

## Reforming the Rules on the Division of Joint Property: A Progressive Legal Approach

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| *Recieved: 25-12-2023*

| *Revised: 29-06-2024*

| *Accepted: 30-06-2024*

**Abstract:** According to Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law (KHI) Articles 96 and 97 on the division of joint property, each person in a marriage that dissolves due to divorce or death is entitled to half of the property that is joint property. However, the legal circumstances presented in Payakumbuh Religious Court's Decision No. 657/Pdt.G/2022/PA Pyk did not follow the KHI and gave the plaintiff (the husband) a portion of  $\frac{1}{4}$  and the defendant (the wife) a share of  $\frac{3}{4}$  of the joint property. Therefore, the goal of the analysis presented in this article is to respond to the judge's ratio decidendi when it comes to joint property that are unrelated to the KHI. Then, a more thorough explanation of progressive law as a method of legal change in the realm of community property is provided. The research approach employed in this paper is the normative legal method. The investigation's findings demonstrate that the judge's reasoning is predicated on the idea that the wife's inherited assets, rather than the husband's income from their marriage, constitute the joint property at issue in the proceedings. In terms of income, living expenses, or child-education expenses, the plaintiff was unable to demonstrate how much he contributed to the defendant's household during their time together. The plaintiff could not provide sufficient evidence to support his claim that he could afford to buy the property, house, and four-wheeled vehicle that are at issue. According to the judge's ruling, progressive law satisfies societal legal requirements. The judge's ruling about the contribution of joint assets served as a legal justification for not dividing joint assets in half, based on the facts of the case.

**Keywords:** Joint Property; Division; Judge's Decision; Ratio decidendi.

### Introduction

Marriage law is a legal system that includes several fields or categories of law, including matters regarding the validity of marriage, marriage between more than one person, the position of children, the rights and obligations of husband and wife, marriage decisions, and their legal consequences (Farhan et al., 2020) as well as marital or joint assets (Asnawi, 2021). Joint assets are property acquired during marriage (Kagan, 2020). This terminology is in line with the meaning of joint property in Article 35 Paragraph (1) of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage (Marriage Law) that joint property is property acquired during marriage (Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, 2019). Meanwhile, Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law (KHI) regulates that joint assets can be divided into two. KHI in line with the provisions in the Civil Code, namely the method of distribution is usually by dividing equally, each (husband and wife) gets half of the joint property (Nagara, 2016).

However, the laws in force in Indonesia regulate that any property acquired during the marriage period is made joint property without distinguishing between who works or acquires the property and is

registered in whose name, as long as the property is not congenital, a gift or inheritance and/or not there is a marriage agreement regarding joint property ownership (Firdawaty, 2016). It needs to be emphasized that the meaning of joint assets is not just property, but also includes debts incurred during the marriage period. This discussion is an expansion of the meaning of Article 35 Paragraph (1) of the Marriage Law which aims to balance the rights and obligations of husband and wife regarding debts that arise during their marriage (Asnawi, 2021).

The law regarding the division of joint property has been regulated in Article 96 Paragraph (1) KHI which states: "In the event of a divorce, then half of the joint property becomes the right of the spouse who survives longer", then it is also regulated in Article 97 which reads: "Widow or Divorced widowers are each entitled to half of the joint assets as long as it is not otherwise stipulated in the marriage agreement. "These two articles explain that if the marriage breaks up, the joint assets are divided in half, half for the husband or husband's family and half for the wife or wife's family.

However, sometimes this provision is not suitable for certain couples, for example for couples whose family finances are borne by the wife. In this case, of course, the distribution in half would not be fair, especially if they have children and the children will be under the care of the wife. Then, in the case of a wife who works and earns money, the money she earns is the wife's full right so of course it cannot be shared with anyone else. So it doesn't feel right if only the wife works and then there is a divorce so the assets are divided in half.

Based on investigations carried out on several judges' decisions, there are still many judges who decide on the distribution of joint assets based on the normative provisions of Articles 96 and 97 KHI, namely that they are divided equally, each gets 1/2 share without considering the size of the contribution of the parties in producing joint assets. However, on the other hand, court decisions regarding joint assets are not rigid and are only guided by normative provisions. There have been several decisions regarding the division of joint assets where the judge divided them into 3 parts, 4 parts or some divided them into 5 parts. The division is based on the facts of the trial and the judge's beliefs.

