



Legal Construction of the Division of Marriage Assets Due to Divorce in Islamic Law Perspective

Munir¹; H. Moch. Isnaeni²; Endang Prasetyawati³

¹ Doctoral Law Student at Universitas 17 Agustus 1945 Surabaya, Indonesia

² Professor Law at Universitas 17 Agustus 1945 Surabaya, Indonesia

³ Associate Professor Law at Universitas 17 Agustus 1945 Surabaya, Indonesia

<http://dx.doi.org/10.18415/ijmmu.v7i8.1943>

Abstract

This study aims to determine the ambiguity of the distribution of marital assets due to divorce and the concept of distribution of marital assets due to divorce in the perspective of Islamic law. The findings of the study: 1) The ambiguity of the concept of sharing the assets of marriage between husband and wife who is Muslim when the marriage ends in the Marriage Law in the perspective of justice and legal certainty is contained in the provisions of Article 31, Article 35 and Article 36 of Law Number 1 of 1974 and the amendments to Law Number 16 of the Year 2019 Regarding Marriage, it is also KHI that husband and wife have equal rights and positions, where both husband and wife are understood to have the same rights. Also Article 157 KHI in conjunction with Articles 96 and 97 Article 97 KHI that a widow or divorcee is entitled to one half of the joint property as long as the marriage agreement is not determined otherwise, but in practice the settlement of the judge's decision is based on the characteristics of the case so that it allows for a different decision on the case. The same so that it reflects more on social justice where the concept of justice is not guaranteed to be the same but rather is adjusted (different) to the capacity of each husband or wife.

Keywords: *Legal Construction; Joint Property; Divorce*

Introduction

Law Number 1 of 1974 and its amendments to Law Number 16 of 2019 concerning Marriage (hereinafter referred to as the Marriage Law) regulate civil law relations by emphasizing evidence of a legal relationship in the form of a marriage certificate quote. Marriage according to Article 1 of the Marriage Law, is "the physical and mental bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on Almighty God" implies that the thick nuances of religion characterize the law of marriage based on the fact that the nation Indonesia which has

the foundation of Pancasila, especially the first precepts of God Almighty.¹ Meanwhile, according to Article 2 of the Compilation of Islamic Law (hereinafter abbreviated as KHI as the main reference within the religious court) Marriage is a very strong contract or *mitssaqan ghalidzan* to obey Allah's orders and carry out it is worship.²

Marriage as a legal bond between husband and wife according to the provisions of Article 31 of the Marriage Law, states that (1) The rights and position of the wife are equal to the rights and positions of the husbands in household and social life; (2) live together in society; (3) Each party has the right to take legal actions; (4) Husband is the head of the family and the wife of the housewife.³ Included in the same rights and position in this case is in the field of assets. Assets in marriage according to Civil Law⁴, there is a division between original assets and joint assets, if the distribution of assets is made in the form of a marriage agreement.⁵ Meanwhile, in the KHI, it is stated that assets in marriage or *syirkah* are assets that are obtained either individually or with husband and wife while the marriage is in progress, herein after referred to as joint assets, without question being registered in the name of anyone as Article 1 letter f. In Article 85 KHI it is stated that "The existence of joint assets in the marriage does not preclude the possibility of having the property of each husband or wife".⁶

