

Distribution of Divorce Assets from Mixed Marriages According to Islamic Law is Linked to Law Number 16 of 2019 concerning Amendments to the Law Number 1 of 1974 Concerning Marriage

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Abstract

The law on the asset division of mixed marriage divorce and problems in the distribution requires legal certainty and law enforcement. It can provide legal certainty that is beneficial and efficient for the community, with the hope that law enforcement will achieve justice. This study aimed to determine the position of mixed marriage assets and the legal consequences of divorce from mixed marriages on the distribution of assets in Islamic law and Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage. The specification of this research is descriptive using a normative juridical approach, namely by reviewing and testing laws and regulations related to existing problems. Data collection techniques are carried out through document studies and analytical methods through normative qualitative. The position of mixed marriage assets in Islamic law, marital assets or syirkah are assets acquired either individually or jointly by husband and wife during the marriage, hereinafter referred to as joint assets and included in the scope of joint assets are tangible and intangible objects. Then the legal consequences of divorce from mixed marriages on the distribution of assets in Islamic law can be viewed from several possibilities, the husband's work minus the living for his family. Whereas in the laws and regulations on marriage, all property acquired during the marriage becomes joint property, as long as the parties do not specify otherwise, the parties are subject to different legal systems in mixed marriages. If the husband is a foreigner there is no property right in Indonesia.

Keywords: Property, Divorce, Mixed Marriage.

Introduction

Divorce from mixed marriages is the breaking up a legal marriage before a court judge based on the conditions determined by law. death, divorce, and by court decision. According to the provisions of Article 209 of the Civil Code regarding various reasons that can result in divorce, namely: Overspel (adultery), leaving the other party without reason, being subject to imprisonment for five years or more after the marriage took place, the wife or husband being seriously injured as a result of the persecution that endangers the life of the persecuted party. Meanwhile, according to the provisions of Article 39, paragraph 1 of the Marriage Law Number 1 of 1974, it states:

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"Divorce can only be done before a court hearing and after the court concerned tries to reconcile the two parties."

Politically, this needs to be examined because divorce in mixed marriages is included in the field of personal status in Private International Law. There will be no problem if the divorce is carried out by a husband and wife of the same nationality, but it is different if the husband and wife have different nationalities.

Divorce issues in the Private International Law field are divided into several aspects that attract attention, including:

"Divorce from Indonesian citizens, divorce from people in Indonesia, Jurisdiction issues in divorce cases, recognition of divorce decisions from abroad".

A divorce for foreigners carried out in Indonesia is very interesting because it involves competence and the issue of which law to use (choice of law). The District Court can issue divorce decisions for foreigners in Indonesian territory if both parties are in Indonesia. The problem is if only one of the parties is in Indonesia while the other party is abroad, then the divorce suit is filed in the District Court. If the parties do not argue for their nationality, then the judge uses Indonesian law. It is necessary to pay attention to the "choice of law" if the parties argue for their nationality. Following the principle of citizenship, a divorce decision pronounced abroad between parties both Indonesian citizens can only be recognized by Indonesian judges, if the decision in question is based on reasons known in Indonesian law.

Article 1 of Law Number 1 of 1974 concerning Marriage which has been amended by Law Number 16 of 2019:

"Marriage is an inner and outer bond between a man and a woman as husband and wife to form a happy and eternal family (household) based on Belief in the One God."

In the era of globalization, relations between countries have become more complex, so that other nations (foreign nationals) can easily enter and leave the territory of the Unitary State of the Republic of Indonesia. The presence of foreigners creates social and cultural changes, especially in environments there are many foreigners. Like big cities and small towns, many foreigners come to travel, do business, or do other social activities. Mixed marriages have penetrated the layers of society. Globalization of information, economy, and transformation has increased human mobility by migrating from one country to another causing a person to meet and communicate with various ethnic groups with different cultures, religions, and customs. These meetings and communications allow residents of a country to enter into marriages with foreigners who have temporary or permanent domiciles (residence) so that what is called a mixed marriage arises.

The definition of mixed marriage in Law Number 1 of 1974 concerning Marriage is regulated in Article 57:

"Mixed marriage in this law is a marriage between two people who in Indonesia obey different laws because of differences in nationality. One party is a foreign citizen and one party is an Indonesian citizen".

Indonesia is a rule of law, has consequences in development in the field of law, including marriage law which is a necessity in developing countries have a social responsibility in the field of legal protection, because marriage is a series of sacred customs by uniting

human beings with the same goal, namely to build a household and to continue the lineage.

The legal basis for mixed marriages is regulated in Law Number 1 of 1974 concerning Marriage. Moreover, Law Number 6 of 2011 concerning Immigration is one of the supporting instruments for the unification of families with different national backgrounds.

Law Number 9 of 1992 concerning Immigration replaces the old regulation. One of the fundamental changes in this new law is to make it easier for foreign nationals who are married to Indonesian citizens to have a residence permit in Indonesia. One of the most important things in a marriage is to perfect the worship of God Almighty. In this case, divorce is the problem. What are the legal consequences for both parties if there are assets resulting from the marriage and use different laws? Thus, this study discussed "How the division of assets in the event of divorce from a mixed marriage."

In Indonesia, the nature of marriage is one of the important events in human life. The marriage that occurs between a man and a woman creates a physical and spiritual bond to their respective families and the wealth they acquire before and after the marriage. Before the birth of the Marriage Law in Indonesia, regarding the provisions, procedures, and legality of marriage for Indonesians, in general, it was based on the respective religious laws and customary laws, according to customary law:

"Marriage is a bond between a man and a woman to form a household which is carried out according to custom and religion by involving the families of both sides, brothers, and relatives."

According to Islamic law:

"Marriage is a very strong contract or *mitsaaqon ghalidhan* to obey Allah's commandments and carrying them out is worship."

