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The Construction of Religious Court Judges' Decisions in the Case of Joint Assets Based on Islamic Law and Legal Development*

Isnawati Rais,[1] **Ya Rakha Muyassar**[2]

Syarif Hidayatullah State Islamic University, Jakarta Indonesia

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Abstract

The judges of the religious courts apply the rules of Article 97 of the KHI to the division of 1/2-1/2 of joint property in determining matters concerning joint property. However, in the decision No. 70/Pdt.G/2002/PA.Mrk, 330/Pdt.G/2004/PA.Tgrs, and 278/Pdt.G/2005/PA.Bkt, judges of religious courts do not rely on this clause. PA Merauke set the division of common property as 4/10–6/10, PA Tigaraksa as 20%-80%, and PA Bukittinggi as 1/4–3/4. This study examines the concerns and perspectives of religious court judges in considering matters relating to joint property. By using a comparative methodology, this research uses a normative-based, qualitative-oriented, and legally binding method. The results of the study stated that the panel of judges in the three religious courts differed from the applicable legal provisions, taking into account various conditions. In deciding joint property cases, the panel of judges considers five elements, including contributing factors, legal arguments, a sense of justice, sources of shared wealth, and contextual interpretation of a statutory provision.

Keywords: Shared Assets; Islamic Law; Progression of Law

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[1] **Isnawati Rais** is a lecturer of the Sharia and Law Faculty, Universitas Islam Negeri Syarif Hidayatullah Jakarta. ORCID: http://orcid.org/0000-0002-5122-5467. Email: isnawatirais@uinjkt.ac.id

[2] **Ya` Rakha Muyassar** is a Lecturer of the Faculty of Law, Panca Bhakti University, Pontianak. Email:yarakhamuyassar@upb.ac.id

*Corresponding Author: isnawatirais@uinjkt.ac.id

Kontruksi Putusan Hakim Pengadilan Agama dalam Perkara Harta Bersama; Perspektif Hukum Islam dan Progresifitas Hukum

Abstrak:
Hakim pengadilan agama menerapkan aturan Pasal 97 KHI terhadap pembagian 1/2-1/2 harta bersama dalam menentukan hal-hal yang menyangkut harta bersama. Namun dalam putusan No. 70/Pdt.G/2002/PA.Mrk, 330/Pdt.G/2004/PA.Tgrs, dan 278/Pdt.G/2005/PA.Bkt, hakim pengadilan agama tidak bergantung pada klausa ini. PA Merauke menetapkan pembagian milik bersama sebagai 4/10–6/10, PA Tigaraksa sebagai 20%-80%, dan PA Bukittinggi sebagai 1/4–3/4. Penelitian ini mengkaji keprihatinan dan perspektif hakim pengadilan agama dalam mempertimbangkan hal-hal yang menyangkut harta bersama. Dengan menggunakan metodologi komparatif, penelitian ini menggunakan metode yang berbasis normatif, berorientasi kualitatif, dan mengikat secara hukum. Hasil penelitian menyatakan bahwa majelis hakim di ketiga pengadilan agama berbeda-beda dari ketentuan hukum yang berlaku, dengan mempertimbangkan berbagai kondisi. Dalam memutus perkara harta bersama, majelis hakim mempertimbangkan lima unsur, antara lain faktor penyumbang, dalil hukum, rasa keadilan, sumber kekayaan bersama, dan interpretasi kontekstual suatu ketentuan undang-undang.
Kata Kunci: Harta Bersama; Hukum Islam; Progresifitas Hukum

Текст научной работы на тему «Построение решений судей религиозных судов по делу о совместном имуществе на основе исламского права и правового развития»

