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CUSTOMARY OR RELIGIOUS LAW: UNREGISTERED MARRIAGE AND ITS RELATIONSHIP TO JOINT PROPERTY

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ABSTRACT

This research aims to analyze the legal impact of unregistered marriages in relation to the ownership of joint property, as well as consider the pretexts of customary and religious law that are often used to justify the practice. Using the normative juridical research method, this study examines legal theories, legal principles, and legislation related to marriage and property division in Islamic law and state law. The results show that the pretext of customary and religious law in unregistered marriages creates legal complexity, both in customary law and in state law. To regulate marriage registration, the ijtihad insya'i approach can be applied with the principle of "rejecting harm takes precedence over bringing good." This approach requires the support of Indonesian Muslim scholars and thinkers to raise public awareness about the importance of marriage registration in the civil aspect and ownership of joint property. In addition, although in customary law joint property is often divided equally, in practice judges may consider the principle of justice based on the facts at trial. Therefore, education by state authorities and ulama is necessary to raise legal awareness in the community towards marriage registration.

INTRODUCTION

In Indonesian society, there are several laws that coexist but influence each other, both influences that support the application of state law and vice versa. Customary law is one of them, this law existed before the Indonesian state law was formed, as well as religious law. Both are older than existing state law, so their existence should be preserved. However, when the transformation and adoption of customary law and religious law into state law, it will more or less affect the application of the state law. For example, the state law on marriage stipulated in Law Number 1 Year 1974, in which more Islamic religious law is adopted, as well as customary law.[1] However, when the law is applied to non-Muslim customary areas, there are different legal consequences.

Among the customary laws that apply in Indonesian society, which were later adopted by the government as positive law, is the law on joint property. The mention of joint property and the procedure for dividing joint property in various regions is actually different. However, in its development, as found in the Burgelijk Wetboek (BW)/Civil Code and the Compilation of Islamic Law, the concept of dividing joint property is that each husband and wife are entitled to half of the joint property in the event of divorce or death of one of the spouses.

[1] The atmosphere of religious life and Islamic law across various regions of the Indonesian archipelago continues to grow and evolve. In some places, customs predate the arrival of Islam—such as in Banten—where customary law often adapts to Islamic law. During the reign of Sultan Ageng Tirtayasa in Banten, there was no distinction between customary law and religious law. In Sulawesi, particularly in Wajo, inheritance matters are resolved using both Islamic and customary law, with the two systems blending harmoniously. See, Ahmad Rofiq, *Hukum Islam Di Indonesia* (Jakarta: RajaGrafindo Persada, 1995), h. 58. See also Teuku Ibrahim Alfian, *Wajah Aceh Dalam Lintasan Aceh* (Banda Aceh: Pusat Dokumentasi dan Informasi Aceh, 1999), h. 229-48. Teuku Ibrahim Alfian, *Perang Di Jalan Allah* (Jakarta: Pustaka Harapan, 1987), h. 38. The explanation above illustrates the concept of the *Receptio in Complexu* theory. This theory was later targeted for elimination by the Dutch, particularly through the efforts of Snouck Hurgronje, who introduced the *Receptie* theory. This theory was implemented in the colonial legal regulations of the time (see Article 134 paragraph (2) of the *Indische Staatsregeling* (IS) 1925 and its subsequent amendments). The core of this theory was to undermine and eliminate the role of religious (Islamic) law in legal matters throughout the archipelago.Eventually, this theory was challenged by Hazairin's *Receptie Exit* theory, which fundamentally rejected the *Receptie* theory for being incompatible with the Qur'an and the Sunnah. Hazairin argued that Islamic law should not be exclusive, but should instead influence and become an inseparable part of national law. This perspective was further developed by Sajuti Thalib through his theory of *Receptie a Contrario*, which asserted that Islamic law applies to Muslims, and customary law applies to Muslims only when it does not conflict with Islamic teachings and principles. Another approach that emerged is the theory of syncretism, which is based on the idea that both customary law and Islamic law can coexist without excluding one another. Both systems are seen as equally binding and valid. However, this theory has its shortcomings, particularly regarding the notion of equality between the two legal systems. Conflicts between customary and Islamic law can and do occur—for instance, in Minangkabau. In their inheritance system, customary law governs ancestral property (*harta pusaka*), whereas Islamic law applies to jointly acquired property during marriage (*harta sepencaharian*, also known as *harta suarang* or *harta sekutu*). In such cases, Islamic inheritance rules apply, wherein male heirs receive twice the share of female heirs. See Ter Haar, *Asas-Asas Dan Susunan Hukum Adat* (Jakarta: Pradnya Paramita, 1983), h. 233. Lihat juga Hilman Hadikusuma, *Hukum Waris Adat* (Bandung: Alumni, 1983), h.48-52. See also Dominikus Rato, *Hukum Perkawinan Dan Waris Adat Di Indonesia*, 2 ed. (Jakarta: LaksBang PRESSindo, 2015). Dominikus Rato, *Hukum Adat Kontemporer*, ed. Zainal Asikin, *At-Tahdis* (Surabaya: LaksBang Justitia, 2015).

