm, is considered "fasid" (corrupt) in the Islamic view, and Muslims individually or collectively are obligated to prevent it.[63]

One of theories used by judges in setting obligatory bequest for secret wife in polygamous marriage is *maslahah mursalah*. As stated by Wahbah Zuhaily, as quoted by Abdul Manan, maslahah mursalah is a characteristic, condition, or action that is in line with Islamic law, but there is no evidence to support or refute it.[64]

Obligatory bequest for adopted children can be said to be legal

[59] Abdurrahman Kasdi and Dosen Stain Kudus, "Maqasyid Syari ' Ah Perspektif Pemikiran Imam Syatibi Dalam Kitab," *Yudisia* 5 (2014): 55.

[60] Sidik Tono, "Dasar Pertimbangan Hukum Mahkamah Agung Ri Tentang Wasiat Wajibah," *Millah* 14, no. 1 (2014): 128, https://doi.org/10.20885/millah.vol14.iss1.art6.

[61] Masdar F. Mas'udi, "Meletakkan Kembali Maslahat Sebagai Acuan Syari'ah," *Jurnal Ilmu Dan Kebudayaan Ulumul Qur'an* VI (1995): 97.

[62] Tono, "Dasar Pertimbangan Hukum Mahkamah Agung Ri Tentang Wasiat Wajibah."

[63] Tono.

[64] Abdul Manan, "Reformasi Hukum Islam Di Indonesia: Tinjauan Dari Aspek Metodologis, Legalisasi Dan Yurisprudensi" (Jakarta: Raja Grafindo Persada, 2006), 266.

progressivism in the field of justice-based property distribution and benefit as in the concept of Syatibi who divides benefit into three levels, namely *daruriyat*, *hajiyyat* and *tahsiniyyat*. Both in carrying out Allah's orders to protect offspring, give property to those who deserve it and maintain the honor of adopted children after their adoptive parents die. To find out maqashid sharia can be known by analyzing the theory of illah al-Amr (command) and an-Nahy (prohibition) in the Qur'an and sunnah. According to Asy-Syatibi 'illah means the benefit and wisdom associated with al-awamir (commands), al-ibahah (permissibility) and al-mafasid (harm) associated with al-nawahi (prohibitions).[65]

In relation to the obligatory bequest for adopted children in KHI which contains the aim to keep descendants who are determined by the court legally about the appointment of children and are responsible for a decent life, the maslahah that exists with the obligatory will that the adopted child will not be miserable after the death of his adoptive parents and also to keep the property rather can be used in its place.[66] The theory of *al-istiqra 'al-ma'nawy* establishes the applicability of interconnected Quranic texts in determining justice. In this case Q.S. An-Nisa verse 9 mentions that the property obtained by a person must be used to maintain the family; his descendants from the weakness of their lives. The property left behind will provide capital for the strength of the descendants, including in this case the adopted child who has been legalized by the court to be kept from weakness and destitution after the death of the adoptive father.[67]

If the legal 'illat of the granting of obligatory bequest to adopted children is compared with some recent cases such as obligatory bequest to non-Muslim heirs, obligatory bequest to stepchildren, obligatory bequest to children born outside a registered marriage and even in the case of granting obligatory bequest to the wife of a polygamous marriage, it can be concluded that although it is not regulated normatively, there is a spirit from the judges to realize a benefit in these cases based on maqashid sharia in order to realize justice to all parties.

Table 2: Analysis of Maqasid Shari'ah in Religious Court Decisions on Obligatory Bequest (Wasiat Wajibah)

Case	Recipient of Obligatory Bequest	Legal Illat Considered by Judges	Fulfilled Maqasid Shari'ah Elements	Category of Maslahah
Obligatory bequest for adopted children	Legally appointed adopted child	Fulfillment of financial support and future protection	Hifz al-Nasl (protection of lineage), Hifz al-Mal (protection of wealth)	Daruriyat (essentials)
Obligatory bequest for unregistered (siri) wife in polygamy	Unregistered wife who lived harmoniously with the deceased	Emotional bond and sacrifices during the marriage, acknowledged by the legal wife	Hifz al-Nafs (protection of life and dignity)	Hajiyyat (needs)
Obligatory bequest for non-Muslim heirs	Non-Muslim heir with emotional closeness	Value of justice and family ties despite religious differences	Hifz al-Din (inclusive religious consideration), Hifz al-Nafs	Tahsiniyyat (complementary)
Obligatory bequest for child	Illegitimate child who is acknowle	Social protection and recogniti	Hifz al-Nasl, Hifz al-'Ird (protecti	Daruriyat

[65] Eko Setiawan, "Penerapan Wasiat Wajibah Menurut Kompilasi Hukum Islam (Khi) Dalam Kajian Normatif Yuridis," 2017.

