

DISTRIBUTION OF JOINT PROPERTIES ACCORDING TO BALANCED JUSTICE PRINCIPLE

M Ridwan

University of Srivijaya, Indonesia

mridwan.doktorilmuhukum@gmail.com

Gugun Gumilar

Dublin City University, Ireland

Gugun.gumilar2@mail.dcu.ie

Amran Suadi

Supreme Court of Republic of Indonesia

amran.suadi@gmail.com

KN Sofyan Hasan

University of Srivijaya, Indonesia

kn.sofyan_hasan@yahoo.co.id

M Syaifuddin

University of Srivijaya, Indonesia

syaifuddin_unsri@yahoo.co.id

Abstract

The structure of joint property divided governed by Law No. 1 of 1974, and the Compilation of Islamic Law must fully reflect the importance of justice and legal clarity. Based on that, the issue addressed in this journal is how to design a more reasonable and legally specific partition of the joint property after divorce for the community in the relevant marital law in the future. This study is categorized as legal-normative research. According to the study's findings, the future concept of joint property law reconstruction is to incorporate the principle of balanced justice based on Pancasila into Article 37 of Law Number 1 of 1974 concerning Marriage and Article 97 of the Compilation of Islamic Law through amendments to Article 37 of Law Number 1 of 1974 and Article 97 of the Compilation of Islamic Law. The notion of balanced justice has been found in various Republic of Indonesia's Supreme Court decisions. As a result, some of the legal rules in the joint property

decision must be reviewed while developing joint property law regulations.

Keywords: Distribution, Joint properties, Principle of Balanced Justice, Citizen Religion of Islam

A. Introduction

Justice in Islam means something balanced, not extreme, and not excessive. Justice touches all aspects, including aspects of family.¹ The family is the smallest unit in the building of society. It is a subsystem of the social system in which ethical, moral, religious, and legal norms apply. Therefore, changes that occur in other subsystems and with the ecosystem will affect the family. The structure and function of the family will change due to social changes following the dynamics that occur in society.

Forming a family is a constitutional right guaranteed by the Constitution. Article 1, paragraph 3 of the 1945 Constitution of the Republic of Indonesia states that Indonesia is a country based on law. As a consequence of the adherence to the rule of law, all activities carried out within the state's territory are regulated and carried out following applicable positive laws in the public and private sectors. This can be seen by regulating human relations with other human beings in legal instruments. Marriage, by definition, contains the meaning of an inner and outer bond between a man and a woman as husband and wife to form a happy and eternal family based on Belief in the One Almighty God.²

Marriage, by definition, is regulated in Law Number 1 of 1974, that what is meant by marriage is an inner and outer bond between a man and a woman as husband and wife to form a happy and eternal family (household) based on Belief in the One Supreme God. Law

¹ Suadi Amran, *Filsafat Keadilan Biological Justice Dan Praktiknya Dalam Putusan Mahkamah Agung* (Jakarta: Kencana, 2020), p.124

² Amran Suadi and Mardi Candra, "Prevention Of Child Marriage In Indonesia Based On System Interconnection," *Journal of Southwest Jiaotong University* 57, no. 6 (December 30, 2022): 926–937.

Number 1 of 1974 concerning Marriage also regulates matters of marital property. These rules can be seen in Article 35, Article 36, and Article 37. As stated in Article 35: (1) Property acquired during the marriage becomes joint property. (2) The inherited assets of each husband and wife and the assets obtained by each as a gift or inheritance are under the control of each as long as the parties do not specify otherwise.

The debate over the distribution of joint properties in a balanced manner in Compilation of islamic law and Law Number 1 of 1974 concerning Marriage is considered not to fulfill the values of justice and certainty. This is reflected in several cases in the court environment. What is known is that there is a crucial role for the court in applying the values of justice and legal certainty in the application of the article regarding joint properties. The debate over the distribution of joint properties in a balanced manner in Compilation of islamic law and Law Number 1 of 1974 concerning Marriage is considered not to fulfill the values of justice and certainty.

Supreme Court Decision Number 266 K/AG/2010 and Supreme Court Decision Number 78/K/AG/2021, and Supreme Court Decision No.266/K/AG/2010 are portraits of the division of joint properties which do not apply the principle of equality between husband and wife, but looking at the distribution of joint properties in terms of their roles and functions as mentioned in their considerations, such as the considerations of the Supreme Court judges in the Supreme Court Decision Number 266 K/AG/2010, that: *"If all the assets obtained in marriage are the hard work of the wife, while the husband never brings or uses the results of his career to meet family needs, the husband is deemed to have never carried out his obligations in providing a living for his family, so that if the provisions for dividing joint properties are 50%: 50 % is applied, it will eliminate the element of justice in law enforcement "*.

