

## Implementation of The Principle of Justice in The Division of Joint Property After Divorce According to Islamic Family Law

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**ABSTRACT:** Marital property law is very important in family life because it affects the way husbands and wives spend their lives, especially when they divorce. Joint property is property acquired during marriage through joint efforts between husband and wife and is not a grant or inheritance. This study is important because it emphasizes the importance of justice as a key element in the division of common property, which can influence court decisions. The results showed that from the point of view of Islamic family law, the division of common property takes precedence over consideration or peace. It is on that basis that the concept of joint ownership in Islamic law is based on the idea of Shirka and Article 97 of the Compilation of Islamic Law which divides property between husband and wife. Fair distribution becomes a consideration in decision making, judges consider in deciding a case in the theory of distributive justice by dividing common property as he does, it has illustrated the value of justice. The judge's decision that widows and widowers are not divided, it shows the value of justice called distributive justice, common property is divided according to the roles they are given. In divorce, the ex-wife receives more money than the ex-husband because she needs more money to pay the installments of all property.

**KEYWORDS:** Common; Property; Divorce

### INTRODUCTION

In Indonesian, the word "married" which means to start a household with the opposite sex, have sexual intercourse or have intercourse, comes from the word "marriage". Article 2 of the Compilation of Islamic Law is the definition of marriage according to Islamic law, i.e. marriage. In essence, there is no difference in the understanding of marriage according to the Marriage Law and Islamic Law when compared to the understanding in Article 1 of the Marriage Law Number 1 of 1974 (Asiyah, 2015).

According to Soedharyo Saimin, marriage is an agreement between two people who have a material goal to create a happy and eternal family. According to Soedharyo Saimin, marriage must be based on faith in the first precept of Pancasila, namely in God Almighty. Panbisa Ali Afandi, marriage is the structure of the family community. The family agreement referred to here is a covenant that has certain characteristics, not a general agreement. What is meant by a contract in the compilation of Islamic law is that marriage occurs when a marriage contract between a man and a woman is carried out as husband and wife by fulfilling the conditions and pillars of marriage stipulated in Islamic law and stipulated in civil law (Amalia, 2016).

The purpose of marriage is to build a family life that is *sakinah*, *mawaddah* and *rahmah*. Marriage is a legally and officially recognized relationship between two people, recognized by society and law. Marriage is an important and sacred event in a person's life. (Atikah Rahmi dan Sakdul, 2016) The legal consequences of marriage include the rights and responsibilities of men and women, including the right to dispose of children, the rights and responsibilities of parenthood, and the right to share property. In a marriage, of course, there are differences of opinion and disputes between spouses. Various factors can trigger conflicts in the household, ranging from economic factors, parenting, to different life principles. If the problem never finds a solution and there is no positive point, then a marriage can end in divorce (Nurwati, 2019).

The purpose of marriage is to create a stable, serene and lasting family or household. Therefore, the divorce process should be more complex. A husband cannot divorce his wife just like that, therefore a wife cannot divorce her husband directly. Article 38 of Law Number 1 of 1974, a marriage can be broken up due to death, divorce, or court order. What is meant by "divorce" is to describe certain legal events, such as marriage between a man and a woman due to legal causes, certain legal procedures, and certain legal consequences that must be decided right away (Salsabila, 2020).

This belief is based on love between men and women, the belief that God provides food and that everyone has the right to enjoy it. Her belief is that each party will avoid greed and greed for wealth because we are willing to divide the property regardless of whether the husband only works or not. The value of balance in development is recognized so that each party can fulfill its obligations and defend its rights. To make sure no parts are damaged when building a permanent home, you need to find a balance. The husband fulfills his responsibilities as the head of the family (Imansyah, 2020).

In the event of a divorce, the right of personal property is recognized as joint ownership of property acquired during the marriage (Cahyani, 2020). Everyone has basic needs such as clothing, food, and income. Man has the right to govern both the possessions created and possessed by God and those needs. Man is not the real owner. They can manage these assets in their role as trustees created by Allah SWT. Over the centuries, man has preserved all of God's creation to be used for all his needs according to his instructions (Imansyah, 2020).