[66] Zainal Arifin, "Telaah Kritis Terhadap Pemikiran Maqasid Shari'ah Al-Shatiby," *Al-Qanun: Jurnal Pemikiran Dan Pembaharuan Hukum Islam* 25, no. 1 (2022): 125, https://doi.org/10.33650/at-turas.v5i1.324.

[67] Abu Ishaq Ibrahim bin Musa al-Lakhami al-Ghimathi al-Maliki Al-Syathibi, "Al-Muwafaqat Fi Ushul as-Syariah" (Kairo: Dar Al-Hadits, 2005), 265.

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Case	Recipient of Obligatory Bequest	Legal Illat Considered by Judges	Fulfilled Maqasid Shari'ah Elements	Category of Maslahah
born out of wedlock	dged	on of dignity	on of honor)	
Obligatory bequest for stepchildren	Stepchild raised by the deceased	Emotional closeness and child-like role during life	Hifz al-Nafs, Hifz al-Mal	Hajiyyat

The table above summarizes various cases of obligatory bequests (wasiat wajibah) and how they align with the principles of Maqasid Shari'ah. Each case demonstrates the fulfillment of specific Shari'ah objectives, such as the protection of lineage (*Hifz al-Nasl*), wealth (*Hifz al-Mal*), dignity (*Hifz al-'Ird*), and life (*Hifz al-Nafs*). These bequests are categorized into different levels of social benefit, ranging from urgent necessities (*Daruriyat*) to enhancements of social harmony (*Hajiyyat*) and moral refinements (*Tahsiniyyat*). The table highlights how Islamic law adapts to various familial and societal dynamics while prioritizing the welfare of all involved parties.

In the case of siri wives from polygamous marriages who are granted obligatory bequests, the legal 'illat used can be equated with the provisions of obligatory bequests to non-Muslims, which lies in the emotional closeness to the heir. The siri wives of polygamous marriages in the two cases above (Decision Number 183/Pdt.G/2023/PA.Mbl and Decision Number 547/Pdt/G/2023/PA.Utj) have similarities in legal facts, namely that the siri wife has been proven to carry out her obligations while living in a household with the testator and lived in harmony for a long period of time until the testator died, plus the fact that the registered wife (his legal wife) was indeed aware of the existence of the siri polygamous marriage but chose to keep it quiet (not reporting legally). Therefore, with the principle of seeking benefit, it would be unfair if the services and sacrifices that have been made by the siri wife to the testator during the household relationship are not appreciated at all by not providing a share of the inheritance property.

Enforcing justice, among other things through legal efforts in its rulings, is a complex task. The main challenge in upholding justice through judicial decisions is aligning justice based on the morality and legal culture of the community on one hand, with the legal justice applied by the state on the other. If judges are unable to reconcile these three aspects, the level of trust in the judiciary institution in general and the judge's decisions in particular will decline further.

Conclusion

The reconstruction of obligatory bequest is something very important because so far, the normative laws governing obligatory bequest have fallen behind with the changing times. This is proven by the existence of a jurisprudence of obligatory bequest for relatives or non-Muslim heirs, followed by the enactment of the SEMA, which regulates the obligatory bequest for illegitimate children and children born out of wedlock, which further increases the complexity of the nomenclature of obligatory bequest.

Currently, based on the decisions of the Religious Court, a legal breakthrough has been made by granting obligatory bequest to secret wives in polygamous marriages. The legal breakthrough achieved by the Religious Court judges demonstrates that in creating legal objectives, one must consider a case from various perspectives.

With the approach of Maqasid al-Sharia,

a law that reflects the value of effective benefit will be created and applied in a particular event. It is worth noting that the expansion of the implementation of obligatory bequest ultimately needs to be limited so that its application is not biased and does not create confusion in its legal application.

Recommendations to judges as the holder of power in interpreting the construction of obligatory bequests in resolving similar cases is to limit obligatory bequests to siri wives from polygamous marriages. Obligatory bequests can be implemented on the condition that they must meet several criteria, namely (1). The legal (registered) wife was aware of her husband's (heir) sirri marriage but chose not to report it, (2). The siri wife can prove in court that she has carried out her rights and obligations as a wife perfectly, (3). The length of the marriage period between the siri wife and the heir must have been more than 5 (five) years and it is also proven that they always live in harmony. The three criteria are based on the maslahat approach so that the rights of the legal wife (registered) are not disturbed and so are the rights of the siri wife who must still be protected based on maqashid sharia.

Credit Authorship Contribution

Rusdi Rizki Lubis: Conceptualization, Legal Framework, Writing – Original Draft, Legal Case Study.

Asmuni: Literature Review, Legal Analysis, Review & Editing.

Tamyiz Mukarrom: Methodology Design, Data Collection, Theoretical Integration.

Candra Boy Seroza: Supervision, Jurisprudential Insight, Final Review & Validation.

Declaration of Competing Interest

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