

The Study of Fairness In The Distribution of Community Property(A Study of Normative Juridical Approaches)

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Abstract:

Discussion: The purpose of this study was to determine the judges' consideration in the community property distribution with a legalistic judicial decision number 339K/AG/2018 and the community property distribution decision number 339K/AG/2018 with the progresif.

Research Method: This research is normative research with a qualitative method, namely analysis with a descriptive-analytical description of secondary data, namely Law No. 1 of 1974 concerning marriage, and article 97 of the compilation of Islamic law stating that "widows or widowers of divorce get a half share of properties".

Discussion: The result study indicate that in general, the panel of judges decided that case of distribution of community properties following statutory regulations, but there were also decisions made not based on applicable legal provisions. This means that the decisions that did not follow the applicable legal provisions were made because the judges prioritized the legal protection and community justice in deciding the case of community property distribution.

Conclusion: Therefore, this study suggests that the panel of judges in deciding a case should have high moral integrity so that they can make decision that not only contain aspects of legal certainty but also have legal justice, moral justice, and social justice.

Key Word: Justice, Supreme Court

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I. INTRODUCTION

Joint Property is a property acquired during a marriage outside of the gift or inheritance, meaning the property acquired at the income of the couple during the marriage. Shared property sharing through the Religious Courts / Syar'iyah Courts, usually by filing a divorce suit or by suing yourself after the divorce.

Recall that common property is not found in Al-Qur'an and only hadits in the Al Qur'an explain men's rights and women's rights whatever they do in the letter of An Nisa' verse 32 which means the following :“ for men have the wealth of their own gain and women have their own gain. ” Thus in Indonesia the majority of the Muslim community was governed separately in Law No. 1 of 1974 and in Compilation of Islamic Law.

Consequences of a law relating to joint property under Article 37 of the Marriage Law are passed on to the divorcing party as to what law and what law applies, and if there is no agreement between the ex-husband, the judge may consider according to the proper sense of justice. Thus, the effect of a divorce on a common property for each person may vary, depending on what law and which parties will use to administer the joint property.

As the case may happen between the plaintiff and the defendant in the case of Case 88K / AG / 2015 the case in the Supreme Court is not in accordance with the rule set forth by the applicable laws. In Law No. 1 of 1974 Article 35 paragraph (1) states "property acquired during marriage becomes joint property". The statement of Article 35 is the property sought during the marriage and Article 37 also states "when the marriage is dissolved because the divorce of joint property is governed by their respective laws".

Subsequently in Article 97 of the Compilation of Islamic Law states that "widows or widows of their respective divorces are entitled to joint property as long as they are not specified in the marriage agreement". The Article 97 statement does not look into or question who is more involved in the acquisition of joint property, so the issue of joint property remains for both as long as no marital agreement is entered into either before the marriage or the marriage takes place. In fact, in the verdict of No. 88K / AG / 2015, the Supreme Court upheld the Court of Appeal's decision of the Court of Appeals, which found that the joint property in the third part of the plaintiff was the ex-husband and 2/3 the Defendant was the ex-wife.

The judges in the ruling have different views on each other. Although most judges in Indonesia adhere to the civil law system, the key feature is that the law, which is the basis of law enforcement in the practice of law enforcement, is generally practiced in legalistic positivism. But there is a legal culture for judges to also obey progressive law where the principle is that human law is not the best, so man is the decider.¹

Therefore, judges should be active in ensuring the smooth running of the trial process, and helping to seek justice and overcome all obstacles and barriers in order to achieve a simple, fast-paced trial. The division of common property in Law No. 1 of 1974 and in Islamic Law compilation has not been based on justice, so this is where a progressive judge is needed.

In this case, it is analyzed the comparison of judges' decisions regarding the distribution of shared assets that are legalistic in the case of joint assets in the cassation level in the Supreme Court with decision Number 339K / AG / 2018 by giving the decision on the distribution of shared assets, ½ part for husband and ½ part for wife, and the distribution of joint assets which the judges' decision is progressive in the case of joint assets in the cassation level in the Supreme Court with a decision Number 88K / AG / 2015, which decides the distribution of assets is 1/3 for husband and 2/3 for wife. Based on these decisions both legalistic and progressive in this case the authors analyze the two decisions, namely the decision Number 339K / AG / 2018 and the decision number 88K / AG / 2015 at the cassation level.