As mentioned above, excluding arrangements for joint properties in positive law in the Supreme Court Decisions and other Religious Court Decisions is a form of non-linearity between the norms of shared assets in a positive direction and the principles of justice and legal

certainty. So that the reconstruction of joint property arrangements in compilation of islamic law and Law Number 1 of 1974 concerning Marriage is deemed necessary to be carried out, this study attempts to identify and analyze the relevance of reconstruction to the dynamics of law enforcement regarding joint property in Indonesia for legal reform and legal discovery.

This research is classified as normative juridical research.³ The research approach used is a statute approach about the legal materials used in this study using techniques that start from collecting, identifying, and carrying out an inventory of statutory regulations. Conduct research with library materials, then select materials that contain different and relevant perspectives related to the problem under study. The technique of concluding this study uses logical thinking or deductive methods.

B. The Principle of Balanced Justice in 3 (three) Supreme Court Decisions in Joint Properties Cases

Shared assets that are distributed equally after the occurrence of divorce today are no longer enforced based on Article 97 of Kompilasi Hukum Islam (KHI) or Compilation of Islamic Law. The provisions of Article 97 of the KHI above can be deviated using *contra legem*. In all cases, applying the requirement for an equal share (50:50) of joint property in Article 97 of the KHI for each husband and wife does not necessarily fulfill a sense of justice. That's why to be able to satisfy the sense of justice of the parties, of course, they must prioritize aspects of expediency and justice, in addition to parts of legal certainty and balance, whether the person concerned also commits to maintaining family harmony in realizing the goal of a marriage that is *sakinah*,

³ Kornelius Benuf and Muhamad Azhar, "Metodologi Penelitian Hukum Sebagai Instrumen Mengurai Permasalahan Hukum Kontemporer," *Gema Keadilan* 7, no. 1 (April 1, 2020): 20–33.

ma'waddah, and *rahmah*. Commits to maintain the integrity and blessing of joint assets in marriage and several other problems.⁴

In the context of the distribution of joint properties based on distributive justice, it will intersect with efforts to maintain property proportionally and reasonably. The decision of the Supreme Court of the Republic of Indonesia Number 266k/Ag/2010, the Decision of the Supreme Court of the Republic of Indonesia Number 597 K/Ag/2016, and the Supreme Court's Decision Number 78/K/AG/2021 are portraits of the distribution of joint properties that do not apply the principle of balance between husband and wife, but looking at the division of joint properties in terms of their roles and functions as stated in their considerations, such as the considerations of the judges of the Supreme Court in the Supreme Court Decision Number 266 K/AG/2010, that: "*if all the assets obtained in marriage are the wife's hard work, while the husband never brings or uses the results of his work to meet the needs of the family, the husband is considered to have never carried out his obligations in providing a living for his family, so that if the provisions for the distribution of joint property are 50%: 50% is applied, it will eliminate the element of justice in law enforcement.*"

Apart from the considerations of the Supreme Court Decision Number 266 K/AG/2010, there are also considerations of the Supreme Court Judges on Decision Number 597 K/Ag/2016. As described below: "*The Supreme Court's decision Number 597 K/Ag/2016, which does not decide to divide the joint properties between husband and wife are entitled to (half), even the Supreme Court decides on the distribution of common properties, namely 2/3 for the wife and 1/ 3 for the husband, with legal considerations the extent to which the contribution of each in forming the joint property appears to contradict the rules contained in Article 97 of the KHI and Articles 128-129 of the Civil Code which states that widows and widowers get an equal share, that is, each gets half of the share. In this case, it turns out that the wife's contribution is more*

⁴ Muhamad Beni Kurniawan, "Pembagian Harta Bersama Ditinjau Dari Besaran Kontribusi Suami Istri Dalam Perkawinan," Jurnal Yudisial 11, no. 1 (April 26, 2018): p. 41.

significant in producing the joint property, so it is natural that the wife's share is larger (2/3) than the husband's share (1/3). "

