

Discourse on Post-Divorce Distribution of Joint Assets in the Perspective of Islamic Law in Indonesia

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Abstract

The distribution of joint assets following divorce is a significant aspect of family law, particularly within the framework of Islamic law in Indonesia. This paper explores the discourse surrounding post-divorce asset distribution from an Islamic legal perspective, shedding light on the principles, practices, and challenges within the Indonesian context. Grounded in Islamic jurisprudence, the analysis delves into the principles governing asset distribution, including considerations of fairness, equity, and the well-being of family members. It examines the Quranic injunctions and Prophetic traditions that guide asset division, as well as the interpretations and applications of Islamic law by legal scholars and judicial authorities in Indonesia. Moreover, the paper scrutinizes the contemporary legal landscape and societal norms influencing post-divorce asset distribution in Indonesia. It addresses the evolving nature of family



structures, economic dynamics, and gender roles, and their impact on asset division practices within Islamic law. Through a multidisciplinary approach encompassing Islamic studies, family law, and socio-legal analysis, this paper contributes to a deeper understanding of the complexities surrounding post-divorce asset distribution in the Indonesian context. By elucidating the intersection of Islamic legal principles, cultural norms, and modern legal frameworks, it aims to inform legal practitioners, policymakers, and scholars engaged in family law reform efforts and contribute to the promotion of justice and equity in family matters within Islamic societies.

KEYWORDS *Divorce, Joint Assets, Post-Divorce Distribution of Joint Asset, Islamic Law*

Introduction

Marriage is a sacred relationship for married couples and every couple of course wants the household that has been built to always run *adem ayem tentrem* (Javanese term, or peacefully) or commonly also known as *sakinah, mawaddah and warahmah*¹. Marriage is included in one of the legal events whose arrangement is in the marriage law of which the law is part of the civil law. Marriage also regulates a man and a woman who have the intention to coexist for a long period of time in accordance with the legal regulations as established by law.²

¹ Besse Sugiswati, "Konsepsi Harta Bersama Dari Perspektif Hukum Islam, Kitab Undang-Undang Hukum Perdata Dan Hukum Adat," *Perspektif* 19, no. 3 (2014): 201, <https://doi.org/10.30742/perspektif.v19i3.22>. See also Latifiani, Dian. "The Darkest Phase for Family: Child Marriage Prevention and Its Complexity in Indonesia." *JILS (Journal of Indonesian Legal Studies)* 4, No. 2 (2019): 241-258; Ilahi, Andi Hidayat Anugrah. "The Evaluation of Early Marriage Law Renewal in Indonesia." *Unnes Law Journal: Jurnal Hukum Universitas Negeri Semarang* 7, No. 1 (2021): 129-152.

² Choirunnisa Nur Novitasari, Dian Latifiani, and Ridwan Arifin, "Analisis Hukum Islam Terhadap Faktor Putusnya Tali Perkawinan," *SAMARAH: Jurnal Hukum*

Based on Article 1 of the Law of the Republic of Indonesia No. 1 of 1974 concerning Marriage (Marriage Law) it is stated that marriage is an inner birth bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the One True Godhead. Marriage results in the emergence of birth bonds as well as inner bonds for the husband and wife. In the sense of a birth bond as well as an inner bond, marriage is a legal relationship for a man and a woman who have bound themselves into a married couple. The meaning of the bond born here is a bond that is able to provide an expression of the legal relationship between a man and a woman in the marital bond and its nature can be seen, while the meaning of the inner bond here is that marriage is a form of soul connection and has the purpose of living together as a married couple. When reviewed in the Marriage Law, every marriage has an ideal purpose because the purpose of marriage has two aspects, namely the birth and the mental aspect. The married couple has a noble goal, which is to build a happy and eternal family for both parties in accordance with the will of God Almighty. That way, the marriage that has been established should last or run for life.³

Basically, a marriage has the intention of establishing a happy relationship and indefinitely or forever. However, in reality it is uncertain that all good causes can be carried out according to the original intention because not enough married couples will eventually have to end their marital relationship. There are many factors that originate from the inside or from the outside that can trigger cracks in household buildings that result in a divorce.

