

# The decision on joint properties in Bengkulu high religious court jurisdiction

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Joint property disputes after divorce at the Religious Courts (PA) under the Bengkulu High Religious Court (PTA) jurisdiction are always equally settled by giving half for each ex-spouse, regardless of the domination in working to earn the properties. The decisions refer to the article 97 of the Compilation of Islamic Law (KHI). The decisions do not fulfill sense of justice regarding the ex-wife participating in earning the living. This library research would like to descriptively analyze the progressive law reviews of the decision related to joint properties with working wives set at some Religious Courts under the Bengkulu High Religious Court jurisdiction in 2016-2019 periods, in the context of reforming the Marriage Law in Indonesia. In drawing conclusions, the data are analyzed by applying progressive law theory. The study shows that Religious Courts' decisions are not regulated in traditional Islamic law, but they are found in contemporary Islamic law by analogizing them as *Shirkah* with the division based on the agreement between the parties. In positive law perspective, the joint property division has been determined with each equally get half. In the meantime, from the progressive law perspective in the context of reforming the Indonesian Marriage Law, ex-wives participating in earning living should get a larger portion of joint properties than their ex-husbands, to fulfill the sense of justice. Their portions are decided amicably on the agreements of the parties.

Sengketa harta bersama pasca perceraian pada Pengadilan Agama (PA) di wilayah Pengadilan Tinggi Agama (PTA) Bengkulu selalu diputus seperdua untuk mantan istri dan mantan suami, tanpa memandang pihak yang lebih dominan dalam bekerja menghasilkan harta. Putusan-putusan tersebut

mengacu pada pasal 97 Kompilasi Hukum Islam. Putusan-putusan tersebut tidak memenuhi rasa keadilan terkait dengan mantan istri yang turut serta bekerja memenuhi kebutuhan keluarga. Penelitian ini adalah Library research yang bersifat deskriptif analitis. Data Primernya adalah putusan PA di wilayah kerja PTA Bengkulu rentang waktu periode 2016-2019. Analisis menggunakan teori Hukum Progresif dengan metode deduktif dalam penarikan kesimpulan. Kesimpulan penelitian ini adalah putusan Harta Bersama dalam kasus istri turut serta bekerja memenuhi kebutuhan keluarga di PA wilayah hukum PTA Bengkulu tidak diatur dalam Hukum Islam Tradisional, tetapi Hukum Islam Kontemporer menganalogikannya dengan masalah Syirkah. Adapun pembagiannya berdasar kesepakatan damai antara para pihak. Sedangkan di dalam Hukum Positif pembagian harta bersama telah ditentukan yaitu mantan suami dan mantan istri mendapatkan seperdua dari harta bersama. Adapun dari sudut pandang Hukum Progresif dalam konteks pembaruan Hukum perkawinan di Indonesia, mantan istri yang ikut berusaha memenuhi kebutuhan keluarga selayaknya memperoleh porsi harta bersama yang lebih besar dari mantan suami karena lebih sesuai dengan rasa keadilan yang hidup di tengah-tengah masyarakat. Porsi mantan istri diputuskan dengan jalan damai dan kesepakatan para pihak.

**Keywords:** *joint properties; progressive law theory; bengkulu high religious court*

## **Introduction**

Article 31 paragraph (3) and Article 34 paragraph (3) of law number 1 of 1974 concerning Marriage in conjunction with Article 80 paragraph (2) and (4) letters a and b of the Compilation of Islamic Law, confirm that husbands as *qawwām* (leader) are ordered to bear the needs of his family members, and this responsibility must be carried out according to their capacity. On other hand, the wife serves as a housekeeper. Based on this paradigm, when they divorce, both ex-husband and wife get half of the properties they acquire during the marriage, known as joint properties.

