

Settlement of Joint Property Disputes Resulting from Divorce in the Religious Courts

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Abstract

The aim of this research is to analyze and find a fair resolution of joint property disputes resulting from divorce in the Religious Courts. The research method used is sociological legal research. This research uses primary data and secondary data. Data collection techniques through literature study, interviews and questionnaires. The collected data was analyzed qualitatively. The results of the research found that the current distribution of joint assets as a result of divorce is not fair, namely Article 97 of the Compilation of Islamic Law, namely that divorced widows or widowers are each entitled to half of the joint assets as long as it is not specified otherwise in the marriage agreement. Fair resolution of joint property disputes resulting from divorce in the Religious Courts is that the distribution of joint property resulting from divorce is carried out casuistically based on contributions taking into account the benefit and prosperity. Settlement of joint property disputes resulting from divorce is based on the orientation of the distribution which is solely for the interests, benefit and benefit of those concerned, on the other hand, certain situations and conditions which can harm the interests and welfare and endanger one of the parties must be avoided. So it is necessary to reconstruct the law, especially Article 37 of Law Number 1 of 1974 and Article 97 of the Compilation of Islamic Law.

Keywords: Settlement, Dispute, Joint Property, Marriage:

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A. Introduction

The legal relationship that exists in a valid marriage gives rise to certain legal consequences (*rechtsgevolg*) for the husband and wife in the marriage. One very basic legal consequence is regarding the legal relationship (*rechtsbetrekking*) between husband and wife. Other legal consequences are the formation of marital property (joint property, marital property ties), the position and status of legitimate children, as well as inheritance relations if one of the husband and wife dies.¹ It needs to be emphasized that, the Marriage Law emphasizes the principle of legality, therefore the legal consequences of marriage as mentioned above can and can only be obtained if the marriage is carried out legally, namely fulfilling the provisions of Article 2 paragraph (1) and paragraph (2) of Law Number 1 of 1974 concerning Marriage (marriages are carried out according to the laws of each religion and belief, and are recorded according to applicable laws and regulations).²

One of the legal consequences of a valid marriage, as stated above and related to the theme of this chapter, is the creation of marital property. Assets or assets in marriage (marital properties) arise from the efforts of both husband and wife. The existence of joint property functions, apart from being an asset, also to fulfill all the needs needed in family life. The Marriage³ Law does not question who is the party who actually cultivates the property (*zahir*) but rather emphasizes the aspect of when the joint property was acquired. This means that the Marriage Law recognizes the existence and roles of the two different parties. If the husband works to earn a living and the wife as a housewife takes care of household affairs well, these two things are a continuation of the role of husband and wife together in earning a living and the assets that exist later.⁴

The Marriage Law regulates property in marriage, including Article 35 paragraph (1) which states that property acquired by husband and wife during marriage becomes joint property; Article 97 of the Compilation of Islamic Law, namely that divorced widows or widowers each have the right to half of the joint property as long as it is not specified otherwise in the marriage agreement.

¹ H. M.Fahmi Al Amruzi, Marital Property Law Comparative Study of Fiqh, KHI, Customary Law and the Civil Code (Yogyakarta, Aswaja Pressindo, (2014)),page.47.

² Gunarto, Subroto, Anis Mashdurohaturun (2022). Legal Reconstruction on Talak Divorce Regulation Based on Justice Value. Sch Int J Law Crime Justice, 5(10): p.462-467.

³Yenni Novita Wulandari, Anis Mashdurohaturun, Abdul Halim Barakatullah, Reconstruction Of Marriage Agreement Regulations In Indonesia Based On Justice Value, South East Asia Journal of Contemporary Business, Economics and Law, Vol. 28, Issue 3 (April).p.115-126.

⁴ Anis Mashdurohaturun, Jamadi, Eman Suparman (2022). Developing Intellectual Property Rights as Joint Assets PostMarriage Decisions Based on Justice. Sch Int J Law Crime Justice, 5(12): 527-535.

B. Research Methods

This research is a type of qualitative research. The approach method in this research is empirical juridical. Juridical empirical¹ legal research on law will produce theories about the existence and function of law in society, along with the changes that occur in processes of social change.² Primary data is data that is directly collected by the researcher from the source of the question.³ Data obtained directly from the community, subjects studied at institutions, or community groups, direct actors who can provide information to researchers who are known as respondents and informants. Secondary data⁴ is in the form of primary, secondary and tertiary legal materials.⁵ The analytical method used in this study uses a descriptive-prescriptive analysis method.