Article 37 of the Marriage Law states that "if the marriage is dissolved, the distribution of joint assets will be regulated according to respective laws" in the explanation referred to as "the law" respectively; is religious law, customary law and other laws ". While the KHI as a general reference in the religious court environment Article 157 stipulates that "Joint assets are divided according to the provisions". In the event of a divorce, then half of the joint property becomes the right of the spouse who lives longer, sharing of joint assets for a husband or wife whose wife or husband is in debt. must be postponed until there is certainty of actual or legal death on the basis of the decision of the Religious Court (Article 96) and "Each widow or divorcee has the right to one half of the joint property as long as the marriage agreement is not stipulated otherwise" (Article 97). However, as the provisions of Article 157 KHI are based on Presidential Instruction No. 1 of 1991 concerning Dissemination of Compilation of Islamic Law Effective Date of June 10, 1991, KHI has no binding power to apply because as Article 7 paragraph (1) of Law no. 12 of 2011 and Law No. 15 of 2019 concerning the Formation of Laws and Regulations do not include statutory regulations. This means that there is a legal vacuum as previously stated. The results of interviews with the Head of the Madiun City Religious Court regarding Article 37 of the Marriage Law, that each legal case has characteristics that are very different from one another, therefore, the Judge's decision is also very casuistic. One decision with another decision may be very different due to differences in the characteristics of the cases at hand. Even though they are both about disputes over joint assets, the characteristics of cases can be different from one another so that it is very possible that the Judge's decision in dealing with joint property disputes can also be different, whether the judge at the court of first instance, the court of appeal or the court of cassation.

Formulation of the Problem

Based on the background description of the problem as mentioned above, the ambiguity of the concept of distribution of marital assets due to divorce from the perspective of justice and legal certainty; the concept of sharing marital assets due to divorce in the perspective of Islamic law.

¹ T. Erwinsyahbana, 'Sistem Hukum Perkawinan Pada Negara Hukum Berdasarkan Pancasila', *Jurnal Ilmu Hukum Riau*, 2012.

² Amir Syarifuddin, 'Hukum Perkawinan Islam Di Indonesia', *Asy-Syir'ah*, 2014.

³ Tomy Michael, 'Alienasi Dalam Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 Tentang Perkawinan', *Mimbar Keadilan*, 2017, 229 <<https://doi.org/10.30996/mk.v0i0.2195>>.

⁴ Besse Sugiswati, 'Konsepsi Harta Bersama Dari Perspektif Hukum Islam', *Kitab Undang-'*, *Perspektif*, 2014.

⁵ K. Daniel O'Leary and Mathew C. Williams, 'Agreement about Acts of Aggression in Marriage', *Journal of Family Psychology*, 2006 <<https://doi.org/10.1037/0893-3200.20.4.656>>.

⁶ Santoso, 'Hakekat Perkawinan Menurut Undang-Undang Perkawinan, Hukum Islam Dan Hukum Adat', *Yudisia*, 2016.

Research Method

This research uses the normative juridical method, as an effort to find legal rules, legal principles, and legal doctrines in order to answer legal issues faced as well as a scientific process to find solutions to emerging legal issues with the aim of providing perceptions about what should be on the legal issues that arise.⁷

Discussion

Ambiguity of the Concept of Distribution of Marital Assets Due to Divorce from the Perspective of Justice and Legal Certainty

Marriage as stated in Article 26 Book I of the Civil Code regarding persons only constitutes civil relations. Civil law regulates legal relationships of individuals or legal relationships that are private in nature, especially regarding family relationships. A private legal relationship is a personal legal relationship, in the nuances of cooperation, it always animates interactions in people's lives, in order to meet the personal needs or private needs of each person.⁸

Article 2 of the Compilation of Islamic Law (KHI) states "Marriage is a very strong contract (*Mitsaqan Ghalidzan*) to obey Allah's orders and carry out it is worship". His contract must be pronounced by the guardian of the prospective bride in a clear form of consent *ijab* (serah) and *qabul* (accept) by the prospective groom carried out in front of two witnesses who meet the requirements.⁹ As an effort to realize the goal of marriage, the Marriage Law affirms that the rights and position of the wife are balanced with the rights and positions of the husbands in household life and the association of living together in society which means that the rights and positions of husbands and wives are balanced.¹⁰ In line with the provisions of KHI section IV Place of Residence, Article 81 states; (1) Husbands are obliged to provide a place to live for the wife and children or the former wife who is still in iddah; (2) Residence is a suitable place to live for the wife while in the marriage bond, or in iddah talak or iddah death; (3) The place of residence is provided to protect the wife and children from interference by other parties, so that they feel safe and at ease. The residence also functions as a place to store assets, as a place to organize and organize household items; (4) The husband is obliged to complete the residence according to his abilities and according to the condition of the environment in which he lives, both in the form of household equipment and other supporting facilities.¹¹ Article 83 stipulates; (1) The main obligation for a wife is to have physical and spiritual filial piety to her husband in what is justified by Islamic law; (2) Wife performs and manages daily household needs as well as possible.

