

The Essence of Justice in the Division of Community Property in Polygamous Marriage According To Law Number 1 of 1974 Concerning Marriage

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Abstract

Norms regarding property in marriage are listed in Law number 1 of 1974 concerning Marriage. Property in marriage can be categorized as joint property, separate property, and property obtained as gifts or inheritances respectively. The objectives of this study are: 1) to analyze the essence of justice in the division of community property in polygamous marriage according to Law number 1 of 1974 concerning Marriage. The design of the research is legal research. Legal research method is based on the essence of legal science whose object is the norm. Legal research assesses legal norms so that this is normative. The analysis results of this study are that all wives have the same rights to community property in polygamous marriage. This right is started from the marriage of each of the spouses. In addition, the portion or part of each wife in the division of community property in polygamous marriage does not look at the time aspect of which the legal relationship occurred and the contribution of each wife in the acquisition of community property, but it only looks at marital status; the wife of a husband.

Keywords: division of community property, law, marriage, polygamy

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1. Introduction

Marriage is a legal act¹ that is desired by two parties that raises rights and obligations, among others, related to property in marriage. Norms² regarding property in marriage are listed in Law number 1 of 1974 concerning Marriage. Property in marriage can be categorized as joint property, separate property, and property acquired as gifts or inheritances respectively. Such norms are stated in the formulation of article 35:

- 1) "Property acquired during marriage becomes community property".
- 2) "The separate property of each husband and wife and the property acquired by each of them as gift or inheritance are under their respective control as long as the parties do not determine otherwise".

According to the norm in article 35, community property is assets acquired during the marriage. Such norms are the same as the term of "joint assets" in customary law.³ "Joint assets" means property that have been collected during the marriage so that they become joint rights between husband and wife".⁴

Law number 1 of 1974 concerning Marriage also regulates the rights and obligations of the husband and/or wife to community and separate properties as formulated in article 36:

- 1) "Regarding community property, a husband or wife may act on the agreement of both parties".
- 2) "Regarding separate property from husband and wife, each has the full right to carry out legal actions regarding his/her own property"

Property included in the category of "community property is assets acquired during the marriage". Regarding the

¹ Legal action is any act of legal subject (person or legal entity) that is intentionally carried out so that it creates rights and obligations. The intended action, for instance, is making a will, making an agreement, etc.

² Norm is "a guideline for someone to act or behave in society, or any rule that must be obeyed". Maria Farida Indrati Soeprapto, *Ilmu Perundang-undangan Dasar-Dasar dan Pembentukannya (Basics and Formation of Legislation)*, (Yogyakarta, Kanisius, 1998), page 6.

³ According to *Deeds of the Special Committee on Marriage Law number 14A in 1972/1973*, community property in this case is the same as "joint assets" in customary law.

⁴ W.J.S. Poerwadarminta, *Kamus Umum Bahasa Indonesia (Indonesian Dictionary)*, (Jakarta: Balai Pustaka, 2001), page 330.

rights and position of the husband and wife who are equal and balanced in marriage,¹ then the husband and wife can do legal actions to the community property under the agreement of each of them. Property included in the category of separate property is assets obtained by a husband or wife prior to marriage. This separate property is under the control of each husband or wife, as long as the husband and wife do not determine otherwise.² That also applies to the separate property obtained from gifts or inheritance that is under their respective control.

Marriage aims “to form a happy and eternal family”; however, not every husband and wife can make it happen. Therefore, some of them have to end their marriage ties in divorce. Marriage is a bond fostering a household between a man and a woman who is regulated according to the laws and regulations. Meanwhile, divorce is the breaking of the bond between husband and wife in fostering a household.³ If divorce occurs, the community property of the husband and wife are divided according to the norms of article 37 of Law number 1 of 1974 concerning Marriage that “if the marriage ends because of divorce, then the community property is regulated according to the law.

Law number 1 of 1974 concerning Marriage in the community property norms of a monogamous marriage, including article 35, article 36, article 37, does not clearly stipulate the division of community property if the marriage is ended in a divorce. However, it was returned to their respective laws. However, the norm in article 65 regulates the division of community property in the case of a husband does polygamous marriage. The norm in article 65 of Law number 1 of 1974 concerning Marriage is a guideline for the division of community property related to polygamous marriage.⁴ However, the substance of the norm still contains obscurity which creates various interpretations and leads to the neglect of legal protection, uncertainty and injustice. This norm obscurity is increasingly apparent in the norms of article 65 paragraph (2) which opens opportunities for deviations in terms of dividing the property differently from the norms contained in article 65 paragraph (1) without giving reasons or criteria that can be considered by the court to deviate or do different divisions from the norms in article 65 paragraph (1).

