

## The Position of Joint Property After the Dissolution of Marriage According to Law No. 1 of 1974 and the Compilation of Islamic Law

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**Abstract.** *Marriage is not only a personal or private matter, but has a social dimension that requires government involvement. According to Islamic law, marriage is an act of worship, so the protection of Muslims in carrying out worship through the implementation of marriage is contained in Article 28e paragraph 1 of the 1945 Constitution. Law No. 1 of 1974 concerning Marriage is a manifestation of the Indonesian state as a state of law. The Marriage Law is contained in Article 2, namely, marriage is valid, if it is carried out according to the laws of each religion. In establishing legal policies in Indonesia, the government has made Islamic law part of national law through the Compilation of Islamic Law (KHI). In this case, Muslims in Indonesia use KHI as a legal basis in cases of marriage breakup, including the division of property in marriage. The legal research method used in this research is research normative juridical which is research conducted or aimed only at written regulations with the nature of descriptive analysis research which is a method that functions to describe or provide an overview of the object under study. The data source used is secondary data with analysis quantitative data. The position of joint property in marriage according to fiqh is not regulated, because in the Qur'an, hadith or fiqh books there is no discussion of joint property. The study of scholars about joint property has given birth to the opinion that joint property can be equated with shirkah, because the wife joint property can be equated with shirkah, because the wife can also be counted as a partner (partnership) who works, although the wife can also be counted as a partner (partnership) who works. (partnership) who work, although not participate in the work in the real sense.*

**Keywords:** *Compilation; Islamic; Joint-Property; Marriage.*

### 1. Introduction

Islamic law sees more separation between the husband's property and the wife's property. What is produced by the husband is his property, and vice versa, what the wife produces is her property. While the wife is only entitled to the maintenance that the husband gives her. On the other hand, the definition of

joint property described in Law No. 1 of 1974 and KHI, brings an ambiguous understanding of the provisions of the husband's obligation regarding maintenance described in Article 34 paragraph 1. The definition of joint property regulated in Law No. 1 of 1974 and KHI, provides an understanding that the husband no longer personally owns the property obtained from the results of his efforts, except those obtained from inheritance or grants. In this case the question arises from which assets the husband carries out the obligation to provide for his wife and children. Because not all husbands have inherited property or inherited property and grants, therefore Article 34 paragraph 1 concerning the obligation to provide maintenance is not relevant in the concept of joint property in marriage. Article 37 of Law No. 1 of 1974 concerning Marriage states that "When a marriage breaks up due to divorce, property is regulated according to their respective laws", what is meant by their respective laws in this Article is Religious Law, Customary Law and other Laws.

## **2. Research Methods**

This research uses normative juridical research and the nature of this thesis's research method is descriptive analysis, namely research that describes, examines, explains and analyzes a legal regulation, in this case related to The Position of Joint Property After the Dissolution of Marriage According to Law No. 1 of 1974 and the Compilation of Islamic Law, Source The legal materials used in this research are secondary data which is data obtained from official documents, books or any form of research related to research objects and research results in the form of reports, journals, theses, dissertations and statutory regulations. The data analysis technique used is qualitative data analysis, namely a research procedure that produces analytical descriptive data, namely by collecting materials and data as well as applicable regulations and legislation which are then analyzed using logical legal thinking.

## **3. Results and Discussion**

After a divorce does not mean that household problems immediately end, precisely with the divorce there are many problems that must be resolved by the husband and wife, one of which is the issue of joint property and its arrangement. Joint property according to KHI in the marriage book Chapter XIII article 87, the inherited property of each as a gift or inheritance is under the control of each as long as the parties do not determine otherwise in the marriage agreement. In Law No. 1 of 1974 concerning marriage regulates marital property, in Chapter VII under the title of property in marriage. In article 35 of Law No. 1 of 1974 concerning marriage, two types of joint property in marriage are recognized, namely Assets acquired during marriage and Congenital property of each husband and wife. So the definition of joint property is property obtained during

marriage outside of gifts or inheritance, meaning property obtained by their efforts, or their own efforts during the marriage period. Similarly, Article 37 of Law No. 1 of 1974 concerning marriage explains that: "When a marriage breaks up due to divorce, joint property is regulated according to their respective laws". In the explanation of the article, it is explained that what is meant by each law is religious law, customary law and other laws. Thus, religious law and customary law are part of the existing legal system in Indonesia.<sup>1</sup>

