

MARITAL PROPERTY CONFLICT RESOLUTION IN THE PERSPECTIVE OF JUSTICE FOR WOMEN

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ABSTRACT

This study aims to analyze the factors made the marital property division in divorce cases has not been able to protect justice for women and to analyze the marital property division after the divorce to guarantee justice for women. In fact, many people did not understand the law and it led to inequity for one party, particularly women. The supporting factors to the condition was assumption that marriage was a private matter so that others should not be allowed to interfere, low education, misconception of religion, dominant role of lebe (Islamic authority holder in one village) and lawyers in helping cases of improper divorce. Therefore, the role of all stakeholders was necessary so that injustice could be minimized. Although the couple did not make a premarriage agreement, they can still conduct a deliberation on the amount of the marital property division and set forth in a joint treaty or mutual agreement. It required the help of lawyer, lebe, community leaders, village head, religious figure, and trustworthy people to be both witnesses and peacemakers.

Keywords: divorce, marital property, gender equity, women right.

A. Introduction

Law of the Republic of Indonesia Number 1 of 1974 on Marriage and Compilation of Islamic Law (KHI) explained that there are three kinds of property in marriage, including marital property, congenital property and acquisition property. Marital property is property or property acquired during marriage or by marriage and during marriage. The meaning of marital property is all the property acquired after the husband and wife are united in a marriage relationship, from their business or the business of one of them.

Marriage aims to form a peaceful, happy, and eternal family or household. In reality, however, not all goes well, there are some who must end the journey due to conflict that can not be solved by way of deliberation even it leads to divorce.¹ Divorce brings legal consequences, including parenting (*hadhanah*), child livelihood (Article 156 KHI), wife's livelihood, marital property.

The union between the husband and wife's property by law since marriage, as long as it is not regulated by other provisions is called marital property (Article 119 of the Civil Code). The marital property, within the laws of Indonesia is set out in Chapter VII, art. 35-37; Article 65 paragraph 1 point b and c of Law No. 1 of 1974, then completed and clarified in Chapter XIII, article 85-97 of the Compilation of Islamic Law (KHI).² Marital property may be in the form of tangible objects, intangibles, movable objects, immovable objects and securities. Indeed, this mixing of marital property will not a problem as long as there is agreement between the two parties. Conflict of marital property will occur if there is a dispute between husband and wife when each claiming the marital property as a congenital property. In general, the wife party often feels aggrieved and experience "injustice" in the marital property division so that the division of marital property is not balanced.

Several previous studies have shown³ that 1) the reality of the settlement of the marital property division often result in uncertainty and harms one party; 2) the marital property division is conducted by one party without the agreement of the other party concerned. Thus, it harms one of the parties so that the values of justice are hard to realize. One of the objectives of law is to bring about justice for all parties, both men and women.

¹Divorce can only be proceeded if it fulfills one of several reasons, but may also occur to meet some of the reasons cumulatively as regulated in article 19 of the Government Regulation of the Republic of Indonesia No. 9 of 1975 on the Implementation of Law No. 1 year 1974 About Marriage. In the Compilation of Islamic Law (KHI) article 113 explains the marriage may be terminated due to death, divorce and court decision.

²Ismuha in Iskandar Ritonga, *Hak-Hak Wanita dalam Putusan Peradilan Agama*, Ditjen Bimas Islam, Jakarta, 2005, p. 193-198

³Anis Muhammad, Dissertation "*Pengaturan Harta Yang diperoleh Dalam Undang-Undang Perkawinan*", UNTAG 2014; Rini Sidi Astuti, *Harta Bersama Dalam Perkawinan (Analisis Putusan Terhadap Penyelesaian Perkara Harta Bersama Akibat Perceraian)*, (Thesis UIN Syarif Hidayatulloh, 2008) and Mahmud Sayuti, Dissertation "*Problematika Pemahaman Masyarakat Muslim Maros tentang Sengketa harta Bersama* (Implementation in the Region of Religious Courts of Class II Maros Year 2010), UIN Alaudin Makassar.