Studies on the division of joint assets have been carried out by many previous researchers and can be mapped based on the focus of studies regarding the analysis of court decisions, among others research on the judge's decision in dividing joint assets by Fitroh Nur'aini Laily (Nur'aini, 2017). Then Ahmad Zainal Fanani about "The Judge's Legal Findings Regarding the Protection of the Wife's Rights in Joint Property Decisions" (Fanani, 2023). Then, research on the division of joint assets from aspects Khairunnisa's research with the title "Justice over Joint Property Disputes in Muslim Family Marriages in Indonesia (Study of Religious Court Decisions in the Bandar Lampung High Religious Court Area)", this paper analyzes 12 decisions of the Lampung High Religious Court regarding the division of joint property, all of which divided the joint property into two parts (Khairunnisa, 2023). Then, Nurnazli's article, entitled "Division of Joint Assets and Its Implications for Reforming Family Law in Indonesia." The results of the research require an update to the KHI regulations regarding the distribution of joint assets so that they are in line with the values of justice and benefit (Nurnazli, 2019).

So if we analyze previous research, no one has discussed the decided ratio division of joint assets whose decision is different from the provisions of Articles 96 and 97 KHI, namely the Payakumbuh Religious Court Decision Number 657/Pdt.G/2022/PA Pyk, dated 3 February 2023 which divides joint assets  $\frac{1}{4}$  for the husband as Plaintiff and  $\frac{3}{4}$  for the wife as Plaintiff. The important issues that will be discussed are First, what is the basis of consideration for the judge in deciding case Number 657/Pdt.G/PA Pyk, and Second, what is this decision like when analyzed using progressive legal theory?

## Literature Review

Discuss literature reviews is the same as talking about law, there is no standard and eternal definition. In fact, in discussing the theoretical framework we will be faced with two kinds of reality, namely reality in abstract which exists in imaginative ideas, and its equivalent in the form of reality in

concerto which exists in sensory experience (Efendi, 2019). Likewise, when discussing progressive law and joint property, it is necessary first to explain several variables in the following literature review.

The progressive legal theory taught by Satjipto Rahardjo seeks to break through the rigidity of legalism which is only oriented towards laws. Progressive law enforcement efforts certainly prioritize the rights that exist in society because the law is born from the social scope that exists in society. An approach to humanitarian principles will certainly produce justice and prosperity for society on the lower middle scale (Utomo, 2020). The basis of progressive legal teachings is the usefulness and ability of law to serve humans, law is always in the process of continuing to become and develop and change itself towards better perfection (Triana, 2021).

This concept of progressive law is also in line with Umar Ibn Al-Khatab's *ijtihad*. Umar's *Ijtihad* and Progressive law are also in line with rejecting the status quo. Both of them want a law that is up to date according to what law seekers need. However, the old law will be maintained as long as it is in line with the times, situations, and conditions of society at that time (Arrasyid et al., 2023). The concept of progressive law, as suggested by Rahardjo, means finding truth and providing legal protection and civil rights that which biological children are supposed to receive. From the progressive perspective, the trial process should not focus on interpreting the code of law textually but on contextualizing the code of law in its current spaces and times (Rohmawati & Rofiq, 2021).

Progressive law has three indicators, namely that law exists for humans and not for themselves, law is always in the status of law in the making and is not final, and law is an institution that has humanitarian morals and not technology that has no conscience. From these three basic assumptions, the criteria for progressive law are: having a big goal in the form of human welfare and happiness; containing very strong human moral content; Progressive law is liberating law, covering very broad dimensions that not only move into the realm of practice but also the theoretical realm; critical and functional (Ramdani, 2020).