C. Discussion

A marriage bond is a legal act that will have legal consequences for a husband and wife, including the existence of rights and obligations that must be fulfilled by each party. The right of each party is to have the same position in the household. Meanwhile, the obligations of husbands and wives are different, the husband is obliged to provide support for the family and the wife as manager of the treasury and as a housewife. The household will not function well if one of the parties neglects their rights and/or obligations; Both must be balanced in carrying out their respective rights and obligations. If in marriage a husband or wife only demands their respective rights without paying attention to their obligations as partners in the household, then the husband and wife relationship between the two will end in separation and disputes. Even after a divorce occurs, their affairs will spread to various other problems, including the issue of joint property during the marriage.⁶

In connection with case decision number 354/Pdt.G/2017/Pa.Bjb. The judge at the Banjarbaru Religious Court tried the case in determining the factual joint assets in which there were joint debts. The plaintiff, as stated in the description of the case, does not demand that joint debts be determined, but only demands that joint assets and their distribution be determined. However, the Court found the fact that the object being sued was land and buildings purchased on credit at Bank BTN. With these facts, the Court saw that two legal statuses were attached to the object being sued, namely the assets of the Plaintiff and the Defendant; as well as liabilities (debts) of the Plaintiff and Defendant to Bank BTN as creditor.

What was put forward by the Court in explaining the legal norms and principles of joint property, which not only include assets, but also liabilities (debts) created by husband and wife during marriage for joint interests, is a progressive legal consideration. It was proven in the trial that the debt created was actually used to buy a plot of land and a house building which then became joint assets between the husband and wife. Furthermore, the house purchase credit was still ongoing for the next several years, which also meant that the Plaintiff and Defendant still had an obligation to repay the bank. Based on these facts, the Court seemed to emphasize that for objects that are being pledged as collateral, it is not appropriate to only designate the assets as joint property, but must also simultaneously determine joint debts that arose or were created jointly during the marriage and will continue for several years to come.

Furthermore, in determining the total net value of the shares of each Plaintiff and Defendant (after paying the balance of their respective debts), the Court's decision which simultaneously determines the joint debt and is paid to Bank BTN, in the author's opinion, is intended to protect the interests of the Bank which is still has receivables from the plaintiff and defendant. With this decision, even if the bank is not withdrawn as a party, the determination of the debt and its payment obligations to the Bank is sufficient to protect the legal interests of the Bank.

From this decision, it can be concluded that the Court has decided more than what was demanded by the Plaintiff. However, this actually provides benefits and certainty of the legal status of assets and debts, both to the Plaintiff, Defendant, and the Bank as a creditor who has receivables from the parties. This decision reflects the Judge's efforts to make the decision on the case truly "resolve" the dispute between the parties to the case and also against other parties who may be related or have an interest in the object of the case. According to Yahya Harahap, the judge's decision that exceeds the demands can still be justified as long as the matters decided are still in line with or have significant relevance to the plaintiff's lawsuit. In such cases, the judge's decision can still

¹ Maniah; Bin Bon, Abdul Talib; Hariadi, Andi Kahar; Gunarto; Mashdurohatun, Anis; et al. Mapping the Competencies and Training Needs of Human Resources to Improve Employee Performance in Indonesia After the Covid-19 Pandemic, *Quality - Access to Success*, 2023, 24(195), pp. 219–225

² Soetandjo Wignjosebroto, *Social/Nondoctrinal Research Methods for Studying Law in Its Concept as a Social Reality*, Digest Epsitema, Volume 3/2013, page. 13.

³ Suryo Subroto, *School Education Management*, (Jakarta: PT Rineka Cipta. 2003),page. 39.

⁴Secondary data is data obtained from written materials. See Soerjono Soekanto, *Introduction to Legal Research*, (Jakarta: Universitas Indonesia, 1986), page. 11.

⁵ Suratman dan H. Philips Dillah, *Legal Research Methods*, (Bandung: Alfabeta, 2013), page. 66.

⁶ Anis Mashdurohatun, *Transfer of Intellectual Property Rights (Studies on the Division of Joint Property (Gono-gini) Post-Divorce)*, *Advances in Economics, Business and Management Research*, volume 121, International Conference on Law Reform (INCLAR 2019), Atlantis Press, 2020. p.70-75.

be justified. This is what was confirmed in the Supreme Court decision Number 140 K/Sip/1971 August 1972.

