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Towards Legal Justice: Expanding Criteria for Obligatory Bequests in Unregistered Wives in Polygamous Marriages

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Abstract

Decision Number 183/Pdt.G/2023/PA.Mbl and Number 547/Pdt.G/2023/PA.Utj has paved the way for expanding the implementation of obligatory bequest by granting the inheritance to the unregistered wife in a polygamous marriage. Stepchildren, non-Muslim heirs, and biological children born outside of a registered marriage are forms of expansion of the obligatory bequest regulated in the nomenclature of jurisprudence or the Circular of the Supreme Court (SEMA). This article is qualitative, with a normative and empirical juridical approach to finding legal justice through the path of *maqāṣid al-sharī'a*. The results of the study show that judges, to realize legal justice, have expanded the implementation of the obligatory bequest by granting the heir's property to the unregistered wife of a polygamous marriage. The researcher offers five criteria for granting an obligatory bequest to the unregistered wife. First, the unregistered polygamous marriage is known to the legally registered wife. Second, the rights and obligations between husband and wife have been implemented. Third, the time of obtaining the inherited property. Fourth, the maximum limit for obtaining inheritance property does not exceed the registered wife's share. Fifth, the psychological factor between husband and wife has been well established.

Keywords: obligatory bequest; unregistered wife; unregistered marriage; polygamy; *maqāṣid al-sharī'a*

Putusan Nomor 183/Pdt.G/2023/PA.Mbl dan Nomor 547/Pdt.G/2023/PA.Utj telah membuka jalan dalam memperluas implementasi wasiat wajibah dengan memberikan tirkah pewaris kepada istri *sirri* dalam perkawinan poligami. Anak tiri, ahli waris non muslim, dan anak kandung yang lahir di luar dari perkawinan tercatat, merupakan bentuk perluasan wasiat wajibah yang telah diatur dalam nomenklatur yurisprudensi atau Surat Edaran Mahkamah Agung (SEMA). Artikel ini bersifat kualitatif dengan pendekatan yuridis normatif dan yuridis empiris untuk menemukan keadilan hukum melalui jalan *maqāṣid al-sharī'a*. Hasil penelitian menunjukkan bahwa hakim, demi mewujudkan keadilan hukum, telah memperluas implementasi wasiat wajibah dengan memberikan harta pewaris kepada istri *sirri* perkawinan poligami. Peneliti menawarkan beberapa kriteria dalam pemberian wasiat wajibah kepada istri *sirri.* Pertama, pernikahan poligami *sirri* diketahui oleh istri sah tercatat. Kedua, telah terlaksana hak dan kewajiban antara suami dan istri. Ketiga, waktu perolehan harta pewaris. Keempat, batasan maksimal perolehan harta waris tidak melebihi bagian istri sah tercatat. Kelima, faktor psikologis antara suami dan istri sudah terjalin dengan baik.

Kata Kunci: wasiat wajibah; istri *sirri*; perkawinan *sirri*; poligami; *maqāṣid al-sharī'a*

Introduction

Islamic law as a social institution has two functions: first, as social control, and second, as a vehicle for new values and the process of social change. Therefore, in this context, Islamic law must accommodate the people's problems without losing its basic principles.[1] In 1991, the Compilation of Islamic Law (KHI) was established through a Presidential Instruction to answer various new problems, especially in family law, to realize legal uniformity. KHI regulates the provision of obligatory bequest in Article 209, which addresses adopted children and adoptive parents. [2]

Until now, KHI has been the only material law that regulates inheritance. The implementation of the obligatory bequest has been different from the initial construction. Obligatory bequests have been given to non-Muslim heirs, stepchildren, and children born from unregistered marriages, as accommodated by jurisprudence and the Supreme Court Circular Letter (SEMA). The development of obligatory bequest is increasingly widespread with the decision of the Religious Court, which stipulates that the unregistered wife of a polygamous marriage also receives the obligatory bequest from the heir. Decision Number 547/Pdt.G/2023/PA.Utj and Decision Number 183/Pdt.G/2023/PA.Mbl has accommodated the determination of obligatory bequest to the unregistered wife.

The position of a wife as the recipient of an obligatory bequest certainly raises pros and cons. From a fiqh perspective, the wife's position is 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 unregistered wife will face problems.[3]

This research offers a novel approach by reconstructing the obligatory bequest for polygamous wives to ensure unbiased implementation, based on insights from prior studies, including those by Hotnidah Nasution and Ahmad

[1] Imam Syaukani, *Rekonstruksi Epistemologi Hukum Islam Indonesia* (Jakarta: Raja Grafindo Persada, 2006), 23.

[2] Fahmi Al Amruzi, *Rekontruksi Wasiat Wajibah dalam Kompilasi Hukum Islam* (Yogyakarta: Aswaja Pressindo, 2014), 8.

[3] 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.

Rifqi,[4] which examine the practice of inheritance distribution from polygamous marriages based on practices in religious courts. Research by Nina Nurmila[5] examines various living arrangements of legal and illegal polygamous marriages with multiple consequences on maintenance and property ownership among wives. Research conducted by Khotifatul Defi Nofitasari examines the legal formulation of obligatory bequest in the KHI, especially in its development aspects, granting compulsory wills to stepchildren and non-Muslim heirs. Supriyadi[6] researched the reconstruction of inheritance rights for children from unregistered marriages in religious courts, stating that after the Constitutional Court's decision Number 46/PUU-VIII/2010, children born from such marriages should still receive legal protection. Fadlih Rifenta and Tonny[7] examined the importance of finding a comprehensive formulation to achieve justice in the distribution of inheritance. This involves rethinking inheritance law within the development of Islamic legal epistemology that encompasses values of justice.

Abdul Azis[8] examines a contemporary method of distributing inheritance that refers to distributive justice or proportional justice based on the economic welfare of the heirs. Deden Hidayat[9] discusses granting obligatory bequest to heirs hindered by Sharia and not entitled to inheritance due to religious

[4] Hotnidah Nasution and Ahmad Rifqi Muchtar, "Negotiating Islamic Law: The Practice of Inheritance Distribution in Polygamous Marriages in Indonesian Islamic Courts," *Al-Manahij: Jurnal Kajian Hukum Islam* 18, no. 1 (2024): 125–44, https://doi.org/10.24090/mnh.v18i1.10921.

[5] Nina Nurmila, "Polygamous Marriages in Indonesia and Their Impacts on Women's Access to Income and Property," *Al-Jami'ah* 54, no. 2 (2016): 427–46, https://doi.org/10.14421/ajis.2016.542.427-446.

[6] Supriyadi, "Rekonstruksi Hukum Kewarisan Anak dari Perkawinan Sirri di Pengadilan Agama," *Ijtihad Jurnal Wacana Hukum Islam dan Kemanusiaan* 16, no. 1 (2016): 27–42, https://doi.org/10.18326/ijtihad.v16i1.27-42.

[7] Fadlih Rifenta and Tonny Ilham Prayogo, "Nilai Keadilan dalam Sistem Kewarisan Islam," *Al-Manahij: Jurnal Kajian Hukum Islam* XIII, no. 1 (2019): 111–27, https://doi.org/10.24090/mnh.v0i1.2117.