A critical study of the Progressive Legal Theory initiated by Satjipto Rahardjo which is applied in a judge's decision includes a decision that places the law for humans, not humans for the law, a decision that responds to the desires of justice seekers and provides welfare value for women as the economic backbone of their families by providing justice in matters distribution of joint assets decisions that accommodate public desires by carrying out rule breaking by judges in actualizing the law in the right time and space by making creative interpretations of existing regulations so that the law also regulates and guarantees the civil rights of children outside of marriage from their parents, decisions that embody moral and spiritual intelligence values containing substantive justice values; decisions that replace and break through the paradigm of the operation of law according to regulations to the paradigm of human behavior (Saifullah, 2018).

As a theory, progressive legal theory can be applied in all fields of law, including the realm of civil law, especially regarding joint property. Joint assets are assets from joint business results obtained after the marriage lasts until the dissolution of the marriage, either due to divorce or death (Khosyi'ah, 2017). This common property is a characteristic of Indonesianness that is not found in classical jurisprudence literature/rules (Aniroh, 2020).

The existence of joint assets in marriage does not rule out the possibility of each husband and wife having assets. These joint assets can be in the form of immovable objects, movable objects, and securities. While the intangibles can be in the form of rights and obligations. Both can be used as collateral by one party with the consent of the other party. Husband and wife without the consent of either parties, are not allowed to sell or transfer the joint assets. Shared property in Islam is synonymous with *syirkah abdan mufawwadlah* which means unlimited sharing of energy and partnership. Even though gono-gini is not regulated in Islamic Jurisprudence, its existence is at least accepted by some Indonesian Ulama. This is based on the fact that many husbands and wives in Indonesian society work together. Trying to earn daily living for the family and just assets for savings for their old age (Analiansyah & Rudanto, 2017).

Marriage law seeks to protect joint assets within the marriage bond in the hope that a quality family will be formed without any problems within the family. Legal regulations provide various reasons for

formal legal guarantees for the protection of joint assets. This reason also does not escape the view of Islamic law through *maqashid shari'ah*. This paper uses a normative approach (Noble, 2020).

Post-divorce joint property disputes at the Religious Court (PA) in the Bengkulu High Religious Court (PTA) area are always decided in half for the ex-wife and ex-husband, regardless of the party who is more dominant in working to produce assets. These decisions refer to article 97 of the Compilation of Islamic Law. These decisions do not fulfill a sense of justice regarding the ex-wife who also works to meet the family's needs. Meanwhile, from the perspective of Progressive Law in the context of reforming marriage law in Indonesia, ex-wives who are involved in trying to meet family needs should receive a larger portion of joint assets than ex-husbands because it is more in line with the sense of justice that lives among society. The ex-wife's portion is decided through peace and agreement between the parties (Jayusman & Imansyah, 2021).

The Sharia Court in Aceh determined the provision of *'iddah*, living, joint property, and child care rights for women; and children receive living expenses, guardianship from the family, and care from the mother. Sociologically, law has functioned as a tool of social control through the Sharia Court and judges as the main part of the legal structure which is supported by other elements of society so that protection for women and children can be realized fairly (Kasim et al., 2022). After a divorce, Moroccan family law stipulates that joint property falls to the wife, except for immovable property which is in the husband's name (Daud & Syarif, 2021).

## Method

This research is normative legal research using a statutory approach (Nuroniya, 2020) and comparative approaches (Hafidzi et al., 2022). The statutory approach is used to analyze court decisions that divide joint assets without following the provisions of the Compilation of Islamic Law, while the comparative approach is used to compare Payakumbuh Religious Court Decisions Number 657/Pdt.G/PA.Pyk with Supreme Court Decision Number 605K/Ag/2019 and Banjarmasin High Religious Court Decision Number 38/Pdt.G/2019/PTA.Bjm. As legal research, it has characteristics of use primary legal materials are Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, Instruction of the President of the Republic of Indonesia Number 1 of 1991 concerning the Dissemination of the Compilation of Islamic Law (KHI). Meanwhile, the secondary materials used are Law Number 50 of 2009 concerning the Second Amendment to Law Number 7 of 1989 concerning Religious Courts. As well as various concepts and practices for sharing joint assets contained in journals, books, and other secondary materials. Data on the rules for dividing joint assets in Indonesia were identified and analyzed holistically regarding the practice of dividing joint assets through judges' decisions at the Religious Courts.

