

COLLECTIVE PROPERTY IN MARRIAGE ACCORDING TO LEGISLATION AND ITS IMPLEMENTATION IN JURISDICTIONS

Orba Susilawati

Mahasiswa S3 Prodi Hukum Islam Konsentrasi Hukum Keluarga Islam
Program Pascasarjan UIN Sunan Gunung Djati Bandung
Email: orba66@gmail.com

Abstract

The background of this research is that it begins with the lack of clarity regarding the boundaries and scope of joint assets mentioned in Law Number 1 of 1974 concerning Marriage and Presidential Instruction Number 1 of 1991 concerning Compilation of Islamic Law (hereinafter referred to as KHI). The definition of joint assets in the aforementioned regulation when correlated in different cases in religious courts there is friction in legal norms, it may even be a clash of principles, so that in the practice of dispute resolution in religious courts it creates disparity in decisions. The results showed that: Efforts to resolve the distribution of assets with husband and wife after divorce according to statutory regulations-the law and its implementation in the Court Decision in the DKI Jakarta High Court Area, the Judge decides the case by following the Islamic Law Compilation, namely $\frac{1}{2}$ there is also a different division.

Keywords: Collective Property, Marriage, Juridistictions

A. INTRODUCTION

Marriage as a special agreement (mitsâqâ ghalîzhâ) has given birth to rights and obligations between husband and wife. Husbands have obligations that must be fulfilled which are the rights of the wife, on the other hand, at the same time the wife also has obligations which are the rights of the husband (Al-Qurthubi, 1995 : 98). Among the obligations of the husband, which is the right of his wife, is to fulfill household income. In addition, the husband as the father also has the obligation to support his child.

Islam has outlined that as long as the marriage lasts until divorce occurs, even until the wife finishes the iddah period, the husband is obliged to pay for his wife's support. (Al-Anshariy, n.d. : 22). Likewise, a husband as a father has an obligation to support his child until the child grows up. The livelihood in these two categories is the income of the wife and children, which can be called the household income.

Regarding the living material itself, in general it consists of three main elements, namely food, clothing and shelter (al-tha'am, al-kiswah, and al-suknâ).

The obligation to support food and clothing is stated in the letter al-Baqarah [2] verse 233 as follows :

وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ ۚ لَا تُكَلَّفُ نَفْسٌ إِلَّا وُسْعَهَا ۚ لَا تُضَارَّ وَالِدَةٌ
بِوَلَدِهَا وَلَا مَوْلُودٌ لَهُ بِوَلَدِهِ ۚ وَعَلَى الْوَارِثِ مِثْلُ ذَلِكَ

"...And it is the father's duty to feed and clothe the mothers in a ma'ruf manner. Someone not burdened but according to ability levels. A mother should not suffer misery because of

her child and a father because of her child, and an inheritor has such an obligation...” (Kemenag, 2016 : 102).

The verse above confirms that the husband is obliged to provide for his wife. In addition, the husband as the father is also obliged to support his child. Because a child has not been able to meet his needs while his father is the person who is most closely related to the child. Even the philosophy of obliging the husband to provide for the wife who has been bullied while breastfeeding is for the sake of considering the benefit of the child (Al-Sayis, n.d. : 157).

With regard to the issue of residence, Allah emphasized in Surah al-Thalaq [65] verse 6:

أَسْكِنُوهُنَّ مِنْ حَيْثُ سَكَنْتُمْ مِنْ وُجْدِكُمْ وَلَا تُضَارُّوهُنَّ لِتُضَيِّقُوا عَلَيْهِنَّ

“Place them (the wives) where you live according to your ability and do not trouble them to constrict their (hearts).” (Kemenag, 2016 : 234).

According to Muhammad Musthafa al-Maraghi, this verse explains that a husband is obliged to provide a place to live to a wife who has been bullied according to his abilities, because the residence is part of the income. Furthermore, al-Maraghi explained that the husband is prohibited from making it difficult for the wife in matters of residence, such as by placing other people whom the wife does not like to live with him, to force the wife to leave the residence (A-Maraghi, 1993 : 236).