The uniformity of the law in the matter of the division of joint property is indeed a commitment of legal unification efforts to overcome conflicts that may arise between the parties due to legal pluralism. However, the question arises as to what extent the conception of the division of joint property can fulfill a sense of justice in a heterogeneous society. Moreover, can the conception of the division of joint property also fulfill a sense of justice in the event that only one of the spouses is meritorious or has contributed in obtaining the joint property? This paper will try to examine the above questions although it does not promise to provide an in-depth and comprehensive study. Broadly speaking, this paper will describe the conception of joint property, both in customary law and positive law and then provide an analysis of the conception of the distribution of joint property.

The community's understanding that marriage registration is only an administrative requirement and does not affect the validity of marriage, so more and more people are taking advantage of this thinking to commit other legal violations. They comfortably marry off minors according to custom and religion, under the pretext that when they feel the need for administrative completeness, they will contact the authorized court.

The Constitutional Court's decision on the status of children out of wedlock is one proof that it fills the legal vacuum at that time, or arguably as a legal breakthrough. This legal breakthrough is not always agreed upon by the community, because the impact of the legal breakthrough will be different when dealing with reality in areas that are in contact with certain customs and religions.

In this research, the author will discuss the juridical aspects of the frequent occurrence of legal deviations under the pretext of customs and religion, so that it will relate and affect the legal consequences that apply in a country, especially in Indonesia.

RESEARCH METHODS

The research method used adalah juridical research. The normative juridical approach is an approach that is carried out based on the main legal material by examining theories, concepts, legal principles and legislation related to this research. This juridical research is also known as a literature approach, namely by studying books, laws and regulations and other documents related to this research. The juridical approach is used to analyze various Islamic laws and regulations in the field of marriage law and property distribution law.

RESULTS AND DISCUSSION

Marriage according to Islamic law is a contract or engagement to legalize sex between a man and a woman in order to realize the happiness of family life which includes a sense of tranquility and love in a way that is approved by Allah SWT. To create family happiness, peace and love, it is necessary to have legal provisions that can bind, such as Marriage Law Number 1 of 1974 which became effective

on October 1, 1975 and the issuance of Government Regulation Number 9 of 1975, on April 1, 1975, and the Compilation of Islamic Law. The law functions as a binding and directing tool in human life so that life becomes orderly and safe. This is because without the law humans can become damaged and chaotic. Through law, bad or negative things in life can be eliminated. To ensure the legal certainty of citizens, every citizen must complete the requirements set by the government regarding marriage. Because from this marriage a relationship will arise between husband, wife and their children. Marriages that are legal and recognized by the government must be registered according to applicable regulations. This is not only important for administrative order, but also for those who enter into marriage, namely as authentic evidence from the government of the relationship between a man and a woman.

In the case of marriage at an early age, it is certain that the marriage will not be approved for registration by the KUA, because it does not meet the requirements according to the applicable legislation. The KUA will suggest postponing the marriage if it is still possible and if it is no longer possible, they will give advice to apply for marriage dispensation to the local Religious Court.

However, this flow is considered by some people to be inhibiting or can buy time while invitations have been distributed, events have been prepared and so on. So some people seem to be asking the local ulama for a “fatwa” on the marriage plan. Of course, by using fiqh considerations, the marriage will be able to take place. Because in fiqh there is no limit on the age of marriage, there is no need for marriage registration. The Marriage Act and the Child Protection Act state that children under the age of sixteen cannot be married. Even if later after the marriage is carried out and is religiously valid and wants to get a marriage book, it can apply for marriage legalization to the Religious Court. The fiqh arguments on which the opinions and “fatwas” of local scholars are based are, for example, those collected in the book al-Fikih al-Islami wa Adilatuhu:

الفقه الإسلامي الجزء التاسع صحـ 171

المبحث الأول أهلية الزوجين: يرى ابن شبرمة وأبو بكر الأصم وعثمان البتي رحمهم الله أنه لا يزوج الصغير والصغيرة حتى يبلغا لقوله تعالى:(حتى إذا بلغوا النكاح) (النساء:6/) فلو جاز التزويج قبل البلوغ لم يكن لهذا فائدة ولأنه لا حاجة بهما إلى النكاح ورأى ابن حزم أنه يجوز تزويج الصغيرة عملاً بالآثار المروية في ذلك. أما تزويج الصغير فباطل حتى يبلغ، وإذا وقع فهو مفسوخ (1) ولم يشترط جمهور الفقهاء لانعقاد الزواج: البلوغ والعقل وقالوا بصحة زواج الصغير والمجنون. الصغر: أما الصغر فقال الجمهور منهم أئمة المذاهب الأربعة بل ادعى ابن المنذر الإجماع على جواز تزويج الصغيرة من كفء واستدلوا عليه بما يأتي (2) : 1 - بيان عدة الصغيرة