## Results and Discussion

### Positivization of Joint Property in the Civil Law System in Indonesia

Both an economic and legal viewpoint can be applied to the idea of common property, or assets. Despite their differences, the two review parts are connected to one another. From an economic standpoint, utility value is the main focus; from a legal standpoint, pertinent legal regulations are the main focus (Putri & Wahyuni, 2021). Property owned by the husband and wife jointly during a marriage. In Indonesia, the rule of law is highly valued, and rules regarding the division of communal property have been put in place (Utami & Dalimunthe, 2023). The Civil Code, the Marriage Act, and the body of Islamic law are among the legislation that regulate the common property regime in positive law (Asnawi, 2021).

A detailed explanation of Civil Code Articles 119 through 138 is provided. partition of communal property. Talk about instruction since then, the husband's and wife's assets are considered joint property. Unless otherwise specified in the agreement, a marriage is deemed legitimate. The Civil Code provides an explanation of marriage in Article 119. Joint property ownership It always remains the joint property of the husband and wife. Preserved either now or in the future and cannot be altered or deleted without both

parties' permission. There are instances in which assets may be acquired without charge, unless the donor or donor In this instance, the money specifically calls for a different outcome (Utami & Dalimunthe, 2023).

The integration of the legal institution of community of property into the framework of marriage norms is a consequence of marriage law. This must be separated from another set of rules, which are the legal ramifications of a divorce. In marriage law, the presence of a community of property is a legal outcome of a legitimate marriage and is formally registered by the state, despite the fact that both are normative systems. Nonetheless, this affects the legal ramifications of a divorce in specific situations, like the partition of all assets (Asnawi, 2021). Article 37 of the Marriage Law does not explicitly stipulate the division of joint assets between husband and wife, so this legal vacuum is filled by Articles 96 and 97 KHI which emphasize the division of joint assets, whether divorced or deceased divorcees each get half of the joint assets (Harimurti, 2021).

Community property is property acquired during marriage. Joint property in Islamic law is not touched on in general or specifically, because this is not specifically recognized in the book of fiqh, this is in line with the principle of individual (private) property ownership. Based on this principle, the husband is obliged to provide support in the form of living expenses with all the accessories for his children and wife from the husband's assets (Syarifuddin, 2014).

Joint assets in other terms are also called mutual assets. Mutual assets are joint assets, both movable assets (motorbikes, cars, shares, etc.) and fixed assets (land, houses, etc.) held during the marriage period. According to customary law, what is meant by marital property is all property controlled by husband and wife as long as they are bound by the marriage bond, both property controlled by relatives, as well as individual property originating from inherited assets, gifted assets, assets of their income, income earned by husband and wife together, and gift items. All of this is influenced by the kinship principles adopted locally and the form of marriage that applies to the husband and wife concerned (Hadikusuma, 2003).

The study of joint property in Islamic law cannot be separated from the discussion of the concept of *syirkah* in marriage. The majority of scholars think that joint property is included in the concept of *syirkah*, considering that the concept of joint property is not found in references to the texts of the Quran and Hadith. Therefore, in carrying out legal bathing, qiyas (comparison) is carried out against the concept of *syirkah* itself. According to Amir Syarifuddin in his book "Marriage Law in Indonesia", it is stated that the marriage agreement must be made at the time the marriage contract takes place or afterward and must be carried out with a special contract in the form of *syirkah*. If these two elements are not applied, then the personal property belonging to each husband and wife cannot be categorized as joint property and remains each individual's personal property (Syarifuddin, 2014).

Islamic law does not recognize the mixing of personal property into joint property, but it is recommended that there be mutual understanding between husband and wife in managing personal property. So in this case, Islamic law allows a marriage agreement to be entered into before the marriage takes place. The agreement can take the form of merging each individual's personal property into joint property, and it can also stipulate that there will be no merging of personal property into joint property. If the agreement is made before the marriage takes place, then the agreement is valid and must be implemented.