2. Research Method

2.1 Research Design

2.1.1 Sources of Legal Material

The sources of legal material in this study include primary and secondary legal materials. Primary legal material is a legal material that is “authoritative” which means that it has the authority consisting of legislation, official records or deeds in the making of legislation, or court decisions.⁵ The basic norm in this study is the 1945 Constitution of the Republic of Indonesia after the fourth amendment. To support this research, the following legislations are used:

- Law number 48 of 2009 concerning Judicial Power (State Gazette of the Republic of Indonesia of 2009 number 157, supplement to the State Gazette of the Republic of Indonesia number 5076);
- Law number 1 of 1974 concerning Marriage (State Gazette of the Republic of Indonesia of 1974 number 1, supplement to the State Gazette of the Republic of Indonesia number 3019);
- Law number 12 of 2011 concerning Establishment of Legislation (State Gazette of the Republic of Indonesia of 2011 number 82, supplement to the State Gazette of the Republic of Indonesia number 5234);
- Law number 39 of 1999 concerning Human Rights (State Gazette of the Republic of Indonesia of 1999 number 165, supplement to the State Gazette of the Republic of Indonesia number 3886);
- Law number 7 of 1989 concerning the Religious Courts (State Gazette of the Republic of Indonesia of 1989 number 73, supplement to the State Gazette of the Republic of Indonesia number 3316);

¹ See article 31 of Law number 1 of 1974 concerning Marriage

² Sonny Dewi Judiasih, *Harta Benda Perkawinan (Marriage Property)*, (Bandung: Refika Aditama, 2015), page 6.

³ Abdul Manan, 2001. “*Problematika Perceraian Karena Zina dalam Proses Penyelesaian Perkara di Lingkungan Peradilan Agama (Divorce Problems Due to Adultery in the Process of Settling Cases in the Religious Courts)*”, *Mimbar Hukum*, number 52 of XII May – June, page 7.

⁴ There are several norms that directly or indirectly influence the way a person behaves or acts, including traditional norms, religious norms, and state legal norms. However, the application of state legal norms is absolute, which means that every state legal norm applies to all people in Indonesia. Maria Farida Indrati Soeprapto, *Ilmu Perundang-undangan (Legislation)*, (Yogyakarta: Kanisius, 1996), page 7.

⁵ Peter Mahmud Marzuki, *Op. Cit.*, page 181.

- Law number 3 of 2006 concerning changes to Law number 7 of 1989 concerning Religious Courts (State Gazette of the Republic of Indonesia of 2006 number 22, supplement to the State Gazette of the Republic of Indonesia number 4461);
- Law number 50 of 2009 concerning the second changes to Law number 7 of 1989 concerning Religious Courts (State Gazette of the Republic of Indonesia of 2009 number 159, supplement to the State Gazette of the Republic of Indonesia number 5078);
- Government Regulation number 9 of 1975 concerning Implementation of Law number 1 of 1974 (State Gazette of the Republic of Indonesia of 1975 number 12, supplement to the State Gazette of the Republic of Indonesia number 3050).

Secondary legal material is “all publications about law that are not official documents including textbooks, legal dictionaries, legal journals”,¹ opinions of scholars, legal cases, results of seminars, workshops, symposiums, and sources of legal material in the form of publication using internet media relating to research material.

2.2 Legal Material Collection Technique

Collection of legal materials was carried out by searching to obtain relevant legal materials to the problem that will be answered in this study; i.e. tracing the norms that govern the division of community property in polygamous marriage and analyzing them in depth so that they can answer the research problem.

Legal materials that had been obtained will be recorded, edited, studied, and the conclusion will be drawn. Furthermore, the legal materials were collected, compiled, grouped, and examined according to the research problem. The processing of legal materials was carried out by selecting and sorting the existing legal materials as needed to answer the problem in this study.

2.3 Analysis of Legal Material

The next step of the research is to analyze the primary and secondary legal materials. Analysis of legal material in this study was carried out using analytical prescriptive; i.e. analyzing, understanding, explaining the facts experienced or found and continued by giving the expected answer to those facts. Thus, this research is expected to produce prescriptions about what should be the essence of legal research that adheres to the character of law as an applied science.² The results of the analysis using legal logic, legal arguments, and legal principles will produce conclusions as answers to the research problems that must be answered.

3. Findings and Discussion

3.1 Justice in the Division of Community Property in Polygamous Marriage according to Law Number 1 of 1974 Concerning Marriage

Before discussing the essence of justice in polygamous marriage, firstly it is necessary to discuss justice contained in the norms of community property division in polygamous marriage according to article 65 paragraph (1) letter c Law number 1 of 1974 concerning Marriage that “all wives have the same rights for the community property that have occurred since their respective marriages”.

