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Gender Justice Analysis of the Division of Joint Property in the Compilation of Islamic Law

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ABSTRACT

In Indonesia, the concept of equality, also known as egalitarianism, is used as a measure to ensure that a person can be treated fairly. This concept emerged when feminists were fighting for gender equality. In women's issues, this idea is known as the concept of gender equality and justice, which means that the human values of men and women are equal. Because gender is the result of the construction of society and is not an innate trait. Nonetheless, the equation in question does not eliminate the biological differences between the two. Gender equality, also known as gender equality, refers to the equal position between men and women in gaining access, participation, control, and profit in the life activities that occur in the family, society, nation, and state. This racial equality is not the same as racial equality. Physical differences between men and women in gender equality

INTRODUCTION

Gender equality is a condition in which men and women have equal access, involvement, control, and benefits in various activities of life, whether in the family, community, or nation and state. Gender equality is different from gender sameness. In gender equality, the physical differences between men and women are still respected. However, despite these differences, neither should be treated unfairly. The most important thing in gender equality is that men and women have the opportunity to determine their own destiny according to their gender. If they receive the same treatment, then they are considered to have been treated fairly. Meanwhile, gender justice is a condition and fair treatment of men and women. Gender justice ensures that two people of different genders have the same rights.

Fairness here does not mean that everything must be exactly the same, but rather that everyone should be treated fairly in accordance with their respective rights and responsibilities. Thus, equality and fairness between men and women can be understood as a situation in which they have the same position and opportunities to obtain their rights as human beings so that they can contribute to development. In other words, society must give equal assessment and appreciation to the similarities and differences between men and women and all the roles they play.

One of the central themes and basic principles of Islamic teachings is the principle of egalitarianism, namely equality among humans, both men and women, as well as among nations, tribes, and descendants. This is implied in Q.S. al-Hujurat [49]: 13 "O mankind, indeed We have created you from a male and a female and made you into nations and tribes so that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous among you. Indeed, Allah is All-Knowing and All-Aware."

This verse implies the ideal concept of gender equality and affirms that men and women have equal status both in terms of worship (spiritual dimension) and social activities (professional careers). The verse also completely erodes the view that there are

differences between the two that marginalize one of them.

Islam has offered a concept of gender that places women and men in a partnership and recognizes them as equal in terms of their respective rights and obligations, showing that Islam is very concerned with gender justice. This is evident from the many arguments that explain the equality between men and women. Justice in the Quran covers all aspects of human life, both as individuals and as social beings. Therefore, the Quran does not tolerate any form of discrimination against men or women. If there is an understanding or interpretation that contains discriminatory elements, then that understanding or interpretation is open to reinterpretation. There are four principles that must be considered in the reinterpretation of Islamic law in order to be in accordance with its objectives, namely the principles of justice, equality, deliberation, and *mu'âsyarah bi al-ma'ârûf* (good relations).

The Compilation of Islamic Law clearly stipulates the rules relating to joint property. These rules are contained in Chapter XIII on Marital Property, which consists of thirteen articles, from Article 85 to Article 97. Generally speaking, these rules attempt to establish a fair system between men and women. However, there are several articles, especially those that discuss how to divide joint property, which only provide superficial justice. This is because according to these rules, when a marriage ends, either due to divorce or the death of one of the spouses, the joint property must be divided equally, regardless of who worked to acquire it.

By dividing the property equally without considering the facts of the married couple's life, one party may feel aggrieved because they did not receive what they were entitled to. This rule can lead to unexpected discrimination. This invisible discrimination can occur when laws, policies, or programs appear to be fair to all genders, but in reality have a negative impact on one party.

a. Problem Formulation

Based on the background description above, the problems raised in this study are as follows:

1. What is the pattern of division of joint property according to the Compilation of Islamic Law from a gender justice perspective?
2. What is the process of filing a lawsuit regarding joint property?

b. Objectives and Benefits

a. The objectives of this study are:

1. To identify and analyze the patterns of joint property distribution according to the Compilation of Islamic Law from a gender justice perspective.
2. To identify and analyze the process of joint property litigation.

b) Benefits of the Study

The benefits of this study are:

Theoretical Benefits

- a. Development of Legal Science: Enriching the wealth of legal knowledge, particularly in the field of Islamic law related to the distribution of joint property according to the Compilation of Islamic Law from a Gender Justice Perspective.
- b. Testing and Development of Theory: Testing the relevance of existing legal theories to actual conditions, strengthening or even refuting previous theories.
- c. Academic Reference: Serving as a reference for future legal research related to the distribution of joint property according to the Compilation of Islamic Law from a Gender Justice Perspective.
- d. Conceptual Understanding: Providing a deep understanding of the principles, doctrines, or concepts of Islamic law and applicable laws and regulations. Manfaat Praktis
- e. Legal Problem Solutions: Providing alternative solutions to legal issues in society related to the distribution of joint property according to the Compilation of Islamic Law from a Gender Justice Perspective.

