

Reconstruction of Law of Joint Property Distribution due to Divorce to the Working Husband and Wife Based on the Value of Justice

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Abstract

Article 97 of Compilation of Islamic Law stated that a divorced widow or widower gets half part of the joint property. The application of the article also cannot be separated from 31 and 34 of Law No. 1 of 1974 on Marriage. However, Article 97 of Compilation of Islamic Law will not be considered fair and could not explain or resolve a problem if there is a wife who not only becomes a housewife, but also a housekeeper that provides the needs for the family (work). The results showed that in certain cases the judge has made a breakthrough related to the distribution of joint property due to divorce in which the wife is working to help husband to meet domestic life. The Verdict of Religious High Court of Padang No.38/Pdt.G/2013/PTA.Pdg. Establishes 1/3 of joint property for the Plaintiff (husband) and 2/3 of the property for the Defendant (wife) with a basic consideration in acquiring joint property of the Plaintiff and Defendant during the marriage, the Defendant is more dominant in the contribution of joint property and actively works as civil servants. Factor that influences the verdict which does not achieve justice is "legal substance factor", "legal structure factor", and "culture of law factors". Reconstruction of value of joint property distribution due to divorce is done based on the contribution by taking into account the benefit and detriment.

Keywords: reconstruction, joint property, divorce, justice

1. Introduction

The discussion on joint property is still considered taboo by the public. Married couples would usually question the division of joint property after a verdict of divorce from a court or when the absence of harmony in a family occurs. In any litigation regarding divorce which influences the division of joint property, frequently occurs upheaval that complicates divorce proceedings between them because each one claims that certain property should belong to them.

Joint property is property in a marriage generated by married couples together during the marriage. Joint property is the right of husband and wife, so that either they have children or no, it does not become a problem since children do not have the rights to joint property, but the right to inherit from their parents. Law No. 1 of 1974 on Marriage regulates joint property in Article 35 that if a marriage ends up, the joint property is governed by the law of each.

Therefore, if a marriage couple is Muslims, they should use Islamic law. In the Compilation of Islamic Law, Article 88 states that, "In the event of a dispute between husband and wife about joint property, dispute settlement is filed to the Religious Court". Article 97 further explains that, "Each of divorced widow or widower is entitled to half of the joint property as long as no other agreement is specified in the marriage agreement".

What if the joint property is obtained from the husband and wife who both work? The author demonstrated a Verdict of Religious Court of Bengkulu No. 0480/Pdt.G/2010/PA.Bn, in which the Plaintiff (46 years old) is a Muslim, graduate of a bachelor degree, teacher in Bengkulu City, and resident of Bengkulu against the Defendant (53 years old) who is a Muslim, graduate of D3, employee in Bengkulu, and resident of Bengkulu. It is known that the Plaintiff and Defendant are former spouse who had divorced in Religious Court of Bengkulu on July 19, 2010 with a Divorce Certificate Number: 0/93/AC/2010/PA.Bn. After the divorce, there is a joint property, which is land and 68 grams of pure gold, belongs to both Plaintiff and Defendant which had not been assigned.

Based on the results of the trial chamber, the judges made decision under Article 37 of Law No. 1 of 1974 stating that "When a marriage ends up because of divorce, the joint property should

be governed by the law of each". Since the Plaintiff and Defendant are Muslims, on the basis of Islamic Personality the Panel of Judges resolved the division of joint property based on the Compilation of Islamic Law. By considering Article 97 of Compilation of Islamic law, there is a provision that each divorced widow and widower is entitled to one-half part of the joint property as long as no other thing is specified in the marriage agreement. From the results of the examination at the trial, none of the evidence can prove their marriage agreement concerning joint property. In accordance with the identity of the Plaintiffs and Defendants in the lawsuit of the Plaintiff, both of them are working as a civil servant who must equally have a job, from which the income was obtained and became their joint property. Therefore, since both are working, the panel of Judges established the division of joint property in accordance with the provisions of Article 97 of Compilation of Islamic Law, i.e. each gets half part of the joint property.