Based on the pre-research conducted on the decisions of the joint property case where the ex-wives participated in working to meet the family's needs in the Religious Court (PA) in Bengkulu High Religious Court jurisdiction, it was found that everything was decided to divide half for both the ex-wife and ex-husband. For example, on:

“Case number: 87/Pdt.G/2017/PA.Bn explained that the husband works as a private employee and the wife works as a civil servant(Decision number: 87/Pdt.G/2017/PA.Bn, n.d.), Case number: 408/Pdt.G/2017/PA.Bn explained that the husband works as a private employee and the wife works as a civil servant(Decision number: 408/Pdt.G/2017/PA Bn, n.d.), Case number: 779/Pdt.G/2017/PA.Bn explained that the husband works as a private employee and the wife works as a civil servant(Decision

number: 779/Pdt.G/2017/PA Bn, n.d.), dan Case number: 819/Pdt.G/2017/PA.Bnexplained that the husband works as a private employee and the wife works as a civil servant(Decision number: 819/Pdt.G/2017/PA Bn, n.d.).”

All the joint property cases stated that the ex-wives participated in earning living in the family, and it was judged that half of the Joint Property was for the widowers and the other half for the widows.

The problem is if the wife also works to earn a living as the main breadwinner or additional income provider, including: civil servants, traders, private employees, business people, and others. It can be said that the ex-wife takes on a double burden in the family. She is in charge of taking care of the family as well as working to meet household needs; both as the main breadwinner and additional provider. There is then a question whether it is fair for the ex-wife who bears a double burden in the family to get the same share as her ex-husband in the matter of the joint property.

Regarding the theme, several previous researches are found: Chairah (2011), in a dissertation entitled: *“Rights of Mut’ab, Hadanah, and Joint Properties for Women after Divorce according to the Views of Pesantrens’ Nyai in East Java”* focused on the views of pesantrens’ Nyai (Kiai’s wife) in East Java regarding joint property after divorce. Besides, there was also Ritonga (2003), in his research entitled *“Women’s Rights in Islamic Family Law in Indonesia: Its Implementation in the Decisions of the Jakarta Religious Courts, 1990-1995”* focused on the realization of women’s rights in the Jakarta High Court decisions including property issues. In addition, there was also Mesraini ( 2008) with a research *“Post-Divorce Women’s Rights in Southeast Asia: A Study of Indonesian and Malaysian Marriage Laws”* focusing on the comparison of women’s rights, including regarding joint property after divorce in the two countries. This research would be different from previous studies because the main problem is the joint property case where the wives work to earn living for the family.

The article aims to analyse the progressive law review of the decision to joint properties with the wife working to meet family needs in the Religious Courts under Bengkulu High Religious Court’s jurisdiction in the context of reforming the Marriage Law in Indonesia.

## **Methodology**

This is a qualitative research in the form of library research with descriptive analytics. It analyses documents from court decision set by Religious Court under Bengkulu High Religious Court jurisdiction in 2016-2019 periods, Law Number 1 of 1974 concerning Marriage, and the Compilation of Islamic Law (KHI). While the secondary data consists of books, journals, and interviews related to the topic. The data is then deductively analyzed by applying the progressive law theory to draw conclusions.

## **Theories of progressive law**

Progressive law is based on empirical facts related to the functioning of law in society. Society is dynamic, like water that continues and never stops. It flows from top to bottom, as well as the attainment of truth that cannot be separated from the reality that lives in the midst of society and law (Mukhidin, 2014).

Progressive Law begins with a thought that the law was made for humans and not vice versa (Rahardjo, 2006: 16). It does not agree with the idea that law is an absolute device and something that has been completed, but it is influenced by its capability to serve humans. The law is interpreted as a device that functions to motivate and encourage people to live a just, prosperous, and happy life (Rahardjo, 2009: 1-2).

The emergence of progressive law is motivated by dissatisfaction with existing legal theory and practice, and the emergence of awareness among legal practitioners of a striking incompatibility between law theories (law in book), and law in reality (law in action). The next factor encouraging the emergence of this legal concept is the empirical facts about the failure of the law in providing feedback on problems that arise in society (Rifa'i, 2010: 40).

Progressive law as expressed by Atmasasmita (2012: 91) which is also based on Roscou Pound's sociological jurisprudence legal theory and Eugen Ehrlich's pragmatic legal realism and is also strengthened by critical legal studies which tend to be a priori to all conditions and is anti-foundationalism. Therefore, this theory does not believe in the success of the analytical jurisprudence school initiated by Austin.