This research is focused on three regions with the highest divorce rate including West Java is Indramayu regency, Central Java is Cilacap and East Java is Malang Regency.⁴ In this study, researchers took the research location on religious courts in Indramayu Regency, Malang Regency and Cilacap with the first reason, each Regency is ranked highest divorce rate in each province; second, the majority of the population in the Regency is Muslim, so that in case of divorce will be settled in the local religious court; third, the majority of divorce suits filed by the wife.

Problems

Based on the background described above, it can be stated the formulation of the problems studied in this research, that is focusing on the problem of marital property that fulfills the justice value for women. The problems studied can be detailed into two problems, including:

1. What are the factors making the division of marital property in divorce cases unable to protect justice for women?
2. How is the division of marital property after divorce that protect justice for women?

Research Methods

a. Research Approach

The approach in this study uses sociological juridical (empirical juridical) approach that sees the law as a phenomenon which can not be separated from non-legal factors in interaction.⁵

b. Data Collection

Data collection techniques used were primary data and secondary data. Primary data was obtained through observation and interviews. Interview technique used is freely using in-depth interviews. Key instruments in this study are the researchers themselves, interview guides and recorders or notes. Informants were divorced husbands or wives, *modins/lebes*, community leaders, heads of religious courts, judges of religious courts.

Secondary data used were the study of legal literature, journals, articles, legal dictionaries and documentation studies of important files from the institutions studied and tracking of related regulations.

c. Data Analysis Technique

Data analysis for primary data used qualitative descriptive normative analysis, whereas secondary data in the form of collected legal materials were used for content analysis. The data analysis used interactive model steps⁶, which consisted of components including: data collection, data reduction, data display, conclusion and verification of data (conclusion drawing and verifying).

B. Results and Discussion

1. Factors Making the Division of Marital Property in Divorce Case have not Secured Justice for Women

Husband and wife in the household is a team work, therefore in the division of property, the judge should consider first, whether each husband and wife has been carrying out each function in fostering the household; second, is there a cooperative relationship with each other and third, is there a balance between contribution of each party in fostering the household with the division of marital property.

In the context of legal system, as Lawrence M. Friedman's theory,⁷ position of the judge is included in the legal structure. The litigants are legal culture while Law No.1 of 1974 concerning marriage and Compilation of Islamic Law as legal substance. The three elements, legal structure, legal culture and legal substance, must be interconnected and can not be separated from each other.

Aspects of community legal culture⁸ is highly influencing behavior of people in every region. Law No. 1 of 1974 on Marriage and Compilation of Islamic Law explains in detail the rights and obligations of married couples, but in reality many people still do not understand it and result in injustice to one party. Not all ex-wives know about the rights they will get after the divorce. Some understand it but they do not want to fight for that. Some others struggle for it but

⁴Indramayu Regency occupies the highest divorce rate in Indonesia, data of 2015 showed divorce of 7430 cases (2058 divorce and 5372 sued divorce cases, 8 cases of marital property); Malang Regency divorce as many as 6844 cases (2298 divorce and 4546 sued divorce case and 2 cases of marital property); Cilacap Regency divorce as many as 5950 (1852 divorce and 4098 sued divorce, 10 cases of marital property).

⁵Ronny Hanitijo Soemitro, *Metodologi Penelitian Hukum*. Ghalia Indonesia, Jakarta. 1992, p.11

⁶Miles, Mathew B. and A. Michael Hubberman. *Analisis Data Kualitatif*. UII Press, Jakarta. 1992, p. 15-20.

⁷ Lawrence M. Friedman asserts that the legal system is a system that includes: legal substance, legal structure and legal culture. see Lawrence M. Friedman, *The Legal System: A Social Science Perspective*, New York: Russel Sage Foundation 1975

⁸ Legal culture is any form of human cultural behavior that affects or relates to legal issues. Satjipto Rahardjo sees the legal culture as the basis for the exercise or not a positive law in society because the implementation of the positive law is largely determined by the attitudes, views and values it embraces. The foundation of his opinion is based on the assumption that the work of the law that can not be ignored is the role of the people / members of the community who are subjected to legal arrangements but also to run is determined by the attitudes, views and values lived by members of the community.

deal with many contradictions, pressures and deceptions because the culture of our society still considers women fighting for their rights is not important and can be defeated by various ways that disadvantage the woman.