Islam allows one person to have more wealth than anyone else. Promises are used correctly, that is, to show responsibility and commitment to the welfare of society. This means that if there is a divorce, the property must be divided in half. The ex-wife and husband each receive half or equal share. Or divide the parties according to their share in the obligations of the household in the production of common goods. Women who work to meet household needs will actually be more accustomed to the benefits and will be happier by their husbands (Rahmadani, 2020).

Husband and wife must be able to deal with all situations as well as possible, married life becomes more complicated. Contact arising from the search for solutions to unresolved problems affects harmony in the household. Because of these circumstances, there are often contacts that only end up disappointing one of the parties and cause the marriage not to go as expected. In this contact, men and women should try to overcome their frustrations. The relationship will improve if the negotiations go well, otherwise it is likely to be disappointed (Salsabila, 2020).

If the marriage between a man and a woman is no longer successful, it ends in divorce. The best way to end a marriage is through divorce because there are many incidents, unpleasant words and domestic violence between husband and wife. One of the legal consequences of divorce is the property of the spouse. Islam regulates

property, including joint property in a married family. Joint property will be discussed in divorce (Hak, 2017).

Arguing at home is commonplace. It's like adding spices to a dish called home cooking. Family disputes or problems need to be resolved carefully to achieve a positive outcome. Couples may break up due to family issues. Therefore, the divorce process becomes difficult for other reasons. The divorce process is even more complicated: a husband cannot divorce his wife just like that, and vice versa, and a wife cannot ask her husband for divorce directly without having a legal basis. This is said to strengthen the marriage bond (Sabiq, 2022).

It is not only religious legislation that contributes to divorce, but also its impact on a culture of shame and control in society. Talak is a word that is difficult to use in families with strong ties but easy to use in families with weak ties. There is no reason for divorce if divorce is the only way to resolve domestic problems. But divorce proceedings should begin as soon as possible. Islam allows men and women to send letters if they have problems at home. Divorce brings new problems, especially regarding custody and joint property acquired by the husband and wife during the marriage (Maharani Putri Utami, 2023).

The breakup of a marriage has legal consequences for the relationship. The legal consequences include custody, iddah bread, wife iddah time, child support, and joint property. The amount of wealth cannot be separated because of the close legal relationship between family and property. In the event of divorce, both must divide all property acquired during the marriage (Anusantari, 2022).

The control of property lies in the status of joint ownership. A husband may not transfer his property to another person without his wife's consent. A wife should not transfer her property to another person alone without her husband's consent. Article 89 of the Compilation of Islamic Law states that the husband is responsible for the joint property of his wife and her property. In

addition, the wife offers property and joint ownership to the husband. According to Article 97 of the Compilation of Islamic Law, widows or other persons have rights (Amalia, 2016).

Neither civil law nor Islamic law regarding the equal or half-share of common property guarantees equal rights between men and women. The division is considered fair if each husband and wife contribute an equal share during the marriage. According to marriage law and a collection of Islamic laws, the husband is obliged to earn a living and the wife is obliged to take care of the household. However, problems arise when one of the parties fails to fulfill its obligations and unequal contributions arise (Santoso, 2020).

According to Sayuti Talib, joint property is property acquired during marriage, not through grants or inheritances. This means that joint property is property acquired by a husband and wife during their marriage. However, Article 35 of the Marriage Law states that property acquired during marriage is considered joint property (Anusantari, 2022).

Husband and wife must agree on the use of joint property during marriage, because the property is acquired jointly and used for the benefit of the joint marriage. If a dispute arises for a husband and wife over marital property, they can come to the Religious Court. Many couples do not sign a prenuptial agreement before marriage, which is why many property issues are rarely reconciled properly. Prenuptial agreement as a guideline when one of them experiences financial difficulties or other difficulties, in this case divorce (Bukhari, 2021).