Based on theoretical facts, progressive law is often contrasted with the theory of legal positivism which views law as something final in its implementation. It enforces the law

in black and white. Sabian explained that in the legal order in Indonesia, they still assume that law is a statutory regulation (without regard to community turmoil). Hence, there is a lack of commitment to fostering an ideal law based on the values of justice in addition to professional certainty, not transactional (Utsman, 2010: 6).

The progressive law initiated by Rahardjo (2008: 3) departs from these two basic assumptions: First, law is for humans, not vice versa, so the presence of law is not for itself, but for something wider and bigger. Therefore, if there is a problem in the law, then the laws and regulations should be reviewed and revised, not humans who are coerced and intimidated into joining a law. Finally, the law is not something absolute and final, because the law is always in the process of becoming (law as a process, law in the making).

The formulation and ideas of Rahardjo describe that the existence of progressive law is not an independent legal theory, but it is related and interconnected with other legal theories. Furthermore, he explains that the progressive law pointer is described as follows: *First*, Progressive legal studies seek to change the focus and concentration of legal studies that initially used legal optics to become public behavior; *Second*, Progressive law positions its existence which has an intense relationship with humans and society; *Third*, Progressive law differs in understanding from legal realism because the law is not positioned based on the perspective of the law only, but is reviewed and tested from the social goals to be achieved and the consequences resulting from the functioning of the law; *Fourth*, Progressive law is closely related to the sociological jurisprudence of Roscoe Pound, which discusses that the law is not only limited to research on legislation but goes out and looks at its impact of function; and *finally*, Progressive law has a close relationship with natural law theory, because it cares about “meta juridical” problems (Kristiana, 2006: 65-66; Sayuti, 2013: 11-12).

### **Joint property in Islamic law**

Discussion about joint property (also known as *gono-gini*) is not found in classical fiqh studies. It is a popular legal term in the community (Department of Education and Culture, 2001: 3). It is a legal issue that has not been thought (*ghoir al-mufakkar*) by classical fuqaha, because joint property issue has surfaced and been widely discussed in the modern period.

In terms of property in marriage, in general, fiqh does not see the existence of joint property. Fiqh states that there is a separation between the wealth of husband and wife. The wealth obtained by the husband belongs to him, and the wealth obtained by the wife belongs to her.

Fiqh views joint property as a joint livelihood of husband and wife that should be included in the discussion of *muamalah*, but it was not specifically discussed. This condition is assumed because in general the authors of classical fiqh books are Arabs who are suspected of not knowing the existence of joint properties produced by a husband and wife partnership, which is known as *syirkah*. Fiqh adheres to the model of separation of wealth between husband and wife as long as they do not agree otherwise. Fiqh gives a husband and wife the choice to make a marriage agreement which in the end will be legally binding or not.

In addition, Fiqh also delegates the ownership of wealth to the spouse individually, which is free and not bound by other parties. Husbands who get gifts, inheritance, grants, and others are entitled to have full ownership of their wealth. It prevails also to the wives. What is outlined by Fiqh is that the assets separation between husband and wife will relieve them if divorce happens later, so that the divorce process becomes simple.

There are a number of factors causing the properties mixing between husband and wife. Tholib (1974) stated that wealth obtained in marriage can be mixed if there is an agreement either in writing or verbally, either before or after the marriage contract takes place.

Explicitly, the Qur'an does not discuss the issue of joint property in marriage, so there are no strict rules regarding it (Basyir, 2000: 66). However, Islamic law recognizes the existence of property rights for everyone, both regarding its management and use, as well as to carry out legal actions on these assets as long as they do not conflict with Islamic law.

Joint ownership of properties between husband and wife in marriage can be analogous to the form of cooperation in business (*syirkah*), the scholars do not include it in the discussion of marriage (*bāb an-nikāh*), but include it in the chapter of commerce (*bāb al-buyū'*) (Lukito, 1998: 83).

