

Reform of The Law on The Division of Joint Property Divorce

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ABSTRACT

The purpose of this study is to find out reform of the law on the division of joint property divorce. 50-fifty provisions regarding the sharing of joint assets are often applied rigidly in accordance with the provisions of Article 97 of the KHI. The resulting output does not provide a sense of justice to the parties. This research is normative law with a substantive analysis approach to the provisions of Article 97 of the KHI. The results showed that the sharing of joint assets was regulating (regelen) not coercive (dwingon). In certain cases, this provision can be deviated by contextualizing it through the maqashid sharia approach to the substance of the case. The amount of the contribution of either party to the acquisition of joint assets and commitment to the sacred promise of marriage is a modifying element ('illat) in the case of sharing of joint assets. Maqashid shari'ah as an instrument in law making (istinbath) plays a very large role in this case, especially if the case presented is closely related to distributive justice where the elements of benefit and the purpose of the law are the main benchmark in seeking justice. Contextual reasoning and a substantive approach to the purpose of article 97 KHI by prioritizing psychological and contributive aspects to the case of division of joint property will make the article flexible.

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1. Introduction

Death and divorce are the causes of the breakdown of the marriage cord. For husband and wife who are divorced or left dead by one spouse, of course, experience a traumatic phase and have an impact on the property left behind, especially the property obtained from the hard work of one party during life or while still a married couple. Property left behind either by death or divorce has legal implications for the party left behind either as inheritance or joint property (gono-gini) (Yunanto & Damayanti, n.d.).

In Islam, the study of common property has not been fully accommodated in classical legal texts, because fiqh which was born in patronage and middle eastern culture around the 13th century AD is full of patriarchal nuances and untouched by gender issues so it is natural that classical scholars have not paid attention to this issue. In addition, legally, the study of common property has

not been textually accommodated in the Qur'an and hadith. Only around the 16th century AD, the study of this common property can be traced in several local fiqh studies (Al-Banjari & Syekh, 2015).

The concept of common property was originally derived from customs that developed in Indonesian society which were later supported by positive laws in force in Indonesia. The formulation of joint property can be seen in the Compilation of Islamic Law Article 1 letter (f) which mentions joint property as property obtained either individually or jointly with husband and wife during the marriage bond without question registered in anyone's name (Sarong, 2020). Basically, there is no mixing between husband and wife property during marriage because the husband's property is fully the husband's right and is fully controlled by him and vice versa the wife's property becomes the wife's right and can be fully controlled by him.

For a harmonious household, there are basically no problems related to the control of property. But if there is a dispute between husband and wife and ends in divorce, this is where various kinds of problems occur with the property they acquired during the marriage. Therefore, the first thing that must be resolved in the event of divorce is the separation and division of property acquired jointly in marriage because each party has rights to the property (Effendi & Zein, 2014).

This is stated in article 37 of Law Number 1 of 1974 concerning Marriage which states that: "If the marriage breaks up due to divorce, property is regulated according to their respective laws". And in the Compilation of Islamic Law Article 97 that "The divorced widow or widower shall each be entitled to one-second of the joint property to the extent not otherwise specified in the marriage agreement" (Umbara & Nomer, 2014). With reference to these provisions, each is textually entitled to one second of the common property.

Application of one-second to each widow/widower as stipulated in the article 97 The IHL in cases of division of common property is often found in practice in court, because textually the article requires an equal balance of distribution of property obtained during marriage without questioning whose name the property is registered in. The textual reading of the provisions of the article is usually applied under normal circumstances where the role of husband and wife in acquiring joint property is carried out jointly and equally, and both parties actively work to produce joint property.

Indonesia as a country that adheres to the principle of supremacy of law indicates that all actions and decisions of state administrators must be based on law (Fajrin, 2019). Indonesia also adheres to the tradition of civil law which tends to prioritize written law in the form of laws and regulations (Asshiddiqie & Safa'at, 2016). Therefore, every judge's decision in Indonesia must be based on written law (disparities). This aims to ensure legal certainty and avoid differences in one judge's decision with another's judge's decision.

In certain cases, the provisions contained in article 97 of the IHL are distorted and not fully applied by the judge. In its consideration, the panel of judges uses more legal discovery efforts (Rechtvinding) with a maqashid sharia approach by looking at the ratio legis to the cases they handle. In the event that the role of one party contributes more to the joint property, then the party is given more portion than dividing the joint property equally as the textual provisions in article 97 KHI above.