[8] Abdul Aziz, "Pembagian Waris Berdasarkan Tingkat Kesejahteraan Ekonomi Ahli Waris dalam Tinjauan Maqashid Shariah," *De Jure: Jurnal Hukum dan Syar'iah* 8, no. 1 (2016): 48–63, https://doi.org/10.18860/j-fsh.v8i1.3729.

[9] Deden Hidayat et al., "Wasiat Wajibah Sebagai Alternatif Pemberian Harta Peninggalan kepada Ahli Waris Beda Agama," *KRTHA Bhayangkara* 17, no. 1 (April 2023): 191–200, https://doi.org/10.31599/krtha.v17i1.2161.

differences with the testator. Rusdi Rizki Lubis et al.[10] examine the principles of equality and justice in the context of *maqāṣid al-sharī'a* in the case of polygamous wives. The originality of the study lies in the difference in research objects. In addition, this research also seeks to bring up a new formulation, namely, a concept of the extent to which and in what characteristics a legal subject must own so that the idea of obligatory bequest can be applied in the distribution of inheritance. The formulation of the model or concept is based on sociological, anthropological, and *maṣlaḥa mursala* approaches to achieve the value of justice.

This research was a qualitative study that combined the normative and empirical legal approaches. 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 related to obligatory bequests. 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. The types of data in this research are primary and secondary data, namely in the form of laws and regulations, and decisions related to this research. In addition, empirical research is also carried out, namely, interviews with sources who can answer research problems.

Obligatory Bequest According to KHI and the Jurisprudence

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 whose uncle covers. In contrast, in the KHI, this condition is applied to the concept of substitute heirs.[11] The obligatory bequest is explicitly mentioned in the Compilation of Islamic Law (KHI) in Article 209, Paragraphs 1 and 2: a. The adopted child's inheritance is divided based on Articles 176 to 193. At the same time, the adoptive parents who do not receive a will are given a mandatory choice of as much as 1/3 of the

[10] R R Lubis, J Arfaizar, and E S Gustanto, "Obligatory Bequest in the Context of Polygamous Wives: Preserving Equality and Just Within the Framework of Maqashid Sharia," *Al-Mawarid Jurnal Syariah dan Hukum* 6, no. 1 (2024): 111–30, https://journal.uii.ac.id/JSYH/article/download/33416/16976.

[11] 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): 25–47, https://doi.org/10.21154/syakhsiyyah.v3i2.3370.

inheritance of their adopted child; b. An adopted child who does not receive a will is given a compulsory choice of as much as 1/3 of the inheritance of his adoptive parents.[12]

The construction of obligatory bequest in KHI that confirms the position of adopted children against the inheritance of their adoptive parents or vice versa, adopted fathers against their children's inheritance, can be categorized using a legal *'illat* taken by the *istiḥsān* method. By prioritizing benefit and avoiding harm, it also applies the exception of *juz'ī* law from *kullī* law or general rules because it is based on specific evidence that supports it.[13]

The basis for determining the obligatory bequest against adopted children is the benefit with *istiḥsān* rules based on the argument of Sūrah al-Baqarah (2): 180. The verse strengthens the enactment of compulsory wills against people in care, namely, adopted children. However, the condition is that the amount of property obtained should not exceed 1/3 of the inheritance of his adoptive parents to continue to protect the share of other heirs.[14]

Apart from that, the discussion regarding granting adopted children and parents as the subject of recipients of obligatory bequest in KHI is also interesting to study. M. Yahya Harahap recounted that during interviews with Indonesian scholars at the time of the preparation of KHI, no scholar accepted the status of adopted children as heirs. This is because the problem of adoption has been corrected and straightened out by Islam through the incident of Zayd Ibn Ḥarītha, an enslaved person whom the Prophet freed. The Companions considered the Prophet's action to be a tradition that was prevalent in *jāhiliya* society. It is in this context that Islam abolishes adoption (*al-tabannī)* because, however, biological children are more appropriate to inherit from each other.[15]

Sūrah al-Aḥzāb (33): 4-5 further emphasizes that the adoption of children whose motivation and purpose is to be equated with biological children is not justified. However, factually, the relationship between the adopted child and the adoptive father cannot be denied legally and this has been accommodated by

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[12] Zainal Arifin and Zaenul Mahmudi, "Mandatory Wills for Adultery Children, Analysis of the Compilation of Islamic Law from the Perspective of Maqasid Syariah al-Syatibi," *International Journal of Law and Society (IJLS)* 1, no. 1 (2022): 36–47, https://doi.org/10.59683/ijls.v1i1.4.

[13] Wahbah Al-Zuḥaylī, *Uṣūl Al-Fiqh Al-Islāmī* (Beirut: Dār al-Fikr, 1986).

[14] Muhammad Muhajir, "Konsep Wasiat Wajibah dalam Tafsir Surat al-Baqarah Ayat 180," *Yudisia: Jurnal Pemikiran Hukum dan Hukum Islam* 12, no. 1 (2021): 151–64, https://journal.iainkudus.ac.id/index.php/Yudisia/index.

[15] M. Yahya Harahap, *Materi Kompilasi Hukum Islam, dalam Peradilan Agama dan Kompilasi Hukum Islam dalam Tata Hukum Indonesia* (Yogyakarta: UII Press, 1993), 188.

KHI Article 171 letter h which confirms that the legal relationship between adoptive parents and adopted children is only limited to the responsibility of financing daily life, education costs and the appointment process must be based on a court decision.

KHI has tried to accommodate all the provisions of Islamic law into the laws that live in the community, but the development of the times and knowledge still lags behind the state of written law. One of them is that the KHI does not discuss specific conditions of the obligatory bequest in detail, which leaves room for interpretation by the judge.[16] The incompleteness of laws and regulations (one of which is KHI) is a necessity. Similarly, what happened to Article 209 KHI, which was initially only intended for adopted children and adoptive parents as recipients of obligatory bequest, has been developed in recent years in its application to other cases. [17]

One of the law sources in religious courts is jurisprudence, a systematic collection of Supreme Court decisions followed by other judges in making the same social decisions.[18] The Supreme Court once made a legal discovery when ruling on the provision of obligatory bequest as a substitute for inheritance rights for Christian children. The Supreme Court's decision is an effort to uphold justice that is not contrary to the ḥadīth text, which does not allow non-Muslim heirs to receive inheritance rights.[19]

The scholars of Islamic jurisprudence agree that three things prevent inheritance: slavery, religious differences, and murder. Regarding religious differences, the scholars agree that non-Muslims cannot inherit from Muslims. However, there are still differences of opinion regarding whether a Muslim can inherit from a non-Muslim. In the KHI, Article 173, the criteria for barriers to inheritance are mentioned. Still, religious differences are not explicitly

[16] Oemara Amiroel Syarief, "Kewenangan Hakim Pengadilan Agama dalam Menetapkan Wasiat Wajibah bagi Pewaris yang Tidak Menetapkan Wasiat," *Tahkim* 17, no. 2 (2021): 209–26, https://doi.org/10.33477/thk.v17i2.1222

[17] Abdul Halim, "Wasiat Wajibah dan Perkembangan Penerapannya dalam Putusan Mahkamah Agung," *Al-Mazaahib: Jurnal Perbandingan Hukum* 6, no. 2 (December 2018): 149–66, https://doi.org/10.14421/al-mazaahib.v6i2.1555.