Because society considers marriage sacred and considers it inappropriate to discuss property between husband and wife, they often ignore the marriage covenant regarding joint property. Of course, the sense of justice and equality of common property cannot be separated from each other. Where the jury must consider the importance of fairness in making decisions.

Justice is generally a relative term, meaning that fair to one person is not necessarily fair to another. Justice should be at the core of public policy. Each place has its own standards of justice, so these standards are entirely determined by society based on morality. Justice is the main theme of law. Generally speaking, law and justice are inseparable. However, many people consider that the current law has not been able to provide justice. Legal justice is another name for justice achieved through law. In this case, if there is a violation then the law will enforce it. This means that anyone who violates the law will be prosecuted according to the legal procedures of each country. This has been achieved (Rosana, 2014).

Experts interpret justice, among others, as a weakening of the ability of ordinary people, while justice is found in rules processed by experts in their fields. Frans Magnis Suseno argues that justice occurs when everyone has the same rights and responsibilities. John Rawls defines justice as fairness which is the fundamental social structure for creating peace. Thomas Hobbes defined justice as acting by agreement (Pandit, 2016).

Aristotle defined justice as obedience to the law, a virtue or morality that affects relations between individuals. Aristotle believed that justice was a complete miracle and had to be performed thoroughly. Aristotle stated that justice is better than any other justice because it is in the interest of all people. For this reason, every society in Indonesia must follow the rules that apply there to achieve justice. Regardless of who the person is, their race, or any other factor that needs attention, ideal justice always determines rights and responsibilities. Protection for all people to exercise their freedom and equal opportunity to earn equal income without discrimination based on race or ethnicity (Salsabila, 2020).

## METHODS

This article uses a comparative approach to conducting a literature study. Researchers use existing data. Furthermore,

the results of this study are not numerical but qualitative. However, this research data comes from an academic journal that discusses the concept of joint ownership in Indonesia after divorce. In this study, the data results were not presented numerically, but qualitatively (Supriyanto, 2021).

## RESULT

### A. Post-Divorce Joint Property

Marriage is a crucial legal event in the lives of Indonesian people. Marriage law issues are not only limited to the legal relationship between the prospective husband and wife, but also parents, siblings, and even the families of both parties. Husbands and wives marry to start a family, so they often seek profit in order for wealth to appear in the family. Marriage law includes the concept of joint property. Other countries that adhere to customary law and civil law have also established common property law institutions, not only in Indonesia. Marital property, community property, or community property are terms often used to refer to joint property. Property or wealth acquired during marriage is known as marital property (Dewi, 2021).

Both the wife and husband can acquire property in marriage. According to paragraph 1 of article 35 of Law Number 16 of 2019, "Property acquired during marriage becomes joint property." Marital property or *Shirkkah* is property acquired by a husband and wife during marriage, either individually or jointly, and does not need to be registered in the name of another person. The above provisions indicate that the formation of joint property in marriage occurs from the time the marriage takes place until the breakup of the marriage (Bahri, 2023).

Article 38 of Law No. 16 of 2019 states that a marriage can end due to divorce, death, or a court determination. The legal consequences of the above

provisions are as follows: the termination of a marital relationship often gives rise to disputes that give rise to legal consequences that affect the rights and obligations between the ex-husband and ex-wife, as well as the children born from the legal marriage. Similarly, property acquired during marriage and inheritance of each husband and wife (Sufirman Rahman, 2020).

Property acquired during marriage, as well as gifts or inheritances, i.e. property acquired through conjugal efforts during marriage, is called joint property. Please note that joint property includes not only acquired property, but also debts incurred between husband and wife during the marriage. (Risky, 2020) here are at least three legal regulations, such as the Civil Code, Law Number 1 of 1974 concerning Marriage, and Presidential Instruction Number 1 of 1991 concerning Law Number Compilation of Islamic Law, regulating joint property in positive law. Book I on Individuals, Chapter VI and Chapter VII Articles 119 to 167 of the Civil Code regulate the association of property. Articles 35 to 37 of Chapter VII of the Marriage Law regulate joint property. Articles 85 to 97 of Chapter XIII which regulate common property are regulated in the Compilation of Islamic Law which is essentially the source of Islamic civil law (Nelli, 2017).