The considerations described above are also used in the Supreme Court Decision Number 78/K/AG/2021 with the following considerations: *"That if both parties carry out their respective functions to the joint property, each has the right to (half) of its share; That, however, if the wife performs two functions at once, namely trying/working to fulfill household needs and also taking care of the household and raising children as in the quo case, then the joint property is unfair if each gets a half share (50:50). Therefore, the division of joint property as determined by the Judex Facti: 70 percent for the Plaintiff (husband) and 30 percent for the Defendant (wife) is appropriate and correct. "*

C. Comparison of Join Property Arrangement and its Implementation in different Muslim countries

1. Joint properties arrangement and its Implementation in Saudi Arabia

Saudi Arabia is an Islamic country with a particular style that adheres to Shari'ah as the law governing all life aspects. The government has not adopted any other legal system and only uses a few Western legal systems. The Kingdom of Saudi Arabia arose from the Saud Dynasty, founded in the 18th century in the Najd region of the Arabian Peninsula.⁵ The Saud dynasty was founded when a political figure named Abdul Aziz bin Abdurrahman Al-Sa'ud (1703-1792) met Muhammad Ibn Wahab, a Hanbaliyah Madhhab of thought proponent.⁶ Based on these facts, it is unsurprising that Saudi Arabia is officially affiliated with the Wahabi sect, which adheres to Hanbali views. In other circumstances, however, Saudi Arabia does not oppose

⁵ Dede Ika Murofikoh, Dini Inasyah Alfaridah, and Novita, "Perbandingan Ideologi Negara Indonesia Dengan Arab Saudi," *Jurnal Hukum dan HAM Wara Sains* 1, no. 2 (December 2022): 188–196.

⁶ D. C. Holsinger, *The Government and Politics of the Middle East and North Africa*, Second. (Kettering: Oxford University Press., 1988).

the teachings of other Sunni schools as long as they comply with the King's wishes or directives.⁷

There are no special laws regarding family law, especially those relating to marriage, endowments, and inheritance; all only depend on the rules in the Qur'an and fiqh. It is difficult to find a chapter in the study of classical fiqh and Arab tradition that discusses joint property in a marriage bond. This is because in the Islamic concept, the wife's property remains her property and is fully controlled by her, while the husband's property belongs to the husband and is fully controlled by himself, so they are unaware of the customs regarding the search for joint asset between husband and wife.⁸ Joint properties are analogous to *syirkah*. The Fiqh Scholars differ on the division of the various types of *Shirkah* in discussing what is permissible and what is not. The Egyptian Fuqaha (the majority are from the Shafi'i and Maliki *Madhhabs*) divide *syirkah* into four types, namely:⁹

- a. *Syirkah Inan*, namely, limited *syirkah* to seek profit through a combination of assets and business. Even if the parties are obtained by other means, such as one of the parties receiving a grant, gift, or other means, it will not become *syirkah* and remain the property of each party;
- b. *Abdan syirkah*, namely *syirkah* in the field of services or work. The service or work performed can be in the form of the same service or work, or it can be a different service or job;
- c. *Syirkah mufannmadhab*, is not limited to the combination of assets and businesses to obtain profits but also includes other ways to bring them. Each Party, such as a person receiving a gift, giving, and others;

⁷ Nurhayati Agustina, "Politik Hukum (Legislasi) Hukum Keluarga Di Saudi Arabia," *Ijtima'iyya* 7, no. 1 (February 2014).

⁸ Yusup Kamaludin Deni and Al Hasan Amin Fahadil, "Perlindungan Hukum Terhadap Hak Anak Dalam Sengketa Harta Bersama," *Jurnal Komisi Yudisial* 15, no. 3 (December 2022): 317–335.

⁹ Ibnu Rasyad al- Qurtubi, *Bidayah Al-Mujtahid Wa Nihayah Al-Muqtashid*, vol. 2 (Egypt: Maktabah Musthofa al-Baaby al-Halby, 1960).

- d. *Syirkah wujub* is *syirkah* that only trusts between two or more people.

While the Hanafi *Madhhab* divides *syirkah* into:¹⁰

- a. *Syirkah Milk* is *syirkah* against an object or wealth with no intention to enter into a special agreement in advance.
- b. *Syirkah Uqud* is *syirkah* that arises because of a prior agreement between two or more people regarding a business.