Some of the opinions of the fuqahâ` regarding the obligation to provide a living, after going through a selection process (al-talfîq wa al-takhayyur) then an agreement was taken and was outlined in Article 80 paragraph (2) Presidential Instruction Number 1 of 1991 concerning KHI which reads: Husband is obliged protect his wife and provide all the necessities of household life according to his abilities. Then in paragraph (4) of the article it is stated that according to his income the husband bears: (a) a living, kiswah and a place of residence for the wife; (b) household expenses, treatment costs and medical expenses for the wife and children; (c) tuition fees for children.

The joint property dispute that has been handled in the DKI Jakarta High Religious Court at the appeal level has certainly gone through a long process for various reasons that occur between husband and wife. And also judges in finding a law certainly through the reasons that are the basis for making decisions and also through deep considerations and ijtiḥad so that the judge's decision is correct and correct.

In Islamic law, a judge is recommended to be fair in deciding a decision. All decisions taken must be considered properly. Good judgment must be in accordance with the rules stipulated by syara', and it is expected that the judge's consideration must be related to the benefit of the community. Judges as enforcers of justice must decide a case according to the syari'at. Shari'at teaches in resolving disputes judges do not follow lust because they want to deviate from the truth.

If the law is enforced fairly in accordance with the teachings of the Shari'ah, peace will be created in society. Collective property disputes handled by judges must also be resolved fairly without taking the side of either party. The determination of the status and ownership of joint assets must be carried out carefully and fairly in accordance with the provisions stipulated by law and not deviating from the provisions of syara'. This is what makes the

author want to examine in depth the judge's decision on the joint property dispute case that occurred in the DKI Jakarta High Religious Court at the appeal level.

In the practice of dispute resolution in court, there are several court decisions within the religious court regarding the object of this research which differ in explaining the legal relationship between shared assets and the obligations of husbands and / or fathers in providing household support. There are several court decisions that allow a joint property claim to be filed together with a lawsuit regarding the maintenance of the wife and children on the grounds that the two have a very close legal relationship. On the other hand, there are also several court decisions that do not allow the filing of cases in a cumulative manner between joint assets and the livelihoods of the wife and children on the grounds that the cumulative lawsuit is only justified if it is expressly stated in the laws and regulations, but this kind of limitation also does not have a clear basis in the statutory regulations. -invitation.

The religious court, which has the main task of examining and adjudicating certain cases for Muslims, includes the settlement of the distribution of joint assets which refers to the provisions of Article 97 of the Compilation of Islamic law which requires the distribution of joint assets to be divided in two. The judge argued that all assets obtained in marriage are joint assets. Often the wife is disadvantaged and experiences injustice in the distribution of joint assets. It turns out that the things that the husband has given to his wife must be divided in half. In QS. An Nisaa verse 20 emphasizes "And if you want to replace your wife with another wife, while you have given them a lot of wealth, then do not take back from her at all".

The framework of thinking in this study uses 3 (three) theories. The grand theory in this study is a theory of justice juxtaposed with the theory of legal objectives in a positive legal perspective. The middle theory in this research is the theory of Islamic law al-mashlahah. Meanwhile, apply theory in this research is the theory of rights and obligations.

B. METHOD

As illustrated in the title and problem formulation above, this research is a normative juridical research. It is called normative legal research because this research is conducted or aimed only at written regulations or other legal materials. Then it is referred to as document study and library research because this research is mostly conducted on primary data in the library (Nasution, 2008).

C. RESULT AND DISCUSSION

Joint assets exist at the time the marriage takes place while the inheritance is obtained before the marriage takes place, however the reality is that many families in Indonesia do not record their joint assets. In a new marriage, the division of shared assets and assets is still clear, but at the age of marriage that is old, the assets and collective assets are difficult to explain in detail one by one.

The role of judges as an apparatus of judicial power after Law Number 7 of 1989 concerning religious courts, in principle, is none other than carrying out the function of the judiciary in accordance with the provisions of the applicable regulations. In carrying out this judicial

function, judges of the Religious Courts must fully realize that the main duty of the judge is to uphold law and justice.