2. Method

This study is a normative legal research, conducted by reference to legal norms contained in the legislation and refers to court decisions. In addition, this study is descriptive analytics reveals the legislation relating with legal theories as research objects (Ali, 2009). The approaches in the study are implemented a statute approach, conceptual approach, and case approach.

3. Discussion

3.1 Weaknesses of Joint Property Distribution due to Divorce to the Working Husband Wife

Unjust verdict issued by the Court can be caused by several factors, such as:

- a. Legal Substance Factor, that is the judge in deciding a case he was dealing with did not pay attention to the substance of the case and did not examine and understand the meaning behind the words in the article of legislation to decide what law should be applied to the case. The judge decided the verdict merely based on articles in the law. In fact, there are still numerous verdict of the judges based on Article 97 of Compilation of Islamic Law, whereas Article 97 is considered unfair if the husband and wife both work or the wife even has greater contribution than the husband, as if the judge merely becomes the funnel of legislation,
- b. Legal Structure/Institution Factor, that is the judge in deciding a case which was being handled was affected by one of the litigants that verdict of the Court did not reflect a justice. The judge decided the verdict on the division of joint property due to divorce under Article 97 of Compilation of Islamic Law that each husband and wife got half of the joint property as requested by the plaintiff based on his complaint letter.
- c. Culture of Law Factor, that is the judge in deciding a case that was being handled did not follow and did not understand the legal values and sense of justice upheld by society to be applied to the case that was being handled. On the contrary, the judge solely applied the article of laws.

3.2 Reconstruction of Law of Joint Property Distribution due to Divorce between the Working Husband and Based on Justice Value

Principally, the Law No. 1 of 1974 on Marriage and Compilation of Islamic Law recognizes and applies the concept of joint property, that is all property acquired during the marriage automatically becomes joint property. The statement also strictly limits joint property by not including property brought by each husband and wife and obtained specifically, for example in the form of inheritance or gift.

Due to divorce, togetherness or joint property of a marriage will not occur when the time for separation and division comes. Legislation governing joint property due to divorce is contained in Article 37 of Act No. 1 of 1974 which determines: "When a marriage ends up because of divorce, the joint property should be governed by the law of each". What is meant by "the law of each" is

religious law, customary law, and other laws.

By reason of advantages and disadvantages in Article 37 of Law No. 1 of 1974 About Marriage as the foundation or basis in the division of joint property due to divorce, to find the legal basis which is based on values of justice, Article 37 of Law No. 1 of 1974 on Marriage needs to be reconstructed or refurbished. Updates in Article 37 of Law No. 1 of 1974 should become legislation which has the following conditions:

- a. The principle of fairness in the division of joint property due to divorce is determined by the amount of contribution and benefit.
- b. The Law becomes a legal umbrella to the division of joint property due to divorce.

Besides Article 37 of Law No. 1 of 1974, Article 97 of KHI also becomes the law governing the division of joint property due to divorce. The advantage of Article 97 is it regulates the distribution of joint property due to divorce, that each of them gets half of the property. However, the disadvantage of Article 97 is it does not regulate the legislation in which the wife is more dominant in acquiring joint property or the wife provides the needs for the family, in addition to her obligations as housewife. Therefore, Article 97 of Compilation of Islamic Law still needs to be reformed.

Updates in Article 97 of Compilation of Islamic Law at least include these three conditions:

- a. The division of joint property in case the husband makes a living while the wife becomes a housewife;
- b. The division of joint property in case the wife makes a living while the husband is unemployed; and
- c. The division of joint property in case the wife is more dominant in meeting the needs of families.

Often the wife undergoes disadvantages and injustice in the division of joint property. This injustice issue is related to the standardization of the role of husband and wife in the Law No. 1 of 1974 which states that the husband is the head of the household and the wife is a housewife. Marriage Law has also established wife as the manager of households dealing with domestic affairs. As the results, many wives do not have a chance to improve their skill and work to earn income. In this case, the wife is suffered from economic dependence on husband. What if the divorce occurs someday? The wife will face difficulty to become economically independent. Expenses of wife are also more severe if she already has children that become her responsibility.