The same thing is also found in cases when a married couple has violated their commitment in marriage by committing immoral acts such as cheating and drunkenness which causes a reduction in the share of joint property because it is spent on things that are not useful, so that these acts can be categorized as a form of inconsistency with the commitment of the sacred vows of marriage and can be a 'legal illat deduction of the share of joint property.

In that framework, the important issue in this study is the gap between the textual regulation of the provisions of article 97 KHI and its casuistic application by not paying attention to the rigidity of the article absolutely but prioritizing the context/substance of the article in finding elements of benefit and legal justice.

Maqashid Sharia is a representation of Maslahat and legal justice which is the main goal in every court decision and of course to get legal justice must be built a reasoning (*ratio decidendi*) based on five elements that become the main benchmark, namely maintaining religion, soul, reason, offspring and property. Law making (*istinbath*) based on these five elements must also be accompanied by a priority scale by taking into account the factors *dharuriyat* (primary), *hajiyyat* (secondary) and *tahsiniyat* (tertiary)

Based on the background above, the author is interested in studying several problems as follows:

1. How is the concept of common property in the perspective of fiqh and positive law?
2. How is the framework and epistemology of Maqashid Shariah?

What is the legal reasoning (*ratio decidendi*) against the provisions of article 97 KHI based on the approach of the concept of Maqashid Shariah?.

2. Materials and Methods

Research on the interpretation of article 97 of the KHI on the division of common property in the perspective of maqashid syariah is a type of normative legal research. Normative legal research is a legal study of legal rules, norms, and principles. According to Soejono Soekonto, normative legal research is directed at research that draws legal principles, legal systematics, synchronization of laws and regulations, comparative law, and legal history (Soekanto, 2012).

The legal materials used in this study are divided into three, namely primary, secondary and tertiary legal materials. Primary legal materials are a number of legislation and court decisions that intersect with research topics including Law Number 1 of 1974 concerning Marriage, Compilation of Islamic Law (KHI), Supreme Court Decision Number 266 K / AG / 2010 and Bukit Tinggi Religious Court Decision Number 618 / Pdt.G / 2012 / PA.Bkt. The secondary legal material includes some legal references that are not included in official state documents such as books, dissertations, theses and several journals related to the research theme. In addition, to complete the two legal materials above, several foreign terms (legal language) are needed contained in several dictionaries and encyclopedias on research topics as part of tertiary legal materials.

The approach used in this study is conceptual-based. The conceptual approach is to try to build a complete argument about a legal concept/purpose behind article 97 of the KHI. The method used is Descriptive Analytical by explaining and analyzing all the legal sources above then analyzed using a substantive approach to the purpose (maqashid sharia) in the case of contextual division of common property. All research results will be described and presented in the form of research results.

3. Result and Discussion

Common Property (Gono-gini) In Fiqh Perspective and Positive Law

Basically, Islamic law does not recognize the term mixing of wealth between husband or wife because of marriage. The wife's property remains the wife's property and is fully controlled by her, as well as the husband's property belongs to the husband and is fully controlled by the husband. So broadly speaking about gono-gini or common property is actually not found in the classical books of fiqh. At that time, the issue of common property was a legal issue that had not been touched or unthought of (*ghair al-mufakkar*) by the scholars of fiqh in the past because the issue of common property had only emerged and was much discussed in the period of women's emancipation as it is happening now.

In general, Islamic law does not look at the existence of these treasures. Islamic law views the separation between the husband's property and the wife's property. What the husband produces is his property, and vice versa, what the wife produces is her property. The absence of a common property institution can be implicitly understood from several events in the time of the Prophet Muhammad, namely when the wife of Ka'ab ibn Malik gave her necklace to the Prophet Muhammad SAW. The grant was received by the Prophet Muhammad after it became known to her husband

(Ka'ab ibn Malik) and allowed his wife to give her necklace (Muhammad, 2016). Similarly, when Hindun bint 'Utbah complained to the Prophet Muhammad that Abu Sufyan (her husband) could not provide for her whether she could make a living from her husband's wealth, the Prophet Muhammad replied: "Take just enough to provide for yourself and your children" (Hasan, 2011). Both incidents illustrate that in a married household in the time of the Prophet Muhammad did not recognize common property because each conjugal property was separate.