Table
Religious Court Decision Regarding the Division of Joint Property Due to Divorce

No	Decision Number	Position of Wife In Case	Division of Joint Assets	Facts and Judge's Considerations
1	29/Pdt.G/2009/PA.Btl.	Plaintiff	Plaintiff $\frac{3}{4}$ and Defendant $\frac{1}{4}$	Wife works and meets the family's needs. Husband works in an NGO office, does not care about the obligation to provide a living and commits domestic violence
2	134/ Pdt. G/2014/PTA JK	Comparison	Defendant 60/100 (60%) and Plaintiff.40/100 (40%)	Wife works and meets family needs. Husband works
3	266 K/AG/2010	Cassation Applicant	The Plaintiff is entitled to own $\frac{3}{4}$ of the joint property and the Defendant is entitled to own $\frac{1}{4}$	Wife works and meets family needs. Husband works and does not provide support for 13 years and does not obey religious orders
4	78 K/Ag/2021	Plaintiff	70/100 (70%) for Reconvension Plaintiffs/Convention Defendants and 30/100 (30%) for Reconvension Defendants/Convention Plaintiffs	Wife works and meets family needs (dual role) The husband does not care about the obligation to provide maintenance
5	248/Pdt.G/2010/PTA Bdg	Comparison	1/3 for widowers/ex-husbands and 2/3 (for widows/ex-wives.	Wife works and pays the family debt installments until her old husband is paid off leaving his wife, not caring about paying off the family debt installments
6	1227/Pdt.G/2021/PA. Bjm	Plaintiff	The Plaintiff gets $\frac{3}{4}$ share/75/100 (75%) and the Defendant gets $\frac{1}{4}$ share 25/100 (25%)	Wife works and contributes a lot to meeting family needs. Husband does not want to pay family debt installments
7	2531/Pdt.G/2022/PA.J T	Convention Defendants	the Convention Plaintiff's share is 30% and the Convention Defendant's share is 70%;	The wife works as a civil servant and meets the family's needs. My husband does not work regularly, and his business has gone bankrupt several times.
8	1914/Pdt.G/2018/PA. Pbr	Defendant	1/3 (one third) of the joint assets belongs to the Plaintiff and 2/3 (two thirds) belongs to the Defendant	The wife works and is dominant in meeting the family's needs. The husband only helps the wife in collecting consumer installments
9	354/Pdt.G/2017/Pa.Bjb	Defendant	The Plaintiff gets $\frac{2}{5}$ of the share and the Defendant gets $\frac{3}{5}$ of the share	Plaintiff works. The defendant was active in helping the family financially. The plaintiff was not responsible for supporting the children, and did not want to help pay for the wedding

The judge's legal considerations or legal reasoning, including in the decision on the distribution of joint assets above, is a very important part of a judge's decision, because legal considerations based on legal theory, doctrine and legal principles will reflect the quality of the judge's decision in deciding a thing. Upholding the image and authority of judges cannot be separated from the quality of the decisions they produce. The judge must be able to explore, discover and analyze the facts obtained during the trial. This is then outlined in legal considerations based on legal theory and principles.

A decision is only the conclusion of a long list of decisions, but methodological, analytical and systematic

legal considerations are a measure of the quality of a decision. The legal considerations given by a judge in deciding a case are based on the results of the judge's *ijtihad* in depth by considering philosophical, juridical, sociological and so on aspects in an effort to uphold justice, legal certainty, benefit and benefit for the parties in dispute.

Judges apply various legal discovery methods in exploring and discovering laws related to the cases they resolve. Legal interpretation methods in providing legal arguments include systematic interpretation, sociological or theological, comparative, and a *contrario*. The basic legal considerations used by judges in deciding disputes over the division of joint assets include: (1) Basic juridical considerations (Marriage Law, Compilation of Islamic Law, HIR and RBg); (2) Basic jurisprudential considerations; (3) Basic considerations of customary law or 'urf, *ushul fiqh* rules and Islamic legal philosophy; (4) Basic Sociological Considerations; (5) Basic considerations for legal interpretation and argumentation.

Based on these basic considerations, it can be described that in principle the Supreme Court Decision which departed from the Religious Court regarding the division of joint assets, consists of four forms, namely: (a) The appeal for cassation is rejected; (b) The appeal for cassation is granted; (c) Cassation Application Rejected with improvements; (d) the cassation request cannot be accepted (*Niet Onvankelijke Verklaard/NO*). Each decision has a different basis for consideration, because the basis of the claim and the evidence put forward by the parties is different.