Common property is a legal consequence of marriage. According to Article 35 paragraph (1) of the Marriage Law, property acquired during marriage becomes joint property. This means that collective property absolutely exists and cannot be negated by the parties. The source of the joint marital assets is the assets obtained during the marriage. Since the beginning of the marriage, there is a mixture of the husband's wealth and the wife's wealth, if no agreement is made, this condition will continue and cannot

⁷ Depri Liber Sonata, 'Metode Penelitian Hukum Normatif Dan Empiris: Karakteristik Khas Dari Metode Meneliti Hukum', *FIAT JUSTISIA*, 2015 <<https://doi.org/10.25041/flatjustisia.v8no1.283>>.

⁸ Stuart Henry, 'Legal Systems: Private', in *International Encyclopedia of the Social & Behavioral Sciences: Second Edition*, 2015 <<https://doi.org/10.1016/B978-0-08-097086-8.86079-1>>.

⁹ Itsnaatul Lathifah, 'Pencatatan Perkawinan', *Al-Mazahib: Jurnal Pemikiran Hukum*, 2015.

¹⁰ Erin Stiles, 'The Right to Marry', *Islamic Law and Society*, 2014 <<https://doi.org/10.1163/15685195-00213p03>>.

¹¹ R. Haniru, 'Hukum Waris Di Indonesia Perspektif Hukum Islam Dan Hukum Adat', *Al-Hukama: The Indonesian Journal of Islamic Family Law*, 2014.

be changed again during the marriage.¹² Mixing of wealth, is about all assets and liabilities, both those brought by each party into the marriage or those that will be obtained at a later date during the marriage. The joint wealth is called "gemeenschap" by law.¹³ Thus, it can be stated that 2 sources of joint marital assets according to Law Number 1 of 1974 and amendments to Law Number 16 of 2019 concerning Marriage, namely: 1) Collective livelihood assets, and 2) Innate assets entered through a marriage agreement. The sources of joint assets as joint livelihood assets are: 1) The husband's income and income; 2) Wife's income and income, income from husband's and wife's personal assets.¹⁴ Including the source of joint assets is inheritance that is included as joint assets, namely assets brought by the husband and wife to the marriage by making a marriage agreement beforehand, before or when the marriage takes place (Article 29 paragraph (1)).¹⁵

The Concept of Dividing Marital Assets due to Divorce in the Perspective of Islamic Law

The concept of household in Islam regulates several obligations of a husband towards his wife, namely: 1) Giving a dowry to the wife (*Qs An-Nisa* verse 4); 2) Providing a living for his wife and children (*Qs Al-Baqarah*: 233).¹⁶ As for divorce, the Islamic concept stipulates that; 1) The wife gets all the dowries if the wife has had sex with her husband or one of the husband and wife dies and the dowry has been determined (*Qs an-Nisa*: 20-21); 2) The wife gets half the dowry if she has not had sex with her husband and the dowry has been determined (*Qs al-Baqarah*: 237); 3) The wife gets *mut'ah* if she has not had sex with her husband and the dowry has not been determined (*Qs Al-Baqarah* 236).¹⁷