[18] Lilik Mulyadi, *Hukum Acara Perdata Menurut Teori dan Praktik Peradilan di Indonesia* (Jakarta: Djambatan, 1999), 14.

[19] Achmad Arief Budiman, "Penemuan Hukum dalam Putusan Mahkamah Agung dan Relevansinya bagi Pengembangan Hukum Islam Indonesia," *Al-Ahkam* 24, no. 1 (2014): 1, https://doi.org/10.21580/ahkam.2014.24.1.129.

mentioned as one of the barriers to inheritance. However, KHI only emphasizes that individuals may inherit from each other based on their religious affiliation, as stated in Article 172 of the KHI.[20]

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 offers obligatory bequest for 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 offers obligatory bequest to non-Muslim children. After conducting thorough research, the basis for a judge's consideration is humanity.[21]

Obligatory bequests to non-Muslim heirs, according to the opinion of Ibn Ḥazm, are a means to bridge the gap between Islamic law and customary law, which cannot be separated in most Indonesian societies. It is also necessary to consider a sociological approach when making court decisions. Changes in the law in a country can affect social changes. Likewise, social changes can lead to changes in a country's law, as Ibn Qayyim al-Jawziyya explained.[22]

The Supreme Court, through its jurisprudence, is correct in providing obligatory bequest to non-Muslims because: 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 non-Muslim relatives of the deceased never disinherit the heir. Therefore, the jurisprudence of the obligatory bequest to relatives or non-Muslim heirs is an accommodative decision towards the democratic atmosphere in society and state, relevant to Islamic law in Indonesia.

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[20] Ahda Fithriani, "Penghalang Kewarisan dalam Pasal 173 Huruf (a) Kompilasi Hukum Islam," *Syariah Jurnal Hukum dan Pemikiran* 15, no. 2 (2016): 93–106, https://doi.org/10.18592/syariah.v15i2.547.

[21] Dwi Andayani B.S. and Tetty Hariyati, "Problematika Wasiat Wajibah terhadap Ahli Waris Beda Agama di Indonesia," *Cepalo* 4, no. 2 (2020): 157–70, https://doi.org/10.25041/cepalo.v4no2.1893.

[22] Syamsulbahri Salihima, *Perkembangan Pemikiran Pembagian Warisan dalam Hukum Islam dan Implementasinya pada Pengadilan Agama* (Jakarta: Prenadamedia, 2016), 18.

Obligatory Bequest in SEMA on Plenary Results of the Religious Chamber

In Indonesia and several other countries adhering to the civil law system, judges are granted specific authority to explore the law (*ijtihād*) in cases where legislation does not provide clear guidance. Article 28 of Law No. 4 of 2004 concerning Judicial Power mandates that judges, as enforcers of law and justice, must explore, follow, and understand the legal values prevalent within society. Under such regulations, judges must be able to engage in legal discovery (*rechtvinding*) when faced with legal vacuums, multiple interpretations, and ambiguities.[23]

One thing that is still being debated is the issue of unregistered marriages. The legal basis for registration of marriages in the view of positive Indonesian law is Law Number 1 of 1974 concerning Marriage. Article 2, Paragraph 2 of the law emphasizes that every marriage must be recorded according to the applicable laws and regulations. Paragraph 1 of Article 2 of the law states that marriage is legal if the law of each religion and belief is carried out. When the two verses are combined, it is clear that every marriage that is legally performed according to their respective faiths and beliefs must be recorded according to the prevailing laws and regulations to be recognized as valid.[24]

The laws and regulations of Indonesia require that marriage registration be carried out. However, the order is not strict, so there is no material punishment for those who do not carry it out. Muslim-majority countries have different legal responses to marriage registration violations. Saudi Arabia, Iran, Indonesia, and Morocco have no such restrictions. Fines and imprisonment are sanctioned in some countries, including Malaysia, Brunei Darussalam, Egypt, Pakistan, Bangladesh, Jordan, Syria, Tunisia, Iraq, and Yemen. According to Islamic law, in the case of divorce, polygamy, or death, the wife is one of the parties who can file a lawsuit for joint property in marriage. Therefore, a marriage not legally

[23] Basar Dikuraisyin et al., "Reconstruction of Marriage Law: Judges' Progressive Reasoning Based on Maqāṣid in Addressing Divergent Interpretations in Indonesian Courts," *Al-Manahij: Jurnal Kajian Hukum Islam* 18, no. 2 (2024): 219–36, https://doi.org/10.24090/mnh.v18i2.9436.

[24] S Sitizalikha, A Abdullah, and Nurazizah, "Marriage Registration in Islamic Law," *Budapest International Research and Critics Institute-Journal (BIRCI-Journal)* 4, no. 3 (2021): 7128–35, https://doi.org/10.33258/birci.v4i3.2566.

registered has negative consequences, including property, wife rights, and child status.[25]

The legalization of unregistered marriages. Multiple interpretations within the Marriage Law, particularly in Chapters 2(1) and (2), have led to the public perception that unregistered marriages are permissible by the state. This belief persists because the state offers a solution through applications for marriage recognition (*ithbāt nikāḥ*) to religious courts. Paragraph (1) states that marriages are recognized according to their respective religions, while Paragraph (2) recommends registration with the Office of Religious Affairs (KUA). The marriage ceremony and registration are hierarchical legal events often involving various dispensations. Consequently, *ithbāt nikāḥ* has become a common legal practice.[26]

Unregistered marriage is not explicitly defined in the law but refers to informal or unregistered marriages. Unregistered marriage became legal in Indonesia after the government made marriage registration mandatory with the Registrar of Marriage Officers or the Office of Religious Affairs. The proponents of this marriage maintain that it is considered valid and legal under Islamic law, although the state law does not admit it.

The Indonesian Council of Ulama thinks that an unregistered marriage, which is carried out by fulfilling all the pillars and conditions in Islamic law, but is not registered by the authorized agency, is legal but will become *ḥarām* if it causes harm. For this reason, marriage registration must be carried out as a preventive effort to avoid a negative impact.[27] Meanwhile, Muhammadiyah states that marriage is one of several types of engagement (*'aqd*). Marriage is not an ordinary engagement, but as stated in Sūrah Al-Nisā' (4): 21, is an engagement that contains a firm covenant. Meanwhile, Sūrah Al-Baqarah (2): 282 explains the order to record non-cash transactions or debts as a form of proof. If debt and credit contracts need to be recorded, the marriage process is even more important to be recorded. This is because the contract in marriage is

[25] Siti Aminah and Arif Sugitanata, "Genealogy and Reform of Islamic Family Law: Study of Islamic Marriage Law Products in Malaysia," *Journal of Islamic Law* 3, no. 1 (2022): 94–110, https://doi.org/10.24260/jil.v3i1.556.

[26] Dikuraisyin et al., "Reconstruction of Marriage Law: Judges' Progressive Reasoning Based on Maqāṣid in Addressing Divergent Interpretations in Indonesian Courts."