So with reference to this, which becomes joint property can be in the form of husband and wife's income and all kinds of results from the husband and wife's income even though the principal property is not included in the joint property by noting that the results of the income are obtained during the marriage period until the breakup of the marriage. So that from this understanding it can also be concluded that debts born during the marriage period are also included in the joint property, of course with the condition that in using joint property it should be with the knowledge of both husband and wife while innate property is property that has been owned by both husband and wife before the marriage bond as well as property obtained by both husband and wife obtained from grants or inheritance so that automatically the property becomes joint property or inheritance so that the property automatically becomes each other's property unless otherwise specified. From the above provisions, we can see that the Marriage Law contains separate principles.<sup>2</sup> The separate principle is that inherited property brought into marriage does not automatically merge into joint property, unlike the acquisition of husband or wife's income during marriage and its control still remains with each husband or / wife. Therefore, the innate property will remain the right and controlled in full by the husband or wife. Against all types of joint property, in accordance with the provisions of Article 36 Paragraph 1 of the Marriage Law, the husband or wife can act on the consent of both parties, so that the husband or wife cannot sell or transfer joint property without the mutual consent of the husband and wife. The application of this is to prevent problems that arise if there is a transfer of joint property without the consent of the husband and wife.

Likewise, on the issue of debt and credit, debt and credit will be charged to joint property if both husband and wife give consent, whereas if one party makes debt and credit without the consent of the other party, then the debt and credit will be charged to each other's assets. Based on the description above, the property in marriage can be classified into three groups according to the origin of the property, including the property of each husband and wife that has been owned

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<sup>1</sup> Ahmad Luthfi, (2020), Pembagian Harta Bersama Menurut Undang-Undang Perkawinan dan Kompilasi Hukum Islam, *Jurnal Al Manhaj*, Vol. 2 No. 3, p.52-55

<sup>2</sup> Liky Faizal, (2019) Harta Bersama dalam Perkawinan, *Jurnal Pengembangan Masyarakat Islam Ijtima'iyya*, Vol. 8, No. 2, p. 39-42

before marriage, whether obtained through inheritance or other efforts, is called innate property.<sup>3</sup> Then there is the property of each husband and wife obtained during the marriage relationship, but not obtained due to joint or separate efforts, but due to grants, inheritance, or their respective wills and finally there is property obtained after they are in a marital relationship for the efforts of both or one of the parties, called livelihood property. Article 128-129 of the Civil Code states that if the marriage rope is broken between husband and wife, the joint property is divided in half between husband and wife, regardless of which party the property was previously obtained. The marriage agreement is justified by the laws and regulations as long as it does not violate the morals and public peace prevailing in the life of the community.<sup>4</sup>

In the position of joint property between husband and wife, each other may not sell or mix assets without the knowledge of the other. This aims to avoid misuse of property so that when divorce arises either divorce by court decision or dead divorce. Based on existing *fiqh*, there are several sources of joint property, among others, first, there is property purchased during the marriage, second, goods purchased and / or built after divorce financed from joint property, third, there is property that can be proven to have been obtained during the marriage and fifth, namely, all the income of each husband and wife. The Compilation of Islamic Law provides an explanation of the forms of joint property, which is stated in Article 85, first, joint property can be in the form of tangible and intangible objects. Second, tangible joint property can be in the form of movable objects, immovable objects and securities. Third, intangible joint property can take the form of rights and obligations. The legal consequences of divorce in Islam regarding joint property are specifically regulated in Article 97 of the Compilation of Islamic Law, namely the widow / widower of a living divorce is entitled to half of the joint property as long as it is not specified otherwise in the marriage agreement. Based on Law No. 1 of 1974 provides a broader arrangement, namely joint property is regulated according to their respective laws, which can be further regulated based on religious law, customary law and other laws. In the event of divorce, Article 37 of Law No. 1 of 1974 Concerning Marriage emphasizes that in the event that a marriage breaks up due to divorce, joint property is regulated according to their respective laws. The explanation of each law is religious law, customary law and other laws.