ـ وهي ثلاثة أشهر ـ في قوله تعالى: (واللائي يئسن من المحيض من نسائكم إن ارتبتم، فعدتهن ثلاثة أشهر واللائي لم يحضن) (الطلاق:65/4) فإنه تعالى حدد عدة الصغيرة التي لم تحض بثلاثة أشهر كاليائسة، ولا تكون العدة إلا بعد زواج وفراق، فدل النص على أنها تزوج وتطلق ولا إذن لها. 2 - الأمر بنكاح الإناث في قوله تعالى: (وأنكحوا الأيامى منكم) (النور:24/32) والأيم: الأنثى التي لا زوج لها، صغيرة كانت أو كبيرة . 3 - زواج النبي بعائشة وهي صغيرة فإنها قالت: «تزوجني النبي وأنا ابنة ستٍ وبنى بي وأنا ابنة تسع» (1) وقد زوجها أبوها أبو بكر رضي الله عنهما. وزوج النبي صلّى الله عليه وسلم أيضاً ابنة عمه حمزة من ابن أبي سلمة وهما صغيران.4 - آثار عن الصحابة: زوَّج (أي عقد) علي ابنته أم كلثوم وهي صغيرة من عروة بن الزبير وزوج عروة بن الزبير بنت أخيه من ابن أخيه وهما صغيران ووهب رجل بنته الصغيرة لعبد الله بن الحسن بن علي فأجاز ذلك علي رضي الله عنهما وزوجت امرأة بنتاً لها صغيرة لابن المسيب بن نخبة، فأجاز ذلك زوجها عبد الله ابن مسعود رضي الله عنه.5 - قد تكون هناك مصلحة بتزويج الصغار، ويجد الأبُ الكفءَ، فلا يفوت إلى وقت البلوغ وهناك رواية: معقولة: وهي بنت ثلاث عشرة.[2]

In the fatwa and jurisprudence of Islamic law itself, it turns out that there is no agreement on the age limit of marriage, so it is still possible for people to use legal jurisprudence according to their wishes. This is actually the important role of the state to take over these different laws and make the best rules with the best considerations to regulate legal order in society. Law Number 1 of 1974 is clear evidence of the state's role in this regard. However, public awareness, and the authority of the ulama, which until now could not be released in a customary community, made legal violations of the provisions of the law often carried out.

The Concept of Joint Property in Customary Law

As it is known that in the Indonesian legal system legal pluralism applies, one of which is customary law. According to customary law, what is meant by marital property is: “All property controlled by husband and wife as long as they are bound in marriage, both controlled kin property, as well as individual property derived from inheritance, grants, self-income property, joint livelihood property of husband and wife, and gift items. All of this is influenced by the principle of kinship adopted locally and the form of marriage that applies to the husband and wife concerned “. Based on this, then

[2] Wahbah az-Zuhaili, *Al-Fiqh Al-Islâmi Wa Adillatuh* (Beirut: Dâr al-Fikr: 1989), Jilid 9, p. 171.

in the perspective of customary law, marital property is divided into: 1) Inherited Property, 2) Income Property, 3) Livelihood Property, 4) Marriage Gifts.[3]

In the customary law community, if a divorce occurs, the joint property between husband and wife must be divided. The procedure for dividing joint property according to customary law is as follows.

1. Original property and joint property

   In relation to the original property of the husband or wife, in the event of a divorce, according to customary law, it returns to the husband or wife as the party who brought the original property. However, according to customary law there is also a provision that if the original property has been mixed for more than 5 (five) years with joint property that cannot be distinguished anymore, then each party gets ½ of the mixed property.

2. Joint Property

   Regarding joint property, according to customary law the division of each husband and wife is ½ of the joint property. However, often in society in the process of division there are many obstacles, as for the obstacles in the division of joint property in customary law, among others:

   a. Lack of legal awareness of the parties so that in the process of dividing joint property there is often fighting and fighting over joint property. This is due to a lack of knowledge and awareness of the applicable legal system.
   b. In the event that the joint property is in the form of a house built on the house of the in-laws, then the settlement that is done generally is that there must be deliberation between the child, the in-laws and the son-in-law.

The division of joint property as described above, is the procedure for division that is generally carried out in indigenous communities. However, there are some communities that divide joint property in different ways. As in Bali, called Sasuhun Sarembat, which has such a custom that the husband gets 2/3 (two thirds) and the wife gets 1/3 (one third). However, after the Second World War, this principle diminished due to the realization of equal rights between husband and wife.

In Indonesian Jurisprudence there are two decisions regarding the division of joint property according to customary law, which emphasize the following:

[3] The discussion on early marriage and its related issues can be found in Neng Djubaidah, *Pencatatan Perkawinan Dan Perkawinan Tidak Dicatat Menurut Hukum Tertulis Di Indonesia Dan Hukum Islam* (Jakarta: Sinar Grafika, 2012). Hilman Hadikusuma, *Hukum Perkawinan Indonesia Menurut Perundangan (Hukum Adat Dan Hukum Agama)* (Bandung: Mandar Maju, 2007). See also Jaih Mubarok, *Modernisasi Hukum Perkawinan Di Indonesia* (Jakarta: Pustaka Bani Quraisy, 2005). See Trusto Subekti, "Sahnya Perkawinan Menurut Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan Ditinjau Dari Hukum Perjanjian," *Jurnal Dinamika Hukum* 10, no. 3 (2010). See also Kementerian Agama RI, *Menelusuri Makna Di Balik Fenomena Perkawinan Di Bawah Umur Dan Perkawinan Tidak Tercatat* (Jakarta: Puslitbang Kehidupan Keagamaan Badan Litbang dan Diklat Kementerian Agama RI, 2013). Yayan Sopyan, *Islam Negara: Transformasi Hukum Perkawinan Islam Dalam Hukum Nasional* (RMbooks, 2012).