Based on the results of research by experts from several Supreme Court decisions from 2008 to 2017, it can be understood that the majority of Supreme Court decisions regarding the distribution of joint assets are in the form of rejecting cassation requests, because the decision of the High Religious Court is deemed appropriate and does not conflict with material or formal law. so *Judex Juris* only strengthens the *Judex Facti* decision

The spirit of judges' *ijtihad* is reflected in the legal discoveries made by judges to explore the sources of written law and the values that live in society starting from the level of *Judex Facti* or justice at the first level, namely the Religious Courts and High Religious Courts, up to the Supreme Court. The sources of law applied by judges in joint property cases are mostly based on statutory regulations, including Law Number 1 of 1974 concerning Marriage, the Compilation of Islamic Law (KHI), unwritten law and Judge jurisprudence, both at the *Judex Factie* level and the Supreme Court carry out qualifications by observing and confirming that the events disputed by both parties have been proven.¹

After consolidating the legal events that occur, the judge looks for legal solutions (solving legal problems) to find the legal answers, then the judge as someone who has the ability and competence to find the legal answers must carry out *ijtihad* and legal discovery (*rechtsvinding*).

Juridically, the judge's decision must contain clear reasons and basic considerations, as explained in Article 50 of Law Number 48 of 2009 concerning Judicial Power which confirms that "A court decision must not only contain the reasons and basis for the decision, but also contain certain articles from statutory regulations. concerned or a source of unwritten law that is used as a basis for adjudicating." The decisions made by the judge are based on the judge's considerations through the process of processing and analyzing data obtained during the trial, both from documentary evidence, witnesses, allegations and oaths revealed in the trial (Article 164 HIR)

Thus, in formulating the basis for legal considerations (*ratio decidendi*) so that they are arranged carefully, systematically and completely, containing event facts, legal facts, formulation of the application of legal norms, whether in positive law, jurisprudence, customary law or legal values that live in in society, the judge is obliged to explore it by mobilizing his *ijtihad* abilities. The decision was handed down with a sense of responsibility, justice, professionalism and objective wisdom.

Legal considerations that are structured systematically means that they are coherent, starting from the authority of the judiciary to the case costs charged to the parties. According to Sudikno Mertokusumo, the legal considerations contained in the judge's decision must describe the following:

1. Legal considerations regarding absolute authority;
2. Legal considerations of legal standing,
3. Consideration of the plaintiff's main and branch arguments;
4. Consideration of the defendant's main and branch answer arguments, perhaps exception and reconvention arguments;
 - a. Consider the arguments for the lawsuit that must be considered
 - b. Consideration of the answer arguments that must be considered;
 - c. Consider whether the evidence meets formal and material requirements and whether the evidence is accepted or rejected;
5. Consideration of facts, both incident facts and legal facts that can be proven;
6. Consideration of the formulation of the relationship between legal events and legal facts that have been qualified as truth based on evidence.

¹ Sudikno Mertokusumo, Indonesian Civil Procedure Law, (Yogyakarta : Liberty, 2002), page.93

7. Consideration of legal arguments relating to positive law, customs, legal sociology, legal morals and so on or the laws that exist in society,
8. Legal considerations relating to case costs;
9. Legal considerations whether the claim is rejected, granted or not accepted.¹

The construction of the Supreme Court's decision in resolving joint property disputes in this research has considered juridical, normative, philosophical and sociological aspects. These aspects are integrated in the judge's decision in order to respond to issues of justice and benefit for the parties to the dispute. The justice that is realized in this decision is justice that is oriented to the main aspects that are guided by the applicable laws. Judges as law applicators really understand laws and other unwritten legal regulations, and assess whether these regulations are fair, beneficial and provide legal certainty if enforced.

Regarding the application of legal discovery in decisions regarding disputes regarding the division of joint property resulting from divorce, legal discovery is an alternative solution to legal problems because of changes in the context of time and place, and changes in the context of time and place are influential factors in determining the law. As stated in the rules of fiqh "taghayyur al ahkam bi taghayyur al azman wa al amkan". Consequently, when the urf changes, the law also changes, because it means that there has been a change in the illat of the law. This is what is meant by scholars, including Ibn al-Qayyim al-Jauziyah (w, 751 H), that there is no denying the existence of legal changes with changes in time and place *تغيير الأحكام بتغيير الأزمان والأمكنة* that the laws of fiqh are was previously formed based on good customs, the law will change if the customs change, so in this case the judge's *ijtihad* is the path taken by the judge in deciding the case, both in relation to the provisions of the law and by concluding from the obligatory law. applied when there is no text or regulation.

Ijtihad is a key word in understanding legal discoveries. In the history of Islamic justice, there are many examples of cases related to legal discoveries, one of which was carried out by Caliph Umar ibn al Khattab. His courage was based on the consideration that the Qur'an speaks more about legal values that are oriented towards benefit. The text is a medium for conveying these beneficial values. Because the Qur'anic legislation is within a certain time period, its implementation needs to be harmonized at different times.

On the other hand, legal discovery is a very complex series of activities in the civil justice process because judges are required to use all their abilities to explore written and unwritten laws that exist in society.