Joint property (community property) is property and/or assets acquired jointly by husband and wife during the marriage period. What is meant by joint acquisition here is the acquisition of property and/or assets from a joint effort or collaboration between husband and wife. Joint Business is a business between husband and wife based on their respective roles to help and support each other in carrying out family affairs and seeking a decent living for all family members.

One important emphasis in determining joint assets is the norm which states that "property is acquired during marriage". It is said that with the concept of *syirkah abdan mufawwadah* or partnership in all matters to obtain the expected results, this norm means that joint assets in the marriage are assets obtained from joint efforts between husband and wife. The concept of *syirkah* in assets recognizes the

proportion of responsibilities (obligations) and respective rights to assets, as is the general understanding of *syirkah*.

Joint Business in this case means both capital and profits obtained entirely during the marriage period. Joint business between husband and wife can be carried out in several forms (Asnawi, 2021): Firstly, the husband works according to his ability while the wife fully supports her husband by taking care of household affairs as well as possible. Second, each husband and wife work together to earn a living according to their respective professions, the results of which become the joint assets of the husband and wife.

From the explanation above, several conclusions can be drawn regarding joint assets, as follows: Assets acquired during marriage, it doesn't matter who is in charge, it doesn't matter in whose name the property or goods are, each party's share of joint assets is half of the total assets as long as during the marriage both parties carry out their respective obligations, the mixing of assets acquired by husband and wife during the marriage into joint assets (*syirkah* assets) can be excluded in a marriage agreement (*huwelijkevoorwaarden*), as can the separation of husband and wife's assets. Joint assets also include joint debts made by husband and wife provided that these debts are used for joint and family interests, for joint debts, repayment can be charged to the joint assets (Asnawi, 2021).

Historically, the issue of marital property and joint property in Article 97 KHI was regulated to provide legal protection for wives who do not work and participate in earning a living in the event of a divorce. Because generally at the time the KHI was passed, more wives were not working to earn a living, they were just taking care of the household, children, and husband. However, a wife's job of taking care of the household is not an easy job but a hard job and full of responsibility. For this reason, because the wife does not have a contribution in looking for property, then if a divorce occurs, the wife still gets her rights to get some of the property, because of the *syirkah* of energy and thoughts contributed to building the household. If the wife does not get a share of the assets, she will have difficulty continuing her life in the future, especially if she has several people to raise and meet their needs.

KHI adheres to the principle of equal rights and obligations of husband and wife in the household. In the context of joint property, each husband and wife contribute according to their roles, where in general the husband earns a living while the wife takes care of household interests. It is based on this equal distribution of rights and obligations that KHI determines that each ex-husband and ex-wife's share (after divorce) of joint assets is also equal, namely half share versus half share.

Regarding this part of joint assets, two general norms apply, namely: If one of the spouses dies (divorce), then the spouse who survives longer is entitled to half of the assets left behind (joint assets). This is confirmed in Article 96 KHI, where this provision is a reference in the distribution of inheritance assets where the giver leaves behind a husband or wife. Half of the assets left behind must first be issued (given) to the husband or wife who is left behind because it is part of the joint assets. The other half of the assets are *tirkah* or inheritance from the heir after all expenses and/or debts of the heir have been removed. If a divorce occurs, each widower and widow are entitled to half of the joint assets, unless otherwise specified in the marriage agreement. This provision is confirmed in Article 97 KHI. The meaning of "half share" in this article is the distribution of  $\frac{1}{2}$  and  $\frac{1}{2}$  shares in kind (divided as is) or the distribution of  $\frac{1}{2}$  and  $\frac{1}{2}$  shares of the proceeds from the sale of the joint assets (if the joint assets cannot be divided in kind) (Asnawi, 2021).

From the explanation above, it is clear that according to the provisions of the Compilation of Islamic Law, if there is a divorce between husband and wife, the joint property will be divided into two parts, half for the husband and half for the wife. So according to what is formulated in the KHI, the application of the distribution of joint property to each party getting half is an effort to unify the law so that there is harmonization of the decisions of religious court judges in deciding joint property cases. The division in the KHI of the share of joint assets in a live divorce which is divided in half, is the same as the rules contained in the Civil Code Article 128, namely that after the dissolution of joint assets, their joint assets are divided in half between husband and wife, or between their heirs, without question which party the goods came from (Kurniawan, 2017).