Article 1 paragraph 1 of Law Number 1 of 1974 concerning Marriage states:

"Marriage is an inner and outer bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on Belief in the One God."

From the three definitions of marriage, in principle, everything that has been regulated in Law Number 1 of 1974 concerning marriage applies to all types of marriage in Indonesia, while the meaning of marriage in Islamic law is contained in Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law which is an important part of Islamic religious teachings, namely those relating to the enforcement of Islamic marriage law is a form of awareness in the Muslim community.

This research needs to be done because it concerns the needs of human life in family life and procreation. It is in accordance with the objectives of Islamic law. According to Imam al-Syatibi, the objectives of Islamic law are *maqashid al-shari'ah* (known as five things or *al-maqashid al-khamsah*). In Indonesia, Islamic law is one of the three legal systems, the other two systems are customary law and western law.

The development of Islamic law cannot be separated from the existence of an Islamic society. When a person embraces Islam, Islamic law automatically applies to him. Constitutionally Article 29 (1) and (2) of the 1945 Law is acknowledgment of the existence of Islamic law in Indonesia states as follows:

"(1) A country based on the One and Only God

(2) The state guarantees the freedom of every people to embrace their respective religion and to worship according to their religion and belief.”

Belief in the One and Only God is the basis of the State and is the first precept in Pancasila. Belief in One Almighty God also animates other precepts, from the hierarchical and pyramidal arrangement of Belief in One Supreme God to the basis of the precepts in Pancasila. One of the rules of Islamic law that needs attention is in the field of marriage law.

Article 2 paragraph (1) Law no. 1 of 1974 stipulates that a marriage is valid if it has been implemented. According to the laws of each religion and the belief of the person carrying out the marriage. As a consequence of the provisions of Article 2 paragraph (1), then for people who are getting married, there are two legal rules that must be used as guidelines, namely Law no. 1 of 1974 on the one hand and Islamic law on the other hand, thus in marriage law, there is pluralism or legal diversity. Every society in various regions has rules and patterns of habits governing sexuality, birth, and rearing of children. Institutions covering these rules and habit patterns include marriage or marriages that have existed throughout human civilization, for example, in the forms of monogamy, polygamy, exogamy, endogamy, and others.

In society, organizing marriages sometimes clashes with marriage regulations. For example, the holding of marriages in some communities does not pay attention to the free will of the bride and groom. In many cases, the man (husband-to-be) or woman (wife-to-be) only knows who he will be married at the marriage is to take place.

Article 6 paragraph (1) Law no. 1 of 1974 stipulates that marriage can only take place with the consent of the two prospective brides and groom (no coercion is allowed). In reality, cases often occur that marriages have taken place according to the wishes of the prospective bride and groom, but contrary to the wishes of the parents or the family, from the man or from the woman's family. As an effort to anticipate it, Islamic law and Article 22 of Law No. 1 of 1974 concerning Marriage regulate the institution of marriage annulment.

Based on Article 22 of Law no. 1 of 1974 and its elucidation stipulates that if a marriage does not meet the requirements for marriage, then the marriage "can be canceled". Can be canceled means it can go on or be canceled. The provisions of the respective religious law do not specify otherwise. What is meant by the cancellation of marriage Law no. 1 of 1974 does not provide a further detailed explanation.

Regarding divorce from mixed marriages, it is included in the field of personal status, where divorces are carried out between spouses who have different nationalities. In addition, there are other legal consequences arising from divorce in mixed marriages between citizens, namely:

- “1. Effects on the joint property after marriage.
2. Consequences for child custody rights resulting from mixed marriages between citizens.
3. Consequences for the citizenship status of the child and each party”.

Another problem, for example for couples who are Muslim, in Islamic law theory is that marriages are carried out. Following Islamic law is valid, but does not meet the formality requirements based on Law no. 1 of 1974, how is the distribution of divorce assets, then canceled by the court, then based on the concept of Islamic law, the annulment of the marriage is not binding on the husband and wife in respect. The consequences of an unregistered marriage certainly will not guarantee legal certainty as stated in the principle

of marriage as the basis for marriage, namely forming a happy and eternal family (household) based on Belief in the One God.

This research is to find out and analyze the position of mixed marriage assets and their legal consequences in Islamic law and Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage.

Research Method

According to Mayer and Greenwood in Widiada Gunakaya the research method is:

“A general approach to the phenomena that the researcher has chosen to investigate, thus the research method is a kind of logic that guides the research.”

This formulation is in accordance with this research to find legal certainty regarding the division of divorce assets from mixed marriages both in Islamic law, as well as marriage laws and regulations in Indonesia, through certain procedures so that it is expected to obtain the validity of the information studied. This research carried out the following stages.

1. Research Specifications

The specification of this research is descriptive. According to Moh. Nazir, the descriptive method is :

“A method of examining the status of a group of people, an object, a set of conditions, a system of thought, or a class of events in the present. While the purpose of this descriptive research is to make a systematic, factual, and accurate description, picture, or painting of the facts, characteristics, and relationships between the phenomena investigated.”

Soerjono Soekanto stated:

“Descriptive research is intended to provide as accurate data as possible about humans, conditions, or other phenomena. The intent is to reinforce hypotheses so that they can assist in strengthening old theories within the framework of compiling new theories.”

From these two opinions, it can be seen that: divorce assets in mixed marriages are a system of thought that requires study using legal theories related to Islamic law and laws and regulations related to mixed marriages, therefore the first thing to examine is the position of marital assets mixture in Islamic law and Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, and secondly the legal consequences of divorce from mixed marriages on the distribution of assets in Islamic law and Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage. The aim is to describe systematically, factually, and accurately the main issues.

2. Types of Research

This type of research is normative juridical which is a type of library research (secondary data) in the form of primary legal materials, secondary legal materials, and tertiary legal materials.

Primary legal material is:

“It is legal material that is authoritative in the form of statutory regulations. The laws and regulations used are related to the research.”