There are arguments of scholars regarding joint property. The first states that there is no joint property between husband and wife. While the other says that Islamic teachings

regulate all aspects of life including those related to joint property (Firdawaty, 2016: 90; Jafizham, 1977: 11). The arguments for both opinions are as follow:

**a. Join property in Islam is analogized as *Syirkah*.**

Islam does not discuss the joint properties between husband and wife as a result of marriage. The wife's property will remain hers and be fully controlled. Likewise with the husband (Ismuha, 1978: 38). Therefore, married women in Islam are still considered capable of acting legally, including in managing their wealth without the help of their husbands (Jamil, 1982: 82; Sugiswati, 2014: 204). God's word in the Qur'an Surah an-Nisā verse 34 said:

الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ ﴿٣٤﴾

*"Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth."*

At-Talāq ayat 6:

أَسْكِنُوهُنَّ مِنْ حَيْثُ سَكَنْتُمْ مِنْ وُجْدِكُمْ وَلَا تُضَارُّوهُنَّ لِتُضَيِّقُوا عَلَيْهِنَّ وَإِنْ كُنَّ أُولَاتٍ حَمْلٍ فَأَنْفِقُوا عَلَيْهِنَّ حَتَّى يَضَعْنَ حَمْلَهُنَّ فَإِنْ أَرْضَعْنَ لَكُمْ فَارْتُوهُنَّ أَجُورَهُنَّ وَأُتْمِرُوا بَيْنَكُمْ بِمَعْرُوفٍ وَإِنْ تَعَاَسَرْتُمْ فَاسْتَزِضِعْ لَهُ أُخْرَى ﴿٦﴾

*"Lodge them (your wives) where you lived together if you can afford it. Do not annoy them so as to make life intolerable for them. If they are pregnant, provide them with maintenance until their delivery. Pay their wage if they breast-feed your children and settle your differences lawfully. If you are unable to settle them, let another person breast-feed the child.."*

The wife gets good protection regarding physical, spiritual, moral and material support housing, maintenance costs and children's education; it is the husband's full responsibility as the head of the family. This means that the wife is considered passively accepting what comes from her husband, so there is no joint property between husband and wife (Firdawaty, 2016: 91). The issue of joint property can only occur in cooperation in the business sector (*syirkah*). Then there is a mixture of wealth between husband and wife that could not be separated anymore (Manan, 2006: 109).

- b. The opinion confirming that there is joint property between husband and wife.

The properties obtained by husband and wife because of their business are joint properties regardless whether both work or just the husband works and the wife only takes care of the household. They are in a marriage bond as husband and wife, then everything becomes one, including wealth, as Qur'an an-Nisā verse 21 said (Tholib, 1974: 84). It does not need to be accompanied by a *syirkah* agreement, because marriage with solemnization and other requirements is considered *syirkah* between the husband and wife. Arguments from this opinion are Qur'an surah an-Nisā verse 19:

يَا أَيُّهَا الَّذِينَ ءَامَنُوا لَا يَحِلُّ لَكُمْ أَنْ تَرِثُوا النِّسَاءَ كَرِهًا <sup>ط</sup> وَلَا تَعْضُلُوهُنَّ لِتَذْهَبُوا بِبَعْضِ مَا ءَاتَيْتُمُوهُنَّ إِلَّا أَنْ يَأْتِيَنَّ بِفَحِشَةٍ مُّبِينَةٍ وَعَاشِرُوهُنَّ بِالْمَعْرُوفِ فَإِنْ كَرِهْتُمُوهُنَّ فَعَسَى أَنْ تَكْرَهُوا شَيْئًا وَبَجَعَلَ اللَّهُ فِيهِ خَيْرًا كَثِيرًا ﴿١٩﴾

*“O you who have believed, it is not lawful for you to inherit women by compulsion. And do not make difficulties for them in order to take [back] part of what you gave them unless they commit a clear immorality. And live with them in kindness. For if you dislike them - perhaps you dislike a thing and Allah makes therein much good.”*

And Qur'an surah an-Nisā verse 21:

وَكَيْفَ تَأْخُذُونَهُ وَقَدْ أَفْضَىٰ بَعْضُكُمْ إِلَىٰ بَعْضٍ وَأَخَذْنَ مِنْكُمْ مِيثَاقًا غَلِيظًا ﴿٢١﴾

*“And how can you take it when one of you has already gone in to the other and they have made with you a firm covenant?”*

From the arguments above, the regulations that have been regulated by the Marriage Law and the Compilation of Islamic Law (KHI) related to the regulation of joint property have their foundation in Fiqh. Joint properties are categorized as *syirkah mufawadah* or *syirkah abdān*. It is declared as *syirkah mufawadah* because the cooperation between husband and wife in obtaining property is unlimited; any wealth they acquire during their marriage is included in the category of joint property. Inheritance, grants, and gifts are exceptions to this. Shared assets are called *syirkah abdān* because most of the husband and wife work together to meet the needs of their families with the goal of forming a happy household in the world and hereafter (Hanapi, 2020: 534).



Joint property is included in the discussion of *maslahah mursalah* (Jumantoro, 2005: 201; Khallaf, 1972: 126; Zahrah, 1958: 279). After exploring the arguments of the Qur'an and hadith that can be used as a basis for justification, and verifying the benefits contained in it, then it can be used as the basis of argument in using *maslahah mursalah* (Fahimah, 2019: 229).

There are benefits contained in the discussion of joint property, where the wife taking care of the household is entitled to a portion or part of her work. When there is a mixture of wealth between husband and wife, it is appropriate if the portion of the wife that has been mixed should be separated again by dividing the joint property to save the wife's rights after the divorce. Another benefit is to ease the burden on the ex-wife so that after the divorce, she does not experience difficulties in financing her own life needs or the children under her care. So it is appropriate if the ex-wife obtains joint property from her marriage (Fahimah, 2019: 230).

It is a local wisdom in Indonesia that a wife is obliged to do all household matters, even more than that, sometimes after that she also works to meet the family need. Indonesians have their own customs and habits; they must then have their own laws in joint property issue. The legitimacy of this joint property issue is based on *urf* and *maslahah mursalah* (Fahimah, 2019: 230).

The solution offered in the Qur'an Surah an-Nisa verse 35 can be applied to disputes related to wealth obtained in marriage. This is justified by the opinion expressed by Abd ar-Rahman who is a Mufti of Hadramaut with the Shafii school of thought, that the wealth obtained by husband and wife in a marriage bond is in the form of *al-māl al-musytarak* in which the settlement can be carried out using the *sullb* method (Umar, t.th: 159). The distribution of joint property using the *sullb* method is the simplest, most efficient method of distribution, and will not cause new problems in the future, because the method prioritizes the elements of peace and kinship.

Based on the opinion of the Shafiyah scholars, the settlement of joint property disputes can be carried out using the *Sullb* principle. It is applied in order to minimize the possibility of future disputes between the ex-husband and wife.

### **Joint property in Indonesian positive law**

The legal term used officially and formally in the laws and regulations in Indonesia especially in Law No. 1 of 1974 concerning Marriage, Civil Law, and the Compilation of Islamic Law (KHI) is *barta bersama* (joint properties).

KHI describes the illustration of joint property in article 1 (f) below: “Properties in marriage is those obtained either individually or jointly by husband and wife during the marriage bond and then referred as joint property without questioning whether it is registered in the name of anyone.” The issue of joint property usually arises when there is a conflict in the household. For instance, in divorce, the distribution of properties obtained in the marriage must be clearly based on the regulations written in positive law.

a. Law no. 1 of 1974 concerning Marriage

The explanation of joint property in the Marriage Law is contained in Chapter VII with the title “joint property in marriage” which consists of three articles, namely articles 35, 36, and 37. In Article 35 it is explained that: “Wealth in marriage consists of joint property and inheritance. Joint property is property acquired during the marriage bond and therefore it becomes the joint property of husband and wife. So husband and wife can act only on mutual consent of the property. Meanwhile, innate property is that obtained by each husband or wife as a gift or inheritance during the marriage bond. Therefore, it becomes the right and is fully controlled by each party. This arrangement is in line with customary law in managing property in marriage.”

b. Joint Property according to KHI

In KHI, the discussion of joint property is contained in chapter XIII which is detailed in several chapters:

Article 85 explains “The existence of joint property in marriage does not rule out the possibility of property belonging to each husband or wife.