Based on Article 113 of the Compilation of Islamic Law (hereinafter as KHI) as stipulated in article 38 of the Marriage Law, it is stated that a marriage can end due to the following things, namely divorce, court decisions, and death. The beginning of family life between a woman and a man begins from the moment of marriage, while the end of family life between married couples can be caused by divorce. The occurrence of

Keluarga Dan Hukum Islam 3, no. 2 (2019): 322, <https://doi.org/10.22373/sjhc.v3i2.4441>.

³ Ana Suheri, "Penyelesaian Sengketa Harta Gono-Gini Dilihat Dari Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan Berdasarkan Kompilasi Hukum Islam," *Morality: Jurnal Ilmu Hukum* 2, no. 2 (2015).

divorce could be because one or both parties want to separate. One of the causes of divorce is due to the non-implementation of rights and / or obligations as a married couple in accordance with the provisions of the law that regulates it. Another reason that is the cause of divorce can also be because of each other that there is no longer a sense of mutual respect, there is no longer a sense of keeping each party's secrets secret, and there is a dispute or conflict of opinion so that it does not find common ground between the two.⁴

When someone thinks divorce is the end of problems in marriage, the assumption is actually wrong because even after divorce there are still problems to be resolved. Some of the issues that still have to be taken care of after the divorce are issues about the child's mental development needs, demands for a child's livelihood, making agreements in custody of children, and disputes related to common property. All of that is still in the same legal sequence and must be implemented together in its entirety by the couple deciding to divorce.

Starting from the process of filing a divorce lawsuit, you must also have a strategy so as to avoid inaccuracies in making steps and decisions. Errors triggered by a lack of knowledge regarding existing legal requirements and inaccuracy of plans in processing divorce lawsuits can result in financial, mental, and physical losses.

An uproar can arise when taking care of the division of common property. The uproar will be exacerbated by the absence of a marital agreement governing joint property before or during the marriage (before the divorce). In fact, in a marital relationship does not cause any mixing related to wealth which is then called joint property or *gono-gini* property. Initially, the concept of *gono-gini* property came from the customs prevailing in society which were later supported by the existence and applicability of Indonesian positive law and Islamic Law.⁵⁶

⁴ Radi Yusuf, "Pembagian Harta Bersama Akibat Perceraian Berbasis Nilai Keadilan," *Jurnal Pembaharuan Hukum* 1, no. 1 (2014): 73–82.

⁵ Ongky Alexander, "Efektivitas Pembagian Harta Gono Gini Pasca Perceraian Dalam Perspektif Yuridis Sosiologis," *El-Ghiroh* 16, no. 01 (2019): 55.

⁶ Ety Rochaeti, "Analisis Yuridis Tentang Harta Bersama (Gono Gini) Dalam Perkawinan Menurut Pandangan Hukum Islam Dan Hukum Positif," *Jurnal*

When the divorce judgment by the court has come out, usually the married couple who have officially divorced have a problem regarding the need for the division of common property. In some cases that are still processing divorces, the issue of the division of common property also often complicates the divorce process in court. This can happen because both parties individually claim that this property and/or property is their right. Examination of the division of common property in cumulative terms is carried out after the examination of the divorce lawsuit. If his divorce suit is rejected, then the division of his joint property is also rejected. Because the division of the common property leads to a divorce lawsuit. Unless it asks for the separation of common property, because one of the parties is concerned or even proven to eliminate the common property by a separate application through a joint property lawsuit.⁷

Many times, the prospective married couple who are about to enter into a marriage are unthinkable about the possibility of a joint property dispute. They only think that the marriage will last forever without thinking about the worst possibility that one day a divorce may occur. At the time of the process or after the occurrence of a divorce usually they just think about common property. Indonesia is a country where most of its citizens convert to Islam, so knowledge related to how to regulate common property in marriage according to Islamic Law is important to discuss. Departing from the description above, in this paper will be discussed related: How is the concept of common property in the perspective of Islamic law? What is the concept of post-divorce joint property division in the perspective of Islamic law in Indonesia?