[27] Majelis Ulama Indonesia, *Himpunan Fatwa Majelis Indonesia Sejak 1975* (Jakarta: Sekretariat MUI, 2011).

noble and sacred. On this basis, Muhammadiyah thinks that registering the marriage contract is obligatory.[28]

The main reason for applying Article 2, Paragraph 2 of the marriage law is to uphold order, which concerns the interests of many people. This order is sought based on empirical facts in the field, namely, misusing marriage, which is actually for noble purposes, to the detriment of others, wives, and children. Legally, an unregistered marriage has legal risks such as: 1) child recognition; 2) child maintenance after divorce; 3) domestic violence. Children from nikah sirrî, because their parents' marriage is not recorded, find it challenging to take care of the legality of their status as children. The legality of children's status will extend to the access they are entitled to, such as education and inheritance rights.[29]

Children born out of an unregistered marriage have a different position from children from other marriages. From a religious perspective, the son of an unregistered marriage is legitimate, but legally, it is not recorded in the Office of Religious Affairs. The existence of a child in an unregistered marriage must be given legal certainty and the protection of the law. The decision of the Constitutional Court (MK) has provided certainty and legal protection, but in a religious court, the verdict has not been granted constitutionally. Therefore, it is necessary to reconstruct the inheritance law of children born out of an unregistered marriage by incorporating Court decision No. 46/PUU-VIII/2010 as a source of law in the legal inheritance system in religious courts. The law should provide protection and legal certainty to the status of a child born out of an unregistered marriage and the rights available to him. However, the validity of the marriage is still in question.[30]

Children born from unregistered marriages have a different position from other extra-marital children because children from unregistered marriages, from a religious perspective, are legitimate, but juridically are not registered at the Office of Religious Affairs. With the decision of the Indonesian Constitutional Court Number 46/PUU-VIII/2010, children from unregistered marriages have different legal consequences compared to before the decision. These differences

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[28] Wawan Gunawan Abdul Wahid, "Pandangan Majlis Tarjih dan Tajdid Muhammadiyah tentang Nikah Sirri dan Itsbat Nikah: Analisis Maqashid Asy-Syari'ah," *Musãwa Jurnal Studi Gender dan Islam* 12, no. 2 (2013): 215, https://doi.org/10.14421/musawa.2013.122.215-236.

[29] Fauzan Muhammadi, "Legalitas Nikah Sirrî Ditinjau dari Kaidah Fikih," *De Jure: Jurnal Hukum dan Syar'iah* 9, no. 1 (2017): 1–12, https://doi.org/10.18860/j-fsh.v9i1.4063.

[30] Supriyadi, "Rekonstruksi Hukum Kewarisan Anak dari Perkawinan Sirri di Pengadilan Agama."

can concern the child's position, inheritance rights, or even the *nasab* relationship of the father or the father's family. The material test of Article 43, Paragraph 1 of the Marriage Law was granted because the relationship between a child and a man as a father is not solely due to the existence of a marriage bond, but can also be based on proof of a blood relationship between the child and the man as a father. Thus, regardless of the procedure/administration of the marriage, the child who is born must receive legal protection, because the child is innocent and the birth is against their will.

The legal reason behind the discovery (*rechtfinding*) is to emphasize that children from unregistered marriages are also entitled to legal protection. This is a form of legal protection for children from unregistered marriages and legal certainty that is just. The blood relationship between the child and the father in a biological sense can be legitimized juridically through a court order. A father from an unregistered marriage must be responsible for his child's survival, so that the child can obtain affection and guarantee a clear legal status.[31]

The Supreme Court has the authority to issue regulations as a complement to fill any deficiencies or legal gaps necessary for the smooth running of the judiciary, by General Elucidation number 2 letter c of Law Number 14 of 1985. Furthermore, Article 79 of Law No. 14 of 1985 stipulates that the Supreme Court may issue further regulations on aspects necessary to ensure the smooth running of the judiciary when there is a void in the law. In the literature, this kind of authority and duty is often called the regulatory function or "regelende functie" of the Supreme Court. [32] Legal reform by The Supreme Court of Indonesia facing the legal vacuum in civil procedure law is through the judgment of the court, the jurisprudence of the supreme court, the doctrine of the supreme judges through the formulation of the plenary meeting results that outlined in the Supreme Court Circular (SEMA), and finally through the formation of Supreme Court Regulation (Perma).[33]

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[31] Supriyadi.

[32] Maulana Rihdo et al., "Kedudukan Surat Edaran Mahkamah Agung (Sema) dalam Perspektif Akademisi: Kekuatan Hukum, Ketetapan dan Konsistensi, Pengaruh terhadap Putusan Hukum," *Usrah: Jurnal Hukum Keluarga Islam* 4, no. 2 (2023): 230–40, https://doi.org/10.46773/usrah.v4i2.791.

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

In this context, the Supreme Court produces various legal products that play a role in determining procedures, guidelines, and guidance for judges, courts, and parties involved in the judicial process. One legal product the Supreme Court issued is the Supreme Court Circular Letter (SEMA). Regarding the position and power of SEMA, it can be concluded that it does not have binding power for judges. They are merely instructions or directives, not regulations requiring judges to comply with legal consequences if not followed. Therefore, the effect of SEMA on legal decisions may vary depending on various factors and contexts in each case. SEMA can be used as a source of law in the Religious Court. SEMA contains procedural law and substantive civil law.[34]

In 2011, the Supreme Court, through decision Number 554K/AG/2011, conducted *ijtihād* by giving an obligatory bequest to stepchildren; the judge used verse 180 of Sūrah al-Baqarah (2) as the legal basis for the obligation to make a will. This decision finally became jurisprudence with the publication of the SEMA regarding mandatory bequests for stepchildren. Obligatory bequest is not intended for stepchildren or stepmothers. One alternative for providing inheritance property is through grants and wills, which are not obligatory bequests. The stronger position of adopted children who have no blood relations at all than stepchildren who have one blood relation makes the issue of stepchildren's inheritance a consideration for the welfare of the child, especially when the stepchildren do not receive grants or wills from their stepparents.[35]

In 2012, SEMA No. 7 of 2012 introduced the nomenclature regarding the obligatory bequest for stepchildren. The obligatory bequest to a stepchild, as accommodated by the Supreme Court Circular Letter, is a breakthrough that can accommodate the diverse family conditions in Indonesian society.[36] That is, equating something that has no legal text (*naṣṣ*) with something that has a legal text because of the similarity of its legal cause (*'illat*).[37] In performing *qiyās*, there

[34] Abdul Manan, *Pengadilan Agama Cagar Budaya Nusantara Memperkuat NKRI* (Jakarta: Kencana, 2019), 271.

[35] Nofitasari, "Wasiat Wajibah kepada Anak Angkat, Non Muslim dan Anak Tiri (Formulasi Hukum Wasiat Wajibah dalam Pasal 209 Kompamadhiilasi Hukum Islam di Indonesia dan Perkembangannya)."

[36] Nofitasari.