The previous sub-chapter discussed the essence and types of justice, the ontological basis of Law number 1 of 1974 concerning Marriage, and the ratio of legislation on the division of community property in polygamous marriage. The sub-discussion will be used to find justice in the norms of community property division in polygamous marriage stated in article 65 paragraph (1) letter c of Law number 1 of 1974 concerning Marriage. It uses the following flowchart in Figure 1.

3.2 The Essence of Justice in the Division of Community Property in Polygamous Marriage

After knowing the justice contained in the norms on the division of community property in polygamous marriage according to article 65 paragraph (1) letter c of Law number 1 of 1974 concerning Marriage, justice in the division of community property in polygamous marriage leads to commutative justice. Therefore, the study was continued

¹ *Ibid.*, page 141-163.

² Peter Mahmud explained that law has a character as a prescriptive and applied science. As a prescriptive science, law studies the purpose of law, the values of justice, the validity of legal rules, legal concepts, and legal norms. As an applied science, law sets standards for procedures, provisions, and signs in implementing the rule of law, Peter Mahmud Marzuki, 2005, *Penelitian Hukum (Legal Research)*, (Jakarta: Prenada Media, 2005), page 22.

by analyzing and finding the essence of justice in the division of community property in polygamous marriage. Thus, it is necessary to reiterate the research findings related to the ontological basis of Law number 1 of 1974 concerning Marriage and legislation ration norms on the division of community property in polygamous marriage in article 65 of Law number 1 of 1974 concerning Marriage.

The main consideration and reason for the establishment of Law number 1 of 1974 concerning Marriage are included in the consideration. The consideration contains philosophical elements that illustrate that the regulations that have been formed take into account the views of life, consciousness, and legal ideals which include the inner atmosphere and philosophy of the Indonesian nation originating from Pancasila and the Preamble of the 1945 Constitution of the Republic of Indonesia.

The background of the thought, intent, and purpose of the compilation of Law number 1 of 1974 concerning Marriage are briefly stated in the consideration “that in accordance with the philosophy of Pancasila and ideals of the nation, the development of national law requires a Marriage Law that applies to all citizens”.

In Pancasila, the words ‘fair’ and ‘justice’ are mentioned in the second principle “just and civilized humanity” and the fifth principle “social justice for all Indonesian people”. Justice, according to the philosophy of the Pancasila, means fair in giving something to anyone in accordance with what is his right; by acting proportionally and not breaking the law. Justice is closely related to rights that cannot be separated from obligations.

The preamble of the 1945 Constitution of the Republic of Indonesia in the fourth paragraph has affirmed the aim of the State in protecting all the Indonesian people and the entire bloodshed of Indonesia. In order to achieve these objectives, the 1945 Constitution of the Republic of Indonesia also contains material on the protection of human rights, including the right to form families through marriage, as stated that “everyone has the right to form a family and continue the descent through legal marriage”.¹ Furthermore, it also affirms that “everyone has the right to the recognition, guarantee, protection, and fair legal certainty and equal treatment before the law”.²

Provision of guarantees, protection and legal certainty in the field of marriage has been regulated by Law number 1 of 1974 concerning Marriage.³ The existence of norms in Law number 1 of 1974 concerning Marriage aims to protect rights and provide justice for every individual.⁴

Based on the description correlated with the essence and types of justice that have been put forward by the scholars, the essence of justice in the division of community property in polygamous marriage based on the philosophy of Pancasila and the 1945 Constitution of the Republic of Indonesia is distributive justice (Justitia Distributive). Distributive justice states that everyone gets rights/ parts proportionally according to their quality. Justitia Distributive is proportional because it demands that everyone get what is their right or part.

This distributive justice is in line with what was stated by Aristotle and the opinion of Ibn Taymiyyah. According to Aristotle, distributive justice or Justitia Distributive is a justice that gives rights to each person based on their services or dividing according to their respective rights. Ibn Taymiyyah wanted justice to relate to the principle of la dharara; not injuring and not harming others. Doing justice will not cause tyranny.⁵

The norm of the division of community property in polygamous marriage aims to provide legal certainty and protection for wife’s rights to community property in polygamous marriage. Commutative justice in the division of community property does not care about the services or contributions of each wife. Commutative justice equalizes achievement with counterparty. Thus, it is contrary to the purpose of norm formation; i.e. to provide protection for wife’s rights to community property in polygamous marriage.

The norm in dividing property by giving $\frac{1}{2}$ part to the wife is the norm of the division of community property in the marriage of a husband and a wife or monogamy in accordance with the norms in article 35:

- (1) “Property acquired during marriage becomes community property”.
- (2) “The separate property of each husband and wife and the property acquired by each of them as gift or inheritance are under their respective control as long as the parties do not determine otherwise”.