Another injustice that often happens is double burden aggravating the wife, that is she works as a breadwinner (even as the main breadwinner) and is burdened with household chores on her return home. Most husbands who think that household chores are the affairs solely belong to wife are generally reluctant to do them even though the wife is the breadwinner.

Therefore, it is unfair to women if the rules of the division of joint property are limited to half of joint property because there are wives whose contribution is greater than the husband. Conditions of the division of joint property should be set proportionally based on contributions and roles of each party. Otherwise, for example, in the division of joint property there is a dispute between husband and wife, the division of joint property can be solved through the creation of joint agreement between husband and wife. However it is important to remember that in making their agreement, they have to be in a state of being free from any pressure, intimidation, and threats.

The division of joint property due to divorce based on the amount of the contribution and the respective roles of husband and wife is the embodiment of the fifth precept of Pancasila, social justice for all Indonesian people, explained in MPR Decree No. 1 of 2003 on 45 points of Pancasila on precepts 5, that is developing fair attitude towards others and maintaining a balance between rights and obligations as well as the attitude of respect for the rights of others.

The decision of the judge in the distribution of joint property is not based on Article 97 of Compilation of Islamic Law. The division of joint property, in accordance with Article 97 of Compilation of Islamic Law, is not separated from Article 31 and 34 of Law No. 1 of 1974, jo. Article 80, Paragraph 2 of Compilation of Islamic Law, in which it is explained that husband has an obligation to protect the wife and provide every necessity of home life based on his ability. Hence, the division of joint property based on Article 97 of Compilation of Islamic law would not be considered fair if the husband and wife both work even wife's income is greater than the husband's income and the wife is a housewife. Therefore, Article 97 of Compilation of Islamic Law cannot

explain and even cannot solve the problem. As the result, the judges are required to perform discovery of the Law to reconstruct the division of joint property due to divorce of a married couple who both work based on values of justice using casuistry approach.

A perfect rule or regulation is almost impossible to exist, hence the judge/court may not refuse to examine, hear, and decide a case filed with no or less clear legal pretext. In such condition, the judge shall explore and understand the legal values and sense of justice in the society. As specified in Article 229 of Compilation of Islamic Law that: "The judges in settling cases submitted to them shall take into account seriously the legal values that live in the community, so that the decision is appropriate with a sense of justice". Therefore it is necessary to conduct a discovery of Law.

The researcher argued that Article 97 in the Compilation of Islamic Law is not a mandatory provision in Islam because no texts in the Quran and Hadith explaining that the division should be half/50 percent of the joint property for each husband and wife. Hence, we can understand why in code of Muslim personnel laws of the Philippines, there is no rule regarding joint property in marriage. Similarly in Malaysia Court Decisions, the issue of joint property is still a problem which has not been solved.

It can be concluded that Article 97 of the Compilation of Islamic Law is not mandatory based on Islamic rules, but permissible/allowed. Then the Article is adopted and set into a binding clause that becomes the sole choice of many options available regarding the division of joint property. However, it is not the sole choice which does not allow another way of distributing the joint property.

By doing reconciliation, the division of joint property can be done on the basis of agreement and willingness of the divorced couple.

Table 1. Reconstruction of Joint Property Distribution Based on the Value of Justice