This *Shirkah* is divided into six types:

- a. *Syirkah Mufawwadhab bil Amwal* is a partnership between two or more people regarding a type of commerce.
- b. *Syirkah Inan bil Amwal* is a partnership between two or more people regarding commerce or all kinds of business.
- c. *Syirkah Abdan Mufawwadhab*, is a partnership with a capital of energy which then there is an equal distribution of profits or losses.
- d. *Syirkah Abdan Inan*, namely the labor sharing with differences in work and wages.
- e. *Syirkah Wujub Mufawwadhab*, is a partnership with only energy.
- f. *Syirkah Wujub Inan*, is an unconditional trust sharing.¹¹

The Ulama concur on the permissibility of *Shirkah 'Inan* among the many kinds of *Shirkah* mentioned above. Only the Hanafi and Maliki *Madhhabs* accept *Shirkah Mufawwadhab*, but the Shafi'i *Madhhab* provides it. The Shafi'i *Madhhab* forbids *Shirkah Abdan*, although the other *madhhabs* accept it. Moreover, *Shirkah Wujub* is permitted according to the Hanafi and Hambali *Madhhabs* but not to the Shafi'iyah and Malikiyah.¹² Imam Shafi'i does not permit *Shirkah*

¹⁰ Al Jaziri and Abdur-Rahman, *Fiqh 'Ala Madzhab al-Arba'Ah*, vol. 3 (Beirut: Darul Kitab al-Ilmiyah, 2003), p. 63-68

¹¹ Muhammad Ridwan, Arbanur Rasyid, and Maulana Arafat Lubis, "Harta Bersama Suami Istri Ditinjau Dari Hukum Islam Dan Hukum Adat," *Yurisprudencia: Jurnal Hukum Ekonomi* 7, no. 2 (December 17, 2021): 201–221.

¹² Al Jaziri and Abdur-Rahman, *Fiqh 'Ala Madzhab al-Arba'Ah*, vol. 3, p. 63-68 .

Mufawwadhah because it comprises multiple ghurur (fraud and ambiguity). At the same time, Shirkah Abdan is prohibited because shirkah (partnership) only applies to property and not labor. The Ulama who tolerate such types of shirkah (shirkah abdan), the partnership's purpose is agreement. Based on the purpose of syirkah abdan, the concept of Gono Gini was born.¹³ The concept arose because, basically, marriage between husband and wife has partnered to serve the ark of the household (*syarikatur rajuli fil bayati*).¹⁴ From here comes the concept of *shirkah abdan* (unlimited partnership) between the two.¹⁵ Based on this concept, if the marriage between the two breaks up due to divorce, death, or a court decision, the property obtained during the marriage will be divided according to the agreement. When the husband and wife have agreed upon the agreement regarding the division of joint property, that is called reconciliation and a sense of peace (*as-shulhu*).

So that it can be concluded that the provisions of joint property are left to the agreement and pleasure of each husband and wife, it is appropriate and reasonable why Saudi Arabia does not regulate in a particular chapter in marriage regarding the property together. Based on the argument above, if a husband and wife are divorced and want to divide the assets of Gono Gini, it can be reached by way of peace (*assbulhu*), namely the distribution of Gono Gini assets depending on deliberation and agreement between husband and wife, maybe the husband gets 50% and the wife 50%, may the husband get 30% and wife 70% or vice versa and may also share with other ratios (percentages). Everything is justified by *syara'* as long as it results from the peace pursued based on each other's willingness.

¹³ Kholil Nawawi, "Harta Bersama Menurut Hukum Islam Dan Perundang-Undangan Di Indonesia," *Mizan: Journal of Islamic Law* 1, no. 1 (June 11, 2018).

¹⁴ Mamat Ruhimat, "Teori Syirkah Dalam Pembagian Harta Bersama Bagi Istri Yang Berkarir Berdasarkan Undang-Undang Nomor 1 Tahun 1974 Dan Kompilasi Hukum Islam Serta Prakteknya Di Pengadilan Agama," *Adliya: Jurnal Hukum dan Kemanusiaan* 11, no. 1 (June 13, 2019): 79–98.