1. Supreme Court Decision dated February 25, 1959 (Reg. No. 387/K/Sip/1958 confirms "that according to the Customary Law prevailing in Central Java a widow gets half of the gono-gini property".
2. Supreme Court Decision dated April 9, 1960 (Reg. Number 120 K/Sip/1960 stipulates "that the livelihood property must be divided equally between husband and wife."

Thus it can be concluded that the division of joint property according to the customary law system in Indonesia is also prular, meaning that it is left to local customs. Considerations of justice in the division of joint property in each region are different and therefore the procedure for division is also different.

The Concept of Joint Property in Religious Law

The explanation of Gono-gini property in the view of the Syafi'iyyah departs from the 'ibaroh in the book Bughyatul Mustarsyidin page 159:

اختلط مال الزوجين ولم يعلم لأيهما أكثر ولا قرينة تميز أحدهما وحصلت بينهما فرقة او موت لم يصح لأحدهما ولا وارثه تصرف في شيء منه قبل التمييز أو الصلح إلا مع صاحبه.... إلى أن قال نعم إن جرت العادة المطردة أن أحدهما يكسب أكثر من الآخر كان الصلح والتواهب على نحو ذلك، فإن لم يتفقوا على شيئ من ذلك فمن بيده شيئ من المال فالقول قوله بيمينه أنه ملكه فإن كان بيدهما فلكل تحليف الآخر ثم يقسم نصفين[4]. ومثله ما في أحكام الفقهاء ج ٣ ص. ٣٨-٣٩.

Meaning: "*The property of husband and wife has been mixed, and it is not known which of them has more, and there is no sign to distinguish between them, and there has been a divorce between them...*" *(emphasis added). If there is a custom that one of them has worked harder than the other, then there should be reconciliation and giving to each other. If there is no agreement on something from the property controlled by the husband, then the husband's opinion is valid with an oath that the property is his. If the property is in the hands of both of them, then each of them should swear by the other, and then the property should be divided in half*".

[4] Abd ar-Rahman bin Muhammad bin Husain bin Umar ba Alawi, *Bughyatu Al-Mustarsyidin* (Beirut: Dar al-Fikr, 2016), h. 159. See also on NU LTN, *Ahkamul Fuqaha'fi Muqarrrarat Mu'tamarat Nahdlatul Ulama'(Soilusi Problematika Aktual Hukum Islam: Keputusan Muktamar, Munas Dan Kombes Nahdlatul Ulama (1926-2004)* (Surabaya: LTN NU Jawa Timur, 2004), Jilid 3, h. 38-39.

In essence, if there is no line of distinction or no agreement to sort things out, then the last resort is to divide it in half with all the consequences. In Hanafiyyah fiqh, this case is usually compared to Syirkatul Milki, as explained in the book Almabsuth Li-Assarokhsy 11/151:

الشَّرِكَةُ نَوْعَانِ : شَرِكَةُ الْمِلْكِ وَشَرِكَةُ الْعَقْدِ

(فَشَرِكَةُ الْمِلْكِ) أَنْ يَشْتَرِكَ رَجُلَانِ فِي مِلْكِ مَالٍ ، وَذَلِكَ نَوْعَانِ : ثَابِتٌ بِغَيْرِ فِعْلِهِمَا كَالْمِيرَاثِ ، وَثَابِتٌ بِفِعْلِهِمَا ، وَذَلِكَ بِقَبُولِ الشِّرَاءِ ، أَوْ الصَّدَقَةِ أَوْ الْوَصِيَّةِ .وَالْحُكْمُ وَاحِدٌ ، وَهُوَ أَنَّ مَا يَتَوَلَّدُ مِنْ الزِّيَادَةِ يَكُونُ مُشْتَرَكًا بَيْنَهُمَا بِقَدْرِ الْمِلْكِ ، وَكُلُّ وَاحِدٍ مِنْهُمَا بِمَنْزِلَةِ الْأَجْنَبِيِّ فِي التَّصَرُّفِ فِي نَصِيبِ صَاحِبِهِ .[5]

Kitab al-Bahru ar-Roo-iq 5/180:

شَرِكَةُ الْمِلْكِ] (قَوْلُهُ: شَرِكَةُ الْمِلْكِ أَنْ يَمْلِكَ اثْنَانِ عَيْنًا إرْثًا أَوْ شِرَاءً) بَيَانٌ لِلنَّوْعِ الْأَوَّلِ مِنْهَا وَقَوْلُهُ إرْثًا أَوْ شِرَاءً مِثَالٌ لَا قَيْدٌ فَلَا يَرِدُ أَنَّ ظَاهِرَهُ الْقَصْرُ عَلَيْهِمَا مَعَ أَنَّهُ لَا يُقْصَرُ عَلَيْهِمَا، بَلْ تَكُونُ فِيمَا إذَا مَلَكَاهَا هِبَةً أَوْ صَدَقَةً أَوْ اسْتِيلَاءً بِأَنْ اسْتَوْلَيَا عَلَى مَالِ حَرْبِيٍّ أَوْ اخْتِلَاطًا كَمَا إذَا اخْتَلَطَ مَالُهُمَا مِنْ غَيْرِ صُنْعٍ مِنْ أَحَدِهِمَا أَوْ اخْتَلَطَ بِخَلْطِهِمَا خَلْطًا يَمْنَعُ التَّمْيِيزَ أَوْ يَتَعَسَّرُ كَالْحِنْطَةِ مَعَ الشَّعِيرِ.[6]

Meaning: *Shirkah of ownership is joint ownership of an item between two or more people that occurs because of one of the causes of ownership (such as sale, grant, will, and inheritance), or because of the mixing of assets that are difficult to sort out and distinguish. Shirkah of ownership is when one party grants property to two people, and both accept it. Then the ownership of that property in Islamic fiqh is called ownership shirkah*.