The compilation of Islamic law as a representation of Islamic law that has been revised and adapted to local cultural values and regulates common property in such a way, Articles 85 to 97 of the Compilation of Islamic Law contain these regulations. The compilation of Islamic Law defines joint property as property acquired by a husband and wife individually or jointly during a marital relationship, without the need to be registered in the name of another person. (Faizal, 2015). The regulation of property in marriage is another provision in the Compilation of Islamic Law which is closely related to the implementation of

the husband's obligation to earn a living. The provisions of the Compilation of Islamic Law do not mix marital property between husband and wife. The wife's property remains the wife's property and she has complete control, just as the husband has complete control over the husband's property. The compilation of Islamic Law recognizes the concept of common property (Bahri, 2023).

Property acquired by a husband and wife is called joint property. According to Article 35 paragraph 1 of the Marriage Law, property acquired during marriage becomes joint property. According to paragraph 1 of Article 35 of the Marriage Law, joint property of a husband and wife includes only property acquired during marriage. Article 35 paragraph 2 of the Marriage Law stipulates that the inheritance of each husband and wife, as well as property acquired as a gift or inheritance, is in the control of each until the parties determine otherwise (Poltak Siringoringo, 2023).

Article 86 of the Compilation of Islamic Law states that the wife's property has all tenure and rights, just as the husband's property has all tenure and rights (Jamil, 2023). The aggrieved party files a lawsuit in court due to the control of one of the parties over the common property. Article 35 of the Marriage Law provides that the estate of each husband and wife, as well as property acquired as a gift or inheritance, shall be in the possession of each until the parties decide otherwise. A legal dispute is a tension that causes legal consequences, both because of a violation of legal norms and because of a conflict with a person's rights and obligations stipulated in legal provisions. Such records can be challenged to legal institutions such as courts or other law enforcement agencies, which distinguish valid records (Bahrin, 2018).

#### **B. Common Property in Islamic Family Law**

Although the Qur'an or Hadith does not contain a discussion of common property, in the books of law there is a discussion that can be interpreted as a

discussion of common property which is also called *shirkah* or *sharia*. *Shirkah* or *Sharia* refers to the mixing of two assets so that they cannot be replaced (Ariska Dwi Chairunisyah, 2023).

The common property is the area of *Ijtihadi*, a secular area that is not affected by classical Islamic issues. The individual efforts of each individual determine how the total estate is divided after divorce. *Shirkkah* is the right of two or more persons to something, *Shirkkah* and its members only through transactions without capital, and *Shirkkah Mufawadhah* is unlimited, the Hanafi, Maliki and Hambali Schools belong to the four classical schools that allow joint ownership in the form of *Shirka Mufawadhah Abdân*, while Imam Shafi'i refuses on the grounds that *Shirka* must begin with the form of capital and die with purpose. to increase wealth (Faizal M., 2017).

In Islam, "urf", i.e. material "common property", or *istishlah* or *maslahah murlah* can be used to achieve common property. This is because in the *nash* it is not explicitly explained what determines the exit of the common property, nor is there a *nash* or *al-hadith* that prohibits the execution of the common property, in which inheritance is included first before the division of its share is allocated (Syhabudin, 2015).

Joint property is not recognized in Islam, in contrast to the Western legal system that was once the basis of Indonesian marriage law. In Islam it is explained that through the existence of *shirka* (partnership), the work of husband and wife can bring wealth. After they joined the covenant, they became one, as described in the *Qur'an* (Faqih, 2017). With *ijab qabul* and fulfilling other requirements, such as guardian, witness, dowry, and *walimah nikah*, it can already be considered the existence of *shirkah* between spouses. Islamic law on common property has still not reached agreement (Harimurti, 2021).