Абстрактный:
Судьи религиозных судов применяют правила статьи 97 КХИ к разделу 1/2-1/2 общего имущества при решении вопросов о совместном имуществе. Однако в решениях № 70/Pdt.G/2002/PA.Mrk, 330/Pdt.G/2004/PA.Tgrs и 278/Pdt.G/2005/PA.Bkt судьи религиозных судов не полагаться на этот пункт. ПА Мерауке установил раздел общего имущества в пропорции 4/10–6/10, ПА Тигаракса – 20–80 %, ПА Букиттингги – 1/4–3/4. В этом исследовании рассматриваются опасения и перспективы судей религиозных судов при рассмотрении вопросов, касающихся совместной собственности. Используя сравнительную методологию, это исследование использует нормативный, качественный и юридически обязательный метод. Результаты исследования показали, что состав судей в трех религиозных судах отличался от применимых правовых норм с учетом различных условий. При решении дел о совместном имуществе коллегия судей учитывает пять элементов, включая способствующие факторы, юридические аргументы, чувство справедливости, источники общего богатства и контекстную интерпретацию положения закона.
Ключевые слова: совместные активы; исламское право; Правовой прогресс

A. INTRODUCTION

Marriage is a legally binding act between a man and a woman (Ali, 2012: 51). Marriage does not only realize worship, but also produces legal consequences (Bunyamin, 2017: 3). According to G. S. Black, if the legal framework is not backed by sociology, it cannot see social realities correctly (Kharlie, 2013: 37).

Marriage confers privileges and responsibilities on the spouses. These rights and responsibilities are governed by Article 32 paragraphs (1) and (2) and Article 34 paragraph (1) of the Marriage Law (Aripin, 2010: 608). Each side is required to fulfill their tasks and responsibilities in order for the marriage to be successful (Arif, 2006: 17). With the realization of the synergy between husband and wife, they will attain body and spirit tranquility, as well as a holy link (Romli, 2009: 10). However, not everything goes according to plan; sometimes marriages end in divorce (Saleh, 1996: 206).

As a component of Indonesia's legal system, religious courts have the jurisdiction to inspect, hear, decide, and resolve Islamic civil cases in line with the law (Ramli, 2013: 3). The judgment must be consistent with its actual aim, namely: first, it must contain an authoritative solution; second, it must contain efficiency; third, it must be consistent with the intent of the law; fourth, it must contain stability considerations; and fifth, it must be fair. As a result of the fact that the judge's decision not only imposes procedural justice, but also substantive justice, "summun ius summa inuiria" implies that conscience is the ultimate kind of justice (Lemek, 2007: 25).

In Indonesia, cases of marriage and inheritance of Indonesian citizens who are Muslim are resolved in religious courts. Prior to 1974, judges decided cases based on Islamic law contained in 13 books of fiqh, namely: *al-Bâjûrî, Fath al-Mu`în, Syarqâwî `alâ al-Tahrîr, Qalyûbî/Mahallî, Fath al-Wahhâb* dengan syarahnya, *Tuhfah, Taghîb al-Musytâq, Qawânîn al-Syar`iyyah lil al- Sayyîd bin Yahyâ, Qawânîn al-Syar`iyyah li al-Sayyîd Shadaqah Dahlân, Syamsûrî fî al-Farâ`id, Bughyat al-Mustarsyidîn, Al-Fiqhu `alâ al- Madzâhib al-Arba`ah, Mugnî al-Muhtâj* (Manan, 2004: 67). After the implementation of the Marriage Law and the Compilation of Islamic Law (KHI), religious court judges base their case decisions not only on fiqh books and the Marriage Law, but also on the KHI's requirements (Bakar, 1993: 363).

In practice, judges of religious courts do not always determine matters in conformity with the law. In some instances, it may be deemed acceptable, while in others, it may not. Judges can stray from current legal provisions in order to

develop new laws that satisfy the parties' sense of justice (rechtsvinding & rechtsschepping). The provisions of Article 5 paragraph 1 of Law Number 48 of 2009 concerning Judicial Power ensure this authority.

The matter of joint property is one of the absolute competencies of religious courts that are experiencing legal development and advancement. In the event of a divorce, the division of shared assets is 50/50. In accordance with the terms of Articles 96 and 97 of the KHI. Among the judgements that breached this requirement was the Supreme Court of the Republic of Indonesia's 67K/AG/2007 decision. The judge awarded the wife two-thirds of the community property, while the husband received only one-third.