أسنى المطالب في شرح روض الطالب - (ج 3 / ص 441) فَرْعٌ لو نَكَحَتْهُ عَالِمَةً بِإِعْسَارِهِ أو رَضِيَتْ بِالْمُقَامِ معه ثُمَّ نَدِمَتْ فَلَهَا الْفَسْخُ لِأَنَّ النَّفَقَةَ تَجِبُ يَوْمًا فَيَوْمًا وَالضَّرَرُ يَتَجَدَّدُ وَلَا أَثَرَ لِقَوْلِهَا رَضِيت بِإِعْسَارِهِ أَبَدًا لِأَنَّهُ وَعْدٌ لَا يَلْزَمُ الْوَفَاءُ بِهِ كما في نَظِيرِهِ في الْإِيلَاءِ قال الزَّرْكَشِيُّ وَيُسْتَثْنَى يَوْمُ الرِّضَا فَلَا خِيَارَ لها فيه كما أَفْتَى بِهِ الْبَغَوِيّ

[5] As-Syamsuddin Asy-Syarkhasi, *Kitab Al-Mabsuth* (Beirut: Darul Kitab Amaliyah, 1993), Jilid 11, h. 151.

[6] Zain ad-Diin bin Ibrahim bin Muhammad al-Ma'ruf bi Ibnu Nujaim al-Mishri, *Al-Bahru Ar-Roiq Syarh Khanz Al-Daqaiq* (Beirut: Dar al-Kitab al-Islami, tth), Jilid 5, h. 180.

وَحَكَاهُ ابن الرِّفْعَةِ عن الْبَنْدَنِيجِيِّ وَيُجَدِّدُ الْإِمْهَالَ إذَا طَلَبَتْ الْفَسْخَ بَعْدَ الرِّضَا وَلَا يُعْتَدُّ بِالْمَاضِي لِتَعَلُّقِ الْإِمْهَالِ بِطَلَبِهَا فَيَسْقُطُ أَثَرُهُ بِرِضَاهَا وَفَارَقَ نَظِيرَهُ في الْإِيلَاءِ حَيْثُ لَا يُجَدِّدُ الْإِمْهَالَ بِطُولِ مُدَّتِهِ ثُمَّ وَبِعَدَمِ تَوَقُّفِهَا على طَلَبِهَا لِلنَّصِّ عليها ثُمَّ بِخِلَافِهَا هُنَا وَلَهَا في مُدَّةِ الْإِمْهَالِ مُدَّةُ الرِّضَا بِإِعْسَارِهِ الْخُرُوجُ من الْمَنْزِلِ لِلِاكْتِسَابِ لِلنَّفَقَةِ نَهَارًا بِتِجَارَةٍ أو غَيْرِهَا فَلَيْسَ له مَنْعُهَا من ذلك وَإِنْ قَدَرَتْ على الْإِنْفَاقِ بِمَالِهَا أو الْكَسْبِ في بَيْتِهَا لِأَنَّهُ إذَا لم يُوَفِّ ما عليه لَا يَمْلِكُ الْحَجْرَ عليها وَعَلَيْهَا الْعَوْدُ إلَى الْمَنْزِلِ لَيْلًا لِأَنَّهُ وَقْتُ الْإِيوَاءِ دُونَ الِاكْتِسَابِ وَلَوْ مَنَعَته الِاسْتِمْتَاعُ نَهَارًا جَازَ لَكِنْ تَسْقُطُ نَفَقَةُ مُدَّةِ مَنْعِهَا إنْ مَنَعَتْهُ لَيْلًا عن ذِمَّةِ الزَّوْجِ بِخِلَافِ ما إذَا لم تَمْنَعْهُ لَا يَسْقُطُ شَيْءٌ من نَفَقَتِهَا.[7]

Meaning: *A husband is not allowed to use or hide his wife's property without her permission, instead a husband is obliged to provide for his wife even if she is rich. Hemmm, but don't rush to ask for a divorce, if if the wife goes home to hang out with the husband to make the husband good (no longer taking the wife's remittances) then that is what the wife must do for the good of the family, obedience and manners of the wife's life with her husband ... so also need to think about the fate of her children if there is a divorce. From the start, it can be suspected that the husband is not responsible for his rights as a husband, because he only asks his wife for the children's expenses, what if he is with his wife? In fact, if there is a wife who is not provided for by her husband, then it is permissible for the wife to leave the house to look for living expenses even without the husband's permission.*

In the book al-Majmu' Imam Nawawi:

(فصل) وان اختارت المقام بعد الاعسار لم يلزمها التمكين من الاستمتاع ولها أن تخرج من منزله، لان التمكين في مقابلة النفقة، فلا يجب مع عدمها. وان اختارت المقام معه على الاعسار ثم عن لها أن تنفسخ فلها أن تنفسخ، لان النفقة يتجدد وجوبها في كل يوم فتجدد حق الفسخ. وان تزوجت بفقير مع العلم بحاله ثم أعسر بالنفقة فلها أن تنفسخ، لان حق الفسخ يتجدد بالاعسار بتجدد النفقة.[8]

[7] Zakaria bin Muhammad bin Zakaria al-Anshari, *Asna Al-Matholib Fi Syarh Raudh Ath-Tholib* (Beirut: Dar al-Kitab al-Islami, 2000), Jilid 3, h. 441.