The primary binding legal materials are in the form of the 1945 Constitution as the Basic Regulation and Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage and Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law in Indonesia.

Secondary legal materials are usually in the form of legal opinions, doctrines, and theories obtained from legal literature, research results, scientific articles, or websites related to research. Secondary legal materials are used to explain primary legal materials. With the existence of secondary legal materials, researchers will be helped to understand or analyze primary legal materials. Tertiary legal materials are legal materials that provide explanations and instructions for primary legal materials and secondary legal materials. Usually, tertiary legal materials are obtained from legal dictionaries, Indonesian dictionaries, English dictionaries, and encyclopedias.

The normative juridical or library law research method is a method used in legal research conducted by examining existing library materials. The first stage of normative legal research is research aimed at obtaining objective law (legal norms) by researching legal issues. The second stage of normative legal research is research aimed at obtaining the subjective law (rights and obligations).

This type of research is legal material that is authoritative, meaning it has authority. Then the laws and regulations regarding marriage law, official records, or treatises in making laws regarding marriage. Meanwhile, secondary legal materials consist of all publications on marriage law, divorce, and distribution of assets that are not official documents, such as legal books, legal journals, papers, magazines, and also information from various websites on the internet.

3. Approach Method

In this study, to solve research problems in this study the approach to applicable marriage laws and regulations (statute approach) was used. The statutory approach used is to find out whether the problem under study is the harmonization or synchronization of legal principles and regulations both horizontally and vertically relating to the requirements contained in the positive moral system (*das sollen*) carried out in legislative policies or implemented in judicial process at the practical level of concrete cases handled by judges (*das sein*). In addition, this research was conducted by using the method of approaching the provisions of Islamic law.

As stated in the Guidelines for Writing Research and Community Service at the Bandung Law College, namely:

“This approach is carried out by examining all laws and regulations that are related to the legal issues being studied, then searching and finding suitability or non-compliance.”

4. Data Collection Technique

Data collection is a systematic and standardized procedure for obtaining the necessary data. There is always a relationship between data collection methods and research problems. In this study, the data research method was carried out using Literature (Study of Literature) or literature studies because the research is normative according to Soerjono Soekanto normative legal research or library law research, namely research conducted by examining library materials.

5. Data analysis method

The data analysis method used in this study is qualitative. It means that the data obtained leads to theoretical studies in the form of principles, conceptions of views, legal doctrines, and content of first systematically legal principles describing them, then analyzing them qualitatively to obtain a thorough analysis, and the form of data analysis

is carried out descriptively. So that the presentation is without using statistical formulas and figures and lists of tables, as Ronny Hanitijo Soemitro said:

“Whereas Juridical-Qualitative data analysis is a method of research that produces Descriptive Analysis data, namely what is stated by respondents in writing or verbally, as well as real behavior, which is researched and studied as a whole without having to use a mathematical formula.”

Discussion

1. Position of mixed marriage assets in Islamic law

In this study, a theoretical basis was used, both in the form of legal theory and the concept of studying the problems in this study concerning the issue of dividing assets for divorce from mixed marriages substantially regulated in the principles and principles of Islamic law and laws and regulations concerning marriage in Indonesia and then studied based on a theoretical basis by using the rule of law theory, the theory of legal certainty and the theory of *maslahat mursalat*.

Certainty is a matter (statement) that is certain, conditions, or provisions. Law must be certain and fair. Certainly, as a guideline for conduct and fairness because the code of conduct must support an order that is considered reasonable. Legal certainty normatively is when a regulation is made and promulgated with certainty because it regulates clearly and logically. Clear in the sense that it does not cause doubts (multiple interpretations) and logically clear in the sense that it becomes a system of norms with other norms so that they do not clash or cause a conflict of norms. Legal certainty refers to the enactment of laws that are clear, permanent, consistent, and consistent, the implementation of which cannot be influenced by subjective circumstances. Certainty and justice are not just moral demands but factually characterize law. A law that is uncertain and does not want to be fair is not just a bad law.

Only because it is fair and implemented with certainty the law can carry out its functions, because Indonesia as a rule of law adheres to the principle of legal certainty for all aspects of life in the social, national, and state fields, the provisions regarding assets must have clear legal certainty.

Treasure in Arabic is called *al-mal* which comes from the word *maalayamiilu-mailan*, which means leaning, inclined, and tilted. Etymologically, wealth is anything that pleases humans, and they maintain it. Both in material form and in benefits. While the meaning of property in terminology is:

“Something that human nature loves and allows to store until needed.”

According to Hanafi:

“Property is anything that can be collected, stored (maintained) and can be utilized according to custom.”

In the Compilation of Sharia Economic Law, Article 1 paragraph 6 *amwāl* (assets) are objects that can be owned, controlled, cultivated, and transferred, both tangible and intangible objects, both registered and unregistered, both movable and immovable objects and rights that have economic value. From this opinion, there are at least four things in the property:

- “a. Something that can be taken advantage of;
- b. Something that has economic value;
- c. Something that is *'urf* (correct custom) is recognized as property;

d. There is a legal protection that regulates it”.

Property needs to be maintained as in the *maslahah mursalah* theory that property is one of the goals of Islamic law to be maintained so that it is useful because the existence of this property is related to the existence of a marriage, in Islamic law marriage is a very important thing. Marriage is a sacred institution. The marriage ceremony is a pure ceremony, the bride and groom are made husband and wife or ask each other for their life partner by using the name of Allah, as contained in the Qur'an Surah An-Nisaa. Marriage has legal consequences for assets. In a juridical sense, the form of household property is determined, if the marriage later breaks up (due to divorce, life or death), and the consequences that occur in the relationship between the household and other parties, the validity of marriage according to Islamic law must comply with the terms and conditions specified.