Indonesian scholars agree that *Syirkah Abdan* should be used as a basis in formulating legal rules on common property. Most married couples in Indonesian society work hard to earn a living and only have savings for old age and as an inheritance for their children after death, for this reason the name "*syirkah abdan*" is used (Lestari, 2023). Men and women in Indonesia fight for food and clothing. Due to the physical differences between men and women, jobs are divided according to their respective body types. For example, a man who works as a farmer chooses the profession of plowing fields. Meanwhile, farmers' wives were given the task of cooking rice, doing household chores, and other tasks that did not require too much physical labor. In this situation you can have fun and earn more (Junaidy, 2014).

Indonesia emphasizes the law and has established regulations for the distribution of joint assets (Sembiring, 2017). These provisions are explained in the Civil Code, the Collection of Islamic Law, and the Marriage Law. Joint property rights to property are calculated from the beginning of the marriage until the end of the marriage due to death, court decision, or divorce (Makmur, 2017).

In addition, the division of common property is a sociological adaptation of Islamic family law. Article 90 of Islamic law states that the wife is also responsible for the joint property and the husband's property (Lamatokan, 2023). Then Article 91 explains that;

1. Assets as tangible or intangible objects under Article 85.
2. It is possible that all tangible assets may include immovable property as well as movable property such as securities.
3. Rights or obligations can be intangible community assets.
4. With the consent of the other party, either party may use the common property as collateral.

The four types of joint treasures also called *Gono Gini* treasures are as follows:

- a. Grant property and inheritance acquired by one spouse;
- b. The results of one's own efforts before marriage,
- c. Property acquired at the time of marriage,
- d. Property acquired during marriage, excluding gifts to husband and wife and inheritance.

Religious courts settle property cases with judges and also consider sociological issues. In addition to references to the compilation of Islamic law based on the Qur'an, hadith opinions on fuqaha, wife needs, child needs, child education and the need for mutual agreement between the two parties in the case are also mentioned (Samad, 2021).

### **C. Analysis of the Implementation of the Principle of Justice in the Division of Joint Property After Divorce in Islamic Family Law**

Religious courts settle property cases with judges and also consider sociological issues. In addition to referring to the compilation of Islamic law based on justice as formulated by the scholars of fiqh, it is also the implementation of God's law. From the perspective of Islamic law, justice serves to protect humanity (Muhammad Nur Kholis Al Amin, 2023).

In Islamic law, all justice is granted without discrimination, regardless of whether one is Muslim or not. What is meant by divine justice in Islamic law is that person whether he already knows good or bad, gets justice forever does not hope in revelation, or is known only by Allah Almighty. Justice must be exercised in all aspects of life, both in the field of law (Pakarti, 2023).

The values of justice must be implemented through legislation. Equality of opportunity and freedom are two examples of justice. Legal justice encompasses the law as a whole and also includes distributive justice and overarching justice. Laws are made to ensure justice for society. A judge must thoroughly investigate all cases for the

sake of justice, it can not rely on revelation or whether it is only Allah Almighty. who knows. Justice must be exercised in all aspects of life, including the fields of law and justice. The compilation of Islamic law provides that a divorced widow or divorced widower is entitled to half of the joint property, unless otherwise specified in the marriage contract. The above rule does not provide a deeper explanation of the duties of husband and wife, which, in the event of divorce, affect the joint property (Rochaeti, 2015).

The ineffectiveness of the rule of law occurs due to the vagueness of the law, the inconsistency of the apparatus or authority, the division of society because it does not support the implementation of the law. If Article 97 of Islamic Law does not provide a complete solution to the problem of common property. This leads to a blurring of norms and requires judges to make decisions based on their beliefs (Suhaili, 2019).

The provisions of Article 97 on the division of common property, in which each party is entitled to half of the common property, are expressly part of the rules of Islamic law. It is true that the wife does not participate in earning a living because she is at home and has to take care of the husband, children, and household. Once a married couple divorces, a fair division of assets will promote peace. Islam teaches mankind to always solve the world's problems based on the principle of justice, including the division of common property. Disputes between the parties only arise if the issue of division of common property is not resolved properly (Ningsih, 2023).