The type of research in this paper is normative juridical research. It can also be referred to as literature research that examines literature materials related to the problem being studied by utilizing various laws and regulations, literature books, and various documents that still have a relationship with the legal issues discussed. The approach used in this

Wawasan Yuridika 28, no. 1 (2013): 650–61,
<https://doi.org/10.25072/jwy.v28i1.61>.

⁷ Asman Asman, “Harta Bersama Perkawinan Pasca Perceraian Di Pengadilan Agama Sambas (Putusan Hakim Nomor. 144/Pdt.G/2019/PA.Sbs),” *Jurnal Ulumul Syar’i* 8, no. 1 (2019): 38–50,
<https://doi.org/https://doi.org/10.52051/ulumulyari.v8i1.46>.

study is the statutory approach. The legal approach is carried out by examining laws and regulations related to the legal issues studied. This approach is the starting point for research conducted by the author so that the author prioritizes the analysis of laws and regulations in Indonesia which still have a relationship with the division of common property after divorce in the perspective of Islamic law.

The Concept of Common Property in the Perspective of Islamic Law

The Compilation of Islamic Law (KHI) is a summary of various books written by *fiqh* scholars that are commonly used as references to religious courts to be processed and developed and compiled into one set. The existence of the KHI was conceived to complement the Marriage Law and position it as a statutory law even though its position is not the same as that. It can further be used by the judges of the Religious Courts in examining, adjudicating and deciding a case filed against it as a guideline.⁸

Islam does not regulate common property in either the Qur'an or the Hadith. In the literature of jurisprudence, there is also no conception of common property because common property is not specifically discussed in the book of *fiqh* on the basis that a husband has an obligation to provide for his children and wife from the husband's own property. Its existence is only based on customary reality, therefore the provisions and practices that occur in society become different. However, in short, conjugal property can be defined as property acquired either singly or jointly with the husband and wife during the marital bond, without questioning whether it is registered in whose name. Thus, the property that has been owned at the time of (brought into) marriage by itself lies outside the common property. The discussion regarding common property in KHI is in Chapter XIII which consists of 13 articles.⁹

⁸ Uswatun Hasanah and Chitra Latiffani, "Kajian Pembagian Harta Gono Gini Menurut Kompilasi Hukum Islam," *Journal of Science and Social Research* 1, no. 2 (2018): 137 – 140.

⁹ Sugiswati, "Konsep Harta Bersama Dari Perspektif Hukum Islam, Kitab Undang-Undang Hukum Perdata Dan Hukum Adat."

In the KHI, precisely stated in Article 1 letter f it is stated that property in marriage or *syirkah* is property obtained either singly or jointly with the husband and wife during the marriage bond hereinafter referred to as joint property, without questioning being registered in the name of anyone. So, according to KHI, joint property is marital property, although it is acquired not jointly. Thus, KHI does not recognize acquired property, because the arrangement of acquired property is the same as that of innate property.¹⁰

The beginning of a marriage begins when *ijab qabul* occurs. In the procession of *ijab qabul* in a contract can take place without mentioning any rights regarding the owner of the property, even if the payment of the dowry is an obligation for the continuation of the implementation of the contract. In principle, according to Islamic law, the continuity of the marriage contract has no legal consequences for the ownership of each of the assets of the husbands and wives. The husband is still bound by the rights and obligations to his own property after the contract just as before as well as the wife is still bound by the rights and obligations to her own property just as before the contract was held. However, related to common property can also be regulated in the marriage agreement. Based on Article 48 of the KHI, it is stated that if a marriage agreement is made regarding the separation of common property, the agreement must not eliminate the husband's obligation to meet household needs. If the agreement does not meet these provisions, it is considered that there will still be a separation of common property or company property with the husband's obligation to bear the cost of household needs.¹¹

Furthermore, in Article 85 of the KHI it is stated that the existence of joint property in the marriage does not rule out the possibility of the property of each husband or wife. Because basically marriage does not cause the mixing of property between husband and wife. The husband's

¹⁰ Zaiyad Zubaidi, "Tanggapan Ulama Dayah Terhadap Pembagian Harta Bersama Menurut Pasal 97 KHI," *Media Syari'ah: Wahana Kajian Hukum Islam Dan Pranata Sosial* 22, no. 1 (2020): 30–47, <https://doi.org/http://dx.doi.org/10.22373/jms.v22i1.6615>.