¹⁵ Yusup Kamaludin Deni and Al Hasan Amin Fahadil, "Perlindungan Hukum Terhadap Hak Anak Dalam Sengketa Harta Bersama.," p. 317-335

2. *Joint properties arrangement and its Implementation in Malaysia*

The Islamic Family Law in Malaysia enforces joint property/requests as part of the cases regulated in Islamic law as outlined in enactment Number 2 of 2003 Seksyen 122. Joint properties are assets that husband and wife jointly obtain during the marriage period under the conditions determined by the Syarak Law of the Islamic Family Law (Wilayah Fellowship) 1984 and the *Enakmen* Negeri Selangor Number 2 of 2003 Section 122. This is described as follows:¹⁶

- 1) The Court has the power when confirming the lafaz talak or when making an order for divorce, ordering that any assets acquired by the parties during their marriage with their joint efforts be divided between them so that the assets are sold everywhere, and the proceeds the sale is divided between the parties;
- 2) In exercising the powers granted by sub-section (1), the court should pay attention to a. The number of contributions that have been made by each party in the form of money, property, or work to acquire these assets. b. Any debt owed by either party that has been made for their mutual benefit. c. The needs of the minor children of the marriage, if any. And subject to these considerations, the court should make an equal share;
- 3) The Court has the power if it justifies the lafadz talak or, when making a divorce order, orders that any assets acquired during the marriage period with the sole effort of one party to the marriage are divided between the parties;
- 4) In exercising the powers granted by sub-section (3), the court should pay attention to (a) The extent of the contribution that the non-acquiring party has made for the good of the family by taking care of the household or maintaining the family. (b) If there is a need for minor children from the marriage and subject to such consideration. In that case, the court may distribute the assets or the sale proceeds

¹⁶ Ibnu Elmi AS. Pelu and Ahmad Dakhoir, "Marital Property within the Marriage Law: A Debate on Legal Position and Actual Applications," *Al-Jami'ah: Journal of Islamic Studies* 59, no. 2 (November 11, 2021): p. 287–316.

according to the customer's level. But in any case, the party who has acquired the assets utilizing his efforts should receive a higher rate;

- 5) For this section, references to assets owned by one party before the marriage have been brought forward to a large extent during the period of marriage by the other party or by their joint efforts.

Islamic family law legislation in Malaysia has recognized joint property as one of the rules regulated in Islamic religious rules. Every state in Malaysia has determined specific provisions regarding the claim. The division of joint property in Malaysia puts forward the aspect of proportionality. The distribution of joint property is not rigid with equal distribution but looks at the portion and role of the parties to the joint property obtained.

D. Construction of the Law on the Distribution of Joint Property in the Future

Philosophically, Islamic Sharia assets cannot be separated from the legitimacy of Allah as the owner.¹⁷ The concept of joint properties based on contributions in marriage, indeed in the interest of carrying out reconstruction, needs to be studied in depth, especially using the perspective of the value of justice. The concept of justice, which in this case is used to analyze the distribution of joint properties in Indonesia, can be seen from various perspectives. However, balanced justice based on Pancasila is the author's guide in reconstructing the provisions for joint properties in Law Number 1 of 1974 concerning Marriage in Article 37 and Article 97 of the Compilation of Islamic Law as their derivatives.

The concept of joint property should be based on contributions in marriage. In a home, for example, the husband works to earn a living, while the wife takes care of the family, devoting herself to her husband day and night, caring for, educating, and watching over the children. Based on this example, the husband and wife's work should be regarded

¹⁷ Ibid, p. 131-145

as contributions, whether the wife's work at home or the husband's work outside the home.

Justice is the basis and basic guideline in examining the extent to which the value of justice is in the legal norms of the distribution of joint properties in positive law. From a historical perspective, the provisions regarding justice in the 5th Precept of Pancasila, "*Social Justice for All Indonesian People*," are not necessarily based solely on the conception of global justice. Justice in Pancasila is prepared by exploring the value of justice unique to the nation's state.

Pancasila, as the basis of Indonesian state philosophy, lays down the precept of "*Social justice for all Indonesian people*" in the fifth precept. This can be read as a form of emphasis that the meaning of the fifth precept is a state goal; the state aims to realize people's welfare through justice. The characteristics of justice based on Pancasila as the nation's philosophy and ideology include several principles, namely:

1. The principle of Pancasila justice is based on Belief in the One and Only God. Uphold justice is based on justice from God. Therefore, the judge based on Pancasila recognizes the existence of religion and belief in each citizen.
2. The principle of Pancasila justice prioritizes human rights and humanizes humans as social creatures whose justice must be protected.
3. The principle of justice Pancasila upholds the value of unity and oneness to create a conducive atmosphere for the nation that provides justice for Indonesian citizens.
4. The principle of justice Pancasila adheres to the principle of democracy for the sake of creating justice for citizens in expressing their respective opinions based on deliberation to reach a consensus
5. The principle of justice Pancasila provides justice for all citizens without exception, following their rights