In the opinion of M. Yahya Harahap, that the Islamic legal perspective on gono-gini or joint property is in line with what Muhammad Shah stated that livelihood with husband and wife should fall into the realm of rub'u mu'amalah, but it was not specifically discussed. This may be because in general the authors of fiqh books are Middle Easterners who culturally do not know the existence of a livelihood with husband and wife. But there is talk of kongsi which in Arabic is called shirkah. Therefore, the problem of livelihood with husband and wife includes sharing or shirkah (As'ad & Razali, 2021).

Islamic law also holds that the property acquired by the husband during marriage belongs to the husband, while the wife is only entitled to the income given to her. However, neither the Qur'an nor the Hadith provide a clear provision that the property acquired by the husband during marriage is entirely the right of the husband, and the wife is only limited to the income provided by the husband. Based on this, the issue of common property is not mentioned clearly and unequivocally in Islamic law so that it is open to Islamic jurists to perform ijtihad against it.

The scholarly study of common property (gono-gini) has given rise to the opinion that common property can be qiyaskan as shirkah. KH. Ma'ruf Amin, said that joint property (gono-gini) can be equated and classified into shirkah property as property accumulated during marriage and should be divided proportionally in case of divorce. This analogy can be understood that the wife can also be considered as a working spouse or partner, even though she does not participate in working in the real sense, such as taking care of the household, cooking, washing clothes, taking care of children, cleaning up the household, and other domestic work that is considered a work activity whose role cannot be underestimated (Susanto, 2008).

If gono-gini property is analogous to shirkah it is very reasonable because both contain understanding as a form of partnership or cooperation between husband and wife. It's just that in the concept of shirkah in general it is more business or cooperation in business activities, while shirkah gono-gini is only cooperation in building a household that is sakinah, mawaddah, warahmah, although it also includes matters related to property in marriage. The understanding between gono-gini and shirkah can also be understood through the argument that the union or mixing of husband and wife property can be understood as additional wealth because of the joint effort between the two of them. Logically, if there is a disconnection (divorce) between them, then the union of property (gono-gini) should be divided in half. The division can be determined on the basis of which party invests more in the cooperation, whether husband or wife. Or it can also be divided equally, that is, each party gets half (fifty-fifty).

Talking about Islamic law, especially regarding common property, formal juridical cannot be separated from the Compilation of Islamic Law which is the result of ijtihad in accordance with the conditions of the needs and legal awareness of Muslims in Indonesia. The compilation of Islamic law is not a new school in Islamic fiqh, but a manifestation of the application of various existing schools of fiqh and is complemented by other institutions such as ulama fatwas in response to problems that arise, court decisions through trials by judges, and laws made by the legislature to answer problems that exist in Indonesia in accordance with the legal awareness of the Indonesian Islamic community itself (Herawati, 2011).

Based on the Compilation of Islamic Law, marital property is regulated in articles 85 to 97 of Book I (one). The formulation of articles 85 to 97 of the Compilation of Islamic Law has been approved by Islamic jurists in Indonesia to make shirkah abdan as the basis for formulating the rules of common

property (gono-gini) (Manan & Putra, 2018). The framers of the Compilation of Islamic Law approached the path of shirkah abdan with customary law. This approach does not contradict the ability to make 'urf (custom/tradition) the source of law and is in line with the rule that says "al-adatu muhakkamah. Some Islamic jurists view gono-gini as the will and aspiration of Islamic law. According to them, gono-gini is a consequence of the existence of a marital relationship between a man and a woman who then produce property from the efforts they both make during the marriage bond. They base on the word of Allah in Sura An-Nisa:21 which refers to marriage as a sacred, strong, and solid covenant (mitsaqan ghlmizhan). That is, a marriage that is performed through ijab-qabul and has fulfilled the requirements and gets along well is a shirkah between husband and wife. Therefore, the legal consequences that arise later, including property (gono-gini) become common property.