[37] 'Abd al-Wahhāb Khallāf, *'Ilm Uṣūl al-Fiqh* (Cairo: Dār al-Ḥadīṯ, 2003).

are essential elements, namely: *'asl* (the root), *far'* (the branch), *ḥukm 'asl* (the ruling of the root), and '*illat* (the cause).[38]

After the enactment of SEMA No. 7/2012, several decisions were implemented, and the rules in the SEMA were not applied. Although in its development, there are still differences of opinion among judges regarding the obligation to provide obligatory bequests to stepchildren. Decision Number 1581/Pdt.G/2020/PA.Pbr is one example where the judge has implemented SEMA Number 7 of 2012 by granting obligatory bequests to stepchildren, as the basis of legal considerations is the emotional closeness between stepchildren and the testator during 38 years until the testator died. [39]

However, in other cases, Supreme Court judges have also abolished granting obligatory bequests to stepchildren by decision number 733K/Ag/2016. The reason is that granting compulsory wills to stepchildren must be based on legal considerations under the law, the Compilation of Islamic Law, and legal facts. This decision differs from the decision at the Religious Court level, which granted a mandatory bequest for stepchildren based on decision number 192/Pdt.G/2015/Sgt. In this decision, the judge has applied the provisions of SEMA Number 7 of 2012.[40]

In a different instance, ruling number 311/Pdt.G/2013/PA.Mtr similarly denied an obligatory bequest to a stepchild, arguing that the other heirs, specifically the testator's biological sister, met the conditions outlined in Article 171, letter c of the KHI, making them the rightful recipients of the testator's inheritance. Considering the dynamics of the decision, it is accurate to say that when a Religious Court judge makes a ruling, they are influenced by factors that aim to deliver justice for the involved parties from both sociological and Sharia viewpoints, rather than solely relying on written juridical laws. In applying the SEMA, various sociological elements need to be considered, and it is fair to assert that the SEMA does not impose a binding obligation on judges.

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[38] 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.

[39] M Nur Fajri, Rika Lestari, Ulfia Hasanah, "Analisis Perbandingan Putusan Hakim tentang Pemberian Wasiat Wajibah untuk Anak Tiri (Studi Putusan Nomor 1581/Pdt.G/2020/PA.Pbr dan Nomor 311/Pdt.G/2013/PA.Mtr)," *Jurnal Ilmiah Wahana Pendidikan* 10, no. 24 (2024):20–33, https://jurnal.peneliti.net/index.php/JIWP/article/view/11196.

[40] Zakiul Fuady Muhammad Daud, "Menyoal Pemberian Wasiat Wajibah kepada Anak Tiri (Studi Putusan Hakim terhadap Kasus Warisan Anak Tiri)," *Jurnal As-Salam* 6, no. 1 (2022): 49–61, https://doi. org/10.37249/assalam.v6i1.387.

SEMA 3 of 2023 again expands the scope of the obligatory bequest construction, which can be given to biological children born from unregistered marriages, by extending the meaning of compulsory will. This nomenclature raises pros and cons because the terminology of child status in legislation is still quite diverse. Children born from an unregistered marriage have a different status than children born out of wedlock because, from a religious perspective, children from an unregistered marriage are legitimate. Still, legally, they are not registered in the Office of Religious Affairs. With the decision of the Constitutional Court Number 46/PUU-VIII/2010, children from unregistered marriages have different legal consequences compared to before that ruling. The differences can relate to the child's status, inheritance rights, or lineage from the father or the father's family. The judicial review of Article 43, Paragraph 1 of the Marriage Law was granted because the relationship between a child and a man as the father is not solely based on the marriage bond, but can also be based on the proof of a blood relationship between the child and the man as the father. Thus, regardless of the administrative issues of the marriage, the child born must receive legal protection, as the child is innocent and their birth was not of their own will.[41]

With the Constitutional Court's decision, the status of children born out of wedlock in quotation marks for unregistered marriage, the clarity of their status becomes clear because it states that the relationship of a child out of wedlock does not only have a civil relationship with the mother, but also has a civil relationship with the biological father as long as the child is out of wedlock. The mother of a child out of wedlock can prove her biological paternity with a DNA test.[42]

Therefore, a father of a child from an extramarital connection can no longer refuse to provide for his child's necessities. The Constitutional Court's decision further strengthens legal certainty and legal protection in civil relations between illegitimate children and biological fathers in terms of being responsible for providing for and providing a living for these illegitimate children, so the burden of caring for and providing a living for illegitimate children is not borne by only

[41] Supriyadi, "Rekonstruksi Hukum Kewarisan Anak dari Perkawinan Sirri di Pengadilan Agama."

[42] Imam Rusdi, "Penetapan Nasab Anak Zina kepada Ayah Biologis dengan DNA Perspektif Maslahah," *Al-Hakim: Jurnal Penelitian Mahasiswa Prodi Hukum Keluarga* 1, no. 1 (2019): 55–78, https://ejournal.unibo.ac.id/index.php/hakim/article/view/420.

one family member (the mother of the child out of wedlock). Still, it must be shared with the family of the biological father.[43]

Unregistered marriages can lead to the absence of legal status or recognition of the relationship between parents and children. As a result of this lack of recognition, the state also does not acknowledge inheritance rights. Thus, indirectly, biological children born from unregistered marriages will not receive inheritance rights from their biological fathers. This certainly puts the child at a significant disadvantage, as the absence of this relationship can eliminate substantial rights. On the other hand, biological children should receive a clear share due to their status as heirs.[44]

Indonesian law to date only regulates child protection conventionally, including fulfilling children's rights and obligations, recognition and ratification of child status, child maintenance, and others. Legal institutions related to child protection arrangements include the Civil Code/BW; customary law; KHI and various laws and regulations such as Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection, Law Number 1 of 1974 concerning Marriage, and Law Number 23 of 2006 concerning Population Administration. The reality is that positive law in Indonesia has not been able to provide certainty, justice, and benefits for children born outside of a registered marriage..[45]

The provisions of SEMA Number 3 of 2023 constitute one form of legal protection for every child born into the world, ensuring that they are not treated discriminatively or unfairly and are protected by their nature. Protecting children born out of wedlock and not registered does not mean endorsing widespread promiscuity. Still, it also requires considering concepts that can address such behavior through guidance and religious education. Therefore,

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[43] Muhammad Abdu Amal Fathullah, "The Relationship Of Children and Their Biological Father (Comparative Study of Positive Law of Indonesia, Thailand and Jordan)," *Syariah: Jurnal Hukum dan Pemikiran* 22, no. 2 (2022): 213–30, https://doi.org/10.18592/sjhp.v22i2.4953.

[44] Abdul Kafi, Muhammad Semman, and Muhammad Yazidi Rahman, "Pembaruan Hukum Wasiat Wajibah bagi Anak Kandung Pernikahan yang Tidak Dicatat di Indonesia," *Journal of Islamic and Law Studies* 8, no. 1 (2024): 22–39, https://doi.org/10.18592/jils.v8i1.12845 .