Haqiki Zaini (2018) in his thesis entitled "Disparity in Judges' Decisions on Joint Assets; Case No. 229/Pdt.G/2011/PA.CN jo 115/Pdt.G/2012/PTA.Bdg jo 21K/AG/2014" found that there were differences in the distribution of joint assets between the first instance, appeal, and cassation. Evi Djuniarti (2017) added in the De Jure Legal Research Journal Vol. 12 No. 2, entitled "The Position of Joint Assets in Marriage; According to Jurisprudence and Indonesian Positive Law and Practice of Religious Court Decisions, which examines decisions at the first level regarding joint assets in the perspective of Islamic law and positive law in Indonesia.

The relationship between human rights, KKG, and legal advancement is one of the most significant subjects in the evolution of legal thought in the realm of marriage. The development of Islamic family law and inheritance law has been heavily criticized (Spenser, 2002: 72). Due to the sensitivity of the subject and the fact that it concerns both spouses, joint property is one of the more intriguing topics to debate. Regardless matter who contributes more to the acquisition of joint property, many feel disadvantaged by the distribution of 1/2 – 1/2. This consideration of justice is hoped to be able to settle these issues (Firdawaty, 2017: 89). As a legal concept, the theory of legal development is ideally suited for joint property situations. This is designed to make judges more attuned to contemporary situations, so that the judgements they render reflect a sense of fairness (Faizal, 2015: 79).

B. METHODS

This study's methodology employs a qualitative, normatively-based legal procedure. The first method (juridical-normative) is based on the appropriate legal provisions, beginning with the Marriage Law, KHI, and Islamic Law and progressing to the Legal Progressive theory for joint property issues resolved by

PA, PTA, and Supreme Court justices. As for the second way (comparative approach), the author employs it as a supplement to the wealth of knowledge and the breadth of the study of judgments that are utilized as research subjects, ranging from positive law (laws and regulations) to Islamic law and the theory of legal evolution.

C. RESULTS AND DISCUSSION

1. The Concept of Shared Assets According to Islamic Law

Generally speaking, Islamic law does not accept joint ownership. There is no asset mixing due to marriage (Rais, 2011: 2). In general, there is no discussion of joint property, either in the Qur'an, sunnah, or classical fiqh books. Islamic law is more concerned with the separation of property in marriage (BP4 Pekanbaru, 2020: 23). There is no combination of assets due to marriage, except in the form of syirkah (Syarifuddin, 2007: 165).

M. Yahya Harahap is of the opinion that the perspective of Islamic law regarding joint property is in line with what was stated by Muhammad Syah, namely that joint livelihoods between husband and wife should be included in the rubu` al-mu`âmalah. Therefore, if you want to discuss joint property, it can be studied in the discussion of syirkah (As`ad, 2010: 2).

Classical fiqh literature only discusses household furnishings. Imamiyah and Hanafiyah concur that the dowry is a specific property of the wife and one of her rights, whereas the husband is responsible for meeting other requirements. According to Malikiyah, the woman is obligated to purchase home equipment, which, by custom, she purchases with the dowry she receives (Mughniyah, 2006: 382). If there is a disagreement, it is first determined if the equipment is designed for men, women, or both. According to the Imami and Hanafiyah schools of thought, if the things are only helpful for the requirements of men, their ownership is based on a declaration by the husband accompanied by an oath, and vice versa. If the items can be utilized together, ownership is determined by who can provide evidence of ownership. If not, swearing is required (Mughniyah, 2006: 383).

Regarding joint property under Islamic law, it is possible if an agreement for the merger of assets is reached during the marriage contract procedure and is carried out either during the contract or later (Syarifuddin, 2007: 176). Khoiruddin Nasution remarked that Islamic law governs the split of property between husband and wife, unless the parties involved stipulate differently

(Basyir, 1999: 69). Islamic law permits husband and wife to negotiate a marriage contract with flexibility (Nasution, 2005: 192).