The term joint property in marriage or others is implicitly not found in the Qur'an or al-Hadith because this term comes from customary law (*'urf*) in society.¹⁸ In most areas, the assets found during the marriage become joint assets. Common property in Islamic law is analogous to *syirkah*. In other words, the assets generated by a partnership (*syirkah*) between husband and wife. Partnership (*syirkah*) is mixing. The jurists define it as a contract of two people who are allies in capital and profit. Madhab Syafi'i divides *syirkah* into four types, namely: 1) *Syirkah Inan*, which is a limited *syirkah* in the form of a combination of assets and efforts to gain profit. Meanwhile, the acquisition of each party in other ways, such as when one person gets a grant, gift or other, does not become a *syirkah* and remains the property of each; 2) *Syirkah Abdan*, namely *syirkah* in the field of providing services or doing work. The service or work performed may be the same service or work may also be different services or jobs; 3) *Syirkah Mufawwadhah*, is a *syirkah* that is not limited to the combination of assets and business for profit and also includes the acquisition of each party in other ways such as a person getting gifts, grants and others; 4) *Syirkah Wujud*, is a *syirkah* between two or more people with only trust.¹⁹

Madhab Syafi'iyah in this case rejects (does not allow) the *syirkah Mufawwadhah*, *syirkah abdan*, and *syirkah wujud* models. The reason Imam Shafi'i did not allow *Syirkah Mufawwadhah* was because this *syirkah* contained various *ghurur* (deception and uncertainty). Meanwhile, the reason for *Syirkah Abdan* is not allowed, according to Imam Syafi'i, is because *syirkah* (partnership) only applies to property,

¹² John R. Davies, *Islam, Law, and Equality in Indonesia: An Anthropology of Public Reasoning*, *Islam, Law, and Equality in Indonesia: An Anthropology of Public Reasoning*, 2003 <<https://doi.org/10.1017/CBO9780511615122>>.

¹³ Tim van Iersel, 'Gemeenschap', 2019 <https://doi.org/10.1007/978-90-368-2204-6_7>.

¹⁴ Tomy Michael, 'Right To Have Rights', *Mimbar Keadilan*, 2017, 106 <<https://doi.org/10.30996/mk.v0i0.2203>>.

¹⁵ Ann Black, Hossein Esmaeili, and Nadirsyah Hosen, 'Islamic Family Law', in *Modern Perspectives on Islamic Law*, 2013 <<https://doi.org/10.4337/9780857934475.00011>>.

¹⁶ Azizah Al-Hibri, 'Islam, Law and Custom: Redefining Muslim Women's Rights', *American University International Law Review* 12, 1997.

¹⁷ Md Zahidul Islam, 'Interfaith Marriage in Islam and Present Situation', *Global Journal of Politics and Law Research*, 2014.

¹⁸ M Noor Harisudin, 'Urf Sebagai Sumber Hukum Islam (Fiqh) Nusantara', *Al-Fikr Jurnal Pemikiran Islam*, 2016.

¹⁹ Elman Jauhari, 'Implementasi Syirkah Dalam Perspektif Hukum Islam', *Jurnal Hukum Sehasen Vol.2 No.2 November 2019*, 2019.

not energy. It's different from Imam Syafi'i who rejects (does not allow) *Syirkah Mufawwadhah*, *Syirkah Abdan*, and *syirkah wujuh*.²⁰ The reasons for obtaining the *syirkah* model are as well as the reasons for the other madhab (Malikiyah and Hanabilah) that allow it are; The objective of the partnership, among others, is to share joint assets (*gono-gini*) between husband and wife.²¹ When a divorce occurs, there is no definite division (*tsabit*), for example, the wife is 50% and the husband is 50%. However, the distribution depends on the agreement between husband and wife based on deliberation on the basis of mutual approval. This is what is called *as-Shulhu* (peace) between husband and wife.

Conclusion

The ambiguity of the concept of sharing the assets of marriage between husband and wife who are Muslim when the marriage ends in Law Number 1 of 1974 and the amendment of Law Number 16 of 2019 concerning Marriage in the perspective of justice and legal certainty is contained in the provisions of Article 31, Article 35 and Article 36 of Law Number 1 Year 1974 and the amendment of Law No. 16 of 2019 concerning Marriage, also KHI that husband and wife have equal rights and positions, where both husband and wife are understood to have the same rights.