[45] Jakobus Anakletus Rahajaan and Sarifa Niapele, "Dinamika Hukum Perlindungan Anak Luar Nikah di Indonesia," *Public Policy (Jurnal Aplikasi Kebijakan Publik & Bisnis)* 2, no. 2 (2021): 258–77, https://doi.org/10.51135/publicpolicy.v2.i2.p258-277.

providing legal protection for children born out of wedlock should also be accompanied by giving advice and religious education to the community.[46]

Obligatory Bequest of an Unregistered Wife in Polygamous Marriage

The family law in modern Muslim countries related to polygamy can be classified into three: countries that prohibit entirely the practice (Turkey and Tunisia), those that allow it with relatively strict conditions (Pakistan, Egypt, Morocco, Indonesia and Malaysia) and the ones that handle it more loosely (Saudi Arabia, Iran and Qatar).[47] Indonesia is among the countries that allow polygamy, provided permission is obtained from the Court.[48] In polygamous marriages, women frequently encounter challenges in securing their entitlements to marital assets, including joint property, maintenance, and inheritance, particularly in cases of unauthorized polygamy.[49]

The issue of polygamy is an issue that is always hot and interesting for discussion because the practice of polygamy has long existed, is deeply rooted, and is often practiced in society. Based on Sūrah al-Nisā' (4) verse 3, the scholars generally understand the permissibility of polygamy. However, the permissibility of polygamy is still conditional, and one must be able to act reasonably. The meaning of being fair is a part that scholars, including Fazlur Rahman and Muhammad Syahrur, debate. With his double movement theory, Rahman argues that no one can do justice in matters of love as emphasized by Sūrah al-Nisa' (4): 129. He stressed that the verse's *maqāṣid* leads to the principle of monogamy, not polygamy. Meanwhile, Syahrur understands fairness in a person's ability to be fair not only in terms of giving charity to

[46] Fikri, Budiman, and Andi Bahri, "Perlindungan Anak di Luar Nikah dalam Hukum Negara dan Hukum Islam (Perspektif Hakim Pengadilan Agama Parepare)," *Diktum: Jurnal Syariah dan Hukum* 12, no. 1 (2014): 57, https://doi.org/10.35905/diktum.v12i1.196.

[47] Muhammad Roy Purwanto et al., "Polygamy in Muslim Countries: A Comparative Study in Tunisia, Saudi Arabia, and Indonesia," *Proceedings of the 2nd Southeast Asian Academic Forum on Sustainable Development (SEA-AFSID 2018)* 168 (2021): 435–37, https://doi.org/10.2991/aebmr.k.210305.082.

[48] Euis Nurlaelawati, "Expansive Legal Interpretation and Muslim Judges' Approach to Polygamy in Indonesia," *Hawwa* 18, no. 2–3 (2020): 295–324, https://doi.org/10.1163/15692086-12341380.

[49] Nurmila, "Polygamous Marriages in Indonesia and Their Impacts on Women's Access to Income and Property."

widows but also to orphans of widowed women who are polygamous, including in terms of looking after, nurturing, and raising them.[50]

This research draws on two court decisions, which show that even within the confines of legal polygamy, realizing women's rights to marital property can pose difficulties. Religious Court Decision Number 4191/Pdt.G/2019/PA.JS and Decision Number 103/Pdt.G/2021/PTA.JK. Both decisions relate to inheritance disputes in the context of polygamous marriages. In both cases, the inherited properties were controlled by the second wives and their children. The first wives contended that the estates should be distributed according to Islamic law. The first wives and their children also acknowledged that their late husbands had granted them specific properties. However, these granted properties were not mentioned in the lawsuit's posita (reasons) and petitum (requests). Despite this, the judges included these properties as part of the inheritance. In resolving these cases, the judges reached different conclusions, particularly regarding the status of the properties left by the testator. These differences significantly impacted the shares allotted to the two wives and their children in the polygamous marriage.[51]

In another case, the religious court once ruled on case number 547/Pdt.G/2023/PA.Utj and 183/Pdt.G/2023/PA.Mbl. Both decisions did not recognize the unregistered wife as an heir under the provisions of Dzawil Furud, because they stated that the state did not recognize the polygamous secret marriage as it violated Article 3, Paragraph 2 of the Marriage Law (without court permission). However, considering the public interest, the inheritor's assets were still granted through an obligatory bequest.

In the case of Decision Number 183/Pdt.G/2023/PA.Mbl involves a legal fact stating that the legitimate wife of a validly registered marriage has left the heir (legitimate husband and registered) for 10 years and has not fulfilled her obligations as a wife during the period of separation. The second marriage of the heir to his unregistered wife is also known to the first wife (legitimate wife and registered). Although the first wife was aware of the marriage, during the second marriage of the testator with his unregistered wife, the first wife never cared for

[50] Khairul Hamim, "Comparison Between Double Movement Theory and Nazariyyat al-Ḥudūd Theory on Polygamy Laws," *El-Mashlahah* 12, no. 2 (2022): 190–209, https://doi.org/10.23971/el-mashlahah.v12i2.4903.

[51] Nasution and Muchtar, "Negotiating Islamic Law: The Practice of Inheritance Distribution in Polygamous Marriages in Indonesian Islamic Courts."

the heir. Even at the end of his life, the second wife (the unregistered wife) was proven to have cared for and looked after the heir.

The results of judges' creativity in conducting legal discovery with various methods allow for decisions that contain legal discretion to realize progressive law. Legal discretion can occur when judges face cases that, if based on existing legal norms, appear to be a legal injustice, do not have complete legal norms, or even the case at hand has no legal norms. Judges are juridically given the legal freedom to adjudicate independently by their convictions without the assistance of extra-judicial parties.[52] Being law enforcers, judges have a crucial position and a hefty 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 to ensure public peace.[53]

With the expanding interpretations of obligatory bequests, 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 unregistered wives from polygamous marriages are applied in all conditions, there will also be the rights of one heir who is disadvantaged. This includes reducing inheritance rights for the first or legitimate wife due to the obligatory bequests. The limitation of the maximum amount of mandatory testament that cannot exceed 1/3 of the inheritance aims to maintain the rights of other heirs. With this limitation, the amount of inheritance the registered wife receives will remain greater than the mandatory will accepted by the unregistered wife.

Towards Legal Justice through *Maqāṣid al-Sharī'a*

Murtadla Muthahhari describes the concept of justice in four dimensions: first, justice as balance, meaning that for a society to endure and remain stable, it must exist in a balanced state where every element exists in its proper proportion, not in identical measure. Second, justice is understood as equality and denying discrimination in any form. This interpretation of justice requires maintaining equality when the entitlement to rights is equal. Third, justice

[52] 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.

[53] 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.

entails safeguarding individual rights and ensuring everyone receives what is rightfully theirs. This reflects social justice within the context of community life and governance. Fourth, justice is the preservation of the right to continued existence. Madjid Khadduri affirms that Islamic justice entails placing things in their rightful place, assigning burdens proportionately to one's capacity, and granting individuals their due in appropriate measure.[54]

From an Islamic point of view, the ultimate aim of law is to achieve justice. Therefore, no matter how elegant or efficient a system may be, it must be rejected if it does not uphold justice. This aligns with John Rawls's statement that justice is the first virtue of social institutions, as truth is of systems of thought.[55] As cited by Gladys, Rawls articulates justice through the difference principle and the principle of fair equality of opportunity. These principles assert that social inequalities must be arranged to benefit the least advantaged members.[56]

Upianus defines justice as *justicia est constans et perpetua voluntas ius suum cuique tribuendi*—a constant and perpetual will to give each their due.[57] Aristotle distinguishes justice into two forms: distributive justice, which allocates resources based on individual merit; and commutative justice, which distributes resources equally regardless of merit.[58]

Legal justice should also be pursued through the lenses of wisdom, empathy, and sensitivity to human circumstances. Whether acknowledged or not, the general tendency in interpreting religious texts is dominated by literal approaches, often ignoring their substantive meanings. Many texts are

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[54] Ahmad Farahi and Ramadhita Ramadhita, "Keadilan bagi Anak Luar Kawin dalam Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010," *De Jure: Jurnal Hukum dan Syar'iah* 8, no. 2 (2017): 74–83, https://doi.org/10.18860/j-fsh.v8i2.3778.