Mertokusumo emphasized that the momentum for legal discovery to begin is after the concrete event is proven or confirmed, because that is when the legal event that actually occurred must be searched for or discovered.²

According to Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, it is emphasized that "judges and constitutional justices are obliged to explore, follow and understand the legal values and sense of justice that exist in society." Judges and Supreme Court Justices have an obligation to carry out these duties, whether in the form of legal discovery, in the form of creating law, or in the form of assessing the propriety and feasibility of applying existing laws and regulations to legal events that occur in society. The mindset of judges who are still shackled by formal legality will result in law enforcement that tends to be unfair, which will harm society's sense of justice.³

Judges are not just "bouche de la loi" (mouthpieces for the law). But also as a meaning giver or translator of a law through legal discovery activities (*rechtsvinding*) with relevant and correct methods, even creating new laws (*rechtscheeping*) through decisions.

Formalistic freedom of judges, namely the freedom of judges in adjudicating, is bound by law to apply it subsumptive (textually/literally) according to the teachings of La Bauce de la lot. Formalistic freedom is the antithesis of realistic judge freedom, which gives judges the freedom to apply the law in accordance with the needs and interests of society in this development.

The decisions (judge made law) resulting from these decisions can ultimately be used as a reference for carrying out legal reform in Indonesia. According to Ade Saptomo, the principles that judges need to pay attention to when adjudicating concrete legal cases in court include three approaches, namely: The legalistic approach is a model used by judges in resolving concrete legal cases whose laws (laws) have regulated clearly so that the judge searches for, sorts and selects the legal elements in the concrete legal case in question and then meets the relevant articles in the law in question. Interpretative Approach, Law in reality it is possible that normative rules are incomplete or vague. In an effort to uphold the law with justice and truth, judges must be able to carry out legal discovery (*rechtsvinding*), and Anthropological Approach, in concrete legal cases that have not been regulated by law, judges must discover the law by exploring, following and internalizing the legal values that exist. live in society.⁴

¹ Ibid page.194-195.

² Sudikno Mertokusumo, *The Discovery of Law An Introduction*, (Yogyakarta: Liberty, 2007), page.78

³ Barda Nawawi Arief, *Carrying the Values of Justice in the Concept of the New Criminal Code*, Academic Paper, (Semarang, UNNES, 2010), page.88.

⁴ Ade Saptomo, *Ade Saptomo, Law and Local Wisdom*, (Jakarta : Grasindo, 2009), page, 54-55

The existence of the three approaches above is relevant to Continental European legal systems, Anglo Saxon legal systems and customary law. The legalistic approach is inherent in the Continental European legal system, then the interpretive approach is inherent in the Anglo Saxon legal system, while the anthropological approach is a characteristic found in customary legal systems.

In legal discovery, there are progressive and conservative schools. The progressive school believes that law and justice are tools for social change, while the conservative school believes that law and justice are only to prevent the decline of morals and other values.

Court decisions that have progressive value at least contain legal discoveries that are able to look far into the longer future, and are able to capture the dynamics of society which is increasingly developing day by day.

Ahmad Rifa'i stated that there are three main characteristics of legal discovery by judges in a progressive legal perspective, namely (1) A visionary method of legal discovery by looking at legal problems for long-term future interests by looking case by case; (2) A bold method of legal discovery in making a breakthrough (rule of breaking) by looking at the dynamics of society, but still guided by law, truth and justice and taking sides and being sensitive to the fate and condition of the nation and state; (3) Methods of finding laws that can lead to prosperity and prosperity and can also bring the nation and state out of adversity and social instability.¹

Achmad Ali, differentiates the method of legal discovery by judges into two types, namely the interpretation method and the construction method (*redeneerwijzen*).²

The interpretation method is interpreting the text of the law and still adhering to the sound of the text. The legal construction method is adopted when no statutory provisions are found that can be directly applied to the legal problem at hand, or in the case of regulations that do not exist, resulting in a legal vacuum or void in the law. Judges no longer adhere to the sound of the text, but judges do not ignore legal principles as a system. Legal construction implies solving or explaining the double meaning, ambiguity and uncertainty of legislation, so that it cannot be used in concrete events being tried.³

Then Abdul Manan divided the interpretation methods as follows:

1. Substantive interpretation method (valid, authentic, official), namely a definite interpretation of the meaning of the words as given by the legislator. The method by which the judge must apply a legal text to the case in concrete;
2. The method of grammatical interpretation or *taalkundig*, is interpretation according to language or words. Words or language are a tool for legislators to express their intentions and desires. Words must be short, clear and precise.
3. Systematic or logical interpretation method, is an interpretation that connects one article with another article in a related statutory regulation, so as to understand its intent and meaning. Interpreting statutory regulations by relating them to legal regulations or other laws or to the entire legal system. Law is seen as a unified whole, not an independent part but an integrated part with others.
4. Historical interpretation method, namely interpretation based on the history of the regulation. Each statutory provision has its own legislative history, so that judges know the purpose of its creation.
5. Sociological or teleological interpretation method, is an interpretation that is adapted to the circumstances of society. The social situation of society is always experiencing development and change, so that the situation when laws are made will certainly have changed with the current development of society. So the emphasis is on the purpose of the law, not just the sound of the words. Legislation that is outdated, its use must be adapted to current conditions and situations.
6. Comparative interpretation method, is interpretation by comparing one legal system with another legal system or between past law and currently applicable law, or between national law and international law.
7. Restrictive interpretation method, is an interpretation to explain the law in a way that the scope of the provisions of the law is limited by narrowing the meaning of a regulation by starting from its meaning according to the language.
8. Extensive interpretation method is an interpretation method that makes the interpretation go beyond the limits provided by grammatical interpretation.
9. The futuristic interpretation method is an anticipatory interpretation of laws guided by laws that do not yet have legal force (*fus constituendum*).⁴

There are 3 (three) steps that a judge must take when trying a case, namely:

1. Finding the law, determining which of the many rules in a legal system will be applied or if none can be applied, arriving at a rule for that case (which may or may not be used as a rule for other cases afterwards) based on the material existing in a way intended by the legal system. This means that the

¹ Hwian Christianto, Progressive Legal Interpretation in Criminal Cases, in the *Mimbar Hukum Journal*, 23 (3), 2011, page. 491-492

² Achmad Ali, *Revealing the Legal Veil, a Philosophical and Sociological Study*, Cet. 1, (Jakarta: Chandra Pratama, 1996), page. 146

³ Jazim Hamidi, *Legal Hermeneutics, History, Philosophy and Interpretation Methods*, (Malang UB Press, 2011), page 40

⁴ Abdul Manan, *Legal Discovery by Judges in the Practice of Procedural Law in Religious Courts*, Paper presented at the Indonesian Supreme Court Rakemas event from 10 to 14 October 2010, Balikpapan, East Kalimantan, page. 4

judge combines legal events with legal rules and translates and gives meaning so that a legal rule can actually correspond to the concrete legal event that occurred.

2. Interpreting the rules so chosen or established, that is, determining their meaning as they were when the rules were formed and taking into account their intended breadth.
3. Applying the rules found and interpreted to the case at hand (Rechtstoepassing).¹

Legal discovery is an official act of a judge mandated by statutory regulations. The juridical basis used as a reference by judges to make legal discoveries includes:

1. Article 24 of the 1945 Constitution which states that: "Judicial power is independent power to administer justice to enforce law and justice."
2. Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, explains that: "The court judges according to the law without discriminating between people."
3. Article 5 paragraph (2) of the Judicial Power Law, states that: "Judges are obliged to explore, follow and understand the legal values and sense of justice that exist in society."
4. Article 189 paragraph (1) RBg/Article 178 paragraph (1) HIR, that: "Judges by virtue of their position when deliberating are obliged to provide sufficient legal reasons that are not stated by the parties."
5. Article 229 of the Compilation of Islamic Law, that: "Judges in resolving cases submitted to them are obliged to pay serious attention to the legal values that exist in society, so that their decisions are in accordance with a sense of justice."

As for the judge's task in creating law (rechtsschepping-judge made law), in this case the judge is faced with several conditions, including:

1. There is a legal vacuum, there is no law available to solve legal problems (rechtsvacuum)
2. The existing law is not clear, for example there are inconsistencies between one paragraph or article and another or there are inconsistencies with the rules in other regulations;
3. Existing laws are outdated (verouderd), due to changes in society so that judges have the authority to overrule these outdated rules by creating new laws;
4. Existing laws conflict with the sense of justice or public order.

In principle, judges are not given the authority to change a law, judges must apply the law in accordance with statutory regulations or written law first, however written law is sometimes not always able to solve the problems faced, while on the one hand judges must examine and decide the case before him as fairly as possible. Therefore, judges can deviate from the law in making their decisions based on developments in people's lives. For this reason, the judge's task becomes more difficult because the judge will discover the content and face of law and justice in society. This is where the judge's role is required to carry out legal discovery (Rechtsvinding) in order to create and complement existing law. Judges must seek completeness by finding the law for themselves regarding the problem being examined and resolved.