This happens because of several factors that influence such as, the factor considering marriage as a private matter so that others are not allowed to interfere, low education, misconception of religion, and so forth. Other factors are the dominance of Lebe's role⁹ as happened in Indramayu Regency. The divorce case is handed over to Lebe to proceed it. So many divorce cases are proceeded without the presence of the defendant (*verstek*).

While in Cilacap, the role of lawyers is very dominant in helping cases of divorce, generally people choose to process it through lawyers, so that the case can be resolved sooner rather than longer conflict with ex-husband, while in Malang regency, most people choose to process it by themselves, since lawyers in Malang are rather expensive and most of them assume that dealing with lawyers will result in longer procedure. The personal and social influences above have much impact on the work of the law and are inseparable from the legal culture of society.¹⁰

2. Division of Marital Property Securing Justice for Women

a. Efforts To Build An Equal Husband And Wife Relationships In The Marital property division

In the case of a divorce, there are several steps to be taken in relation to the marital property division, including the intention to divide the marital property; plans to divide the marital property; implementation of the marital property division. Division of the marital property becomes very complicated if one party feels more entitled to the disputed property. Settlement of marital property for divorced spouse can be performed in three alternative law, that is based on religious law, custom law or other law. The marital property division can be executed in ways that *first*, occurred in the case of divorce of life and divorce by death; *second*, the amount of the marital property acquired by each husband and wife is equal parts; *third*, for the case of divorce by death, the one getting a share of the marital property is his/her heir; *fourth*, determinants of the marital property does not take into account on who is more dominant in the business. Thus, as long as the property is acquired during the marriage period, it is counted as a marital property regardless of who have more dominant and greater contribution.¹¹

If the husband and wife are not able to agree to divorce and intend to share the marital property, there are several stages that must be considered, including *first*, the existing assets should be inventoried in advance, either in the form of movable or immovable property, tangible or intangible, bank accounts, debts and bills and others. It includes the property of each party, whether as a gift or inheritance; *secondly*, identifying or sorting out which belongs to the marital property and which does not include in the marital property. Only those belonging to this marital property will be the subject of a dispute to be held in court; *thirdly*, to file a lawsuit in the case of winning the marital property is essentially the same as the ordinary civil court proceedings, it depends whether the marital property lawsuit is united or separated in the divorce lawsuit, it settling the divorce lawsuit first, and after obtaining a divorce verdict be continued to file a marital property lawsuit.¹²

Within the proceedings in court, all the judges to do in resolving conflicts of marital property are 1) putting the husband and wife position equally and equally contribute to the acquisition of marital property collected during the marriage; 2) to assume that the wife's status as a housewife is an equal contribution in the process of creating marital property of family; 3) always take into account the necessity of the wife's consent to legitimacy of legal transactions of a marital property object conducted by the husband; 4) in cases where the husband dies in a disaster, the proof of the marital property certificate in the name of the husband proposed by the deceased's heiress is not immediately deemed to have more legal power because ownership of the marital property is not questioned as being registered on behalf of any person.¹³

Settlement of marital property is not only performed in court, the settlement of marital property is often conducted out of court through conciliation and mediation. In mediation (deliberation) either the husband or wife must take into account the livelihood of the children and their ability to bear the costs or expenses in the future. Although the husband and wife did not make a marriage agreement before the husband and wife can still conduct deliberations on the amount of marital property that the husband and wife received and will be written in a treaty or agreement. To solve the marital property cases outside the court, in addition to the need for help from lawyers, community leaders, religious or trusted figure and trustworthy people to be witnesses, the role of the village head is also very great to be a peacemaker. In the settlement of marital property among people of Malang Regency, Cilacap and Indramayu mostly use non-litigation settlement, the role of neutral mediator becomes very important, including the role of village head. As the official who becomes the foundation of its citizens in solving the problem, then the role of the village head should be neutral, understand the complexity of marital property and its settlement.