According to several legal provisions applicable in Indonesia such as the Civil Code, the Compilation of Islamic Law, and the Marriage Law, joint property is

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<sup>3</sup> M. Fahmi Al Amruzi. (2014). *Hukum Harta Kekayaan Perkawinan, Studi Komparatif Fiqh, KHI, Hukum Adat dan KUHPerduta*. Yogyakarta: Aswaja Pressindo, p. 38

<sup>4</sup> M. Idris Ramulya. (2015). *Hukum Perkawinan, Hukum Pewarisan, Hukum Kewarisan, Hukum Acara Peradilan Agama*. Jakarta: Sinar Grafika, p. 62

divided equally between husband and wife who have officially divorced as long as it is not specified otherwise in the marriage agreement governing separation in the agreement. The underlying provisions regarding the division of joint property, both the Civil Code, the Compilation of Islamic Law and Law No. 1 of 1974 concerning Marriage, broadly speaking, provide the same provisions, namely between husbands and wives who have officially divorced have the same rights to joint property so that each gets one-twelfth of the share. In the marriage law, freedom is given to the parties to the divorce to be able to choose which law to use / which will be applied and provide an opportunity for husband and wife to make an agreement if necessary, but if there is no agreement then, the judge can consider the existing legal facts so that they can fulfill a sense of justice. So that the legal consequences regarding the determination of the share of joint property between one case and another can be different depending on what law is used by the parties later.<sup>5</sup>

The philosophy of joint property in marriage is that Islamic law does not recognize the existence of joint property. existence of joint property because in Islamic law there is no mixing of wealth between husband and wife. between husband and wife. In Indonesia, joint property is recognized through customary law which is then applied continuously to become a law that is impossible to get rid of because of its value. applied continuously becomes a law that is impossible to get rid of because the value of maslahat greater than mudhorot.<sup>6</sup> In Islam, marriage aims to provide happiness including the fulfillment of material needs, this is in line with QS An Nisa 34 where it is stated that the male party has the obligation to provide for the family. So that the existence of joint property can be said to be property obtained by the husband during marriage. If the wife also works then the wife's income is not part of the joint property.<sup>7</sup> part of the Joint property. This is also in line with QS Al Baqarah 233 and QS An Nisa4 which provides an explanation that the obligation to support the family is the duty and responsibility of a husband, not borne by him. responsibility of a husband is not imposed on the wife. In addition, there are provisions of Law No. 1 of 1974 concerning Marriage Article 35 paragraph (1) that the property produced by husband and wife who work together can be seen as circah property between husband and wife. The Civil Code also regulates the formation of joint property, namely article 119 that since the marriage is entered into according to the law, there is a comprehensive joint property between husband and wife unless there

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<sup>5</sup> M. Idris Ramulya. (2015). *Hukum Perkawinan, Hukum Pewarisan, Hukum Kewarisan, Hukum Acara Peradilan Agama*. Jakarta: Sinar Grafika, p. 76

<sup>6</sup> M Beni Kurniawan, (2018), Pembagian Harta Bersama Ditinjau dari Besaran Kontribusi Suami Istri dalam Perkawinan, *Jurnal Yudisial*, Vol. 11 No. 1, p. 41-53

<sup>7</sup> Ahmadi Yakini & Sri Mamudji.(2019), Perbandingan Hukum Pembagian Harta Bersama Menurut Undang-Undang Perkawinan dan Kompilasi Hukum Islam, *Jurnal Hukum dan Keadilan*, Vol. 1 No. 3, p. 82-84

are other provisions and wife unless there are other provisions. So any property obtained from the marriage contract until with the breakup of the marriage either due to divorce or death, all assets become Joint property without seeing from whom the property is. From here it can be seen that there are differences the regulation of joint property in Islamic law, the Marriage Law and the Civil Code.

#### 4. Conclusion

The position of joint property in marriage according to *fiqh* is not regulated, because in the Qur'an, hadith or *fiqh* books there is no discussion of joint property. The study of scholars about joint property has given birth to the opinion that joint property can be equated with *shirkah*. The division of joint property depends on the agreement of the husband and wife, which in the Qur'an is called "*ash shulhu*", which is an agreement to make peace between the two parties (husband and wife) after they disagree. The position of joint property in marriage according to Indonesian positive law is regulated in Law No. 1 of 1974 concerning Marriage and the Compilation of Islamic Law. Each husband and wife are obliged to maintain joint property. It can be used as collateral by one party with the consent of the other party and is not allowed to sell or transfer joint property without the consent of the other party.

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