Currently, the existing construction of joint property distribution is considered to reflect something other than the justice values of

Pancasila. This can be seen from Article 37 of Law Number 1 of 1974 concerning Marriage stipulates Article 97 of the Compilation of Islamic Law, which regulates joint properties and the provisions for their distribution. Article 37 Law Number 1 of 1974: *"If the marriage is broken up due to divorce, joint properties are regulated according to their respective laws."* Furthermore, Article 97 of the Compilation of Islamic Law, namely: *"Divorced widows or widowers are each entitled to half of the joint property as long as it is not specified otherwise in the marriage agreement."*¹⁸

In Article 37 of Law Number 1 of 1974 above, it is known that the phrase "each law," according to the elucidation of Article 37, is religious law, customary law, and other laws. Article 37 of Law Number 1 of 1974 concerning Marriage, which is an advantage, can be used as a legal basis for the distribution of joint properties due to divorce. Still, Article 37 of Law Number 1 of 1974 concerning Marriage has a drawback if it is used to distribute common properties due to divorce. Weaknesses of Article 37 of Law Number 1 the Year 1974 Concerning Marriage, if it is used in the distribution of common properties as a result of divorce, are:

1. Article 37 of Law Number 1 of 1974 concerning Marriage does not explain in totality and detail the division of joint properties as a result of divorce;
2. Article 37 of Law Number 1 of 1974 concerning Marriage does not differentiate between husband and wife who provide maintenance.

As described above, there are several areas for improvement in 37 Law Number 1 of 1974 concerning Marriage and Article 97 of the Compilation of Islamic Law in its application if it is used in the distribution of joint properties due to divorce. One of the drawbacks is that the Norms of Article 37 of the Marriage Law and Article 97 of the Compilation of Islamic law are deemed unable to solve problems that now exist in society in situations and conditions where the wife is more dominant in obtaining joint properties or in meeting the needs of the

¹⁸ Kurniawan, "Pembagian Harta Bersama Ditinjau Dari Besaran Kontribusi Suami Istri Dalam Perkawinan.", p.45

family, apart from the wife still carrying out her obligations as a housewife, household manager.

This means that the role of the wife is more dominant in the joint property after marriage. In addition, the norms in Article 37 of Law Number 1 of 1974 and the Compilation of Islamic Law do not regulate the distribution of joint properties with considerations based on the origin of the joint properties. It does not give freedom to judges to decide on the distribution of joint properties because it has been determined by default, and not offer space to the parties to deliberate, and does not provide a transparent distribution portion because there is only 1 (one) option in the distribution; each party gets half of the joint property.

Therefore, departing from this situation, it was felt necessary to renew Article 97 of the Compilation of Islamic Law with a reconstruction instrument. Reconstruction implies rebuilding the legal concept of joint properties as outlined in Article 37 of Law Number 1 of 1974 concerning Marriage and Article 97 of the Compilation of Islamic Law, which is considered philosophically inconsistent with bringing justice to all parties. The principle of equality adhered to in Article 37 of Law Number 1 of 1974 concerning Marriage and Article 97 of the Compilation of Islamic Law is considered an obstacle to realizing balanced justice.

As a result, these legal norms cause dissatisfaction with the community, which sociologically feels disadvantaged, especially regarding the role and position of ex-wives as partners who are more significant than ex-husbands. This is proven by the many decisions that are *inkracht* which are not guided by the provisions of Article 37 of the Marriage Law and Article 97 of the Compilation of Islamic law. Still, judges carry out law-breaking or legal breakthroughs to create justice and the quantity of filing lawsuits for joint properties because the judge's decision at the first level and appeals are also guided by the provisions on the division of assets together following the requirements of positive law.

Reconstruction is also required in a formalist juridical manner in the context of creating legal certainty (rule certainty) and creating a linear legal order between norms and judge guidelines in pouring out the provisions of the reconstructed joint property norms based on views and decisions of judges at the cassation level as described in Supreme Court Decision Number 266 K/AG/2010, Supreme Court Decision Number 597K/AG/2016, Supreme Court Decision Number 78/K/AG/2021. As comprehensively researched and dissected in this study.