⁹Lebe has a very big role in Indramayu Regency in terms of divorce management in Indramayu Regency. Lebe is another name for the field technical practitioner in charge of people's welfare. (Regional Regulation of Indramayu Regency No. 8 of 2006 on Village Government).

¹⁰SatjiptoRahardjo, *HukumdanMasyarakat*, Angkasa Bandung, 1990, p. 10

¹¹Anshary, *HartaBersamaPerkawinandanPermasalahannya*, MandarMaju, Bandung, 2016, p.32

¹²SolahudinPugung, *MendapatkanHakAsuhAnakdanHartaBersama*. Indonesia Legal Center Publishing, Jakarta, 2011, p. 42.

¹³A. Mukti Arto, *Pembaharuan Hukum Islam Melalui Putusan Hakim*, Pustaka Pelajar, Yogyakarta, 2015, p. 260

b. Conflict Resolution of Marital Property Division Protecting Justice For Women

If marital property conflicts are filed in the court, the Judges' considerations in determining the division of marital property will be as follows: a) Considerations referred to evidence. The Plaintiff filed written evidence so as to provide explanation and conviction for the judge to pass a verdict in his favor. While the Defendant can not deny it. b) Considerations referred to in Article 35 Law No. 1 of 1974 is the property acquired during marriage into marital property, so that at the time of divorce the marital property is divided equally between ex-husband and wife. c) The considerations referred to in Article 88 of the Compilation of Islamic Law, stipulates that if there is a dispute over marital property, it shall be submitted to the competent Religious Courts. d) Considerations referred to in Article 97 of the Compilation of Islamic Law concerning the percentage of the marital property division. In accordance with the Decision of the Court, the marital property division is $\frac{1}{2}$ (half) to the plaintiff and $\frac{1}{2}$ (half) for the defendant.

Basically, the division of $\frac{1}{2}$ part of the marital property for each is not a problem as long as it does not result in gender inequalities¹⁴. This division is realized when in 2 (two) conditions that first, ex husband and ex-wife are both the subject of work. Second, only the ex husband works and earns for living while the ex-wife does not work and only be a housewife. Thus, in order that the implementation will not result in gender inequality, the normative, religiosity, sociological and philosophical approach should not be contradictory. However, if it is in contrary, gender equity will be impossible to be expected.

Normative approach is conducted by looking at the legal instruments applied in a particular society. This approach can be traced from applying the division of marital property in applicable law. In this normative approach will be focused on Islamic law. The marital property division for the parties of Islam is set forth in article 97 of the Compilation of Islamic Law, that "divorced widow or divorcees of each life shall be entitled to half of the marital property as long as it is not specified otherwise in the marriage agreement". From the provisions stipulated in article 97 of the Compilation of Islamic Law it can be seen that each will get $\frac{1}{2}$ part of the marital property. This $\frac{1}{2}$ division is exceptional as long as it is not regulated and specified in an agreement. If the normative foundation of article 97 of this of the Compilation of Islamic Law is examined more deeply, the injustice will be found, especially when women are positioned as a working subject and earn for living. In addition, the duty of women doubles as the duties of a housewife.

Religiosity approach is to look at the basis of Qur'anic verses that are used as references by judges in making decisions. The judges of the religious courts when deciding on the marital property division always refer to the letter an-Nisa 'verse 32 which reads: "...for men there is a share of what they earn, and for women there is share of what they earn, and ask Allah for some of His bounty. Allah is All-Knowing All."