II. MATERIAL AND METHODS

This study adopted type of normative legal research. The normative legal approach is also known as doctrinal research. In this research, the law is defined as norms, principles and dogma. The initial stage of normative legal research is conducting library research, but as long as it necessary interviews can be carried out as a complement to library research.²

III. RESULT

1. Analysis of Legalistic Sharing of Assets Sharing and Progressive Sharing of Assets

A. Analysis of Decision on the Distribution of Joint Assets Number 339K / AG / 2018 which is legalistic.

Based on the authority of the judge in completing a case that was filed up to the level of cassation the Supreme Court succeeded in ruling the case of joint assets. That basically the Plaintiff and Defendant were husband and wife and on December 9, 2014, a divorce had occurred with divorce deed Number 0318 / AC / 2014 / MB-Bir. After the divorce between the Plaintiff and the Defendant is no longer harmonious. The plaintiff as an ex-wife had attempted to settle the dispute over the distribution of shared assets through village officials, but to no avail, so the plaintiff submitted his case to the Syar'iyah Bireun Court. Because the Plaintiff and Defendant live together in the jurisdiction of the Syar'iyah Bireun Court. In filing a lawsuit, the basis of the lawsuit (Rechtelijke Grond) and Basic Fact (Feitelijke Grond) are based on the lawsuit, where there is a clear and detailed *posita* and *petitum*.

Noting the lawsuit above, namely case number 0304 / Pdt.G / 2016 / MS.Bir, has been fulfilled as expected by the provisions above. That the lawsuit of the Syar'iyah Bireun Court has decided ½ for the plaintiff and ½ for the defendant. With respect to the decision, the Defendant felt dissatisfied and appealed to the Aceh Shariah Court, and the Sharia Court has issued a decision with Case Number 84 / Pdt.G / 2013 / MS. and ½ part for Defendant.

Against the verdict of the Aceh Syar'iyah Court, the comparison (ex-husband) did not fast and submitted an appeal to the Supreme Court. The Supreme Court against the *a quo* has also given its verdict with case number 339K / AG / 2018 which essentially strengthens the verdict of the Aceh Syar'iyah Court, which continues to provide a half share for the Appellant (former husband) and ½ for the Respondent Cassation (ex-wife).

The judge completes the *a quo* case and makes his decision in legal consideration, the judge must be oriented to the subject matter, without regard to this matter, it will result in legal considerations that are not coherent and systematic. *Petitum* is essentially a demand that the court handed down the verdict according to the Plaintiff's request. Therefore the judge must consider in detail *petitum* for *petitum*. In completing the case in court there is a formula as follows :³

1. Every *petitum* must have an answer in the ruling.
2. Every decision order must have legal considerations which is an argument the conduct the decision order.

¹C.S.Tn. Kansil, 2018, *Pengantar Ilmu Hukum dan tata Hukum Indonesia* [Introduction to Indonesian Law and Law], PN Balai Pustaka, Jakarta, p. 56

²Syah Kuala University, Faculty Of Law, *Pedoman Penulisan Tesis Masgiter Ilmu Hukum* [Thesis Writing Guidelines for Master Of Laws], Darussalam, Syiah Kuala University, p.9

³A.Mukti Arto, 2017, *Penemuan Hukum Islam Demi Mewujudkan Keadilan* [The Discovery of Islamic Law for the Realization of Justice], *Buku Kesatu*, Pustaka Pelajar, Yogyakarta, p. 250

3. Every legal consideration must have an object considered in the form of legal facts that can be punished.⁴

If you pay attention to the decision No. 0304 / Pdt.G / 2016 / MS.Bir, has included the formulation as expected above, besides that the panel of judges in completing this case has mapped out the subject matter, there is a proof stage which is given the widest opportunity to the parties, the judge's analysis of the evidence and consideration of the petitum for the petitum. In the process of answering and verifying the panel of judges has given a fair opportunity to the parties to reveal the arguments of the lawsuit and the arguments of the rebuttal, so that in this case the principle of *audie et al teram partem* has been fulfilled. The legal basis for disputed assets, according to the panel of judges, is that the Plaintiff's claim is not denied by the Defendant, so according to article 311 R.Bg, article 1925 KUHPerd, article 313 R.Bg and article 1924 KUHPerd, considered valid evidence and strong.