Besides that, to formalize it officially in society, after completing the marriage contract ceremony with the process up to the Qabul consent, it is also circumcised to hold a *walimah* (a wedding party), but it is not obligatory, as stated in the Hadith of the Apostle narrated by Anas bin Malik who tells that after the marriage of the Prophet Muhammad SAW with Safiah bint Hujai bin Akhtab after the end of the Khaibar war. Prophet Muhammad said;

“Tell, announce to those around you about our marriage. Likewise, the hadith of the Prophet's *qauliyah* reads: Do *walimah* even if only by providing food consisting of goat's feet. *Walimah* means a wedding ceremony to announce it to the public”.

Moreover, to fulfill what is contained in Article 2 paragraph 2 of Law Number 1 of 1974, the marriage must also be recorded. Registration of marriages in Indonesia is regulated in several articles of laws and regulations, including:

“1. Article 2 paragraph 2 of Law Number 1 of 1974 which regulates: "Every marriage is recorded according to the applicable laws and regulations".

2. Registration is carried out by Marriage Registrars as regulated in Law Number 32 of 1954 concerning the Registration of Marriages, Divorces, and Reconciliation.

3. The procedure for recording it is regulated by the provisions of Government Regulation Number 9 of 1975. Article 10 paragraph 3 states that marriages are carried out in front of a Registrar Officer who is attended by two witnesses. The function of recording is stated in number 4b.

4. The registration of a marriage is addressed to all Indonesian citizens, whether they are in Indonesia or outside Indonesia.

5. For Indonesian citizens who carry out their marriage outside Indonesia, it is regulated by the provisions in Article 56 of Law Number 1 of 1974.

6. Article 11 paragraph 1 and paragraph 3 states that immediately after the marriage takes place, the bride and groom sign the marriage certificate which has been prepared by the Registrar. By signing the marriage certificate, the marriage has been officially registered.

7. Article 13 paragraph 2 states that each husband and wife are given a copy of the marriage certificate.”

Thus, after obtaining the excerpt of the marriage certificate, the marriage has been declared and has the right to receive legal recognition and protection. The statutory provisions that give orders for registration also apply to Indonesian citizens who are Muslim, it is just the difference that marriage registration for Muslims is at the Office of Religious Affairs, while for Indonesian citizens who are not Muslim, the registration of their marriage is done at the Civil Registry Office.

Regarding joint assets in the marriage, it will have an impact on those who carry out the marriage, their descendants, and assets. Regarding the position of assets, especially joint assets, Law Number 1 of 1974 does not explain it in detail. Joint assets are regulated in several articles, for example, Articles 35, 36, and 37 of Law Number 1 of 1974 concerning Marriage.

The definition of joint property according to Article 35 is "Property acquired during the marriage becomes joint property." We can find more complete arrangements for joint assets in the Compilation of Islamic Law in Chapter 1 General Provisions in Article 1(f) states that:

"Marital assets or *syirkah* are assets acquired either individually or together with husband and wife during the marriage, referred to as joint property."

The Compilation of Islamic Law in Article 91 emphasizes that what is included in the scope of joint assets are tangible and intangible objects.

Tangible objects include:

- "a. Immovable objects, such as houses, land, factories.
- b. Movable objects, such as household furniture, and cars.
- c. Securities, such as bonds, deposits, checks, demand deposits."

The Compilation of Islamic Law also regulates the issue of assets and liabilities. This can be seen from the provisions of Article 91 paragraph (3), which reads:

"Intangible shared assets can be in the form of rights or obligations". In this case, rights refer to assets, while liabilities are liabilities, namely obligations in the form of paying several debts".

The Compilation of Islamic Law has included all passives in shared assets. Thus, when a divorce occurs between husband and wife, they share joint assets. Moreover, what is shared is not only assets that are assets in nature, but all debts and credits made during the marriage bond by mutual agreement must be included as joint assets that are passive.

Article 35 (b) Law Number 1 of 1974 regulates the problem of property that is not included in joint assets as follows:

- "1. Inheritance of each husband and wife. Inherited assets are assets acquired by each husband and wife before the legal marriage bond was formed.
- 2. Assets obtained by each husband and wife in the form of grants, wills, or inheritance received by the husband or wife before or after they are married."

All the assets mentioned in points 1 and 2 above are the inherited property of each husband and wife whose control is in each of the husband and wife that does not include joint property. Unless they stipulate by means of an agreement that the inherited assets shall be used as unanimous unitary assets. The provisions of Article 35 (b) can be seen that the principle contained in the Marriage Law in Indonesia is to adhere to a separate principle. It means that any inherited property brought into the marriage does not automatically become a unified property with the assets acquired during the marriage, but each of these inherited assets is separate and becomes the control of each husband and wife.

Likewise, Articles 86 and 87 of the Compilation of Islamic Law stipulate it. Basically, there is no mixing of the husband's and wife's assets due to marriage. It means that the inherited property of each husband and wife does not automatically constitute unanimous unitary property due to marriage. The husband's property remains the husband's right and controlled by the husband only. Likewise, the wife's inheritance remains the right and controlled by the wife. Against this innate property, the husband or wife has the full right to take legal action.

Article 92 of the Compilation of Islamic Law states: "Husband or wife without the consent of the other party is not allowed to sell or transfer joint property." The provisions of the aforementioned articles prohibit a husband or wife from selling a joint property without the consent of the other party. The article also prohibits a husband or wife from transferring joint assets without the consent of the other party. Such as rent, mortgage, grant, and collateral to the bank. If a husband or wife sells or transfers joint property to another party without the consent of the husband or wife, the sale and purchase transaction or transfer can be filed for cancellation in court. The application of this article, if there is a lawsuit for joint property due to divorce, then the judge can determine the joint property that has been sold by the husband or wife as part of the party that has sold it, without having to involve the buyer as a party to the case. About debt problems, if the husband or wife owes money to another party while in the marriage bond, while the husband or wife's actions in debt are not known by other parties? Who is obliged to pay, and from which assets can debt payments be taken?