The compilation of Islamic Law in Indonesia is a development of marriage law contained in Marriage Law Number 1 of 1974. Therefore, it cannot be separated from the mission carried out by the Marriage Law even though its scope is limited to the interests of Muslims. The IHL absolutely must be able to provide a legal basis for marriage held by Muslims. So with respect to this joint property, the husband or wife has the same responsibility and the joint property will be divided equally or fifty-fifty if the marriage breaks up due to death or divorce and because of a court decision. Based on the analysis, the articles governing joint property include articles 88 and 95. Article 88 stipulates that if there is a dispute over common property, it will be handed over to the competent Religious Court. This article is an article that regulates the division of joint property in case of disputes. The compilation of Islamic Law shall submit all matters relating to the division of common property to the Religious Court which has the authority to resolve the petition for the joint property dispute. And this means that the determination of the case at hand is in the hands of a panel of judges who decide the case based on existing evidence and also witnesses submitted to the trial. Settlement through this court is an alternative dispute resolution. Couples can choose a more elegant way, namely by peaceful or deliberative means (Kodri, 2023). This method is much more effective because it does not need to be convoluted, time-consuming, costly, and or also eat the feelings of the parties. This method can be used as long as it is done fairly. In deliberation, the parties can agree on the percentage of distribution of joint property, not necessarily half-heartedly. Wives can earn one-third and husbands two-thirds or vice versa provided no one feels wronged or cheated. However, if indeed the method of dispute resolution through peaceful channels cannot be carried out, then settlement through litigation (Court) can be carried out if according to the parties as the best way.

The Basic Concept of Maqashid Syari'ah and its Epistimology

Etymologically, maqashid shari'ah is a combination of two words: al-maqashid and al-shari'ah. Maqashid is the plural form of the word maqshud, qashd, maqshd or qushud which is a derivation of the verb qashada-yaqshudu, with various meanings such as towards a direction, goal, middle, just and not beyond limits, straight path, middle between exaggeration and lack (Mawardi, 2010). While Shari'ah, etymologically means the way to the spring, the road to this spring can also be said to be the path to the main source of life. Shari'ah in terminology is al-nushush al-muqaddasah (sacred texts) from the Qur'an and the mutawatir al-Sunnah which has not been interfered with by human thought at all. The content of shari'ah in this sense includes aqidah, amaliyyah, and khuluqiyyah (al-Daraini, 2016).

In terminology, maqashid al-shari'ah can be interpreted as the value and meaning that is used as a goal and to be realized by the maker of Sharia (Allah SWT) behind the making of Sharia and law, scrutinized by mujtahid scholars from Sharia texts (Auda, 2022).

Maqasid ash-Shari'ah is the most basic theory, especially in examining philosophical aspects related to the rights and obligations of husband and wife, the obligation to earn a living and its implications for joint property in the event of divorce. This theory is a fundamental aspect of building

Islamic legal thought to achieve Maqasid ash-Shari'ah (the purpose of Shari'a) which is to realize benefit, that is, universal benefit for humans, or in a more operational expression called social justice. The formulation and reconstruction of laws and regulations, theoretical offers and methods of *ijtihad* in resolving Islamic legal problems must refer to the realization of benefit (justice). Laws are made, created and established with the sole purpose and purpose of creating benefit (justice). This concept originated from the theory of *Maslahah Mursalah* which is intended for the benefit of society and serves to provide benefits and prevent harm. This theory was developed and held as a source of law by Imam Malik and his followers. This theory was further elaborated by al-Shathibi with the theory of Maqasid ash-Shari'ah which is an attempt to justify the ability of Islamic legal theory to adapt to social needs

In his work, *Al-muwafaqat*, ash-Shatibi uses different words related to maqashid al-shari'ah. These words are maqashid al-shari'ah, al-maqashid al-shari'ah fi al-shari'ah, and maqashid min syar'i hukm. In principle, the naming of these different words contains the same meaning, namely the purpose of the law revealed by Allah SWT. Every cry of Allah can be understood by reason, why Allah commands, of course there is benefit for mankind, whether explained by himself the reason or not, or explained why an act is forbidden, of course there is also benefit for man so that man does not enter into destruction as explained by al-Shatibi in his book *al-Muwafaqat*:

"Indeed, the shari'a (maker of shari'a) in promulgating its law aims to realizing the benefit of his servants both in this world and in the hereafter simultaneously".