- f. Input for Law Enforcement Officials: Serving as input for judges, police, prosecutors, and advocates in handling certain cases involving the distribution of joint property according to the Compilation of Islamic Law from a Gender Justice Perspective.
- g. Policy Basis: Serving as consideration in the formulation of legislation or public policy (legal policy).

Increasing Legal Awareness: Providing the public with an understanding of legal rights and obligations with regard to gender.

METHODS

Types of Research

1. The legal research conducted is a type of non-doctrinal or empirical legal research (legal social research), which shows that law as a social structure is always related to various other social variables. Therefore, law cannot be studied solely by relying on a collection of laws (law in books), but there must also be an analysis of the application of law in practice (law in action), its historical context, its connection to the spirit of society or the nation, and so on.
2. Hans Kelsen. that the rules in legislation are often not in line with the implementation of law in the field, and may even be contradictory. Non-doctrinal research is research that has emerged in the empirical study area in the concept of sociological jurisprudence, which has produced many legal results based on legal sociology.

Approach Method

The research approach is very important because it can be used as a guideline to facilitate the process of studying, analyzing, and understanding existing problems. Regarding this empirical research, the approaches used in the study are:

- a. Statute approach
- b. Conceptual approach.
- c. Empirical approach (sociological approach)

1. Data Types and Sources

According to Soerjono Soekanto. The data sources in this study use primary data as the main data and secondary data as supporting data. Secondary data sources include primary legal materials and secondary legal materials. The legal materials that have been collected are then discussed in a descriptive analytical manner, namely by presenting a detailed description of various aspects related to the issue, then analyzing their validity.

The method or means of concluding the analysis results was carried out using qualitative analysis, namely by examining and reviewing issues related to applicable legal provisions, as well as descriptive analysis, namely by explaining the issue in general through a description based on materials obtained from library sources.

The method used to check whether the data collected in this study is correct and valid is triangulation. The triangulation used is source triangulation, which is comparing and rechecking the level of confidence in information obtained through different times and tools in qualitative research. According to Moleong, triangulation is a way of checking whether the data is correct and accurate by using something different outside the data as a checking tool or for comparison with the data.

RESULTS AND DISCUSSION

1. Patterns of Shared Property Distribution

According to the Compilation of Islamic Law from a Gender Justice Perspective

The Compilation of Islamic Law, which was officially introduced through Presidential Instruction No. 1 of 1991 and implemented through Decree of the Minister of Religious Affairs of the Republic of Indonesia No. 154 of 1991, and then disseminated through a Circular Letter from the Director of Islamic Judicial Agency Development No. 3694/EV/HK.003/AZ/91, is the best result of Islamic jurisprudence thinking in Indonesia. This statement emerged from a long process of compiling the code, which culminated in a National Workshop attended by fiqh scholars from various Islamic organizations,

fiqh scholars from universities, and the general public, with all groups of scholars estimated to have participated in the discussion. Thus, this can be considered as an agreement or *ijma* (consensus) of scholars in Indonesia.

The position of the Compilation of Islamic Law in the Indonesian legal system can be understood through several elements of the national legal system as follows. First, the ideal basis and constitution of the KHI are Pancasila and the 1945 Constitution. This is stated in the considerations of the Presidential Instruction and also in the General Explanation of the KHI. The KHI was created as part of the national legal system that supports the continuity of religion based on Belief in One God, which also reflects the legal awareness of the Indonesian people and nation. Second, KHI was ratified through a legal document in the form of a Presidential Instruction, which was then implemented through a Decree of the Minister of Religious Affairs, which is part of various applicable laws. Third, it is derived from Islamic law, which is sourced from the Quran and Sunnah. This is the core of Islamic law, which covers various dimensions: sharia, fiqh, fatwa, qanun, qadha, and adat. It is a manifestation of Islamic law with an Indonesian character. Fourth, the channels for the actualization of the KHI include courts within the scope of the Religious Court, as can be interpreted teleologically from the General Explanation of the KHI.