The sociological approach can be seen in 5 (five) circumstances including *first*, a working husband and wife as housewives who take care of various home affairs. *Second*, a working husband and wife also work other than as housewives who take care of various home affairs. *Third*, a husband does not work and the wife also works other than as a housewife who take care of various home affairs. *Fourth*, a husband does not work but does household chores such as washing, cooking, cleaning the house, taking care of the child etc. and the wife also works other than as a housewife who take care of various house affairs. *Fifth*, a husband works and helps with housework such as washing, cooking, cleaning the house, taking care of children etc. While the wife also works as a housewife who take care of various home affairs. 5 (five) circumstances in sociological terms is very important to see the side of gender equity.

The judge when facing cases of the marital property division with petition from one of the parties out of the normative context of article 97 of the Compilation of Islamic Law, the judge then can not only consider from the normative side but also must view from other side like religiosity, sociology and philosophy-ideology. Therefore, the key to a gender-based equity decision is the judge's paradigm. Judge must be literate or understand and have gender paradigm. Understanding of this gender aims to avoid discriminatory behavior toward women.

Bali, with the patriarchal tradition towards woman and man, has been transformed into modern tradition which is placed man and woman equally. It impacts towards marital property after the divorce in the law of customary tradition and their attitude towards marriage regulation.¹⁵The effort for women's rights is also conducted in some countries. In Ghana, the courts have recognized the right of women and men to obtain equal rights in the distribution of common property;¹⁶ in India, the effort to minimize social injustice for women continues to be pursued by some reformers such as Ran Mohan

¹⁴ Gender equity is a process and fair treatment of women and men. Gender equity means that there is no standardization, double burden, subordination, marginalization and violence against women and men. The realization of gender equality and justice is characterized by the absence of discrimination between women and men, and thus they have access, opportunity to participate, and control over development and to obtain equitable and fair benefits from development.

¹⁵I Ketut Sudantra, *Development Of Balinese Women's Rights Above Marital Property In The Event Of Divorce*, International Journal of Business, Economic and Law, Vol. 12, Issue 4 (Law), ISSN 2288-1552, 2017, 64-66.

¹⁶Banner Sam (National Programme Coordinator of Wildaf in Ghana Africa), *A Matter of Equality in Matrimonial Rights*. Espaco Juridico, Journal of Law: 13 (3), 141-148

Roy.¹⁷ In India, the United Kingdom, Australia, and the United States, the legal dispute settlement process among families is not only done in court (litigation) but is also conducted non-litigation through arbitration.¹⁸

In some countries such as Saudi Arabia, Egypt and Turkey as Muslim-majority countries, different policies have different policies on common property, in Saudi Arabia, not knowing the existence of joint property, for divorce can be done by husband and wife. Egypt State in Personal Status Law Article 76 explains that a divorced woman will receive 25% of her husband's monthly income on benefits if they do not have children. If they have one or two children, earn 40% and if they have more than two children 50%.¹⁹ The rule of law in Turkey adopted European law, in the field of joint property of the couple's freedom to determine their common property and the system used for whether their property is separate, merged and its rules.²⁰ After an agreement on common property must be ratified in the presence of a notary, if the spouse does not register then their joint.

C. Conclusion

The legal culture of community is highly influencing the behavior of people in every region in Indramayu, Malang and Cilacap Regency. Although Law no. 1 of 1974 on Marriage and Compilation of Islamic Law has explained the details of the rights and obligations of husband and wife, division of marital property, in reality however, many people still do not understand it and lead to injustice against one party, especially women. Factors that give effect to them, considering marriage is a private matter so that others do not need to interfere, low education, misconception of religion, the dominance of the role of Lebe, lawyers in helping the case of divorce is less appropriate.

The settlement of marital property can be performed in two ways, in and out of the court. First, the settlement in court, the judge must use several approaches such as normative approach, religious approach, sociological approach and philosophical-ideological approach. And it takes a courageous judge to be gender responsive by directing the law into a more responsive system for marital property division with perspective on gender justice; Second, out-of-court settlement is often done through conciliation and mediation. Although the husband and wife did not make a marriage agreement before the husband and wife can still conduct deliberations on the amount of the marital property division and written in a joint treaty or agreement. In addition, it takes the help of lawyers, community leaders, village heads, religious figure or people who are trusted to be witnesses and peacemaker.