M. Yahya Harahap stated that, from the perspective of Islamic law, joint property is consistent with Muhammad Shah's statement that a husband and wife's shared means of subsistence should be included in rubu' al-mu'amalah, although this was not particularly addressed. This is due to the fact that the authors of ancient fiqh works are mostly Arabs who do not accept the existence of a shared source of income between husband and wife (Satrio, 1983: 188). According to Ahmad Azhar Basyir, Islamic law accords each party uncontestable property rights and control (Basyir, 2004: 192). According to the opinions of the aforementioned authorities, Islamic law does not recognize joint property. This is intended to simplify the divorce procedure so that it is not cumbersome and difficult.

There is no reference of joint ownership in Islamic legal literature, as the concept originated in Indonesian al-'urf. It is comparable to syirkah to examine the law. Ismail Muhammad Syah argued in his dissertation that husband and wife should form a partnership or syarikat to support themselves (Syah, 1978: 55). In classic fiqh texts, joint property can only exist when syirkah is present (Manan, 2017: 109). Experts in jurisprudence define syirkah as a contract between two capital- and profit-aligned parties (Sabiq, 1999: 210). The legal basis of Shirkah in Islam. Q.S. al-Shad: 24.

The scholars of fiqh differ on the division of syirkah. Broadly speaking, the Egyptian fuqaha divide syirkah into 4 types: (Al-Qurtubi, 1960: 201): a. Syirkah `Inân, namely limited syirkah in the form of combining property and business for profit; b. Syirkah `Abdân, namely syirkah in the field of providing services or doing work; c. Syirkah Mufâwadah, namely syirkah that is not limited to the combination of assets and businesses to earn money only, but also includes the acquisition of each party in other ways such as a person getting a gift, grant, and others; d. Syirkah Wujûh, is syirkah between two or more people with assets with trust.

Based on the many types of syirkah discussed previously, it may be determined that joint property is included in the 'abdan syirkah, as husband and wife work together to sustain their families. This is consistent with the viewpoint of Ismail Muhammad Syah because, in practice, both husband and wife in Indonesia labor to provide for their daily needs and retirement savings (Syah, 1978: 56).

There is no conventional distribution rule for joint property. Islamic law merely provides general guidelines for its resolution. According to Islam, the allocation of joint property depends on the agreement between the husband and wife. This arrangement is called "Ash Shulhu" and it is a peace treaty between two parties following a conflict. Similarly, in order to establish a distribution agreement, one or both parties must sometimes give up some of their rights. For example, both the husband and wife work and purchase household items with their own funds. Upon divorce, they agree that the wife will receive 40% of the property and the husband will receive 60%. It is up to the two of them to reach an agreement (Faizal, 2015: 79).

2. Provisions on Joint Assets in accordance with Indonesian Law

The linguistic definition of property is "things that become riches," whereas the definition of the term is "anything that can be controlled and exploited." Article 35 of the Marriage Law defines joint assets as those produced jointly by the husband and wife during the marriage. In Minangkabau, joint property is referred to as *"Harta-Suarang";* in Kalimantan, *"restricted goods";* in South Sulawesi, *"Cakkara";* in Central and East Java, *"gono-gini";* and in West Java, *"guna-kaya"* or *"mix-kaya."*

Not only in terms of the mention of the name that experienced a difference, but also in terms of distribution. Although in general, husband and wife both get part of the joint property, but there are differences in the distribution procedure according to customary law. In some areas in Central Java, for example, it is customary to divide property with the husband to get two-thirds and the wife to get one-third. The principle of distribution is called "*sakgendong-sakpikul*". This distribution procedure is also known on the island of the gods as "*susuhun-sarembat*". Likewise, in the Bagai islands there is also a division of joint property like this. However, in its development, the principles of "*sakgendong-sakpikul*" and "*susuhun-sarembat*" are in their development more and more swallowed up by the times, are no longer used.

Regarding joint property in marriage, it is regulated in Article 35-37 of the Marriage Law, namely: Article 35 (1) Assets obtained during marriage become joint property; (2) The innate property of each husband and wife and the property obtained by each as a gift or inheritance are under the control of each as long as the parties do not specify otherwise; Article 36 (1) Regarding joint assets, husband and wife can act with the approval of both parties; (2) Regarding each other's property, husband and wife have the full right to carry out legal actions regarding their property.