The concept of justice in the distribution of joint properties has been emphasized and regulated in the Compilation of Islamic Law, particularly in Article 229 Compilation of Islamic law..." *In settling the cases submitted to him, the judge must pay serious attention to the legal values that live in society so that his decision is in accordance with a sense of justice..*"

The Judicial Authority in Indonesia, especially the Religious Courts based on Article 57, uses Pancasila Justice as the standard for administering judicial power. That the trial was conducted for the sake of Justice Based on The One Almighty God, this is then technically sounded where each stipulation and decision begins with the sentence "Bismillahirrahmanirrahim" followed by "For the sake of Justice Based on The One Almighty God." This seems to give the impression that true justice is justice that is solely carried out based on the commands of God Almighty. As the word of Allah S.W.T in Q.S Al-Maidah verse 8: *"O you who believe, be those who always uphold (the truth) for Allah, witness fairly. And don't let your hatred of a people make you act unjustly."*

The description of data and facts in the quo Supreme Court Decision is a non-linear portrait of the mandate of Article 229 Compilation of Islamic law and the Pancasila concept of justice with Article 97 Compilation of Islamic law which caused public discontent, which led to a joint property lawsuit at the Religious Courts up to the cassation stage at the Supreme Court. Thus, the reconstruction of article 97, a Compilation of Islamic law and other relevant and interrelated articles, is necessary to restore the value of Pancasila justice, especially

justice based on belief in one and only God in the distribution of shared assets.

Supposedly, the distribution of joint properties must be seen from the side according to the contribution and amount of each party. Bearing in mind that the division of joint properties as a result of divorce based on the contribution and role of each husband and wife is a manifestation of the fifth precept of Pancasila, namely social justice for all Indonesian people, as mandated by TAP MPR Number 1 of 2003 concerning 45 points of Pancasila in the 5th precept, namely, develop a fair attitude towards others and maintain a balance between rights and obligations as well as a philosophy of respecting the rights of others.

In a divorce, the wife and husband are entitled to 1/2 of the joint property. If the husband works to earn a living and the wife does not carry out her obligations to take care of the household, does not serve her husband, educate her children, and even perform nusyuz against her husband, it means that the wife is not contributing equally to that of her husband. In a divorce, the husband is entitled to a larger share than the wife. It can be for husbands 2/3 or 3/4, while for wives, only 1/3 or 1/4. If the one who earns a living, the wife even takes care of the household, giving the wife a double burden. Meanwhile, the husband does not carry out his obligations as a breadwinner, does not even want to know about household finances, and is a drunkard and gambler. If there is a divorce, the wife can get a more significant share than the husband. It can be for the wife 2/3 or 3/4, while for the husband only 1/3 or 1/4.

So, to achieve balanced justice in the distribution of joint properties, it is necessary to reconstruct the provisions of Article 37 of Law Number 1 of 1974 concerning Marriage, namely: *"If the marriage is broken up due to divorce, joint properties are regulated according to their respective laws"* And the provisions in Article 97 of the Compilation of Islamic Law, namely: *"Divorced widows or widowers are each entitled to half of the joint property as long as it is not specified otherwise in the marriage agreement."*

Become as follows:

“(1) If the marriage is broken up due to divorce, joint properties are regulated according to their respective laws as long as nothing is specified otherwise in the marriage agreement.”

The draft Paragraph (1) in Article 37 of Law Number 1 of 1974 concerning Marriage above is an affirmation that the provisions in Article 37 apply if there has not been a marriage agreement made following the applicable legal rules, so that if there has been a valid marriage agreement, then it becomes the law for the parties is the marriage agreement made.

Furthermore, Article 37, paragraph (2) of Law Number 1 of 1974, is reconstructed to provide space for the ex-husband and ex-wife to reach a consensus before taking legal action. Still, if it turns out that the consensus deliberation fails and no agreement is found, the judge can mediate and decide on the distribution of joint properties through legal remedies proposed by the parties, as described in Article 37 paragraphs (2) and (3) below: *“(2) The distribution of joint properties is carried out by a consensus deliberation between the ex-husband and the ex-wife (divorced widows and widowers). (3) If there is no deliberation to reach a consensus in the distribution of joint properties as referred to in paragraph (2), then it can be submitted to the court for a decision by the judge.”*

Furthermore, the existing construction in Law Number 1 of 1974 concerning Marriage does not provide sufficient space for the freedom of judges to decide on the distribution of joint properties because the distribution refers to the provisions of Article 97, Compilation of Islamic law which regulates the standard distribution of joint properties, namely 1/2 for each ex-husband and ex-wife, apart from that there is no clear basis regarding the 1/2 portion in situations where there is an imbalance in the role of the wife who contributes more to the ownership of joint properties so that the reconstruction carried out is to provide various distribution options to the judge along with the reasons in the division, while still giving freedom to the judge in deciding according to the principles of justice. As described below: *“(4) The amount of distribution of shared assets for ex-husbands and ex-wives (widows,*

divorced, and widowers) decided by the judge is 1/1, 1/2, 1/3, and 1/4 according to the origin of the acquisition of joint properties. .”