Article 86 states that basically there is no mixing of husband’s and wife’s property due to marriage. The wife’s property remains the wife’s right and is fully controlled by her, as well as the husband’s property.

Article 87 states “The innate assets of each husband and wife and the assets obtained by each as a gift or inheritance are under their respective control, as long as the parties do

not specify otherwise in the marriage agreement. Husband and wife have full rights to carry out legal actions on their respective assets.

Article 88 then states “If there is a dispute between husband and wife regarding joint properties, the settlement is submitted to the Religious Court.”

Articles 89 and 90 explain “Husbands are responsible for maintaining joint property, wife’s property and his own property, and so are the wives.”

Article 91 further explains that “Joint properties as referred to in article 85 above can be in the form of tangible or intangible objects. Tangible properties can include immovable objects, movable objects, and securities. Intangible joint properties can be in the form of rights or obligations. Joint properties can be used as collateral by one party with the approval of the other party.”

Article 92 states that “Husband or wife without the consent of the other party is not allowed to sell or transfer joint property.”

Article 93 states that: “Accountability for the debts of the husband or wife is borne by their respective assets. Accountability for debts carried out for the benefit of the family is borne by joint properties. If the joint property is not sufficient, it is charged to the husband’s property. If the husband’s property is not available or sufficient, it is charged to the wife’s property.”

Article 94 states that “Joint properties from the marriage of a husband who has more than one wife, each separate and independent. Ownership is calculated at the time of the second, third or fourth marriage contract.

Article 95 explains “Without reducing the provisions of article 24 paragraph (2) letter c of Government Regulation No. 9 of 1975 and article 136 to place a confiscation of collateral on joint properties without a request for divorce, if one of them commits an act that harms and endangers the joint property such as gambling, drunkenness, extravagance, and so on. During the confiscation period, the sale of joint properties for family needs can be carried out with the permission of the Religious Court.”

Article 96 contains “In the event of a death divorce, half of the joint property becomes the right of the spouse who lives longer. The distribution of joint property must be postponed until there is certainty of an essential death or legal death based on a decision

of the Religious Courts.

And the last, Article 97 states “Ex-wife or ex-husband is each entitled to one-half of the joint property as long as it is not specified otherwise in the marriage agreement.”

Article 35 paragraph (1), Law no. 1 of 1974 concerning Marriage and KHI determine that all assets obtained during marriage are automatically joint properties according to law, but there are several things that can be used as an illustration of joint property in a marriage, including the following: (a) Property purchased during marriage; (b) Assets purchased and built after a divorce financed from joint property; (c) Assets that can be proven and obtained during the marriage; (d) Income of joint property and innate property; and (e) All forms of husband and wife personal income.

The profits obtained from the management of the joint property or derived from it, then become part of the joint property. Likewise, the profits obtained from the husband’s or wife’s personal property will fall into the object of joint property.

According to Law no. 1 of 1974 the source or origin of joint property in marriage can be divided into four types, namely; *first*, the assets become the private property of husband and wife. However, based on the desire and sincerity of both, it is then included in the joint property.

*Second*, joint property derived from assets earned by each husband and wife. In essence, the property belongs to each. That is, the assets earned by the wife is hers, and those earned by husband are his. However, the assets of both can be used as part of the joint property, as long as the husband and wife agree on it.

*Third*, joint property that comes from the husband’s or wife’s personal gifts. In principle, wealth owned by the husband or wife during the marriage does not become joint property. Therefore, the wealth that comes from gifts is owned by each individually (Ismuha, 1965: 41-43). Private property is a joint property with the awareness and will of each husband and wife to turn it over as joint property.

*Fourth*, joint property obtained during marriage. The property originating from marital property become joint properties. So that it becomes joint property (Abdurrahman, 1992: 74). This means that the couple has the same and equal position in acting, taking benefits, and being responsible for the joint property.