[8] Abu Zakaria Muhyi ad-Diin Yahya bin Syaraf an-Nawawi, *Al-Majmu' Syarh Al-Muhazzab* (Beirut: Dar al-Fikr, tth), Jilid 18, h. 271.

The point of the above example: Husbands should not be pretentious if it is not possible to support their wives (especially if the person is still young and healthy), the husband in this case should be grateful if the wife is willing to earn her own living.

In the book syarah al-Muhazzab that a wife is not obliged to prepare clothing, shelter and so on. Nor is she obliged to cook, wash and so on. The wife's obligation is only in bed.

So in conclusion:

1. The husband does not have the right to dispose of the wife's property without her permission, and if the wife allows it, then the disposal of the property must be in accordance with what the wife wants, otherwise the husband is obliged to replace it.
2. This kind of khulu' is permissible without being disliked. The ibarot seem to be in Asnal Matholib. Almausu'atul fiqhiyyah 2/9428:

ذهب جمهور الفقهاء - الحنفيّة والشّافعيّة وهو الرّاجح عند الحنابلة - إلى أنّ المرأة البالغة الرّشيدة لها حقّ التّصرّف في مالها ، بالتّبرّع ، أو المعاوضة ، سواء أكانت متزوّجةً ، أم غير متزوّجة . وعلى ذلك فالزّوجة لا تحتاج إلى إذن زوجها في التّصدّق من مالها ولو كان بأكثر من الثّلث والدّليل على ذلك ما ثبت عن النّبيّ صلى الله عليه وسلم أنّه قال للنّساء : » تصدّقن ولو من حليّكنّ ، فتصدّقن من حليّهنّ « ولم يسأل ولم يستفصل ، فلو كان لا ينفذ تصرّفهنّ بغير إذن أزواجهنّ لما أمرهنّ النّبيّ صلى الله عليه وسلم بالصّدقة ، ولا محالة أنّه كان فيهنّ من لها زوج ومن لا زوج لها ، كما حرّره السّبكيّ . ولأنّ المرأة من أهل التّصرّف، ولا حقّ لزوجها في مالها ، فلم يملك الحجر عليها في التّصرّف بجميعه ، كما علّله ابن قدامة.[9]

This means that women are also experts in tashorruf (utilizing property). There is no right for the husband from his wife's property, so the husband has no right to prevent the wife from using her property.

The author assumes that the occurrence of many differences of opinion in Islamic fiqh in the law of division of joint property, requires action from the state to intervene to provide legal certainty to the community.

[9] Abu Umar, *Al-Mausû'ah Al-Fiqhiyyah Al-Kuwaitîyyah* (Kuwait: Wizarat al-Awqâf al-Kuwaitiyyah, 1427), Jilid 2, h. 9428 See also Tim Penyusun, *Al-Mausu'atu Al-Fiqiyah Al-Kuwaitiah* (Kuwait: Wuzara al-Awqaf wa as-Syuun al-Islamiah, 1427).

The Concept of Joint Property in State Law

The Compilation of Islamic Law in article 1 letter (f) explicitly states: “Property in marriage or syirkah is property obtained either individually or jointly by husband and wife during the marriage bond and hereinafter referred to as joint property, regardless of being registered in the name of anyone.”

In Islam itself, both the Qur'an and Hadith do not mention or regulate directly about the concept of joint property. The classical scholars including al-imam al arba'ah also never discussed joint property as the concept is understood in Law Number 1 of 1974 concerning marriage or in the Compilation of Islamic Law. According to the fuqoha, the husband has his own property and the wife also has her own property. As his obligation, the husband gives some of his property to the wife in the name of nafkah, which the wife then uses to meet the needs of her family.

The Civil Code Article 119 states that "From the time of marriage, according to the law, there is joint property between husband and wife, to the extent that no other provisions are made in the marriage agreement. The joint property, as long as the marriage lasts, may not be nullified or changed by an agreement between husband and wife".

So if you refer to the provisions of the Civil Code, what is meant by joint property is all forms of property in the form of inheritance, gifts and even inherited by husband and wife since the marriage takes place, it becomes joint property. In contrast to the provisions of Law Number 1 Year 1974 as follows: Marriage Law Number 1 Year 1974 Article 35 paragraph (1), states that what is meant by joint property is “Property obtained during the marriage period”. This means that property obtained before marriage is not referred to as joint property.

In KHI as follows: The Compilation of Islamic Law Article 85, states that “The existence of joint property in marriage does not rule out the possibility of the existence of property owned by each husband and wife”. In this article, it is stated that there is joint property in marriage, but it does not rule out the possibility of the existence of property owned by each husband and wife.

In more detail, the differences in the regulation of joint property in the Civil Code with Law Number 1 of 1974 concerning Marriage can be seen in the provisions of Article 35 paragraph (1) explaining that property obtained during marriage becomes joint property. Furthermore, Article 35 paragraph (2) explains that the innate property of each husband and wife and the property obtained by each as a gift or inheritance are under their respective control as long as the parties do not determine otherwise.