Justice is the value of creating interpersonal relationships that are given rights, and those rights must be distributed fairly, or when someone does not administer justice, punishment is imposed in lieu of just and appropriate problem solving. From the perspective of Islamic law, justice serves to protect humanity. In Islamic law, all justice is

given without discrimination, regardless of whether the religion is Islamic or not (Khairiyah, 2023).

Al-Bazdawi, stated that God promised to fulfill his promise to reward everyone who does good so that He can punish everyone who does evil so that justice can be done. Fiqh scholars define justice as the execution of God's law. According to Article 31 paragraph (3) and Article 34 paragraph (2) of Law Number 1 of 1974 concerning Marriage, divorced husbands have a higher share than divorced husbands. A person who is physically fit and able to work should earn more for his condition and affiliation. Therefore, the judge must re-examine each party to ensure a fair division of the common property. It is important to remember that such laws may change depending on the current circumstances, conditions or circumstances. This for example applies to the issue of how joint property should be divided between husband and wife in the event of divorce (Andre Kiemas, 2023).

Cases brought before the Religious Court use the function of the case, as well as the prosecution in determining the causes of legal events. Article 97 of the Civil Code says widows and widowers receive part of the joint property. Dividing wealth between widows and widowers is not always the same, as stated in the article, because the law that applies in court is case law. According to Islamic law, the law revolves around the question of whether there is a reason, and looking at the two cases examined, there is an obvious reason. Therefore, according to Article 97 KHI it is unfair to use it in decisions because the article is considered unfair (Syahril, 2021).

The Ta'lili method and the Maqashid Shari'ah theory of justice are also used in the distribution of common wealth. Where prioritizes the purpose and reason for its implementation. The benefit is the goal, therefore, the division of property during divorce is carried out in order to achieve benefit. Justice used in every case

must be the basis for the total distribution of property. Fairness in this case will be enforced when no party is discriminated against in the distribution of distributive justice referred to herein. (Azahari, 2022)

The general paradigm shift regarding the division of property after divorce is due to the impact of implementing the division of joint property after divorce based on the value of equity. Judges appointed by God on earth are obliged to examine, adjudicate, and decide cases, including cases related to the division of common property that require jurisdiction. The paradigm of judges as law-formers and law enforcers has not changed (Angriani, 2019).

Judges are required to adjust laws to fit today's society or times. If these rules cannot guarantee justice, they must be drafted so as not to cause harm to the parties involved in the proceedings. If the results illustrate the common justice in the division of property in a divorce, based on which it is more likely to contribute to removing property to pay off installments of joint property. Therefore, in both cases, distributive justice is taken into account in the verdict (Azhar, 2022).

## CONCLUSION

In the principle of justice dividing joint property with Islamic family law with the provisions of Article 97 IPR on the division of joint property, in which each party is entitled to half of the joint property, is expressly part of the rules of Islamic law. It is true that the wife does not participate in earning a living because she is at home and has to take care of the husband, children, and household. Once a married couple divorces, a fair division of assets will promote peace. Islam teaches mankind to always solve the world's problems based on the principle of justice, including the division of common property.



Disputes between the parties only arise if the issue of division of common property is not resolved properly. Article 97 KHI in resolving cases is less effective involving community property, thus causing blurring of rules and judges must make decisions based on beliefs that must be fulfilled. The theory of distributive justice, which arises from the judge's consideration in deciding cases by dividing community property according to his deeds in such a way that reflects the value of justice based on the judge's consideration.

The issue of joint property in article 97 states that widowers or divorced widows each widow and widower have one-second rights to joint estate, as long as there are other provisions such as in the marriage agreement. Meanwhile, articles 128-129 of the Civil Code state that in the event of a break in the marriage relationship, the joint property is divided in half between husband and wife. According to the Compilation of Islamic Law and the Civil Code, the rules on common property being divided in half, or divided equally, do not provide justice to men and women. If each husband and wife make an equal contribution during the marriage, an equal share is considered fair. According to the Marriage Law and Islamic Law, the husband must earn a living, and the wife must look after the house. However, the problem arises when one of the parties neglects its obligations, causing the contribution to be unbalanced.

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