Judges' consideration in making decisions in case Number 0304 / Pdt.G / 2016 / MS.Bir, based on Al-Qur'an Letter An-nisa' verse of 32 which means: "... and for men there is a right part of whatever they are trying to do, and for women (women) there is also a right to a part of what they are trying to do ... ", so for the Plaintiff and Defendant each has the right $\frac{1}{2}$ to the former wife and former husband of the joint property without any ties to third parties in accordance with article 37 of Law Number 1 of 1974 jo. Article 97 and Article 157 Compilation of Islamic Law.

Noting the first level of decision above, the judge in completing the case only pursues legal certainty only (positivism / legalistic flow) and is passive, because the trial process is good in terms of answering, the witness examination process is not a single question from the panel of judges that leads to ways how to obtain the joint property, does the Plaintiff as the wife participate in making a living (selling help to the Defendant). Does the wife have a double burden (double burden), it seems as if it is not done by the panel of judges and examination of this case.⁵

So the consideration of the first-rate judge in case Number 0304 / Pdt.G / 2016 / MS.Bir, only applies what is stated in the applicable laws and regulations, without further tracing the contribution of the acquisition of the joint property so that in its decision to give a form $\frac{1}{2}$ the portion for ex-wife and the other half for ex husband proven as joint property. At the appellate level, the appellate judge upheld the first stay decision (the Syar'iyah Bireuen Court), as well as the Supreme Judge appointed to handle this joint property case, which refused the petition of the Petitioner (the original Defendant). According to the Supreme Court judge in his decision number 339K / AG / 2018, there was no error in the application of the law, no violation of the law, no negligence in fulfilling the conditions required by applicable legislation and also did not exceed the limits of authority, so the Supreme Judge remained strengthen the decision of the Aceh Syar'iyah Court which stipulates $\frac{1}{2}$ part for ex-wives and another half for ex-husbands who are proven as joint assets.

B. Analysis of the Decision on the Distribution of Joint Assets Number 88K / AG / 2015 which is progressive in nature.

The marriage between the Plaintiff and Defendant has broken up with divorce in 2012 during the marriage between the plaintiff and the defendant has obtained joint property, in addition to having owned a child also has joint property.

Based on the answers from the Defendant, replicas, duplicates and other evidence, it turns out that when they were husband and wife, the Defendant already worked as a Civil Servants, besides that the Defendant was active in earning a living, the Defendant borrowed money from the cooperative for capital, also bought a storefront land in the shop another person who pays monthly installments of the Defendant's salary, while the Plaintiff as a husband does not carry out his obligation to earn a living. The Plaintiff only works / trades which is funded by the Defendant. In the case that the Plaintiff as the head of the household must be responsible for living, it is contained in the Letter An-Nisa' verse of 34, which means: "the man is a leader in the household", and in article 80 paragraph (4) letters a and b that say that the obligations of a husband to his wife are :

1. A living, *kiswah* (clothes) and place of residence for a wife;
2. Household costs, care costs and medical expenses for wives and children.

The Plaintiff and his claim have been in accordance with the provisions in force, where the claim letter has a clear and detailed *posita* and *petitum*. The plaintiff in his claim letter requested that the joint property be divided $\frac{1}{2}$ for the Plaintiff and $\frac{1}{2}$ for the Defendant, but in reality the judge in his decision was 618.Pdt.G / 2012 / PA-Bkt decided $\frac{1}{3}$ part for the Plaintiff and $\frac{2}{3}$ for the Defendant, this is based on the contribution found or obtained in joint property

⁴Hilman Hadikusuma, 2000, *Hukum Perkawinan Menurut Perundangan Hukum Adat Hukum Agama* [Marriage Law According to Traditional Law and Religious Law], Rafika Aditama, Bandung, p. 189

⁵Dedy Muchti Nugroho, 2018, *Varia Peradilan*, Nomor 388 Maret 2018, IKAHI, Jakarta, p.35-36

In addition to the aforementioned considerations obtained in case number 618 / Pdt.G / 2012 / PA.Bkt, also found facts when the Plaintiff and Defendant were married, the Defendant played a greater role in meeting the needs of his household life, while the Plaintiff was the head the household works as has been attempted by the Defendant previously

In the case of the assets claimed by the Plaintiff, the Defendant in this case acknowledged that even though the method of obtaining more contributions from the Defendant, according to the Panel of Judges, the Defendant's response was considered as a pure confession which has a perfect, binding and uncertain proof value (volledig, bindende, en beslissende bewijskracht) based on Article 1925 of the Civil Code, it must be proven that the assets are joint assets between the Plaintiff and the Defendant, even though there has been a confession from the Defendant, but the Plaintiff still attach written evidence and witness evidence before the trial/court.