From the 2 provisions of this article, it can be understood that there are 2 types of property in a marriage, including: 1. Congenital Assets. Assets owned by husband and wife before the marriage bond, and property they obtained as a gift or inheritance. Legally, husband and wife have full authority to use it without the consent of other parties as regulated in Article 36 paragraph (2). Congenital assets can be combined into joint assets according to the agreement, as regulated in Article 35 paragraph (2); 2. Joint Assets. Assets obtained by husband and wife during the marriage bond. In its use there must be approval by the other party. In the event of a divorce, the settlement of joint property is regulated according to the religion adopted or according to the customary law in force in the place where they live.

According to the provisions of the Marriage Law, the division of joint property is regulated briefly, concisely, and clearly in Chapter VII and only consists of 3 articles, namely Articles 35, 36, and 37. While in KHI it is regulated more clearly and in detail in Chapter XIII Article 85 -97 concerning Wealth in Marriage.

Article 85, "In the joint property as a result of marriage it does not rule out the possibility of property belonging to each party, both husband and wife; Article 86 (1) states that basically there is no mixing of assets between husband and wife due to marriage; Article 86 (2) states that the wife's property remains the right of the wife and is fully controlled by the wife, and vice versa; Article 87 (1) innate property brought by each party obtained as a gift or inheritance, is under the control of each party as long as they do not specify otherwise in the marriage agreement; Article 87 (2) husband and wife have full rights to carry out legal actions on their respective assets in the form of grants, gifts, sodaqoh, and others; Article 88 if there is a dispute between husband and wife regarding joint assets, the settlement is submitted to the Religious Court; Article 89, the husband is responsible for the custody of the joint property; Article 90, the wife is also responsible for maintaining joint assets, both her own property and the property of her husband.

Article 91 consists of four paragraphs. (1) Joint assets can be in the form of tangible objects or intangible objects; (2) Tangible joint assets include immovable objects, movable objects, and securities; (3) Intangible joint assets may be in the form of rights and obligations; (4) Joint assets may be used as collateral by one party upon the appointment of the other party. Then further regulated in Article 92, husband and wife without the consent of the other party are not allowed to sell or transfer joint property. Article 93 (1): Joint assets of a husband who has more than one wife, each separate and independent; (2) Ownership of joint

property from the marriage of a husband who has more than one wife starting from the time the second, third, and fourth marriage contracts take place. Article 95 (1), without prejudice to the provisions of Article 24 paragraph 2 letter (c) of Government Regulation Number 9 of 1975 and Article 136 paragraph (2), allows husband and wife to petition the Religious Court to place a confiscation of joint assets without filing for divorce, if one party commits an act that harms and endangers the joint property, such as gambling, intoxication, extravagance, etc. (2) During the term of confiscation, the sale of joint assets for the family's benefit may be conducted with the authorization of the Religious Court.

Article 96 consists of 2 paragraphs: (1) In the event of a divorce, half of the joint property becomes the right of the spouse who lives longer; (2) The distribution of joint assets for the missing husband and wife must be postponed until there is certainty of death, either real death or legal death based on the decision of the Religious Court. The provisions of Article 97, in the event of a divorce, each party gets one-half of the joint property, as long as the parties do not specify otherwise in the marriage agreement.

Briefly, the main points of joint property in Chapter XIII KHI can be described as follows: a. Joint assets are separated from each other's personal (innate) assets: 1) Personal assets remain private property, and are fully controlled by each party; 2) Joint property becomes the joint right of husband and wife and is completely separated from personal property; b. Joint assets start from the date of commencement of the marriage: 1) Since then joint property is automatically formed; 2) Regardless of who is looking; 3) Regardless of whose name it is registered; c. Without mutual consent, neither husband nor wife may alienate or transfer joint property. d. Debts for common interests are charged to joint assets. e. In more than one marriage, the joint property is separated between the husband and each of his wives. f. If a marriage bond is broken: 1) The joint property is divided in two; 2) Each party gets one-half; 3) If there is a divorce, then his share becomes tirkah (Nasution, 2005: 191).