In this regard, in every decision a judge wishes to impose in ending and settling a case, three essential things need to be considered, namely justice (*gerechtigheit*), certainty (*rechtsecherheit*), and benefit (*zwachmatiheit*). These three things must receive attention, balanced professionally, although in practice it is very difficult to make it happen. The judge must do everything possible so that every decision that is passed contains the principle mentioned above. Do not let a judge's decision cause unrest and chaos in people's lives, especially for justice seekers.

According to the author, Justice actually relates to conscience, not definition nor formal-formal matters. It is closely related to the practice of everyday human life. Not a matter of legal theories. It seems that according to the theory of legal science the verdict is a good, scientific argumentative. But actually, it hasn't touched the sense of justice that lives in society. So that is precisely what Gustav Radbruch said: "*Summum ius summa iniuria*", that the highest justice is conscience. People who are too obedient to the law as is will often be detrimental to justice.

One of the goals of the existence of law is that there is an element of justice, certainty and legal usefulness. Justice is a result of a decision-making process that contains truth, is impartial, can be accounted for and treats every human being in an equal position before the law. Justice is also shown by giving something to another person. Disputes over the distribution of joint assets after divorce are the authority of the Religious Courts and this case can be filed after the divorce occurs and can also be filed together with a lawsuit / application for divorce (accumulation).

After it is clear which assets are truly joint assets between the Plaintiff and the Defendant, then the assets are divided into two between the Plaintiff and Defendant. On this decision, the defendant and the plaintiff did not appeal to a higher court regarding what they were entitled to.

Although almost all judges' considerations focus on the principle of legal certainty, this does not mean that the judge does not consider the principle of justice and benefit. In this decision the judge also considers according to the principles of justice and benefit. The panel of judges gave the same rights to the Plaintiff and Defendant and this decision also provided benefits to both parties so that the dispute could be resolved.

Sharing of joint assets in a divorce must be done, but a husband and wife only questioned the distribution of assets *gono-gini* after a court ruling. This is because husband and wife do not think about this property at all. And the problem that arises after the divorce is the problem of property.

Legally and formally in the statutory regulations both in Law Number 1 of 1974 concerning Marriage, the Civil Code (KUHPerdata), and in the Islamic Law Compilation, the term *gono-gini* is mentioned using the term joint property. As the main basis for marriage in Indonesia, Law Number 1 of 1974 concerning Marriage in Chapter VII Article 35 to Article 37. Article 35 of the Marriage Law states that assets acquired during marriage become joint assets, and the inheritance of each -Each husband and wife and the property obtained by each as a gift

or inheritance is under their respective control as long as the parties do not determine otherwise.

Article 36 of the Marriage Law states that regarding joint assets, husband and wife can act with the consent of both parties, and the assets of each husband and wife have the full right to carry out legal actions regarding their property. Article 37 of the Marriage Law states that if a marriage breaks up due to divorce, joint assets are regulated according to their respective laws. Based on the description of Article 37, according to the respective laws, namely religious law, customary law and other laws, it can cause different interpretations of joint property after divorce and can become a conflict or conflict in the enforcement of one of these laws. The distribution of the joint assets of the husband and wife after the divorce did not find an agreement in the distribution so that this joint property became a dispute.

In Islam there are no specific rules how to divide property gono-gini. Islam only provides general signs in solving common problems including:

The distribution of property gono-gini depends on the agreement of the husband and wife. This agreement in the Koran is referred to as "ash-Shulhu", which is an agreement to make peace between the two parties (husband and wife) after they disagree.

Allah subhanhu wa ta 'ala believes:

وَإِنِ امْرَأَةٌ خَافَتْ مِنْ بَعْلِهَا نُشُورًا أَوْ إِعْرَاضًا فَلَا جُنَاحَ عَلَيْهِمَا أَنْ يُصْلِحَا بَيْنَهُمَا صُلْحًا ۗ
وَالصُّلْحُ خَيْرٌ ۗ وَأُحْضِرَتِ الْأَنْفُسُ الشُّحَّ ۗ وَإِنْ تُحْسِنُوا وَتَتَّقُوا فَإِنَّ اللَّهَ كَانَ بِمَا تَعْمَلُونَ خَبِيرًا

"And if a woman is worried about nusyuz or indifference from her husband, then it is okay for both of them to make real peace and that peace is better (for them)." (QS: An. Nisa': 128).