References

- Al-Hibri, Azizah, 'Islam , Law and Custom : Redefining Muslim Women's Rights', *American University International Law Review* 12, 1997.
- Besse Sugiswati, 'Konsep Harta Bersama Dari Perspektif Hukum Islam , Kitab Undang-', *Perspektif*, 2014.
- Black, Ann, Hossein Esmaeili, and Nadirsyah Hosen, 'Islamic Family Law', in *Modern Perspectives on Islamic Law*, 2013 <<https://doi.org/10.4337/9780857934475.00011>>
- Davies, John R., *Islam, Law, and Equality in Indonesia: An Anthropology of Public Reasoning, Islam, Law, and Equality in Indonesia: An Anthropology of Public Reasoning*, 2003 <<https://doi.org/10.1017/CBO9780511615122>>
- Erwinsyahbana, T., 'Sistem Hukum Perkawinan Pada Negara Hukum Berdasarkan Pancasila', *Jurnal Ilmu Hukum Riau*, 2012.
- Haniru, R., 'Hukum Waris Di Indonesia Perspektif Hukum Islam Dan Hukum Adat', *Al-Hukama: The Indonesian Journal of Islamic Family Law*, 2014.
- Harisudin, M Noor, "'Urf Sebagai Sumber Hukum Islam (Fiqh) Nusantara', *Al-Fikr Jurnal Pemikiran Islam*, 2016.
- Henry, Stuart, 'Legal Systems: Private', in *International Encyclopedia of the Social & Behavioral Sciences: Second Edition*, 2015 <<https://doi.org/10.1016/B978-0-08-097086-8.86079-1>>
- van Iersel, Tim, 'Gemeenschap', 2019 <https://doi.org/10.1007/978-90-368-2204-6_7>
- Jauhari, Elman, 'Implementasi Syirkah Dalam Perspektif Hukum Islam', *Jurnal Hukum Sehasen Vol.2 No.2 November 2019*, 2019.
- Karim, Abdul, 'Pola Pemikiran Imam Syafi'i Dalam Menetapkan Hukum Islam', *Jurnal Adabiyah*, 2013.
- Lathifah, Itsnaatul, 'Pencatatan Perkawinan ', *Al-Mazahib: Jurnal Pemikiran Hukum*, 2015.
- Md Zahidul Islam, 'Interfaith Marriage in Islam and Present Situation', *Global Journal of Politics and Law Research*, 2014.
- Michael, Tomy, 'Alienasi Dalam Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 Tentang Perkawinan', *Mimbar Keadilan*, 2017, 229 <<https://doi.org/10.30996/mk.v0i0.2195>>
- , 'Right to Have Rights', *Mimbar Keadilan*, 2017, 106 <<https://doi.org/10.30996/mk.v0i0.2203>>

²⁰ Abdul Karim, 'Pola Pemikiran Imam Syafi'i Dalam Menetapkan Hukum Islam', *Jurnal Adabiyah*, 2013.

²¹ Harisudin.

- O’Leary, K. Daniel, and Mathew C. Williams, ‘Agreement about Acts of Aggression in Marriage’, *Journal of Family Psychology*, 2006 <<https://doi.org/10.1037/0893-3200.20.4.656>>
- Santoso, ‘Hakekat Perkawinan Menurut Undang-Undang Perkawinan, Hukum Islam Dan Hukum Adat’, *Yudisia*, 2016.
- Sonata, Depri Liber, ‘Metode Penelitian Hukum Normatif Dan Empiris: Karakteristik Khas Dari Metode Meneliti Hukum’, *Fiat Justisia*, 2015 <<https://doi.org/10.25041/fiatjustisia.v8no1.283>>
- Stiles, Erin, ‘The Right to Marry ’, *Islamic Law and Society*, 2014 <<https://doi.org/10.1163/15685195-00213p03>>
- Syarifuddin, Amir, ‘Hukum Perkawinan Islam Di Indonesia’, *Asy-Syir’ah*, 2014.

Copyrights

Copyright for this article is retained by the author(s), with first publication rights granted to the journal.

This is an open-access article distributed under the terms and conditions of the Creative Commons Attribution license (<http://creativecommons.org/licenses/by/4.0/>).