Although the KHI is not included in the hierarchy of legal regulations in Indonesia as stipulated by Law No. 12 of 2011 concerning the formation of regulations, Article 7 paragraph (1) of Law No. 12 of 2011 explains that the types and hierarchy of legal regulations include: a) The 1945 Constitution of the Republic of Indonesia, b) Decrees of the People's Consultative Assembly, c) Laws/Government Regulations in Lieu of Laws, d) Government Regulations, e) Presidential Regulations, f) Provincial Regulations, g) Regency/City Regulations. However, the purpose of creating and disseminating the KHI is to fill important legal gaps for Muslims, especially in terms

of resolving family issues in courts related to Religious Courts.

Thus, it is hoped that the KHI can serve as a guide for judges in the Religious Court when resolving legal issues covered therein, including the division of joint property. However, upon closer inspection, not all provisions regarding joint property in the KHI fully support the principle of gender equality. There are several articles, particularly those relating to the division of joint property, which are considered to be lacking in their support for gender equality. Therefore, this discussion will examine several articles in the KHI related to joint property in marriage, as well as articles that are considered to not fully support gender justice. The standard used to assess the fairness of a KHI article in relation to gender is to see whether there is discrimination against women and men in the content of the article.

In general, there are more articles that support the idea of gender justice in the rules on joint property in the KHI than articles that do not fully support gender justice. These articles discuss several things, for example Article 85, which states that “The existence of joint property in marriage does not mean that the husband or wife does not have their own property.”

Then Article 86 paragraph (1) emphasizes that “In general, the husband's property and the wife's property should not be mixed because they are married,” and paragraph (2) states that “The wife's property remains her right and she has full control over it, as does the husband's property, which remains his right and he has full control over it.” Furthermore, Article 87 paragraph (1) explains that “The property owned by each husband and wife and items obtained as gifts or inheritance remain their respective property, unless they agree otherwise in a marriage contract”, then paragraph (2) states that “Husbands and wives have full rights to manage their property, whether in the form of grants, gifts, charity, and so on.” The three articles above explain that in marriage there are two types of property, namely personal property and joint property. Personal property includes items owned before marriage and

property acquired during marriage as gifts or inheritance.

Authority over personal property is fully controlled by the husband or wife who owns the property. If the owner wants to do something related to their property, they do not need to ask permission from anyone else. In other words, the husband or wife who owns the property can freely take legal action regarding that property, and this is recognized by law. This situation is the general rule, unless the husband and wife make an agreement to the contrary. If they agree on their property, then the ownership and control of personal property will follow the terms of the mutually agreed upon agreement. If they agree that personal property will be combined and made into joint property, then its management will be treated as joint property.

The provisions of the KHI contained in the above articles fall into the category of supporting gender equality, as there are no elements of discrimination in them. In addition, this is also based on the fact that these provisions of the KHI are in accordance with Article 16 paragraph (1) letter h of the CEDAW Convention. This article states that all participating countries must establish appropriate rules to eliminate discrimination against women in all matters relating to marriage and family relations, in order to achieve equality between men and women. In particular, these rules must ensure that the rights of husbands and wives regarding the ownership, acquisition, management, administration, use, and transfer of property, whether free of charge or for money, are equal.

Furthermore, the KHI provisions on joint property that support justice between men and women are Article 89, which states that “The husband is obliged to take care of the joint property, the wife's property, and his own property.” Similarly, Article 90 states that “The wife is also responsible for taking care of the joint property and the husband's property in her possession.” Then, Article 91 paragraph (1) explains that “The joint property mentioned in Article 85 can be tangible or intangible,” paragraph (2) states that “Tangible joint property can consist of property, movable goods, and

valuable documents,” and paragraph (3) states that “Intangible joint property can be rights or obligations”, And in paragraph (4) it is stated that “Joint property may be used as collateral by one party if agreed to by the other party.”

Then, Article 92 explains that “A husband or wife may not sell or transfer joint property without the consent of their spouse.” This rule explains how husbands and wives should treat the property they own jointly. Both have a responsibility to protect their joint property as well as their respective personal property. Furthermore, the explanation of rights in Article 91 paragraph (3) refers to owned property, while obligations refer to debts. So, if a husband and wife divorce and have to divide their property, not only the owned property is divided, but also all debts and credits incurred during the marriage with mutual consent must be counted as joint property in the form of debt.