Before the enactment of Law Number 7 of 1989 concerning Religious Courts, the authority to adjudicate disputes over joint property, including Muslim, rested with the General Court. The reason is that joint property is included in customary law institutions. Articles 35 and 36 of Law Number 1 of 1974 concerning Marriage, do not explicitly indicate that joint property disputes for Muslim people are resolved through the Religious Courts. Although, Article 37 has given authority to the Religious Courts to resolve it. It is seen from the wording of Article 37:

"If the marriage is broken up due to divorce, joint assets are regulated according to their respective laws."

In the elucidation of the article, it is stated that the respective legal terms refer to the religion adhered to by the person in the dispute. Law Number 7 of 1989 and amended by Law Number 3 of 2006, through Article 49 and its explanation paragraph 2 number 10:

"The field of marriage regulated in Law Number 1 of 1974 concerning Marriage includes settlement of joint assets."

Thus, disputes over shared assets among people who are Muslim fall under the authority of the Religious Courts because they are included in the field of marriage Law No. 1 of 1974 concerning Marriage, as well as Government Regulation No. 9 of 1975, and Law No. 7 of 1989 concerning the Judiciary Religion, which was changed by Law Number 3 of 2006, does not explicitly regulate the division of joint assets in the event of a divorce between husband and wife. Provisions regarding the division and the amount of the portion of the acquisition of each husband and wife from the joint property in the event of a divorce, both divorced and widowed, or the wife disappear, can be found in the provisions of Article 96 and Article 97 of the Compilation of Islamic Law. Article 96 says:

"a. In the event of a divorce and death, half of the joint property belongs to the spouse who lives longer.

b. The distribution of joint assets to husbands or wives whose wives or husbands are missing must be suspended until there is a certainty of actual death or legal death on the basis of the decision of the Religious Court."

In article 97:

"Divorcees are entitled to half of the joint property as long as it is not specified otherwise in the marriage agreement."

The articles above emphasize the distribution of joint assets between husband and wife who are divorced and those who are divorced die, or because one of them is missing, each of them gets half or half of the joint property. It does not take into account who is working, and in whose name the joint property is registered. As long as the property was acquired during the marriage period in accordance with Article 35 and Article 36 of Law Number 1 of 1974, the property acquired is joint property, and is divided in half between the husband and wife. The provisions of the articles above have shifted strictly the provisions for the distribution of joint assets that apply to indigenous peoples in Indonesia, such as the Acehnese indigenous people and indigenous peoples in Java.

The Supreme Court of the Republic of Indonesia has supported the provisions contained in Article 96 and Article 97 of the Compilation of Islamic Law regarding the distribution of joint assets and the amount of each husband and wife's acquisition with their decisions. As the dispute case was decided by the Jombang Religious Court in 1996, in case number 167/Pdt.G./1996/PA.JBG.

The Supreme Court's decision essentially confirms the decision of the Jombang Religious Court that has stipulated that the husband and wife's share of joint property after a divorce is the same, namely half for the husband and half for the wife. Thus, the decisions of the Supreme Court automatically shift the legal provisions that apply according to custom regarding the distribution of joint assets. Provisions governing the issue of joint property in polygamous marriages are also regulated in the Compilation of Islamic Law and the Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia. Article 94 of the Compilation of Islamic Law regulates the joint property of polygamous marriages as follows:

- “1. Joint property from a marriage of a husband who has more than one wife, each of which is separate and independent.
2. Ownership of joint assets from the marriage of a husband who has more than one wife as referred to in paragraph 1, is calculated at the time the second, third, or fourth marriage contract takes place.”

The Supreme Court of the Republic of Indonesia with the Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia Number: KMA/032/SK/IV/2006 dated 4 April 2006, has enacted Book II concerning Guidelines for the Implementation of Duties and Administration of Courts, the contents of which, among other things, concern joint property issues in polygamous marriages. The aim of the Supreme Court to regulate joint property in polygamy is to prevent the smuggling of the rights of the previous wife by the husband. It is common when the wife has given her husband permission to remarry, she is ignored, and her rights from the joint property are reduced by the interests of the second wife. Therefore, the Supreme Court requires that there should be a strict separation between the joint assets of the husband and the previous wife when the husband is going to practice polygamy. For this reason, the teachings of Islam really require accurate and accountable bookkeeping, which is made by husband and wife who have joint properties, so that there is no mixing of assets with the first, second wife, and so on.

2. Position of mixed marriage assets in Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage

Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage has principles of marriage that have been adapted to the developments and demands of the times. These principles or principles are:

- “a. The purpose of marriage is to form a happy and eternal family. For this reason, husband and wife need to help and complement each other, so that each of them can develop their personality to help and achieve spiritual and material well-being.

b. This law states that a marriage is valid if it is carried out according to the laws of each religion and belief; in addition to that, each marriage must be recorded according to the applicable laws and regulations. Registration for each marriage is the same as recording important events in a person's life, for example, birth, and death stated in certificates, and an official deed which is also included in the registry.

c. This law adheres to the principle of monogamy. It is only desired by the person concerned because the law and religion of the person concerned allow it. A husband can have more than one wife. However, the marriage of a husband with more than one wife, even if it is desired by the parties concerned, can only be carried out if certain conditions are met and decided by the Court.

d. This law adheres to the principle that the prospective husband and wife must be physically and mentally mature and able to enter a marriage. In order to realize the goals of the marriage properly without ending in divorce and to produce good and healthy offspring. For this reason, marriages between prospective husbands and wives who are still underage must be prevented. In addition, marriage has a relationship with population problems. It turns out that a lower age limit for a woman to marry results in a higher birth rate when compared to a higher age limit. In this connection, this Law determines the age limit for marriage for both men and women, which is 19 (nineteen) years.