When examined al-Shatibi's statement above, it can be understood that the content of maqashid al-Shari'ah is for the benefit of mankind. Therefore, it can be said that all the teachings contained in the Qur'an and Sunnah postulate the existence of *maslahat*. Although the sources of sharia do not all speak of benefit directly, there are several propositions that can indicate the existence of *maslahat* in Islamic shari'a.

To paraphrase Ghofar Shidiq, studies of maqashid al-shari'ah theory in Islamic law are very important. That urgency is based on the following considerations. First, Islamic law is a law that originates from God's revelation and is reserved for mankind. Therefore, he will always be faced with social change. In such a position, whether Islamic law whose main sources (the Qur'an and Sunnah) came down in the past few centuries can adapt to social change. The answer to this question can only be given after a study of the various elements of Islamic law, and one of the most important elements is the theory of maqashid al-shari'ah. Second, from a historical aspect, attention to this theory has actually been carried out by the Prophet SAW, his companions, and the next generation of *mujtahid*. Third, knowledge of maqashid al-shari'ah is the key to the success of *mujtahid* in his *ijtihad*, because it is on the basis of the purpose of the law that every problem in the *mu'amalah* between human beings can be returned. Abdul Wahhab Khallaf, an expert on *ushul fiqh*, stated that the *nash-nash* of shari'ah cannot be properly understood except by someone who knows maqashid al-shari'ah (the purpose of law). This opinion is in line with the views of another *fiqh* expert, Wahbah al-Zuhaili, who said that knowledge of maqashid al-shari'ah is a matter of *dharuri* (urgency) for the *mujtahid* when it comes to understanding *nash* and making legal *istinbath*.

The doctrine of al-Shathibi about al-maqashid al-Shari'ah which is an effort to uphold the concept of *al-maslahah* as the main element in the objectives of Islamic law includes five main elements that must be maintained and realized. The five basic elements are religion, soul, reason, heredity, and property. A believer will gain benefit if he can preserve the five basic elements. On the contrary, he will get *mafsadat* if he cannot maintain the five basic elements properly. Furthermore, al-Shathibi established three ranks to enforce these five basic elements, namely: *dharuriyat*, *hajiyat*, and *tahsiniyat*.

Maintaining the *dharuriyat* group is to maintain the primary (essential) needs of human life. The primary need is to maintain religion, soul, reason, offspring, and property within limits lest the existence of the five basic elements is threatened. In the group of *hajiyat* includes essential (primary)

needs, such as needs that can prevent humans from difficulties. The non-fulfillment of this hajjiyat group does not cause the threat of the essence of the five basic elements, but will only cause difficulties. This hajjiyat group is closely related to the law of rukhsah (dispensation) or leniency in fikh, while the group of needs that include tahsiniyat are needs that are supportive of increasing one's prestige in society or increasing dignity before Allah SWT in accordance with their respective obedience. This is closely related to the issue of Sunnah or other virtues in worship.

Understanding the order of ranking needs becomes important when related to the priority scale of their application in life, namely when there is a clash of needs with one another. In this case, of course, we will take the attitude as stated above. The top priority of dharuriyat should take precedence over the priority of hajjiyat, and the priority of hajjiyat should take precedence over the priority of tahsiniyat. This provision implies a legal justification for ignoring matters of second and third priority if the needs of the first priority are threatened.

Interpretation of Article 97 KHI Based on the Concept of Maqashid Shari'ah

Joint property in marriage is a term for property that arises in a marriage between a man and a woman. With marriage, there will automatically be joint property obtained due to the efforts of the husband or husband and wife together. The value of balance in building a household is realized so that each party can fulfill its obligations and receive its rights. Balance needs to be created so that no parties are harmed, so that an eternal home is built. The husband as the head of the family carries out his obligations in fulfilling the income and the wife as a housewife is in charge of taking care of the household well. Balance will be created if each party understands and respects each other. In the event of a divorce, then the value of this balance still needs to be maintained, so that no party is harmed. If only the husband works and the wife is only a housewife, then the wife still gets the right to share joint property, this balance can be interpreted by equal division or divided according to a sense of justice.