The division of joint property can only be done if the marriage is broken either because of divorce, death, or a court decision. Based on the provisions of the Marriage Law, the distribution of joint property does not look at where or who the owner of the property is, so it can be concluded that what is included in joint property are: 1. The results of the husband's income during the marriage bond; 2. The result of the wife's income during the marriage bond; 3. The result of husband and wife's personal income during the marriage bond (Satrio, 1990: 23).

In the Marriage Law, the procedure for the partition of joint property is not explicitly outlined. Article 37 indicates that if a marriage is dissolved due to divorce, the division of joint assets is governed by the different laws of the parties. The definition of each law highlights that it may contain religious law, customary law, and other laws, including the law that applies to the marriage, as described in Article 37 of the Marriage Law (Sugiswati, 2014: 203).

According to M. Yahya Harahap, the distribution of joint property is left to the will and awareness of the community, then the judge will seek and find it in the legal awareness of the community to be poured as objective law. However, based on a jurisprudential study on court decisions regarding joint property after the divorce, joint property must be divided in half between husband and wife. This can be seen in the consideration of the Medan High Court Number 389/1971 dated December 30, 1971 jo. Supreme Court Number 31R/Sip/1972 dated May 25, 1973 jo. Medan District Court Number 129/1972 dated July 2, 1973 jo. Medan High Court Number 358/1973 dated July 2, 1973 jo. Tasikmalaya High Court Number 44/1967 dated 27 March 1968 jo. Bandung High Court Number 198/1969 dated December 3, 1970 jo. Tegal High Court Number 27/1971 dated March 16, 1972 (Sugiswati, 2014: 204).

3. Legal Progressive Theory in the Division of Shared Assets

Etymologically, progressive is derived from the term progress, which signifies advancement. Legal progressivity implies that the law should be able to keep up with the times so that it can respond to the community's morality-based goals (Ali, 2013: 107). Legal advancement is the capacity to resist and seek to alter the existing quo. Maintaining the status quo entails accepting the conventional norms and existing institutions without attempting to identify their flaws and without making hardly any effort to modify the law; all that remains is to administer the law as usual (Rahardjo, 2006: 114).

Legal progress is part of a process of searching for the truth that never stops in responding to the times. Legal progress can be interpreted as law for humans, not humans for law. So if something is found that is wrong with a rule of law, then what is changed is the law, not the person. The law must be able to keep up with the times as human movements are increasingly advanced and flexible. The law is not a draft that is final and cannot be tampered with, but the law is always in a phase that continues to change in order to keep up with the times, law as process, law in making (Syamsuddin, 2012: 106).

The idea of legal progressivity is based on two legal components, namely rules and habits. Law is placed as an aspect of behavior and regulation at the

same time. Regulations will build a positive legal system, while behavior will drive the rules and systems that will be built (Rahardjo, 2006: 265). So the discovery of legal progress firmly links legal, humanitarian, and moral factors, so that in the end it is the judge who will make the decision (Rifai, 2014: 48).

Legal advancement entails comprehending the law by having the courage to depart from the normal law's absolutism and then applying the law to all human issues. The evolution of the law is imbued with a profound sense of human decency. If human ethics and morals have deteriorated, the aim of law enforcement cannot be accomplished (Rifai, 2014: 49). The law does not reflect the law as an immutable and unchangeable institution, but rather it is based on its capacity to serve the society (Rahardjo, 2009: 1).

Therefore, legal evolution cannot be entrusted to the absolute autonomy of the text's topic. We require a topic with a level of interpretation that demonstrates how intricate and dynamic human affairs are. The wording of the text tends to simplify the situation (Faisal, 2015: 40). Existing legal reality is still sentalistic, fanatical, formalistic, and authoritarian, and the current quo has generated a great deal of criticism from professionals as well as a new solution to these issues (Sulaiman, 2001: 91). The law should be responsive legislation, as proposed by Philippe Nonet and Philip Selznick, that is, law that serves to fulfill social needs and interests (Nonet; Selznick, 2008: 84).