¹ Article 28B paragraph (1) of the 1945 Constitution of the Republic of Indonesia: “Everyone has the right to form a family and to continue the descent through a legal marriage”

² Article 28B paragraph (1) of the 1945 Constitution of the Republic of Indonesia

³ State Gazette of the Republic of Indonesia of 1974 number 1, supplement to State Gazette of the Republic of Indonesia number 3019

⁴ Mukti Arto, *Penemuan Hukum Islam Demi Mewujudkan Keadilan (Discovery of Islamic Law to Realize Justice)*, (Yogyakarta: Pustaka Pelajar, 2017), page 2.

⁵ Euis Amalia, *Sejarah Pemikiran Ekonomi Islam (History of Islamic Economic Thought)*, (Jakarta: Grama Publishing, 1996), page 210-214.

The definition of community property in the norm is similar to the definition of joint assets in customary law so that the rights to community property are half respectively. However, if there are more than one wife, then such norms will cause injustice and ignore the protection of the wife. When the husband marries a second wife, the marriage law relationship with the first wife does not break up. Therefore, since then the husband has two women who are bound in marriage. The implication is that the property obtained from the marriage with the second wife are also the property with the first wife. Similarly, in the case of a wife who has a dominant contribution in the acquisition of community property, it will be unfair that she must obtain the same division with the other wife who does not make a significant contribution in the acquisition of community property.

Norms that emphasize aspects of equality as a form of justice will tend to ignore the rights of others who should be entitled and potentially lead to tyranny. Equality is different from justice. Justice means placing something in accordance with the right to be received and not necessarily the same.¹ Justice in the division of community property does not have to equalize each other's portions, because such equality is not necessarily fair. One thing that is missed by the initiators of equality is denying the character of humans who tend to be greedy and envy. However, the character of equality is still needed by a civilized nation; i.e. the equality relating to human rights from birth, equality in the eyes of law, gender equality, and others. All these equality lead to the purpose of justice.

The essence of justice is all things that are pleasing to attitudes and actions in human relations that contain a demand that people treat others according to their rights and obligations.² The essence of justice in the division of community property in polygamous marriage is justice which gives rights to each wife proportionally based on the aspect of the time of the occurrence of legal relations and contributions in obtaining the community property. Each wife has equal rights to community property; however, each wife's part is not the same. Each wife gets proportional rights or shares of community property; i.e. by looking at, among other the occurrence of legal relations and contributions to the acquisition of community property.

4. Conclusion

The norms of the division of community property in polygamous marriage aim to provide legal certainty and protection of wife's rights to community property in polygamous marriage. Normatively, justice in the division of community property in polygamous marriage, according to article 65 paragraph (1) letter c of Law number 1 of 1974 concerning Marriage, is in accordance with the theory of commutative justice whose norms can be abstracted as follows:

- all wives have equal rights to community property in polygamous marriage and those rights are started from the date of their respective marriages; and
- the share or portion of each wife in the division of community property in polygamous marriage does not look at the time of the occurrence of legal relations and the contribution of each wife in the acquisition of community property; but that only looks at the marriage status as: a wife of a husband.

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¹ Kholid Mushlih Agus, www.rumaysho.com, accessed on August 19, 2018.

² <http://www.pengertianahli.com/2014/01/pengertian-keadilan-apa-itu-keadilan.html#> accessed on August 27, 2018.

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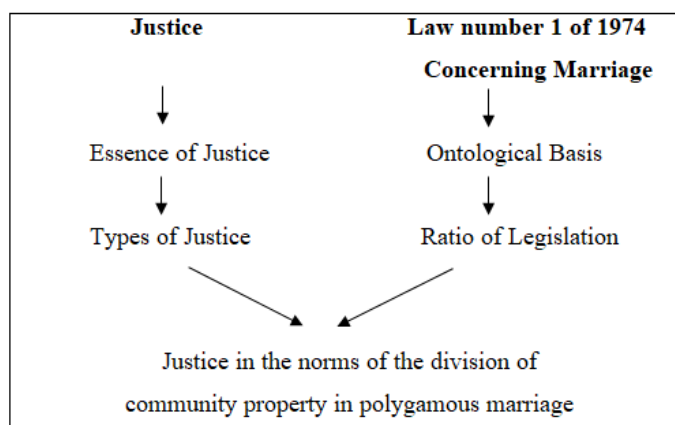


Figure 1. Flowchart Think on Justice in the Division of Community Property in Polygamous Marriage according to Law Number 1 of 1974 concerning Marriage