Reform of the law on the distribution of joint assets as a result of divorce is carried out casuistically based on contributions taking into account the benefit and prosperity. As in the Decision of the Bukit Tinggi Religious Court no. 618/ Rev. G/ 2012/PA. Bkt, has been canceled by the Padang High Religious Court with No. 38/Pdt.G/2013/PTA.Pdg. by adjudicating themselves, namely determining the joint property of 1/3 share for the Plaintiff (husband) and 2/3 share for the Defendant (wife) based on considerations in obtaining the joint property of the Plaintiff and Defendant during the marriage, the Defendant was more dominant and played an active role as a civil servant, therefore It is appropriate and fair that the Plaintiff gets 1/3 of the joint property and the Defendant gets 2/3 of the joint property. So the judge decides on the division of joint property as a result of divorce between husband and wife who work based on the value of justice.

Furthermore, considering that apart from the European legal system as a legacy of the colonial era as positive law, in Indonesia there is a customary legal system and an Islamic legal system, the definition of living legal values in the provisions above must be interpreted as customary legal values and Islamic legal values.

If a husband and wife who are going to divorce take a case regarding their shared assets to the Religious Court, then there are special provisions that apply in the Compilation of Islamic Law, Article 97, which states that a divorced widow or widower is each entitled to half of the joint assets, as long as it is not specified otherwise in marriage agreement." As stipulated in Article 29 of Law Number 1 of 1974 which reads

Article 29

- (1) At or before the marriage takes place, both parties, by mutual agreement, can enter into a written agreement ratified by the marriage registrar, after which the contents also apply to the third parties involved.
- (2) The agreement cannot be ratified if it violates the boundaries of religious law and morality.
- (3) The agreement is valid from the time the marriage takes place.
- (4) As long as the marriage is in progress, the agreement cannot be changed, unless both parties agree to change it and the change does not harm a third party.

¹ Roscoe Pound, 1960 Law Finding Through Experience and Reason: Three Lecturer, Athens, University of Georgia Press., page. 1

However, if the husband and wife do not litigate in the Religious Court, that is, they conduct their own deliberations, then the mutually beneficial assets can actually be divided in another way, namely divided based on agreement and willingness of the husband and wife, or divided according to the percentage of each party if the amount is known.

So the researcher is of the opinion that the provisions of article 97 in the Compilation of Islamic Law are not provisions that are mandatory in Sharia, because there is no text in the Quran and Alhadith which explains that the distribution must be like that, namely that husband and wife each get half / 50 percent. In Malaysian court decisions, the issue of joint property is still an unresolved issue. This shows that the rule of distribution of joint property that applies in Indonesia / fifty-fifty distribution is not a mandatory provision according to sharia. Because if it were mandatory, of course the provisions would be the same between Indonesia and Malaysia, therefore it can be concluded that the provisions in the Compilation of Islamic Law that divide fifty-fifty according to Sharia law are not mandatory, but permissible. Then this mubah provision was adopted and stipulated as a binding article, so the fifty-fifty distribution is actually only one option, of the many options available regarding how to divide assets like this. It's not the only option that you can't use other distribution methods. Therefore, as has been stated above, the resolution of disputes over Gono Gini assets can be carried out outside the Religious Courts based on deliberation by taking the path of peace/ash-shuluh. In this case, the words of the Prophet Muhammad can be applied, "peace is permissible between Muslims, except for peace that prohibits what is halal or makes lawful what is haram."

This hadith has allowed for peace, ash-shuluh, namely a contract/agreement to resolve disputes. In one application, peace can be implemented between husband and wife who are in dispute. By carrying out this reconciliation, the distribution of mutually beneficial assets can be carried out based on the agreement and willingness of the divorcing husband and wife.

Thus, the new legal norm, namely the need to revise the provisions of Article 37 of Law Number 1 of 1974 concerning Marriage and Article 97 of Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law, becomes as follows: Article 37 of Law Number 1 of 1974 concerning Marriage, needs to be revised so that it reads: Article 37: If a marriage is dissolved due to divorce, joint assets are regulated according to their respective laws. This provision cannot be implemented if 1) in carrying out his obligations the wife is more dominant in fulfilling the family's needs. 2) If the wife's contribution to meeting the needs of the family is greater, then the divorced widow is entitled to a share of the joint assets that is greater than the share of the divorced widower. Article 97 of the Compilation of Islamic Law also needs revision, so it reads as follows: Article 97 paragraph 1: If the marriage is dissolved due to divorce, joint property is regulated according to each respective law. Article 97 paragraph (2) Widows and divorcees each receive $\frac{1}{2}$ share of the joint assets, as long as the parties do not specify otherwise in the marriage agreement. Article 97 paragraph (3) The provisions of paragraph (2) cannot be implemented if the wife is more dominant in fulfilling the family's needs in fulfilling the family's needs. If the wife's contribution is greater in fulfilling the family's needs, then the divorcee is entitled to a greater share of the joint assets than divorced widower's part.