a. Because the purpose of marriage is to form a family that is eternally happy and prosperous, this Law adheres to the principle of making it difficult for divorce to occur. To allow for divorce, there must be certain reasons and must be done before the Court.

b. The rights and position of the wife are in balance with the rights and position of the husband both in domestic life in social relations. In this way, everything in the family can be negotiated and decided jointly by the husband and wife.

c. Law Number 1 of 1974 concerning Marriage was ratified in Jakarta by President Soeharto on January 2, 1974. On January 2, 1974, in Jakarta, Law Number 1 of 1974 concerning Marriage was promulgated by Minister or State Secretary Sudharmono. SH.

d. Law Number 1 of 1974 concerning Marriage was promulgated in the State Gazette of the Republic of Indonesia of 1974 Number 1. Explanation of Law Number 1 of 1974 concerning Marriage was promulgated and placed in the Supplement to the State Gazette of the Republic of Indonesia Number 3019.

e. Law Number 1 of 1974 concerning Marriage was amended by Law of the Republic of Indonesia Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage was ratified by President Joko Widodo on 14 October 2019 in Jakarta. Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage came into force after the promulgation of Plt. Menkumham Tjahjo Kumolo on October 15 2019 in Jakarta”

Law Number 1 of 1974 concerning Marriage was amended by Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage because:

”1. The Constitutional Court of the Republic of Indonesia has issued Constitutional Court Decision Number 22/PUU-XV/2017. One of the considerations of the Constitutional Court in the decision is " When the difference in treatment between men and women affects or hinders the fulfillment of basic rights or constitutional rights of citizens, both belonging to the group of civil and political rights as well as economic, educational, social and cultural rights, which should not be differentiated solely on the basis of gender, then such distinction clearly constitutes discrimination." In the same consideration, it is stated that setting a different minimum age limit for marriage between men and women has not only resulted in discrimination in the context of exercising the right to form a family as guaranteed in Article 28B paragraph (1) of the 1945 Constitution but has also created discrimination against the protection and fulfillment of these rights of children as

guaranteed in Article 28B paragraph (2) of the 1945 Constitution. In this case, when the minimum age for marriage for women is lower than for men, legally women can start a family more quickly. Because of this, the Constitutional Court ordered the legislators to make changes to Law Number 1 of 1974 concerning Marriage within a maximum period of 3 (three) years.

2. Changes in norms in Law Number 1 of 1974 concerning Marriage reaching the age limit for marriage, and improvement in norms reached by increasing the minimum age for marriage for women. In this case, the minimum age for marriage for women is equated with the minimum age for marriage for men, which is 19 (nineteen) years. The said age limit is considered to be physically and mentally mature and able to enter into a marriage. So that the goal of marriage can be realized properly without ending in divorce and to produce healthy and quality offspring. It is also expected that an increase in the age limit higher than 16 (sixteen) years for women to marry will result in lower birth rates and reduce the risk of maternal and child mortality. Apart from that, children's rights can also be fulfilled so as to optimize children's growth and development including assisting parents and providing children's access to education as high as possible.”

Matters that can be used to carry out a divorce are explained in the Explanation of Article 39 paragraph (2) of Law Number 1 of 1974 concerning Marriage, namely:

“a. One of the parties commits adultery or becomes a drunkard, addict, gambler, and so on which are difficult to cure;

b. One party leaves the other for 2 (two) consecutive years without the permission of the other party and without valid reasons or for other reasons beyond his will;

a. One of the parties gets a prison sentence of 5 (five) years or a more severe punishment after the marriage takes place;

b. One of the parties commits cruelty or severe persecution that endangers the other party;

c. One of the parties has a disability or illness which causes them to be unable to carry out their obligations as husband or wife;

d. Between husband and wife there are constant disputes and fights and there is no hope of living in harmony in the household again”.

Law Number 1 of 1974 concerning Marriage was amended by Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage. The amendment is to amend Article 7 and insert 1 Article between Article 65 and Article 66 namely Article 65A, as follows:

The provisions of Article 7 are amended to read as follows:

“1. Perkawinan hanya diizinkan apabila pria dan wanita sudah mencapai umur 19 (sembilan belas) tahun.

2. In the event of a deviation from the age requirement referred to in paragraph (1), the male and female parents may request a dispensation from the Court with very urgent reasons accompanied by sufficient supporting evidence.

1. The granting of dispensation by the Court as referred to in paragraph (2) must listen to the opinions of both the bride and groom who will enter into a marriage.

2. The provisions regarding the condition of one or both parents of the prospective bride and groom, as referred to in Article 6 paragraph (3) and paragraph (4) apply to the provisions regarding the request for dispensation as referred to in paragraph (2) without prejudice to the provisions referred to in Article 6 paragraph (6).

3. Between Article 65 and Article 66 is inserted 1 (one) article namely Article 65A which reads as follows:

Article 65A

When this Law came into force, marriage applications that had been registered under Law Number 1 of 1974 concerning Marriage continued to process following the provisions of Law Number 1 of 1974 concerning Marriage.

The consideration of Law Number 1 of 1974 concerning Marriage is that following the philosophy of Pancasila and the ideals for fostering national law, it is necessary to have a Law concerning Marriage that applies to all citizens.

The legal basis for Law Number 1 of 1974 concerning Marriage is:

“1). Article 5 paragraph (1), Article 20 paragraph (1), Article 27 paragraph (1), and Article 29 of the 1945 Constitution;

2) Decree of the People's Consultative Assembly Number IV/MPR/1973”.