D. Bibliography

Books:

- Anshary, 2016. *Harta Bersama Perkawinan dan Permasalahannya*, Bandung: Mandar Maju.
A. Mukti Arto, 2015. *Pembaharuan Hukum Islam Melalui Putusan Hakim*, Yogyakarta: Pustaka Pelajar.
IsmuhadalamiskandarRitonga. 2005. *Hak-Hak Wanita dalam Putusan Peradilan Agama*, Jakarta: Ditjen Bimas Islam.
Lawrence M. Friedman. 1975. *The Legal System: Social Science Perspective*. New York: Russel Foundation.
Miles, Mathew B. dan A. Michael Hubberman. 1992. *Analisis Data Kualitatif*. Jakarta: UII Press.
Ronny Hanitijo Soemitro. 1992. *Metodologi Penelitian Hukum*. Jakarta: Ghalia Indonesia.
Satjipto Rahardjo. 1990. *Hukum dan Masyarakat*. Bandung: Angkasa
Solahudin Pugung. 2011. *Mendapatkan Hak Asuh Anak dan Harta Bersama*. Jakarta: Indonesia Legal Center Publishing.

Undang-Undang:

- Undang-Undang R.I No. 1 Tahun 1974 *Tentang Perkawinan dan KHI Serta PERPU Tahun 2009 Tentang Penyelenggaraan Ibadah Haji*, 2010. Surabaya: Kesindo Utama.
Kompilasi Hukum Islam (KHI), Instruksi Presiden (Inpres) No. 1 Tahun 1991

Journals and Dissertations:

- I Ketut Sudantra, *Development Of Balinese Women's Rights Above Marital Property In The Event Of Divorce*, International Journal of Business, Economic and Law, Vol. 12, Issue 4 (Law), ISSN 2288-1552, 2017, 64-66.
Banner Sam (National Programme Coordinator of Wildaf in Ghana Africa), *A Matter of Equality in Matrimonial Rights*. Espaco Juridico, Journal of Law: 13 (3), 141-148
S. Ganesh Kumar, S. Punithavathi, Dr. C. Balakrishnamurthy, *Matrimonial Property Rights in India; A Perspective on Women Empowerment*, India Streams Research Journal: 5 (12), 2016.

¹⁷S. Ganesh Kumar, S. Punithavathi, Dr. C. Balakrishnamurthy, *Matrimonial Property Rights in India; A Perspective on Women Empowerment*, India Streams Research Journal: 5 (12), 2016.

¹⁸M. (I.eentjie) De Jong, *Arbitration of Family Separation Issues-A Usefull Adjunct to Mediation And Court Process*. Potchefstroom electronic Law Journal: 7 (6); 2355-2410, 2014.

¹⁹<https://www.al.monitor.com/egypt's-divorce-laws-women-deman-their-fair-share-of-assests>, 18 September 2016

²⁰Buitenlands IPR/Foreign PIL, *Matrimonial property regime in Turkey*, npr-online.eu, Tahun 2014

M. (I.eentjie) De Jong, *Arbitration of Family Separation Issues-A Usefull Adjunct to Mediation And Court Process*. Potchefstoon electronic Law Journal: 7 (6); 2355-2410, 2014

<https://www.al.monitor.com/egypt's-divorce-laws-women-deman-their-fair-share-of-assests>, 18 September 2016

Buitenlands IPR/Foreign PIL, *Matrimonial property regime in Turkey*, npr-online.eu, 2014

Anis Muhammad, Dissertation “*Pengaturan Harta Yang diperoleh Dalam Undang-Undang Perkawinan*”, UNTAG 2014

Mahmus Sayuti, Dissertation “*Problematika Pemahaman Masyarakat Muslim Maros tentang Sengketa harta Bersama (Implementation in the Region of Religious Courts of Class II Maros Year 2010)*”, UIN Alaudin M

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