### The decisions of the Bengkulu High Religious Courts

During 2015-2019 in the Religious Courts under the Bengkulu High Religious Court Jurisdiction, there were twenty-two decisions on joint property disputes in which the wives participate in earning living for the family; which become the focus of this research. The Decisions came from Religious Courts of Bengkulu, Curup, Arga Makmur, Manna, Lebong, and Tais. The decisions studied are:

**Table 1. joint property cases**

No	Case numbers	No	Case numbers
1	696/Pdt.G/2016/PA.Bn	12	310/Pdt.G/2018/PA.Agm
2	759/Pdt.G/2016/PA.Bn	13	188/Pdt.G/2016/PA.Crp
3	87/Pdt.G/2017/PA.Bn	14	299/Pdt.G/2016/PA.Crp
4	408/Pdt.G/2017/PA Bn	15	301/Pdt.G/2017/PA.Crp
5	779/Pdt.G/2017/PA Bn	16	324/Pdt.G/2018/PA.Crp
6	819/Pdt.G/2017/PA Bn	17	261/Pdt.G/2018/PA.Crp
7	620/Pdt.G/2018/PA.Bn	18	304/Pdt.G/2018/PA.Mna
8	135/Pdt.G/2019/PA.Bn	19	496/Pdt.G/2018/PA.Mna
9	299/Pdt.G/2019/PA.Bn	20	599/Pdt.G/2018/PA.Mna
10	440/Pdt.G/2019/PA.Bn	21	28/Pdt.G/2018/PA.Lbg
11	854/Pdt.G/2019/PA.Bn	22	43/Pdt.G/2019/PA.Tas

Based on data from the decisions, the profession of ex-husbands and wives are mentioned. Then, of 22 cases, the ex-wives professions are detailed as follow: there are 9 people or 41% are working as civil servants, 3 people or 14% working as traders, 4 people or 18% working as entrepreneurs, 4 people or 18% working as farmers, and 2 people or 9% working as a private employee. The ex-wives work to meet the needs of the family in addition to carrying out their duties in managing the household.

According to the judge opinion in the case of joint property, regarding to the wife participating in earnin living (working outside the home) and is even more dominant in producing wealth than the husband, if in the lawsuit or at the answer stage, the wife argues that she works even more dominantly in producing joint properties, then the panel of judges

is obliged to consider it and open opportunities for the distribution of joint properties and not following Article 97 of the KHI (Cholil, 2017: 465). If in the lawsuit or at the answer stage the wife argues that she works even more dominantly in producing joint properties, then the panel of judges must consider it and open the opportunity for the distribution of joint properties not to follow article 97 of the KHI Pradinata: 2020, Yuzar: 2020, Rogaiyah: 2020, Fahonah: 2020). However, there are also judges who argue that normatively the division of joint properties is regulated in Article 97 of the KHI (Rifa'i: 2020).

The next question is whether the decision on the joint property case based on article 97 of the KHI in the case of the wife participating in making living is fair. Most said it is fair if the decision has permanent legal force (*inkracht*), then it is considered fair and final because there is no more legal action from the parties (Rogaiyah: 2020, Fahonah: 2020). Another reason is because it has accommodated the rights of the wife (Pradinata: 2020), and because the decision has fulfilled the juridical, philosophical and sociological aspects (Yuzar: 2020). There is a different answer that the ex-wife gets a larger share of joint property compared to the ex-husband's portion, the goal is to obtain the goodness and benefit of the ex-wife after divorce (Rifa'i: 2020).

### **Progressive law review of the decisions in joint property**

The issue in the joint property cases where the wife work to meet the needs of the family in the Bengkulu High Religious Court jurisdiction is a legal issue that has not been discussed (*ghoir al-mufakkar*) by traditional fuqaha, because this issue arise and is widely discussed at this contemporary era. Joint properties can be analogized as *syirkah* because it is understood that the wife can also be taken into account and positioned as a partner (shareholder) who works to meet the needs of the family. In a household, the husband is tasked with working to earn living for the family and the wife is in charge of taking care of the household.