In the event of divorce, then generally the joint property must be divided in half, the ex-wife and ex-husband will each get the same share (each half share). Or different parts based on the portion concerned in accordance with their duties and obligations in the household, as well as contributions in producing the joint property. Regarding the wife who also earns a living in meeting the needs of the household, it is more appropriate for the benefit, she gets a greater share of the ex-husband's share. Because besides also earning a living, they also play a double role in taking care of household needs, including their husbands and children.

The phenomenon of creating joint property in marriage that develops in Indonesian Muslim society is very diverse, ranging from husbands who dominate, or also wives who take many roles, it is even very possible that husbands have spent joint property without the wife's knowledge, for example because the husband has an affair. In other cases, it can be the other way around, namely that the wife has spent joint property (gono-gini) without the knowledge of the husband, for example the wife who had an affair / nusyuz. In this atmosphere, the application of Article 97 KHI is no longer a dead price. Moreover, Surah al-Nisa verse 3230 which is the philosophical basis for the formulation of joint property in marriage does not provide clear provisions at all regarding the degree / share of each husband or wife from the joint property. This is due to the flexibility of Islamic law flexibility in determining the share of the husband / wife which is certainly adjusted to the role and contribution of each party in obtaining joint wealth.

Therefore, the affairs of common property (gono-gini) become a space and field of ijtihad whose determination of share is left to humans, in this case the judge as the enforcer of law and justice. In the Compilation of Islamic Law article 96 of the KHI it is explained that "In the event of a death divorce, half of the joint property becomes the right of the spouse who lives longer". Meanwhile, article 97 of the IHL explains that "widows or divorced widowers are each entitled to one-second of the joint property as long as it is not otherwise specified in the marriage agreement".

Article 97 of the KHI actually provides a clear picture of flexibility in the division of joint property, especially in certain cases, because the article is regulating (regelen) not forcing (dwingen) so that the division is not absolute fifty-fifty. The existence of the phrase "as long as it is not otherwise specified in the marriage agreement" is an option for the parties to determine the amount of the share of joint property in accordance with the agreement, so according to the author, there is still room to give legal choices to the parties. The fifty-fifty provisions in the article are only regulatory in nature and must be understood when under normal conditions between husband and wife perform their respective roles in a balanced manner. Therefore, casuistically the provision can be set aside. If this is related to the formulation contained in article 97 of the KHI, which originally the joint property between the widower and the widow received half a share each, then it may undergo changes, if in certain cases there are elements that change it. This is in line with the method of jurisprudence which reads: "al-asl baqa'u ma ka na 'ala ma ka na ma lam yakun ma yughayyiruhu".

Ibn Qayyim al-Jauziyah, states that the purpose of Shari'ah is the benefit of the servant in this world and in the Hereafter. The Shari'ah is all just, everything contains mercy, and everything contains wisdom. Any matter that deviates from justice, mercy, benefit and wisdom is definitely not a provision of the Shari'ah. In simple terms, *maslahat* (al-*maslahah*) is defined as something good or something useful. The types of benefits maintained by Shara include maintaining religion, soul, reason, offspring, and property. The discussion of common property falls into the realm of maintaining property (*hifzul mal*).

With regard to the application of law (*tatbiq al-ahkam*) in cases of division of common property in religious courts, law enforcers can use the *maqashid shari'ah* approach for the upholding of law and justice by looking at the elements of benefit and justice in it. *Maqashid sharia* is meant by looking at the case *a quo* contextually both with a psychological and contributive approach to the position of the legal subject in the acquisition of joint property which in this case is the former husband and wife.

In a psychological context, we can see the decision of the Supreme Court Cassation Number 266 K / AG / 2010 which gave a share to the widower 1/4 part and 3/4 for the widow, considering that the ex-husband did not have a permanent job, did not provide a living for a dozen years, did not obey religion and had bad morals such as drunkenness, while all joint property was obtained by the wife so that this had a psychological impact on the Cassation Respondent. Here we can see, the consideration used by the Cassation Council by giving a larger portion to the ex-wife than the ex-husband is in the framework of upholding justice. The morals of a husband who is not religiously observant and does not provide for a dozen years become a factor in reducing the share of joint property.