No	Item	Commentary
1.	Basis of Reconstruction	Blending local wisdom in the form of precept 5 of Pancasila with international wisdom about the division of joint property in different countries
2.	Paradigm	Constructivism by strengthening the division of joint property based on values of justice
3.	A. Finding Dissertation on Reconstruction of the division value of joint property as a result of divorce.	<p>1. Factors influencing the division of joint property due to divorce which are not based on justice:</p> <p>a. Legal Substance Factor, that is the judge in deciding a case he was dealing with did not pay attention to the substance of the case and did not examine and understand the meaning behind the words in the article of legislation to decide what law should be applied to the case. The judge decided the verdict merely based on articles in the law. In fact, there are still numerous verdict of the judges based on Article 97 of Compilation of Islamic Law, whereas Article 97 is considered unfair if the husband and wife both work or the wife even has greater contribution than the husband, as if the judge merely becomes the funnel of legislation,</p> <p>b. Legal Structure/Institution Factor, that is the judge in deciding a case which was being handled was affected by one of the litigants that verdict of the Court did not reflect a justice. The judge decided the verdict on the division of joint property due to divorce under Article 97 of Compilation of Islamic Law that each husband and wife got half of the joint property as requested by the plaintiff based on his complaint letter.</p> <p>c. Culture of Law Factor, that is the judge in deciding a case that was being handled did not follow and did not understand the legal values and sense of justice upheld by society to be applied to the case that was being handled. On the contrary, the judge solely applied the article of laws.</p> <p>3. Reconstruction of the division value of joint property as a result of divorce based on the values of justice is as follows;</p> <p>3.1. Reconstruction of the division value of joint property as a result of divorce is done in a casuistic way by considering the contribution and taking into account the advantages and disadvantages.</p>
4.	B.Reconstruction of Law of Marriage of the Republic of Indonesia and the Compilation of Islamic Law in Indonesia.	<p>Reconstruction of law is made specifically to Article 37 of Law No. 1 of 1974. Article 37</p> <p>When a marriage ends up because of divorce, the joint property should be governed by the law of each.</p> <p>reconstructed to be Article 37</p> <p>(1) When a marriage ends up because of divorce, the joint property should be governed by the law of each</p>

		<p>(2) a. Each of divorced widow or widower is entitled to half of the joint property as long as no other agreement specified in the marriage agreement b. The provisions of Paragraph (2) a can not be carried out if wife's obligation is more dominant in meeting family needs. c. If the wife gives greater contribution to meet family needs, the divorced widow is entitled to greater part of the joint property than the divorced widower. d. The division of joint property due to divorce should be based on the objectives for the benefit</p> <p>In addition to reconstructing the Article 37 of Law No. 1 of 1974, it also needs to reconstruct Article 97 of Compilation of Islamic Law, Article 97 Each of divorced widow or widower is entitled to half of the joint property as long as no other agreement specified in the marriage agreement. Reconstructed to be: Article 97 1. When a marriage ends up because of divorce, the joint property should be governed by the law of each 2. a. Each of divorced widow or widower is entitled to half of the joint property as long as no other agreement specified in the marriage agreement. b. The provisions of Paragraph (2) a can not be carried out if wife's obligation is more dominant in meeting family needs. c. If the wife gives greater contribution to meet family needs, the divorced widow is entitled to greater part of the joint property than the divorced widower. d. The division of joint property due to divorce should be based on the objectives for the benefit</p>
5	Objective of Reconstruction	The realization of the division of joint property due to divorce is based on the value of justice.

4. Conclusion and Recommendations

4.1 Conclusion

The discussion on the distribution of joint property due to divorce to working husband and wife can be concluded that:

- a. Factors that influence the division of joint property due to divorce which is not based on justice are legal substance factor, legal structure/institution factor, and culture of law factor.
- b. Reconstructions of the division of joint property due to divorce based on the value of justice are as follows:
 - 1) Reconstruction of the division value of joint property as a result of divorce is done in a casuistic way by considering the contribution and taking into account the advantages and disadvantages.
 - 2) Reconstruction of law is done, particularly in Article 37 of Law No. 1 of 1974.
 - 3) It is highly recommended to revise article 37 of Law No. 1 of 1974 and Article 97 of Compilation of Islamic Law.

4.2 Recommendations

Suggestions for further improvement of the Law, especially the laws on joint property distribution, in Indonesia are:

- a. When married couples divorce and disputes occurs in the division of joint property, it should be solved earlier with the family to reach an agreement.
- b. Article 37 of Law No. 1 of 1974 on Marriage and Article 97 Compilation of Islamic Law should be revised.

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