The Civil Code further emphasizes its concept of joint property in Article 121 of the Civil Code as follows: With regard to expenses, the joint property includes all debts made by each husband and wife, both before marriage and after marriage as well as during marriage.

It is further clarified by the provisions of Article 122 of the Civil Code that “All income and income, as well as all profits and losses obtained during marriage, also become the profits and losses of

the joint property." To this end, it is clear that the concept of joint property is clear that the concept of joint property is the same as the concept of joint property. " At this point, it is clear that the concept of joint property promoted by the Civil Code is completely the opposite of the concept in the Marriage Law.

Regarding the procedure for the division of joint property, Article 128 of the Civil Code explains that "after the dissolution of the joint property, their joint assets are divided in half between husband and wife, or between their heirs, without questioning which party the goods came from." So it can be concluded that without questioning whether it is congenital property, gifts, inheritance from one of the parties, the property is still considered as joint property whose division is partly for the husband and partly for the wife.

In the case of this division, all joint property absolutely must be divided without exception, there are few exceptions but still do not reduce the rights of each husband and wife regarding the division of joint property for personal items. The Civil Code is regulated in Article 129 which imperatively states: "Clothing, jewelry and tools for the livelihood of one of the husband and wife, along with books and collections of artistic and scientific objects, and finally letters or mementos related to the origin of the descendants of one of the husband and wife, may be demanded by the party from whom the object originated, by paying the price estimated by deliberation or by experts."

This means that it is permissible for one of the parties if they have divided the joint property according to their portion to demand a certain type of item that they think is important and cannot be replaced by other substitute items. In this case, the Civil Code allows to demand the desired item with the condition that it must be replaced according to the estimated value by a competent person in the field.

In connection with the provisions of the Civil Code, in Law Number 1 of 1974 concerning marriage related to the division of joint property mentioned in Article 35 paragraph (1), Article 37 explains that "if the marriage breaks up due to divorce, the joint property is regulated according to their respective laws, namely religious law, customary law, and other laws".

This means that it is clear that the law still applies the provisions of civil law, because indeed in Indonesia the laws adopted are plural. Law Number 1 Year 1974 is a law that specifically regulates marriage between Muslims and Muslims as well as regarding joint property, although it does not rule out the possibility for the division of joint property between Muslims to follow the rules of local customary law.

Therefore, the enactment of the Civil Code is an alternative law for those who are not Muslim. So, specifically for Muslims in the division of joint property refers to Law Number 1 Year 1974 and for other people in Indonesia can refer to the local customary law system or refer to the provisions of the Civil Code as explained above.

The legal basis for joint property is regulated in several laws and regulations, including the following:

1. Article 35 paragraph (1) of Law Number 1 of 1974 concerning marriage states that what is meant by joint property is property obtained during the marriage period.
2. Article 1 point (f) KHI regarding the definition of joint property as mentioned above; Article 119 of the Civil Code: that since the marriage is held, according to the law there is a comprehensive between husband and wife, as long as no other provisions are made in the marriage agreement. The joint property, during the marriage period, may not be eliminated or changed by an agreement between husband and wife.

Relationship between Unrecorded Marriage and Joint Property

According to Endang Ali Ma'sum, there is a common perception among legal practitioners, especially Religious Court judges, that what is meant by itsbat nikah is a declarative legal product simply to declare the validity of a marriage that is carried out according to religious law but not recorded, with legal implications after the marriage isitsbatkan to have legal certainty (rechtszekerheid). Based on Article 7 paragraph (3) letter a of the Compilation of Islamic Law (KHI), itsbat nikah can only be conducted in the context of divorce settlement. However, this rule does not clearly limit marriages before or after the enactment of Law Number 1 Year 1974.

According to Neng Djubaidah, the rules of itsbat nikah have not fully guaranteed the inheritance rights of wives and children who are legal according to Islamic law but whose marriages are not recorded. Religious courts often reject itsbat nikah if it is filed after the husband dies, because only divorces are recognized when the husband is still alive. In addition, Article 7 paragraph (3) letter c of the KHI refers more to marriage annulment than to itsbat nikah if there is any doubt about the validity of the marriage. The main problem in itsbat nikah is the time limit for the implementation of marriage before or after the enactment of the Marriage Law. In practice, itsbat applications are often made for marriages after 1974, so judges need to consider the legal basis that allows acceptance of the case in the Religious Court.

Based on the description above, it can be said that the law is not rigid, but follows developments in society. This means that judges must seek and explore the laws that live and develop in society. There are at least two reasons why the Religious Courts can accept and decide on itsbat nikah cases against marriages after the enactment of the Marriage Law. First, related to the principle of ius curia novit and Second, a sociological approach so that the law remains relevant to the development of society. These steps are then known as legal discovery (rechtsvinding).

Based on the description above, it can be said that the law is not rigid, but follows developments in society. This means that judges must seek and explore the laws that live and develop in society. In

addition to being legal, a regulation is also sociological, empirical, which cannot be separated absolutely. By using the knife of interpretation, judges do not merely read regulations, but also read the reality that occurs in society, so that the two can be put together. From there there will be creativity, innovation, and progressivism that give birth to legal construction.