*Syirkah* is basically more business oriented or cooperative in economic activities, while *syirkah* of joint property is more oriented towards cooperation in fostering a *sakinah, mawaddah*, and *rahmah* household, although it also includes problems related to wealth obtained in marriage. The pooling or merging of assets between husband and wife can be read as joint properties because of their collective work. Logically, if divorce happens, then

the mixed wealth must be shared between the two. The distribution of this wealth can be decided based on the peace of the parties or it can be distributed equally.

This approach in the form of *syirkah abdān* uses customary law or traditions that are institutionalized in society. This is not contrary to its legitimacy as *'urf* (local wisdom) as in Javanese society (Suhandjati, 2018: 203) as a legal proposition and in tune with the rule of "*al-'ādatu muhakkamah*" that local wisdom can be used as a legal argument (As'ad, 2010: 8).

Joint property is the legal consequence of a marriage between a man and a woman as husband and wife who get wealth from the efforts and cooperation that are carried out and strive together while in the marriage bond. The legal consequence emerging later is that there is wealth or assets that become joint property which is used for the common good.

Judges must be fair in making decisions, including in the joint properties division. The problem of injustice is related to the point of view that the husband is the head of the household and the wife is the housewife. Perhaps, the most wives are economically dependent on her husband and not working with the understanding of making money. The next problem that is often encountered in the community is a double burden; where the wife also works to meet the needs of the family as well as take care of the household. Sometimes the wife works and is active inside or outside the home as the breadwinner, even as the main breadwinner, but is still burdened with domestic tasks.

To this point, this social formation is unfair to the wife. If the regulation on the distribution of joint property only obtains half of the joint property, then it becomes less or unfair. This is because the wife contributes more than the husband. It is unfair if the wife gets a joint property that is smaller than her husband or does not get a share at all because it is assumed that there is no share whatsoever in participating in collecting it. Getting a share of wealth in marriage is for the benefit of maintaining property (*bi'z al-māl*) for the wife to have property to continue her life after the divorce (Mulia, 2020: 411).

Justice in the perspective of Islamic teachings is a compilation of moral and social values that refer to honesty, balance, equality, kindness, and simplicity. These values are the basic foundation in Islamic teachings that humans must apply in their lives as individuals, family members, part of society, and state administrators. Justice is generally interpreted as placing something proportionally and distributing rights to its owner.

Furthermore, the equal share of half for ex-husband and wife is based solely on Article 97 of the KHI. However, it would be considered unfair to get half of the assets because the wife participates in making a living, because even the wife who does not work in the distribution of joint properties must still be divided in half, referring to Article 97 above (Rahmawati, 2020: 366). As the consequence, the judges must be observant in seeing a case they are handling and assessing that the wife should be the responsibility of the husband, it is the wife who is working hard to collect property, even though the husband is also working, the judges should give a decision that truly reflects the value of justice and does not contradict legal values, actually one step ahead of progressive, developing and dynamic legal values.

Likewise, in the settlement of joint properties, where the understanding, general habits and sense of justice that live in the midst of society, in terms of the obligation to earn a living, the judges should consider in deciding the case for the division of joint properties after divorce. In this way, basically there are things that need to be criticized, namely the division of joint properties in which the wife participates in making a living for the family with the result that it is better and fulfills a sense of justice. The joint properties are used for the common good for their lives, especially for a wife who also earns a living in the family.

### **Conclusion**

This research concluded that the decisions on joint properties disputes where the wives participate in working to meet the family needs set in Religious Courts under the Bengkulu High Religious Court jurisdiction were not regulated in Traditional Islamic Law, but they were analogized with *Syirkah* in Contemporary Islamic Law. The divisions were based on peace agreements between the parties. On one hand, the joint properties have been determined in Positive Law by dividing them equally half for each party. But on other hand, viewed from Progressive Law perspective laying on Marriage Law reform in Indonesia, there is an argument that ex-wives who participate in earning family needs should get a larger portion of joint property than ex-husbands, because it is more in line with the sense of justice living in society. The ex-wives' portions are decided by peaceful means and the agreements between the parties.



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