For a country and nation like Indonesia, it is essential to have a National Marriage Law which simultaneously accommodates the principles and provides a legal basis for marriage which has been the basis for and has been in force for various groups in our society. Currently, various marriage laws apply to various groups of citizens and various regions, as follows:

“a. for Indigenous Indonesians who are Muslim, the religious law that has been regulated in Customary Law applies;

b. for other Indigenous Indonesians, Customary Law applies;

c. for Indigenous Indonesians who are Christians, the *Huwelijksordonnantie Christen Indonesia* (S. 1933 Number 74) applies;

d. East Chinese foreigners and Indonesian citizens of Chinese descent apply the provisions of the Civil Code with minor changes;

e. other East Foreigners and Indonesian citizens of other Eastern Foreign descent apply their customary laws;

f. Europeans and Indonesian citizens of European descent and what is equated with them apply the Civil Code.

a. In accordance with the basic philosophy of Pancasila and the 1945 Constitution, this Law, on the one hand, must be able to realize the principles contained in Pancasila and the 1945 Constitution. On the other hand, it must also be able to accommodate all the realities that live in today's society. This Marriage Law has accommodated in it the elements and provisions of the law of religion and belief from those concerned.

b. This law determines the principles or principles regarding marriage and everything related to marriage that has been adapted to the developments and demands of the times. The principles contained in this law are as follows:

1. The purpose of marriage is to form a happy and eternal family. For this reason, husband and wife need to help and complement each other so that each of them can develop their personality to help and achieve spiritual and material well-being.

2. This law states that a marriage is valid if it is carried out according to the laws of each religion and belief, and each marriage must be recorded according to the applicable laws and regulations. Recording of each marriage is the same as recording important events in a person's life, for example, birth, and deaths stated in certificates, an official deed which is also included in the registry.

3. This law adheres to the principle of monogamy. Only if the person concerned wants it, because the law and religion of the person concerned allow it, a husband can have more than one wife. However, the marriage of a husband with more than one wife,

even though it is desired by the parties concerned, can only be carried out if certain conditions are met and decided by the court.

4. This law adheres to the principle that the prospective husband and wife must be physically and mentally mature and able to enter a marriage, in order to realize the goals of the marriage properly without ending in divorce and to produce good and healthy offspring. For this reason, marriages between prospective husbands and wives who are still underage must be prevented. In addition, marriage has a relationship with population problems. It turns out that a lower age limit for a woman to marry results in a higher birth rate when compared to a higher age limit. In this connection, this Law determines the age limit for marriage for both men and women, namely 19 (nineteen) years for men and 16 (sixteen) years for women.

5. Because the purpose of marriage is to form a family that is eternally happy and prosperous, this Law adheres to the principle of making it difficult for divorce to occur. To allow for divorce, there must be certain reasons and must be done before the Court.

6. The rights and position of the wife are in balance with the rights and position of the husband both in domestic life and in social relations so. In this way, everything in the family can be negotiated and decided jointly by the husband and wife.

7. To guarantee legal certainty, marriages and everything related to marriages that took place before this Law came into effect are carried out according to the existing law is legal.”

2. The legal consequences of divorce from mixed marriages on the distribution of assets in Islamic law and Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage

The legal consequences of divorce from mixed marriages on the distribution of assets in Islamic law can be seen from the joint assets as stated in the Compilation of Islamic Law. Article 97 Compilation of Islamic Law stipulates "a divorced widow or widower each has the right to half of the joint property as long as it is not specified otherwise in the marriage agreement." For more, see Gono Gini's Legacy and Treasure.

According to Islamic Law as explained by Moch. Idris Ramulyo:

“In the event of a breakup of the marital relationship, either due to divorce or divorce at the request of the husband, or due to a claim by the wife, then the joint assets acquired during the marriage must be divided between the husband and wife, according to the same balance.”

As a legal consequence of marriage to each other's assets, there is no mixing of these assets by itself, meaning that with the existence of the marriage. Earlier, it is not automatically the assets brought by the husband and the assets brought by the wife become one, but apart from each other.

Regarding property in Islamic law, it is seen that a family has three possibilities: First, property that belongs to the husband only or property that is owned by the husband without the slightest ownership of the wife in that property. For example, the husband's assets before marriage, the assets obtained from the work of the husband and not given as a living to his wife, the assets that were donated by other people to the husband specifically, or the assets that were inherited to the husband, and so on. Second, assets belong to the wife only, assets owned by the wife alone without the slightest ownership of the husband in those assets. For example, the wife's assets before marriage, work assets obtained from the wife without having to interfere with her obligations as a wife, assets donated by other people specifically for her, or assets inherited by the wife, etc. Third, joint properties. An example is the property that is donated by a person to a husband and wife, or property such as a house, land, or something else purchased from the money of the two of them, or property that they acquire after marriage. The Husband and wife both

work to generate income and so on. This third property is which is then termed gono-gini assets.

Under such circumstances, it is impossible to divide such arbitrary assets except by way of sulh, 'urf, or qadha (decision). Sulh itself is an agreement between husband and wife based on deliberation on the basis of mutual pleasure. The arguments for the law on husband and wife peace include:

From Katsir bin Abdillah bin Amr bin Auf al-Muzani, from his father from his grandfather, Rasulullah said:

“Shallallahu 'alaihi wa sallam said: "Making peace is permissible between Muslims, except for a peace that forbids what is lawful or justifies what is unlawful. And Muslims depend on their conditions, except for conditions that forbid what is lawful or what is lawful for what is unlawful.” (HR. Tirmidzi no.1370, Ahmad 2:366, and Abu Dawud no. 3594)

When explaining the hadith above, ash-Shan'ani said: The scholars have divided ash-shulh (peace) into several types: peace between Muslims and infidels, peace between husband and wife, peace between groups that are wrong (unjust) and groups justice, peace between two people who complain about the problem to the judge, peace in cases of injury such as forgiveness for property sanctions that should be given, and peace to give a number of shared assets and rights. This division means that the fiqh experts call ash-shulh (peace).

Thus, based on the argumentation of Amr bin Auf al-Muzani's hadith above, if a husband and wife separate and want to divide mutual assets between them, peace can be taken. It is because one type of peace is peace between husband and wife, or peace when there is a dispute over joint property.