This verse describes the peace that a husband and wife take after they disagree. Usually in this peace there are those who have to give up their rights, in the above paragraph, the wife gives up her rights to her husband for the sake of harmony between the two. This is corroborated by the words of Rasullah Sallallahu Alaihi Wassallam: Gari Amru 'bin Auf al-Muzani from his father from his grandfather that Rasullah Sallallahu Aaihi Wassallam said: "Peace is permissible among Muslims, except peace which forbids what is lawful and peace that justifies what is haram" . (Narrated by: Abu Dawud, Ibn Majah, and validated by Tirmidhi).

Likewise in the distribution of assets gono-gini, one of the two parties or both sometimes have to give up part of their rights in order to reach an agreement. For example: a husband and wife who both work and buy household items with both of their money, then when they both divorce, they agree that the wife gets 40% of the goods, while the husband gets 60%, or the wife 55% and husbands 45% or with other shares, all submitted to the agreement of both of them. In the KHI (Compilation of Islamic Law) in the Religious Court, article 97, which states that:

"Widows or widowers who are divorced are each entitled to one half of the joint property as long as the marriage agreement does not specify otherwise" (Kompilasi hukum Islam, 2004).

The obligation to share equally, that is, each gets 50% as in the KHI does not have arguments that can be accounted for, so that the correct opinion in the distribution of assets is returned to the agreement between husband and wife, where the distribution of assets is gono-gini. This is a dispute between husband and wife because they cannot find a mutual agreement in the distribution.

Article 38 of Law Number 1 of 1974 concerning Marriage states that there are at least three causes for the breakdown of a marriage, namely; because of death, because of divorce or divorce, and on court decisions. The death of one of the husband and wife automatically results in the breakdown of the marriage. As for the break up of a marriage due to divorce, it can occur through divorce or based on a divorce suit from the wife which is granted by the Religious Court. Marriages can also be terminated because of the Court's decision on the request of one party where the other party is missing, not necessarily in succession and lasts for at least 2 years (Article 39 of Marriage Law No. 1975, in conjunction with Articles 16 and 19 of Government Regulation No.9 of 1975).

Islamic scholars differ in their opinion regarding collective property, especially in terms of its legal basis: First, it says that joint property is regulated in Islamic law on the basis of the law of Surah Al-Baqarah verses 228 and Surah an-Nisa 'verses 21 and 34. The verse provides a view of the assets obtained by husband and wife due to their efforts, either alone or in collaboration, are joint property. Second, while the second opinion is that syirkah is the basis of collective property in Islamic law, or an agreement between husband and wife made before marriage (marriage agreement).

At least in Islamic society, there are two patterns regarding the treatment of assets obtained by husbands and / or wives during marriage: (a) Islamic society separates the property rights of husband or wife. In this pattern there is no common asset. However, if the husband works, the wife is still provided with a living for household needs. (b) The Islamic community mixes the proceeds of husband and wife, on the basis that the marriage contract contains syirkah / partnership / partnership agreement, just like a cooperative. So the assets resulting from a legal husband and wife marriage are joint assets (Zein, 2004 : 59).

Positive law regulates marriage assets in more detail than Islamic law. Regulations regarding marital assets can be found in the Civil Code or BW, in Law no. 1 of 1974 concerning Marriage and Compilation of Islamic Law / KHI. The explanation is as follows: (a) Civil law refers to joint property or marital property with *algehele gemeenschap van goederen* or a mixture of wealth. According to Prof. Since the beginning of the marriage, there is a mixture of the husband's wealth and the wife's wealth, as long as no agreement is made, this situation lasts forever and cannot be changed during the marriage (KHUerdata article 119).

Furthermore, subekti explained that the unanimous union includes all assets and passive, both those brought by each party into the marriage or those that will be obtained in the future (Subekti, 1978 : 32). Assets referred to in unified union include all assets that were owned before marriage and after the marriage contract, assets, gift assets and inheritance all become joint assets, gifts that are not specifically given will become joint assets, even debts made before marriage will become joint assets. the debt of unity. (b) Game assets in Law no. 1 of 1974 concerning marriage is regulated in article 25 which reads: 1) Assets acquired during marriage become joint assets; 2) The inheritance of each husband and wife and the

assets obtained by each as a gift or inheritance are under their respective control as long as the parties do not determine otherwise.