[55] Ridho Akbar, "Penerapan Peradilan Elektronik di Masa Pandemi dalam Tinjauan Teori Hukum Responsif dan Teori Keadilan John Rawls," *LoroNG: Media Pengkajian Sosial Budaya* 10, no. 2 (2021): 147–58, https://doi.org/10.18860/lorong.v10i2.967.

[56] Gladys Donna Karina, "Analisis Pendekatan Teori Keadilan John Rawls dan Teori Utilitarianisme Jeremy Benthan terhadap Konsep Pemenuhan Hak Korban Menurut Presfektif Viktimologi," *Journal of Indonesian Comparative of Syari'ah Law* 6, no. 2 (2024): 259–76, https://doi.org/10.21111/jicl.v6i2.11194.

[57] 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.

[58] Nur Kholis, Jumaiyah, and Wahidullah Wahidullah, "Poligami dan Ketidakadilan Gender dalam Undang-Undang Perkawinan di Indonesia," *Al-Ahkam* 27, no. 2 (2017): 195, https://doi.org/10.21580/ahkam.2017.27.2.1971.

understood solely in their apparent, literal sense. However, embedded within this literal meaning are fundamental messages advocating for justice and public welfare—universal moral values that must be upheld. These core messages should take precedence when reinterpreting religious texts in response to contemporary issues, rather than merely resting on the literal interpretation.

Amir Syarifuddin argues that justice, particularly about material rights such as inheritance, should be interpreted as a balance between rights and obligations, and between what is received and its necessity or utility. He further asserts that inheritance rights represent the continuation of the deceased's responsibility to their family. Therefore, the share received by each heir should correspond to their respective responsibilities toward the family.[59]

In pursuing justice, Muhammad Shahrur's theory of limits in inheritance offers a relevant model aligned with social justice values. It does not violate existing rules but emphasizes fairness based on the responsibilities borne by each heir, taking into account specific circumstances. The principle of balanced justice is evident in Islamic inheritance laws, and Shahrur's reading of inheritance verses advocates understanding the boundaries set by Allah, which must not be transgressed. Within these boundaries, however, lies a space for dynamic, flexible, and elastic *ijtihād* (independent reasoning).[60]

Bilateral inheritance in Islamic law contains two forms of justice: divine justice and human justice. Divine justice is based on transcendental understanding, emphasizing that true justice can only be achieved when God is placed in a central, proportional role. In this view, God is the axis of all behaviors and norms, from creation to conduct standards. Human justice, on the other hand, refers to justice grounded in humanistic principles.[61]

Islamic law is never intended to be burdensome or harmful in its implementation. Applying *maqāṣid al-sharī'a* as the foundation for ijtihad in inheritance issues is highly appropriate because it harmonizes textual commands with contextual realities. This approach ensures that the application of law achieves justice as stated in the legal maxim that *al-Shāri'* (Allah) does not intend for *taklīf* to be burdensome or distressful.

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[59] Ramadhita, "Keadilan Proporsional dalam Pembagian Waris Anak Angkat."

[60] Asmara, Kurniawan, and Agustian, "Teori Batas Kewarisan Muhammad Syahrur dan Relevansinya dengan Keadilan Sosial."

[61] Syaikhu Syaikhu, "Kewarisan Islam dalam Persfektif Keadilan Gender," *El-Mashlahah* 8, no. 2 (2019): 122–34, https://doi.org/10.23971/maslahah.v8i2.1323.

According to Wahbah al-Zuḥaylī, the flexibility of Islamic law is a divine blessing granted by Allah to Muslims. Islamic law was established to uphold justice, which is represented by public welfare (*maṣlaḥa*). As cited by Abdul Azis, al-Zuḥaylī emphasized that Sharia is a form of *taklīfī* law instituted on the foundation of justice. Commandments and justice are fundamental objectives of Sharia. Based on this core value, the law of inheritance, as one of the components of Islamic law, must align with *maqāṣid al-sharī'a* to deliver justice and welfare to the heirs. The justice intended in inheritance law is proportional distributive justice, not cumulative justice.[62]

In light of the *maqāṣid al-sharī'a*, which asserts that the objective of law is to achieve *maṣlaḥa* in all aspects of human life, the application of mandatory bequest to those who are not recognized as legal heirs provides a means of including individuals who are close to or have significantly contributed to the deceased. This inclusion allows them to receive a portion of the estate, thereby upholding a sense of justice that can be collectively experienced by all parties involved.[63]

Justice in Islamic inheritance law is closely tied to rights, obligations, and the balance between what is received and its necessity and utility. From this understanding, the principle of justice becomes evident in the distribution of inheritance in Islamic law.[64] A judge's decision is the culmination of legal reasoning and the realization of law when confronted with juridical obstacles in delivering justice. The ruling becomes the ultimate instrument to enforce the function and vision of national law by ensuring justice in the cases brought before the court. In this sense, a judicial decision is the concrete expression of justice values grounded in belief in the Almighty God, as applied to the specific context of the case.[65]

Expanding the Compulsory Will Is a Necessity

Expanding compulsory will should be confined, as it is essential to view compulsory will not only as a means of seeking maslahat but also as a

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[62] Aziz, "Pembagian Waris Berdasarkan Tingkat Kesejahteraan Ekonomi Ahli Waris dalam Tinjauan Maqashid Shariah."

[63] Samsul Hadi, "Pembatasan Wasiat sebagai Bentuk Keadilan Hukum Islam," *Al-Ahwal: Jurnal Hukum Keluarga Islam* 9, no. 2 (2017): 169, https://doi.org/10.14421/ahwal.2016.09203.

[64] Fadlih Rifenta, Tonny Ilham Prayogo, "Nilai Keadilan dalam Sistem Kewarisan Islam," *Al-Manahij: Jurnal Kajian Hukum Islam* XIII, no. 1 (2019): 111–27, https://doi.org/10.24090/mnh.v0i1.2117.

[65] Yasinta Meilinda Lihawa, "Penemuan Hukum Islam dalam Mewujudkan Keadilan Berdasarkan Ketuhanan Yang Maha Esa," *Lex Privatum* VI, no. 6 (2018): 5–11.

mechanism for avoiding mudharat, in alignment with the objectives of legal justice. Consequently, every court decision must embody the values of justice, certainty, and expediency while adhering to the principles of *maqāṣid al-sharī'a*. Right now, the provision of the obligatory bequest may also be utilized to allocate the heir's property to the wife in the context of a polygamous marriage, as evidenced by various rulings from religious courts.