D. Conclusion

The provisions for the division of joint assets as a result of divorce are Article 37 of Law Number 1 of 1974 concerning Marriage and Article 97 of Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law, namely that a divorced widow or widower is each entitled to half of the joint assets as long as it is not specified otherwise in marriage agreement. The provisions of Article 97 of the Compilation of Islamic Law, which determines half of joint assets, are felt to be unfair to widows who carry out their obligations and are proven to have contributed greatly or are dominant in meeting the family's needs. Settlement of disputes regarding the distribution of joint assets resulting from divorce based on justice values means that the distribution of joint assets resulting from divorce is carried out casuistically based on contributions taking into account the benefit and prosperity. The division of joint assets as a result of divorce is based on the orientation of the distribution which is solely for the interests, benefit and benefit of those concerned, on the other hand, certain situations and conditions which can harm the interests and welfare and endanger one of the parties must be avoided. Meanwhile, reform of norms was carried out, especially article 37 of Law Number 1 of 1974 and Article 97 of the Compilation of Islamic Law.

BIBLIOGRAPHY

- Abdul Manan, Legal Discovery by Judges in the Practice of Procedural Law in Religious Courts, Paper presented at the Indonesian Supreme Court's Rakemas event from 10 to 14 October 2010, Balikpapan, East Kalimantan, 2010.
- Achmad Ali, Revealing the Legal Veil, a Philosophical and Sociological Study, Cet. 1, Jakarta: Chandra Pratama, 1996.
- Ade Saptomo. Law and Local Wisdom, Jakarta: Grasindo, 2009.

- Anis Mashdurohatun, Jamadi, Eman Suparman. Developing Intellectual Property Rights as Joint Assets PostMarriage Decisions Based on Justice. *Sch Int J Law Crime Justice*, 5(12): 2022.
- Anis Mashdurohatun, Transfer of Intellectual Property Rights (Studies on the Division of Joint Property (Gonogini) Post-Divorce), *Advances in Economics, Business and Management Research*, volume 121, International Conference on Law Reform (INCLAR 2019), Atlantis Press , 2020.
- Barda Nawawi Arief, Carrying Justice Values in the New Criminal Code Concept, academic paper, Semarang, UNNES, 2010.
- Gunarto, Subroto, Anis Mashdurohatun. Legal Reconstruction on Talak Divorce Regulation Based on Justice Value. *Sch Int J Law Crime Justice*, 5(10).2022.
- H. M. Fahmi Al Amruzi, Marital Property Law Comparative Study of Fiqh, KHI, Customary Law and the Civil Code (Yogyakarta, Aswaja Pressindo, 2014.
- Hwian Christianto, Progressive Legal Interpretation in Criminal Cases, in the *Mimbar Hukum Journal*, 23 (3), 2011.
- Jazim Hamidi, Legal Hermeneutics, History, Philosophy and Interpretation Methods, Malang UB Press, 2011.
- Maniah; Bin Bon, Abdul Talib; Hariadi, Andi Kahar; Gunarto; Mashdurohatun, Anis; et al. Mapping the Competencies and Training Needs of Human Resources to Improve Employee Performance in Indonesia After the Covid-19 Pandemic, *Quality - Access to Success*, 2023, 24(195).
- Roscoe Pound, *Law Finding Through Experience and Reason: Three Lecturers*, Athens, University of Georgia Press, 1960.
- Soerjono Soekanto, *Introduction to Legal Research*, Jakarta: University of Indonesia, 1986.
- Soetandjo Wignjosebroto, *Social/Nondoctrinal Research Methods for Studying Law in its Concept as a Social Reality*, Epsitema Digest, Volume 3/2013,.
- Sudikno Mertokusumo, *Indonesian Civil Procedure Law*, Yogyakarta : Liberty, 2002.
- Sudikno Mertokusumo, *The Discovery of Law An Introduction*, Yogyakarta: Liberty, 2007.
- Suratman and H. Philips Dillah, *Legal Research Methods*, Bandung: Alfabeta, 2013.
- Suryo Subroto, *School Education Management*, Jakarta: PT Rineka Cipta. 2003.
- Yenni Novita Wulandari, Anis Mashdurohatun, Abdul Halim Barakatullah, Reconstruction of Marriage Agreement Regulations in Indonesia Based on Justice Value, *South East Asia Journal of Contemporary Business, Economics and Law*, Vol. 28, Issue 3 (April).2023.