The concept of a progressive national law development arises from the worry that practical legal science stresses the paradigm of regulation, order, and legal certainty, while ignoring the human welfare paradigm. According to Satjipto Rahardjo, a proponent of progressive law, the law exists for humanity, not vice versa. Progressive legal science lays a greater emphasis on humans (people) than rules (rules), so that it is not subservient and does not simply accept existing laws, but rather critical (Rahardjo, 2006: 17).

This legal reform is better known as legal reform (Soetandyo, 2007: 97). The concept of progressivism is based on a perspective of humanity, in that it attempts to transform immoral laws into moral institutions. As for its execution, particularly on judge rulings, judges frequently impose legal reformers in the Religious Courts, Religious High Courts, and Supreme Court. In order to satisfy a feeling of justice regarding the issue at hand, judges are permitted to depart from applicable legal provisions. Judges are permitted to go against the law. The freedom of the judge is safeguarded under Law Number 48 of 2009 regarding Judicial Power.

A common occurrence involving the distinction between das sein and das sollen is shared ownership. In accordance with Articles 96 and 97 of the KHI, in the event of a divorce between a husband and wife, the division is 50/50. On the

basis of the existing legal norms, it may be able to establish that it is fair enough for the parties in one instance, but not in another. It is believed that the notion of the division of joint property based on legal advancement can provide space for judges to investigate the values of justice in society, and it is possible to choose which one is more appropriate by examining many factors. Beginning with the legal facts, the parties' statements, the evidence, and the legal 'illat. Through legal advancement, judges are not simply "the cornerstone of the law." The judge must utilize his intellect to locate the applicable law (Kurniawan, 2018: 41).

4. Decision Analysis

In this study, it was found that not all joint property cases were decided based on existing legal provisions, namely the provisions of Article 97 of the KHI, "Each widow or widower is entitled to one-half of the joint property as long as it is not specified otherwise in the marriage agreement".

Table 1.1 Study of 3 (three) Decisions of Religious Court Judges in Deciding Joint Property Cases (PA, PTA, and MA)

Number	Verdict Number	Criteria			Decision
		Marriage Law	Islamic Law	Legal Progress	
1	70/Pdt.G/2002/PA.Mrk	×	×	√	4/10 - 6/10
	4/Pdt.G/2003/PTA.Jpr	√	×	×	1/2 - 1/2
	345 K/AG/2004	√	×	×	1/2 - 1/2
2	330/Pdt.G/2004/PA.Tgrs	×	×	√	20% - 80%
	11/Pdt.G/2005/PTA.Bdg	√	×	×	50% - 50%
	381 K/AG/2007	√	×	×	50% - 50%
3	278/Pdt/G/2005/PA.Bkt	×	×	√	1/4 - 3/4
	27/Pdt.G/2006/PTA.Pdg	×	×	√	1/3 - 2/3
	67K/AG/2007	×	×	√	1/3 - 2/3

Only the Bukittinggi PA judge's ruling was followed by legal action by the aforementioned court agencies (PTA Padang & the Supreme Court). The other two decisions were returned in line with the applicable rules (PTA Jayapura & PTA Bandung), namely based on the provisions of Article 97 KHI with the partition of joint property 1/2-1/2 between the husband and the wife.

Regarding Islamic law's perspective on joint property, none of the disputes are settled through ash-shulhu as a means of resolving disputes over the allocation of joint property (when a divorce occurs). Due to the legal laws in effect in Indonesia, the settlement of disputes involving joint property is returned based on the terms of the Marriage Law and KHI, which apply to both parties. If it relates to legal advancement, then the decisions of the Merauke PA, Tigarkasa PA, Bukittinggi PA, Padang PTA, and the Supreme Court (in this case) only

contribute to legal progress by judging matters outside of the applicable legal provisions.