In order to emphasize the scope of joint assets above M. Yahya Harahap (Former Supreme Court Justice of the Republic of Indonesia), quoted by Drs. HM Anshary MK. SH.MH. which is included in the category of joint assets are: (a) Assets purchased during marriage, (b) Assets purchased after divorce that are financed by joint assets, (c) Assets acquired during marriage, (d) All income from joint assets and individual assets. (e) The income of the husband and wife during the marriage (K, 2010 : 134-136).

Meanwhile, what is not included in joint assets according to Law No.1 of 1974 concerning Marriage are: (a) The inheritance of each husband and wife, (b) Assets obtained by each husband and wife in the form of grants, wills and inheritance received by husbands. or wife either before or after marriage. However, these provisions can be distorted if the husband and wife determine otherwise in a written agreement. With the enactment of Law no. 1 of 1974 concerning marriage will invalidate the articles in the Civil Code which regulate the same issue (see Transitional Rules).

The arrangement of joint assets in the Compilation of Islamic Law regulates in more detail and in detail regarding joint assets, the provisions in KHI are more detailed in the nature of the arrangements in Law No.1 of 1974 concerning marriage. Collective assets in KHI are regulated in CHAPTER XIII ASSETS IN MARRIAGE articles 85-97 regulate the following: (a) Types of assets in the family: Assets, gifts, inheritance, joint assets, (b) Responsibilities, (c)) Dispute resolution institutions, (d) The form of property, (e) Guarantee of assets, (f) Liability for debt, (g) Arrangement of joint assets in polygamous marriages, (h) Confiscation of guarantees, (i) Distribution in case of divorce, divorce of life or divorce.

We can find justice in shared assets in the distribution of joint assets after a divorce, namely how the distribution is determined by the court judge. Is it in accordance with the justice felt by the community or not. The indication is to see whether after the distribution of assets the parties accepted and there were no further disputes (Anshary, 2010 : 149).

D. CONCLUSION

Efforts to resolve the distribution of assets together with husband and wife after divorce according to statutory regulations and its implementation in Court Decisions, namely the concept of sharing joint assets for Muslims is the authority of the Religious Courts. Legal protection measures for joint property issues can be decided by the court in a way that can be $\frac{1}{2}$ between the plaintiff and the defendant or it can be $\frac{1}{3}$ and $\frac{2}{3}$, depending on the evidences from the parties. So that judges can provide a sense of justice, certainty and legal sanctity.

Reference

- Al-Anshariy, M. ibn A. al-Ramaliy. (n.d.). Syarh Zayd ibn Ruslân. Dar al-Ma'rifah.
- Al-Qurthubi, M. (1995). Al-Jâmi' li Ahkâm al-Qur`ân (Vol. 5). Dar al-Ihya' li Tirkah al-'Arabi.
- Al-Sayis, M. 'Ali. (n.d.). Tafsîr Âyât al-Ahkâm. Dar Al-Kutb Al-Ilmiyah.

- A-Maraghi, M. M. (1993). *Tafsîr al-Marâghi* (A. Bakar, Trans.; Vol. 28). CV. Toha Putra.
- Anshary, M. M. (2010). *Hukum perkawinan di Indonesia: Masalah-masalah krusial*. Pustaka Pelajar.
- Kemenag. (2016). *Al-Qur'an dan Terjemahnya*. Jakarta: Kementerian Agama Republik Indonesia.
- Kompilasi hukum Islam. (2004). Pustaka Widyatama.
- Nasution, B. J. (2008). *Metode Penelitian Ilmu Hukum*. Mandar Maju.
- Subekti. (1978). *Pokok-pokok hukum perdata*. P.T. Intermasa.
- Zein, S. E. M. (2004). *Problematika hukum keluarga Islam kontemporer: Analisis yurisprudensi dengan pendekatan ushuliyah*. Diterbitkan atas kerja sama Fakultas Syariah dan Hukum UIN Jakarta dan Balitbang Depag RI.