After the granting of itsbat nikah, the implication is on the marital status where the marriage has legal force. Likewise, children born from this marriage receive State recognition, where these children are entitled to inheritance from their father. In addition, the property obtained since the marriage is joint property.

Thus, marriage registration is a formal requirement for the validity of marriage, this formal requirement is procedural and administrative in nature. Itsbat nikah has implications for providing more concrete legal guarantees for the rights of children and wives in the marriage and also if the couple divorces. Or in other words, itsbat nikah is the legal basis of marriage registration which gives birth to legal certainty regarding marital status, child status and property in marriage.

While unregistered marriages can be validated by the Religious Court, there are of course other things that may happen before the validation. What may happen at that time is that the joint property that has been accumulated during the underhand marriage is controlled by one of the parties to the dispute, which will have different legal consequences. The winding road to get the right to the joint property must be taken by the interested party.

Every divorce must have an impact in terms of the division of joint property, which is commonly known in the community as the division of gono gini property. Here problems often arise where one party feels more entitled to the contested property. For example, X and Y are husband and wife whose marriage is not registered and have divorced. In the course of their household with X they owned a house. However, it was not long before the household that X and Y built together fell apart and led to divorce. Y was arbitrarily divorced by X, and evicted from the house. Tragically, because Y was married to X through a nikah sirri in the presence of her parents, Y could not do much to claim her rights to X except to cry. The problem is, what is the implementation in terms of the division of joint property in the event of divorce from a sirri marriage (under hand). If there is a divorce in a sirri marriage or underhand marriage, a wife cannot claim about the existence of joint property because the marriage is not recorded at the KUA. Because in state law the marriage between the two never existed, then if the husband dies, the existing property is only counted as the husband's personal property, and will be distributed to his legal family according to legal lineage. According to article 6 of the Compilation of Islamic Law, marriages that are not recorded or cannot be proven by a marriage certificate do not have any legal consequences. This means that if the husband or wife does not fulfill their obligations, then one of the parties cannot claim anything to the court, either regarding the maintenance of the wife and

children or the joint property that they have obtained during the marriage. Even if one of the parties dies, he or she cannot inherit from the husband or wife.

However, it seems to the author that this problem can be resolved, albeit through a slightly tortuous journey, namely first the party who feels that their rights have been violated, can apply for a marriage legalization (even though at that time they had divorced under the hand) with a divorce. After there is a decision from the court that the marriage has been recognized and is valid in religion as well as the state, then the party who feels aggrieved can file a lawsuit for joint property. Now, the possibility of these laws that can still be sought for legal tricks, is a consideration for most people to underestimate marriage registration.

One of the legal consequences arising from a divorce is the division of joint property (gono-gini) between husband and wife. The legislation in force in Indonesia regulates that any property obtained during the marriage period is made into joint property without distinguishing who worked or obtained the property and in whose name, as long as the property is not an inherited property, gift or inheritance and or there is no marital agreement in terms of ownership of joint property.

This rule inevitably raises many problems that occur in practice in the Religious Courts because not a few assess and assume that the division of joint property does not fulfill a sense of justice if it is divided equally while one party has committed an act that harms the other party because it does not carry out what has become its obligation, especially over a long period of time.

Based on this assumption, the author tries to examine the regulation of joint property, especially regarding the amount of each party's share with a juridical approach, namely by looking at the wife's material rights that also arise due to marital relations in several other regulatory provisions. The concept of division of joint property as stated in the relevant legislation is a product of law and in neither the Qur'an nor Hadith has ever been mentioned, so the concept of division of one-half as stipulated in Law number 1 of 1974 concerning marriage and the Compilation of Islamic Law is not a qath'i provision in sharia so it is possible to accept changes.

Article 97 KHI which states that widows or widowers divorced each entitled to one-half of the joint property as long as not specified otherwise in the marriage agreement. This can be understood because the understanding of the position of the wife in KHI is balanced with the position of the husband in household life and social life together in society (vide article 79 paragraph (2) KHI), so that the legal consequences of the amount of ownership of joint property are also balanced. In relation to the division of joint property, a judge in adjudicating and examining cases must be able to consider juridical, philosophical and sociological aspects, so that the justice to be achieved in the judge's decision is justice oriented towards legal justice, moral justice and social justice.

CONCLUSION

The pretext of adat or religious law makes the legal consequences more complex in various legal levels, both in adat itself, and state law. Furthermore, to bring order to the law relating to marriage registration, then if viewed from the point of view of its benefits, marriage registration as a valid requirement can be carried out by applying ijtihad insya'i (new form of ijtihad) using the rule "rejecting harm takes precedence over bringing good" needs to get appreciation from Indonesian scholars and Muslim thinkers and intellectuals. However, the challenge from the authority of the "ulama" who do not agree with the changes in Islamic law, must still be considered and given space for communication to provide an explanation between the maslahah of marriage registration and the mudharat of unrecorded marriages.

Although the solution for unregistered marriages can still be sought legally, public awareness of marriage registration, which has legal links to various civil and ownership, must certainly be built in such a way. Not only from the state authorities, but also from the ulama, who are at least close and have a high position in the community. Even though in customary law the division of joint property is often divided in half, half for the husband and half for the wife. But in its development, the judge can determine otherwise by paying attention to the principles of justice based on the facts in the trial.

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