With this way of peace, the distribution of wealth depends on deliberation between husband and wife. It could be that the husband gets 50% and the wife 50%, or the husband gets 30% and the wife 70%, the husband can get 70% and the wife 30%, and it is also possible to share with other percentage ratios. Everything is justified by syara' as long as it is the result of reconciliation that has been made based on the willingness of each in the Compilation of Islamic Law which is applied. In the Religious Courts, marital assets between husband and wife are not divided unless each gets 50%. In Article 97 of the Compilation of Islamic Law, it is stated:

“Widows or divorced widows each is entitled to half of the joint property as long as it is not specified otherwise in the marriage agreement.”

However, this provision in the Compilation of Islamic Law is not a patent legal decision. If a husband and wife agree to share assets with a certain percentage, then the agreement and their pleasure take precedence. 'Urf is a custom that applies in a society so that it becomes the law in that society. The scholars agree that 'urf can be used as a legal reference.

a. The legal consequences of divorce from mixed marriages on the distribution of assets in Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage.

Furthermore, according to Article 36 paragraph (1) regarding joint property, this joint property can be managed jointly by the husband and wife. However, in every legal action involving joint property, there must be the agreement of both parties. If the parties decide to enter into a marriage agreement, namely a marriage agreement to separate assets, the agreement must be made notarial or underhand which is legalized by a marriage registrar, namely the Office of Religious Affairs or the Civil Registry Office. In practice, a marriage agreement can be made after the marriage takes place by submitting an

application to the court and having obtained a court decision that has permanent legal force.

If the marriage agreement is not legalized by the marriage registrar, then legally it is considered that there is no marriage agreement so the marriage is considered a marriage of mixed assets. Regarding the inherited property of each husband and wife, it is the full right of the husband and wife to carry out legal actions regarding their property, Article 36 paragraph (2).

If the husband is a foreigner and the wife is an Indonesian citizen, then the wife applies to him on the terms of her husband. So it is necessary to pay attention to Government Regulation Number 41 of 1996 concerning Ownership of Residential or Residential Houses by Foreigners, who are domiciled in Indonesia and Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 7 of 1996 concerning Requirements for Ownership of Residential or Residential Houses by Foreigners, who In essence, it states that foreigners whose presence in Indonesia benefits national development can own a residential or residential house in the form of a house with certain land rights or a unit of flats built on land with use rights over state land. The intended foreigner is a foreigner who owns and maintains economic interests in Indonesia by carrying out investments to own a residential or residential house in Indonesia.

In the event of a divorce, the joint assets are regulated according to their respective laws (Article 37). In the case of mixed marriages, foreign law or national law can be used (Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage Number 1 of 1974).

In the event of a divorce, for mixed marriages carried out in Indonesia and abroad, if the divorce is filed in the Indonesian Court, it is clear that the terms and reasons for the divorce are based on the provisions in force in Indonesia, namely in the provisions of Law No. 1 of 1974 and Government Regulations. No. 9 of 1975 and specifically for civil servants also apply the provisions of Government Regulation No. 10 of 1983 and Government Regulation No. 45 of 1990. The consequences of divorce, especially on assets: if the marital property becomes joint property, with divorce the assets are jointly divided by 2 (two) between husband and wife. If the marital assets are separated then after the divorce the assets are in accordance with the ownership of each.

The distribution of joint assets between ex-wife and ex-husband as a result of divorce in mixed marriages often faces obstacles, especially regarding the distribution of joint assets in the form of ownership rights to land and buildings, because it is based on the provisions of Article 21 paragraph (1) of the Basic Agrarian Law which determines that: "only Indonesian citizens can have property rights" and when connected with the provisions of Article 35 of Law no. 1 of 1974, which stipulates that all property acquired during the marriage becomes joint property, as long as the parties do not specify otherwise. Because in mixed marriages, the parties are subject to different legal systems, in the event of a divorce, the assets in the form of property rights based on Indonesian law partially become the rights of the ex-husband and partly become the rights of the ex-wife. Especially for the part of the husband who is domiciled as a foreigner, it is clear that it is not permissible to have property rights in Indonesia so this division will be felt as not giving a sense of justice by the foreign party (ex-husband). Moreover, the money for buying joint assets in the form of freehold land comes from the third party (husband).

Conclusion

1. The position of mixed marriage assets in Islamic law provides that there are assets in the Compilation of Islamic Law, namely, assets in marriage or syirkah are assets that are acquired either individually or together with the husband and wife during the marriage, hereinafter referred to as joint assets and those included in the scope of joint

assets are tangible and intangible objects. Whereas the position of mixed marriage assets in Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, marriage is broken up due to divorce, joint assets are regulated according to their respective laws, but as parents, they are still obliged to maintain and educate their children, solely based on the interests of the child; when there is a dispute regarding the control of children, including mixed marriages between two people who are subject to different laws in Indonesia, because of differences in nationality and one of the parties is an Indonesian citizen.

2. The legal consequences of divorce from mixed marriages on the division of assets in Islamic law, the distribution can be viewed from several possibilities: First, if it is known with certainty the calculation of the husband's and wife's assets, namely the results of the husband's work are known with certainty minus the income for his family. Second, if the calculation of the husband and wife's assets is not known, the husband and wife both work or cooperate with each other in building the family economy. Furthermore, the legal consequences of divorce from mixed marriages on the distribution of assets in Islamic law and Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage are that all property acquired during the marriage becomes joint assets as long as the parties do not determine otherwise. Because in mixed marriages, the parties are subject to different legal systems, in the event of a divorce, the assets in the form of property rights are based on Indonesian law, part of which becomes the right of the ex-husband and part of it becomes the right of the ex-wife. Especially for the husband who is domiciled as a foreigner, it is clear that it is not permissible to have property rights in Indonesia.

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