Decision of the Bukittinggi Religious Court, the Defendant was less satisfied and filed an appeal to the Padang High Religious Court and on December 17, 2013 the Padang High Religious Court overturned the decision of the Bukittinggi Religious Court with Number 38 / Pdt.G / 2013 / PTA.Pdg, for which:

1. Declare that appeals from the Appellant are acceptable;
 2. Cancel the decision of the Bukittinggi Religious Court Number 618 / Pdt.G / 2012 / PA.Bkt. July 17, 2013;
- And by adjudicating themself:
- a. Grant the Plaintiff's claim in part;
 - b. Determine joint property of the Plaintiff and Defendant is a plot of land with an area of 200 m² (two hundred square meters);
 - c. Assign shared assets in dictum 2 above 1/3 (one third) part for the Plaintiff and 2/3 (two thirds) part for the Defendant;
 - d. Punish the Defendant to submit 1/3 (one third) part to the Plaintiff and 2/3 (two thirds) part will be the right of the Defendant, if it cannot be divided in natura, then it can be done through auction or compensation;

That the Defendant was again dissatisfied with the decision of the Padang High Religion Court and filed an appeal to the Supreme Court, having given a decision with case number 88 K / AG / 2015, whose application still invalidated the Bukittinggi Religious Court's decision and amended the Padang High Religious Court's decision in terms of charging fees case.

The decision of the Supreme Court in this case stipulates that joint property is divided for the Plaintiff 1/3 and 2/3 for the Defendant, in consideration, when the acquisition of the joint assets, there is a portion of capital from the Defendant, it is considered fair if the distribution is more for the Defendant. In this case the Supreme Court also paid more attention to the efforts made by the plaintiff and the defendant in producing the assets to meet their daily needs. So the Supreme Court agreed with judges at the first instance and appellate judges who overruled article 97 of the Compilation of Islamic Law and dared to resort to self-justice for justice and use distributive justice in its deliberations.⁶

Legal considerations that have been given by the judge in determining more portion for the wife in the distribution of shared property because the wife has a double burden in addition to taking care of the household also helps earn a living for daily life. As regulated in Article 80 paragraph (4) letter a, Compilation of Islamic Law states: "That the obligation of a husband to his wife is a living, kiswah, and a place of residence for his wife".

The judge in this case considers a double burden on his wife as a housewife and breadwinner, so it is not fair if the joint property is divided equally between husband and wife. With respect to decision number 618 / PDT.G / 2012 / PA.BKT, the one of the parties objected, so the appeal level was filed with the Padang High Religious Court so that the High Court gave the decision number 38 / Pdt.G / 2013 / PTA.Pdg, still in its decision to give the greater part to the Defendant is 2/3 parts and for the Plaintiff 1/3 part. In the case of Cassation Case Number 88 K / Ag / 2015 also strengthened the Decision of the High Court of the Religion of Padang in terms of the distribution of shared assets, namely 2/3 for Defendants (wives) and 1/3 for Plaintiffs (Husbands), these three judicial levels conducted *Contra legem* against the case.

The decision of the case panel judge number 618 / Pdt.G / 2012 / PA.Bkt uses the *contra legem* principle in which this principle gives more part to those who have more roles in obtaining shared assets. And this *contra legem* ruling is permissible in accordance with Law Number 4 of 2004, article 28 paragraph (1), namely: "Judges must explore, follow, and understand the legal values and a sense of justice that lives in society".

The judge in this case has the authority of the judge in an *ex officio* manner in examining a case in order to find the right legal conception. The judge's task is not to preserve existing normative legal texts to be

⁶ Amran Suadi, 2018, *Implementasi Teori Hukum Progresif Dalam Penegakan Hukum Oleh Hakim Indonesia* [Implementation of Progressive Legal Theory in Law Enforcement by Indonesian Judges], *Varia Peradilan* Nomor 386 Januari 2018, IKAHI, Jakarta, p.26

enforced, but rather to re-establish the function of normative law in order to achieve the intended normative legal objectives.