Contributive considerations in the form of the large role of one party in the acquisition of joint property can also be seen in decision Number 618/Pdt.G/2012/PA. Bkt where in that case the role of the wife as a civil servant is more in terms of obtaining joint property from the husband. The wife, as a civil servant, has provided for household needs, borrowed money from the bank to buy land, sold her gold, and even bought a shop for her husband. In the construction of houses, it is the wife who builds with money from cooperative loans, salaries and savings. While the plaintiff (husband) did not provide capital to buy building materials. As well as joint property in the form of shops, it is the wife who provides trading capital from cooperative loans which are then paid in installments with her own salary. While the husband did not want to know about the debt from the cooperative loan made by the wife to buy land, build houses, and shops, so in this case the panel of judges gave a ruling for the wife's share of 2/3 and the husband's share of 1/3 of the joint property

The fifty-fifty portion of the common property is no longer absolutely applied based on article 97 of the KHI. The philosophical reason for measuring the value of justice in the case of the division of common property is to look at how much of a party's role in contributing to the share of the common property. If in the current millennial context, the role of the wife is more dominant in

contributing, then the wife's share will get a larger portion than the husband and it can even be understood, the dual role of the wife as a housewife as well as a wife who works to help household finances should be considered by judges in dividing the portion of joint property. The provisions of article 97 KHI above can be stored using *contra legem*.

In all cases, the application of the provision for equal property (50:50) in article 97 of the IHL for each husband and wife does not necessarily satisfy the sense of justice. Therefore, to be able to fulfill the sense of justice of the parties, of course, they must prioritize aspects of expediency and justice, in addition to aspects of legal certainty and balance, does the person concerned also have a commitment to maintain family harmony in realizing the goals of marriage that are *sakinah*, *mawaddah*, and *rahmah*, Does the person concerned also have a commitment to maintain the integrity and blessing of property that becomes joint property in marriage? Therefore, in some cases that manifestly do not fulfill such commitments, the division of common property must pay attention to distributive justice based on proportional equilibrium rather than cumulative justice based on pragmatic equality of values.

According to the author, the commitment to be faithful in living the household ark can also be a *ratio legis* and should be considered in the division of common property. If the divorce occurs due to the infidelity of one of the parties resulting in the breakup of the marriage and has become a court verdict, then the infidelity can be a reducing factor in the division of joint property. In this framework, a reasoning is built that the division of joint property is not absolutely understood textually (50:50), but can be influenced by several influencing modifiers such as commitment to marriage vows such as not infidelity, domestic violence, drunkenness and taking into account the amount of contribution of one party in the acquisition of joint property. Of course, this *ratio decidendi* is built based on the concept of *maqashid sharia* by taking into account the five basic principles on which it is based, namely maintaining religion, soul, offspring, reason and property.

In the context of the division of common property based on distributive justice, it will certainly intersect with efforts to maintain property proportionally and equitably. By taking into account the amount of contribution and looking at the commitment of one party in marriage, an output will be achieved in accordance with the goals and objectives of Islamic law, namely for the benefit of Muslims, in this case the subject of law is the former husband / wife himself. Prioritizing aspects of distributive justice in the application of cases of division of common property is the purpose of the concept of *maqasid shari'ah*. With efforts to contextualize article 97 of the KHI, it is hoped that the substance of Islamic law will be able to provide a sense of justice to all parties in the case of division of common property so that the practice of rigidity in law will decrease.

4. Conclusion

From the description above, it can be concluded that rigidly applying the provisions of article 97 KHI to all cases of division of joint property will certainly hurt the sense of justice of the parties, especially the ex-wife. The provisions for the fifty-fifty division of joint property as stipulated in article 97 of the KHI are in order to regulate (*regelen*) not coerce (*dwingon*). The arrangement of equal distribution of portions (50:50) as intended by the article can be applied under normal conditions when husband and wife perform their respective roles in a balanced and proportionate manner and are not influenced by legal modifiers (*'illat hukm*) that can reduce the share of joint property.

Maqashid shari'ah as an instrument in law making (*istinbath*) plays a very large role in this case, especially if the case presented is closely related to distributive justice where the elements of benefit and the purpose of the law are the main benchmark in seeking justice. Contextual reasoning and a substantive approach to the purpose of article 97 KHI by prioritizing psychological and contributive aspects to the case of division of joint property will make the article flexible. In the event that the role of one party is greater in the acquisition of joint property and there is an attitude of

inconsistency of one party towards marital commitment, it becomes a ratio legis of reduced share of joint property of the former husband and wife.

5. References

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