¹¹ Muhammad Siddiq and Irmawati Irmawati, "Analisis Putusan Mahkamah Syar'iyah Meureudu Terhadap Pembagian Harta Bersama," *AHKAMUL USRAH: Jurnal Hukum Keluarga Dan Peradilan Islam* 1, No. 1 (2021): 84–103.

property remains the right of the husband and is fully controlled by him, and vice versa as described in Article 86 of the KHI. So, the provisions that apply to the parties are that both the husband and the wife's side can both personally perform *tassaruf* on their respective behalfs of their property. Both, personally, have an obligation to strive to keep their respective possessions in their possession. To the extent not otherwise specified in the marriage agreement, the property of each party, both husband and wife and also the property obtained as an inheritance or gift remains under their respective control. Both are fully entitled to perform legal acts on their respective property in the form of grants, gifts, *sodaqah* or others. For the common property owned by the married couple, the two must jointly take responsibility for the property they own. Common property can be both tangible and intangible objects. Tangible objects can be immovable objects, movable objects, and securities. Meanwhile, intangible objects can be in the form of rights or obligations.

The Concept of Post-Divorce Common Property Division in the Perspective of Islamic Law in Indonesia

The breakup of the marriage due to divorce will certainly greatly affect the common property owned by the husband and wife during the marriage. Joint property in Islamic law is property obtained by a married couple if in obtaining their property both parties, namely the husband and wife, both participate (do not obtain property by self-effort). Common property in marriage exists with the aim of meeting the needs of the household ark such as the needs needed by the wife, the husband or the party of their son and/or daughter. Based on this, there must be a decision on the division of joint property from both parties, both from the husband and the wife side, which can be used as a basis for an agreement or

willingness between the two parties to be able to use the joint property. This way is a lawful way and is the best way to solve it.¹²¹³

Abdul Manan mentions that Hazairin, Anwar Harjono and Abdoerraoef argue that Islam does not regulate the common property in the Koran, therefore it is left entirely to them (husband and wife) to regulate it. This means that the division of their property (married couple) that exists in Islamic law at the time of divorce is following the law of the married couple. A married couple can use the appropriate law, namely Islamic law or Islamic law complications in the division of common property if both parties the couple is Muslim.¹⁴

The division of the property of the two married couples that has been stipulated in Islamic law is a form of growing a sense of justice. The provision regarding the division of property of a married couple is one-second for the wife and one-second for the husband. This division is in line with the good things that each married couple has done to be together in carrying out their roles in order to maintain the togetherness and sustainability of the household. Each party, both the wife and husband, has the right to own one-second of the property they have based on the role performed by the wife or the husband as a partner who helps to maintain togetherness and harmony in the household.

The mention of common property is termed differently from one region to another. For example, in Sunda the common treasure is called *guna-kaya*, in Minangkabau the common treasure is called the *suarang* treasure, in Aceh it is called *haeruta sihareukat*, in Java it is called *gono-gini*, and many more. Division of common property if one day a case occurs, namely divorce in running a household, be it a dead divorce or a living divorce, then the division can be carried out by conducting a consensus

¹² Desi Fitrianti, "Harta Bersama Dalam Perkawinan Poligami Menurut Undang-Undang Nomor 1 Tahun 1974 Dan Hukum Islam," *Intelektualita* 6, no. 1 (2017): 83, <https://doi.org/10.19109/intelektualita.v6i1.1302>.

¹³ M Adami, "Isbat Nikah: Perkawinan Sirri Dan Pembagian Harta Bersama," *At-Tafahum: Journal of Islamic Law*, 2017, 43–56.