The KHI not only shows an open attitude towards discussions about gender justice, but also has several rules regarding the division of joint property as mentioned above. This shows that the KHI has progressive ideas that do not conflict with Islamic law. Thus, these rules as a whole have met the need to reform the law in our country, which seeks to provide justice for men and women. Therefore, these rules can be applied and used as a reference.

Rules for the Compilation of Islamic Law in the Case of Distribution of Common Property

The judiciary is a place where the rights of men and women that are often overlooked by the law can be revisited. In addition, the judiciary, particularly the Religious Court, is also considered a good place to change Islamic family law and the rights of men and women, for example in terms of the division of joint property. From the decisions issued by the Religious Court, we can see how well fair laws for the rights of men and women are being implemented. Meeting the requirements of procedural justice does not always mean that real justice will be achieved. This can only be clearly seen if an in-depth study of the judge's decision is conducted.

The principle of gender justice in the division of joint property is not only seen in terms of a 50:50 division, but also in understanding the importance of the economic and non-economic roles of both spouses during marriage. The role of the wife, such as managing the home, supporting her husband, and organizing daily life, is also very important in obtaining joint property, even though these roles do not always generate direct income.

In Islamic law, the principle of *syirkah* is the basis for justice, whereby husband and wife are considered partners in creating the family's economic life. Therefore, contributions that are not in the form of money are still legally valued when determining joint ownership of property. This principle of gender equality is also in line with the laws applicable in Indonesia. Article 35 paragraph (1) of the Marriage Law stipulates that assets acquired during marriage are joint property. Meanwhile, Article 36 paragraph (1) states that the husband or wife may only take action related to joint property if both parties agree.

This shows that the division of joint property does not only consider official ownership documents, but also takes into account the equal rights of husbands and wives in managing property during marriage. Article 92 of the Compilation of Islamic Law even prohibits the transfer of joint property without the consent of both parties as a way to maintain equal legal protection.

The panel of judges no longer relies solely on formal ownership documents, but also considers the wife's contributions that are not legally recorded, reflecting the principle of gender equality that has begun to be applied more tangibly. In a number of rulings, wives who play a domestic role are still given an equal share of joint property because their contribution is considered to be as important as financial contributions. This approach reflects the application of substantive justice in Indonesian Islamic family law, where the principle of justice is not only formal in nature, but also takes into account the social conditions and actual roles of each party.

Based on the Compilation of Islamic Law (KHI), the division of joint property (gono-gini) is regulated in Article 97, whereby widows or widowers who are divorced are each entitled to half (50%) of the joint property, unless the marriage agreement stipulates otherwise. Joint property includes property acquired during the marriage, regardless of who worked for it.

Rules for the division of joint property according to the KHI:

- a. Basic Principle (Article 97 KHI): In the event of divorce, joint property is divided equally (50:50) between the husband and wife.
- b. Marriage Agreement: The 50:50 division does not apply if the marriage agreement (prenuptial agreement) stipulates a different division.
- c. Death (Article 96 KHI): If one of the spouses dies, the joint property shall be divided first. Half (50%) shall belong to the surviving spouse, and the rest shall be inherited.
- d. Separate Property: Separate property (property owned before marriage or gifts/inheritance during marriage) remains under the control of the husband/wife, unless otherwise specified in the agreement.

Dispute Resolution: Disputes over joint property are resolved through the Religious Court.

CONCLUSION

Based on the above discussion, the following conclusions can be drawn:

1. Regulations on joint property in each article. However, of the thirteen articles regulating joint property in Chapter XIII, there are two articles whose provisions do not fully support the spirit of gender equality. These provisions are found in Article 96 paragraph (1) and Article 97, which essentially state that when a marriage ends, whether due to divorce or death, joint property must be divided equally regardless of who acquired the property.

2. Rules for the division of joint property according to the KHI: a) Basic Principles (Article 97 KHI). b) Marriage Agreement, c) Death (Article 96 KHI), d) Personal Property, e) Dispute Resolution Disputes over joint property are resolved through the Religious Court.

Based on the above discussion and conclusions, the following recommendations can be made:

1. Women should understand their rights to joint property, and the role of legal aid needs to be strengthened to ensure equal access to justice in the process of gender-equitable division of joint property.
2. The government, Islamic legal researchers, and scholars must improve legal literacy among the public.

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