Table 1.1 Factors Included in the Decisions of Religious Court Judges in Deciding Joint Asset Cases

Number	Panel of Judges	Factors					Percentage
		Contribution	Value of Benefit and Sense of Justice	Legal Evidence	The Origin of Shared Property	Contextual Understanding of a Legal Provision	
1	PA Merauke	√	√	√	×	×	60%
2	PA Tigaraksa	√	√	×	×	×	20%
3	PA Bukittinggi	√	×	×	√	√	60%

In this study, the authors identified five characteristics that religious court judges use to decide joint property disputes outside of applicable legal restrictions. Before deciding on joint property issues, religious court judges diverge from applicable legal provisions by investigating laws that live and evolve in society and by adapting to the times by considering other elements. Factors of Value of Benefit and Sense of Justice; 3. Factors of Legal Evidence; 4. Factors of Origin of Joint Assets; 5. Factors Contextual Understanding of a Legal Provision.

This component is 60% in Merauke PA and Bukittinggi PA, while it is 40% in Tigaraksa PA. In deciding the joint property case, the Merauke PA judge considers three factors: contribution factors, the value of benefit and a sense of justice, and legal arguments, whereas the Bukittinggi PA includes contribution factors, the origin of joint assets, and contextual understanding of a legal provision in its legal considerations. The Tigaraksa PA justices have only two considerations at their disposal: the contribution element, the value of expediency, and a feeling of justice.

D. CONCLUTIONS

In considering joint property issues, religious court judges in Indonesia rely on the Marriage Law and the KHI as their legal basis. If the situation and circumstances so warrant, the judge decides the matter in accordance with applicable legal provisions. Nevertheless, it is permissible for religious court judges to rule on instances involving joint property outside of these requirements

(departing from the provisions of Article 97 of the KHI) if they consider a number of considerations. The existence of considerations and other criteria may serve as the foundation for a judge's decision in instances involving joint property. This is evidenced by the judge's fortitude in deciding the case of joint property in accordance with existing legal provisions, i.e., by dividing the property 50/50. 1/2 portion for the husband and the remaining 1/2 portion for the wife. Article 5 paragraph 1 of Law No. 48 of 2009 on Judicial Power, which states: "Judges and constitutional judges must investigate, adhere to, and comprehend legal values and emotions of justice. Justice that resides in the community."

The word joint property does not exist in Islamic law, however shared property (gono-gini) might be classified as syirkah 'abdan. This is because, according to Indonesian custom (al'urf), husband and wife work together to meet the family's daily necessities. This is consistent with the viewpoint of Ismail Muhammad Shah. As for the discussion in traditional fiqh texts, it is implicitly explained in the context of domestic furnishings. If there is a dispute over joint property, the ownership based on the property can be used by either men or women, or both. Whoever can demonstrate ownership accompanied by an oath will acquire the property. This is consistent with the beliefs of the Imamiyah and Hanafiyah. Regarding Islamic law, ash-shulhu, which is a peaceful technique of resolving a disagreement over the ownership of jointly held property, is presented as a solution.

Meanwhile, according to the provisions of Article 97 of the KHI, the distribution of joint assets must be done by dividing 1/2-1/2 parts. However, in resolving certain cases whose legal illat are different, it is possible to divide joint assets outside of these provisions. For example with the distribution of 4/10-6/10, 20%-80%, or 1/3-2/3 part of the joint property, as contained in the decision of the religious court number 70/Pdt.G/2002/PA.Mrk, 330/Pdt.G/2004/PA.Tgrs, and 278/Pdt/G/2005/PA.Bkt.

Concerning the factors that become legal considerations for Religious Court Judges when deciding joint property cases, the authors identified five (five) factors: contribution factors, expediency value factors and a sense of justice, legal arguments factors, origin factors -proposal of joint property, and contextual understanding factor of a legal provision. The Merauke PA ruling has a factor percentage of 60% because the judge examines the contribution factor, the value of benefit and sense of justice in addition to the legal argument element while evaluating the joint property issue. PA Tigaraksa 40% because legal considerations include only contributing factors, the value of benefits, and a feeling of fairness. Last but not least, PA Bukittinggi 60% with the contribution

component, the origin of the joint property, and the contextual understanding of a legal provision element.

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