Conclusion

Based on the descriptions above, it is possible to conclude that the future concept of joint property law reconstruction is to incorporate the principle of balanced justice based on Pancasila into Article 37 of Law Number 1 of 1974 concerning Marriage and Article 97 of the Compilation of Islamic Law through amendments to Article 37 of Law Number 1 of 1974 and Article 97 of the Compilation of Islamic Law. The notion of balanced justice has been found in various Republic of Indonesia's Supreme Court decisions. As a result, some of the legal rules in the joint property decision must be reviewed while developing joint property law regulations.

References

- Benuf, Kornelius, and Muhamad Azhar. “Metodologi Penelitian Hukum Sebagai Instrumen Mengurai Permasalahan Hukum Kontemporer.” *Gema Keadilan* 7, no. 1 (April 1, 2020): 20–33.
- Dede Ika Murofikoh, Dini Inasyah Alfaridah, and Novita. “Perbandingan Ideologi Negara Indonesia Dengan Arab Saudi.” *Jurnal Hukum dan HAM Wara Sains* 1, no. 2 (December 2022): 188–196.
- Holsinger, D. C. *The Government and Politics of the Middle East and North Africa*. Second. Kettering: Oxford University Press., 1988.
- Ibnu Rasyad al- Qurtubi. *Bidayah Al-Mujtahid Wa Nihayah Al-Muqtashid*. Vol. 2. Egypt: Maktabah Musthofa al-Baaby al-Halby, 1960.
- Al Jaziri, and Abdur-Rahman. *Fiqh ‘Ala Madzhab al-Arba’Ab*. Vol. 3. Beirut: Darul Kitab al-Ilmiah, 2003.

- Kurniawan, Muhamad Beni. "Pembagian Harta Bersama Ditinjau Dari Besaran Kontribusi Suami Istri Dalam Perkawinan." *Jurnal Yudisial* 11, no. 1 (April 26, 2018): 41.
- Nawawi, Kholil. "Harta Bersama Menurut Hukum Islam Dan Perundang-Undangan Di Indonesia." *Mizan: Journal of Islamic Law* 1, no. 1 (June 11, 2018).
- Nurhayati Agustina. "Politik Hukum (Legislasi) Hukum Keluarga Di Saudi Arabia." *Ijtima'iyya* 7, no. 1 (February 2014).
- Pelu, Ibnu Elmi AS., and Ahmad Dakhoir. "Marital Property within the Marriage Law: A Debate on Legal Position and Actual Applications." *Al-Jami'ab: Journal of Islamic Studies* 59, no. 2 (November 11, 2021): 287–316.
- Ridwan, Muhammad, Arbanur Rasyid, and Maulana Arafat Lubis. "Harta Bersama Suami Istri Ditinjau Dari Hukum Islam Dan Hukum Adat." *Yurisprudencia: Jurnal Hukum Ekonomi* 7, no. 2 (December 17, 2021): 201–221.
- Ruhimat, Mamat. "Teori Syirkah Dalam Pembagian Harta Bersama Bagi Istri Yang Berkarir Berdasarkan Undang-Undang Nomor 1 Tahun 1974 Dan Kompilasi Hukum Islam Serta Prakteknya Di Pengadilan Agama." *ADLIYA: Jurnal Hukum dan Kemanusiaan* 11, no. 1 (June 13, 2019): 79–98.
- Suadi Amran. *Filsafat Keadilan Biological Justice Dan Prakteknya Dalam Putusan Mahkamah Agung*. Jakarta: Kencana, 2020.
- Suadi, Amran, and Mardi Candra. "Prevention Of Child Marriage In Indonesia Based On System Interconnection." *Journal of Southwest Jiaotong University* 57, no. 6 (December 30, 2022): 926–937.
- Yusup Kamaludin Deni, and Al Hasan Amin Fahadil. "Perlindungan Hukum Terhadap Hak Anak Dalam Sengketa Harta Bersama." *Jurnal Komisi Yudisial* 15, no. 3 (December 2022): 317–335.