¹⁴ Daniel Alfaruqi, "Pembagian Harta Bersama Menurut Komplikasi Hukum Islam Dan Implementasinya Di Pengadilan Agama Jakarta Selatan Perspektif Keadilan Jender" (Universitas Islam Negeri Jakarta, 2019).

deliberation between the ex-wife and the ex-husband's party or it can also be based on a decision issued by the court.¹⁵

In the event of a dead divorce, the division of common property according to the KHI is regulated in article 96 of the KHI which states that if there is a dead divorce, then half of the common property becomes the right of the spouse who lives longer. The division of common property for a husband or wife whose wife or husband owes shall be suspended until the certainty of his or her essential death or legal death on the basis of a religious court decision. Then, in Article 97 of the KHI, it is regulated regarding the division of common property in the event of a life divorce case. In Article 97 of the KHI it is stated that: "*Widows or widowers of divorced life are each entitled to one-second of the common property so long as it is not otherwise specified in the marriage agreement.*" Based on this agreement, it means that in the event of a dead divorce or a live divorce, the property of the married couple is still divided equally, the wife gets one-second share and the husband also gets one-second of the other part. In essence, property that is the *harta baawaan* on the part of the husband or wife has been recognized in the KHI.

In the Complication of Islamic law, precisely in article 93 paragraphs (1) to (4) it has also been regulated regarding the liability of the wife and the husband to the debts they have in order to patch up the needs in carrying out life in a family, if the joint property owned by the two of them is not enough then the property of each individual married couple will be taken to carry out their accountability.

Consultative or court decisions are not certain to divide the common property into one-second for each party. The judge could have decided on a different division of property between the ex-husband and ex-wife's side. This is because the judge's consideration is based on a preliminary search of the inherited property of each individual married couple. Searches are carried out to find out which party carries more property and which party carries less property. Tracing also needs to be done very well before giving a verdict regarding the amount of division of common property because

¹⁵ Noval Noval, "Musyarakah Pada Harta Bersama," *Jurnal Srudi Ilmu Syariah Dan Hukum* 14, No. 1 (2020): 5–24.

not infrequently there are even often cases where the party carrying less property asks to get an equal share and even a more share.

The judge's attitude in conducting this first search is legally justifiable because the judge has the freedom to decide and has the right of autonomy in the concept of "*for the sake of justice*" to *contra legem* (deviate) against articles that are felt to be incompatible with the sense of justice and truth.¹⁶ Consideration of the division of *gono gini* property a judge must look at the issue of which one does indeed carry more property, or which one is less, because it is true that there are often cases where those who carry less property demand to get more or are equivalent to those who carry more property.¹⁷

Conclusion

Islam does not regulate common property in either the Quran, hadith, or *fiqh* literature. The existence of common property is only based on the customary realities that have prevailed in society. Joint property is property acquired either singly or jointly with the husband and wife during the marriage bond. Following the needs of the community then the common property is regulated in the KHI is in Chapter XIII which consists of 13 articles. According to KHI, the division of common property in the event of a divorce, whether it is a dead divorce or a living divorce, then each party of the former married couple is entitled to a share of half of the amount of common property owned while not otherwise specified in the marriage agreement. In addition, the division of common property can also be through deliberation of consensus between the ex-wife and the ex-husband's party or based on a decision issued by the court.

¹⁶ Arun Pratama, "Implementasi Percampuran Harta Bersama Dan Harta Bawaan Dalam Perkawinan (Studi Kasus Putusan Pengadilan Agama NOMOR: 0189/PDT.G/2017/PA.SMG)," *Jurnal Ius Constituendum* 3, No. 1 (2018): 15, <https://doi.org/10.26623/jic.v3i1.861>.

¹⁷ I Kadek Leo Byasama Wijaya, I Nyoman Putu Budiarta, and Ni Made Puspautari Ujianti. "Penyelesaian Perkara Harta Warisan Dan Harta Bersama Dengan Prosedur Mediasi Di Pengadilan Agama Badung (Nomor Perkara 0095/PDTG/2017/PABDG)." *Jurnal Preferensi Hukum* 2, no. 1 (2021): 88–92. <https://doi.org/10.22225/jph.2.1.2800.88-92>.

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