The granting of an obligatory bequest to an unregistered wife in a polygamous marriage aims to uphold *maṣlaḥa*, especially for the unregistered wife; however, it can also result in *maḍarrāt* for her or other heirs. Therefore, it is essential to establish clear guidelines to ensure that implementing an obligatory bequest remains fair and impartial. The process of reconstructing an obligatory bequest, especially in the context of an unregistered wife in a polygamous marriage, goes beyond mere discourse. In this article, the author presents five normative concepts that can be used as a reference in the application of an obligatory bequest in cases of polygamous marriages with unregistered wives.

First, the execution of an unregistered marriage is assessed by examining whether it follows the principles of a valid unregistered marriage. A key indicator is the awareness of the first wife, particularly whether she knows about the unregistered marriage. In many cases, the legal wife was unaware, but it is becoming more common for her to understand and sometimes consent, as long as the marriage remains unregistered. This awareness and consent play a crucial role in the legitimacy of the marriage.

Three factors contribute to a legally recognized wife's decision to maintain her position in a polygamous marriage. First, the wife may express a clear intention to preserve the marital bond and avoid initiating divorce proceedings despite the existence of a subsequent marriage. Second, she may deliberately withhold legal recognition of the second wife, thereby preventing formal acknowledgment of the latter's status. Third, the registered wife may be unwilling to share her legal rights and social standing as the officially recognized spouse, thus reinforcing her exclusive position within the marriage.

Second, the rights and obligations of spouses are implemented. Under the Marriage Law, the Compilation of Islamic Law (KHI), and *fiqh* literature, husband and wife rights and responsibilities are clearly defined. In reconstructing compulsory wills, judges must assess whether, in informal polygamous households, the husband and first wife continue to fulfill their

duties, including both physical and emotional support, as well as whether the first wife meets her responsibilities as a wife.

Third, the timing of the acquisition of assets from the heir. When granting an obligatory bequest to an unregistered wife in a polygamous marriage, the timing of asset acquisition must be considered. Whether the assets were acquired during the marriage to the unregistered wife or the first wife must be proven. If the assets were obtained during a legitimate marriage, the bequest to the unregistered wife should be rejected. However, granting the obligatory bequest may be considered if the assets were acquired during the marriage to the unregistered wife.

Fourth, the maximum share of unregistered wives. In Indonesia, the maximum share from an obligatory bequest is 1/3. Suppose an unregistered wife in a polygamous marriage has the right to an obligatory bequest; it may not exceed 1/3 of the registered wife's share. It ensures justice for the legitimate wife recognized by the state and carries out religious and legal obligations. If both wives receive the same inheritance, it will cause injustice because the rights of the legitimate wife must be protected.

Marriage registration is something that is mandated by the state to maintain order. One of the things that marriage registration aims to avoid is the occurrence of unregistered marriages or unofficial marriages that can violate the law. As a solution to this issue, the author suggests that the portion that an unregistered wife can obtain should be a maximum of 1/3 and not exceed that of the officially registered wife.

Fifth, compulsory will (psychological closeness). The author emphasizes using compulsory wills, especially in religious courts, to address inheritance issues. For an unregistered wife in polygamous marriages, psychological proximity to the testator serves as a basis (*sadd al-dharī'a*) to facilitate inheritance grants.

According to former Supreme Court Judge, Amran Suadi, an obligatory bequest requires a claim from the party seeking inheritance. Without such a claim, judges are not obliged to grant it, highlighting the importance of initiative from the entitled party.[66] In an interview, Ramadaniar stated that an obligatory

[66] Yasardin et al., "Dinamika Hukum Kewarisan Islam terkait Pembagian Harta Warisan bagi Ahli Waris Beda Agama" (Jakarta, 2016), https://ebook.bldk.mahkamahagung.go.id/index.php/product

bequest for an unregistered wife in a polygamous marriage is unjustifiable, as polygamy without court approval should not be protected due to its harm to the legal wife. If permitted, it risks greater injustice. However, if granted, two conditions apply: assets' acquisition timing must be assessed, and the unregistered wife's share must be the smallest among the heirs.[67] In agreement with that, Sudiliharti added that the duration of the marriage of an unregistered wife is significant to consider. A secret marriage lasting less than 5 years is deemed ineligible to receive a portion of the inheritance through obligatory bequest.[68] In contrast, Fatkul Mujib supports granting obligatory bequests to concealed wives and considers it a laudable legal reform. He agrees with the researchers, asserting that as long as the polygamous marriage was religiously valid, the concealed wife is entitled to inheritance, regardless of the duration of the marriage or the timing of the acquisition of assets.[69]

Based on judges' opinions, the researcher finds differing views on granting obligatory bequests to unregistered wives in polygamous marriages. Given the case's complexity, the researcher proposes strict limitations and criteria for such bequests to ensure fairness and uphold a just legal order in handling these sensitive inheritance issues.

Conclusion

Expansion of obligatory bequests is necessary because, up to now, the normative law governing obligatory bequests is outdated. The Religious Court has made a legal breakthrough by giving the inheritance to unregistered wives in polygamous marriages. This legal breakthrough with the *maqāṣid al-sharī'a* approach will produce laws that reflect the value of the benefit. However, the expansion of the implementation of obligatory bequests ultimately needs to be limited so that their implementation does not become biased.

The new concept of special legal construction for unregistered wives in polygamous marriages proposes the application of obligatory bequests as a viable solution to inheritance problems. The five criteria proposed by the author

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[67] Interview with Ramadaniar, Judge of Bengkulu Religious Court Class 1A, Bengkulu, April 25, 2025.

[68] Interview with Sudiliharti, Judge of Bengkulu Religious Court Class 1A, Bengkulu, April 25, 2025.

[69] Interview with Fatkul Mujib, Judge of Arga Makmur Religious Court Class 1B, North Bengkulu, April 25, 2025.

are as follows: First, secret marriages must be carried out by legal norms. The first wife must be informed of and agree to the subsequent marriage. Second, the rights and obligations of the second wife must be fully implemented. Third, the time of acquisition of assets from the heirs. In the process of granting an obligatory bequest to an unregistered wife from a polygamous marriage, it is also essential to consider the time of acquisition of assets. In court, it must be proven whether the inheritance assets were obtained during the marriage with the unregistered wife or have existed since the marriage with the first wife. Fourth, there is a maximum share of unregistered wives. Suppose it has been determined that the secret wife from a polygamous marriage is entitled to an obligatory bequest. In that case, it must be determined that the amount is not more than 1/3 or must not exceed the share of the legal wife. This idea is also based on the rights of the legal wife, which must be protected reasonably. Fifth, an obligatory bequest is justified based on sociological considerations of good relations. If an unregistered marriage does not, in essence, cause detrimental consequences for the husband, then as a form of appreciation for the care and living of the second wife, as long as the legal wife does not carry out her obligations, giving a will must be permitted, provided it does not exceed 1/3.[a]

Author Contribution Statement

Rusdi Rizki Lubis: Conceptualization; Data Curation; Formal Analysis; Methodology; Validation; Writing Original Draft.

Asmuni Asmuni: Validation; Review; Editing.

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

Candra Boy Seroza: Supervision; Jurisprudential Insight; Final Review.

Aisyah Kahar: Formal Analysis; Visualization; Review; Editing.

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