Progressive Law is a law that is able to provide legal protection and justice for each individual in every condition, place and time. But as it is known that although the legal regulations were originally made in such a way as to be able to provide legal protection and justice to each individual, but because the legal regulations are static while the events arranged are dynamic, the consequences of existing legal regulations can no longer be can provide legal protection and justice as before. When the incident is submitted to the Court in order to obtain legal protection and justice if only merely applying existing legal regulations. In such circumstances, it is necessary to have the courage of the judge to make a legal discovery. Courage and the ability to make legal discovery is only owned by progressive judges.

As you know, it is not easy to create a perfect and appropriate legislation in entire life. Especially now that the development of life and values of public awareness are becoming smaller and smaller, therefore a judge who has the ability, willingness, courage and conscience to take a decision is needed to uphold law and justice.

Prof. Taverne as a Dutch legal expert, stated that with good law enforcement, even bad law will produce justice in society. This is in line with an article posted in a British court "Give me a good judge, there must be in my hands a bad law". Noting the judge's decision in this joint property case, the verdict in this case the judge really puts forward the element of justice, where the judge in making decisions more considers the contribution of the acquisition of shared assets.

The verdict of the first instance in this case, the panel of judges tried to provide justice in the distribution of shared assets, where the Defendant (ex-wife) received a 2/3 portion, while the Plaintiff (ex-husband) only received 1/3 of the portion. Basically, although the husband does not have a share in the acquisition of shared assets, the husband as the head of the household has protected the family, among others by giving the Defendant's permission to work. That is why the acquisition of 1/3 of the husband is considered quite fair in its distribution. Bukittinggi Religious Court Judges have the courage to override rules which according to them are not appropriate and unfair if it is applied in this case, a sense of justice is put forward, religious dogma is firmly held, conscience is used so as to encourage the panel of judges to explore and find legal values so that they dare to do *ijtihad* (seek the truth) in order to achieve justice. Judges who act as law reformers are progressive judges, ie progressive judges can make changes to texts that are not appropriate to the present situation by making a fair interpretation of the existing regulations.

Progressive legal teachings in the decision No. 88K / Ag / 2015 proven by the strengthening of the decision that divides 2/3 parts for the wife and 1/3 part for the husband, this judge dares to *contra legem* the applicable laws and regulations which according to the judge's observations are not in accordance with the situation in the a quo case. In this case, the judge paid more attention to the contribution of the acquisition of the assets, where the wife who worked as a Civil Servant more played a role in obtaining the shared property, while the husband was only passive and only enjoyed the results of his wife's efforts. It is therefore felt very fair if the judge gives more form for his wife by the Bukittinggi Religious Court judge, which was strengthened both at the appeal level by the Padang High Religious Court and the cassation level by the Supreme Court Judge.

Based on the decision above, both the decision of the Religious Court Number 618 / Pdt.G / 2012 / PA.Bkt, the decision of the Padang High Court number 38 / Pdt.G / 2013 / PTA.Pdg, and the decision of the Supreme Court Number 88 K / AG / 2015, including progressive decisions, because the joint property dispute is included in the *aanvullend recht* category which regulates the relationship of rights and obligations between husband and wife whose justice is not just legal certainty.

IV. CONCLUSION

Joint Assets Decision number 339 / K / AG / 2018 whose judge's decision divides Joint assets ½ for ex-husbands and ½ for ex-wives according to the judge's decision that decides the Joint assets decision by considering and applying the decision based on the Compilation of Islamic Law Article 97 which stipulates joint property ½ for ex-wives and ½ for husband's husband without considering who has more role in making a living, this decision can be referred to as a legalistic decision because the consideration has only been proven as joint property and the distribution is divided according to the applicable provisions, here the judge is passive without considering the contribution of the acquisition of shared assets. Unlike the case with the decision 88 / K / AG / 2015 where the judge's decision to divide shared property 2/3 for ex-wife and 1/3 for ex-husband by considering the element of justice that is the contribution of the acquisition of shared property, so that the judges make *contra legem* and even this does not deviate from the applicable provisions, the judge in a quo case is active so that gives birth to a progress sive decision that is needed for the present.

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