According to Mursyid Djawas in Abidin Nurdin, the division of joint property originally came from customs and customs in society in the archipelago before Indonesia was founded, even before the arrival of the Dutch and Japanese colonialists. So it is said that this division of joint assets is a characteristic and characteristic of Indonesian jurisprudence because it has not been found in the Middle East so far. It may be that due to differences in culture and social systems in society, women in Indonesian society also work, for example in the fields, in trade, and even as civil servants, while women in the Middle East tend not to work at home. Sheikh Arsyad al-Banjari, a cleric born in Banjarmasin, South Kalimantan, gave *ijtihad* in matters of inheritance in his book *Sabilul Muhtadin*. In this *fiqh* book, Sheikh Arsyad Banjari states that the distribution of inheritance is valid based on the custom of abstinence, namely that assets are divided in half first between husband and wife, then the results of the half are distributed to the heirs (Nurdin, 2019).

Customary rules regarding the division of joint property are then adopted into statutory regulations, namely the Marriage Law and other legal regulations. As in the Compilation of Islamic Law (KHI), 1991, it is stated that, the position of husband and wife regarding joint property after divorce; The wife's property remains the right of the wife and is fully controlled by her, likewise the husband's property remains the right of the husband and is fully controlled by him (article 86 (2) KHI). Apart from that, husband and wife have full rights to carry out legal actions regarding their respective assets in the form of grants, gifts, *sadaqah*, and others as regulated in Article 87 paragraph (2) KHI (Hasibuan, 2017).

### **Ratio Decidendi of the Panel of Judges in Determining Joint Property Cases**

The judge's decision must be accepted as a form of legal discovery (Arif Hidayat, 2019) determined based on philosophical, sociological, and juridical considerations. The judge's decision must of course accommodate the basic values of law enforcement, namely justice, usefulness, and certainty (Efendi, 2019). However, sometimes a judge's decision cannot fulfill these three basic legal values, because when a judge is oriented towards aspects of justice and usefulness, this will undermine the aspect of legal certainty.

#### **1. Analysis of the Decision of the Payakumbuh Religious Court Number 657/Pdt.G/2022/PA.Pyk**

As is the case in the Payakumbuh Religious Court Judge's Decision Number 657/Pdt.G/2022/PA.Pyk, in this decision the judge departed from the normative provisions of Articles 96 and 97 KHI. KHI wanted the joint property to be divided, each of them getting  $\frac{1}{2}$  of the requested property, but in this decision, the panel of judges determined that the Plaintiff was entitled to  $\frac{1}{4}$  (a quarter) share and the Defendant was entitled to  $\frac{3}{4}$  of the value of the joint property.

This decision was born based on the consideration that Articles 96 and 97 KHI are not imperative but facultative so that to fulfill a sense of justice, the distribution of joint assets is determined based on portions and proportionally based on portions. In addition, the decision of the judge at the Payakumbuh Religious Court was based on the Jurisprudence of the Supreme Court of the Republic of Indonesia Number 266K/AG/ 2010 based on the evidence and facts at trial it turned out that the husband did not provide a living from the results of his work and the wife obtained all joint assets from the results of her work. ", then for the sake of justice it is appropriate for the Plaintiff to receive joint assets in the amount that has been determined."

Then the determination of the division of joint assets in Article 24 Paragraph (2) letter c Government Regulation Number 9 of 1975 in conjunction with Article 78 letter c of Law Number 50 of 2009 is only limited to divorce, so its scope is too narrow. So within the authority based on Articles 5 and 10 of Law Number 48 of 2009 concerning the Principles of Judicial Power, judges have the freedom to make legal discoveries to achieve aspects of justice. So in extensive *a quo* cases, you can also be guided by Articles 823 to Article 830 of the Reglement of *Rechtsvordering* (Rv). Due to paying attention to the principle of process *doelmatigheid* (interest in proceedings) or the principle of process order (orderliness of proceedings) so that confiscation of joint assets can be carried out comprehensively, the Panel of Judges agreed to remain guided by the Rv.

KHI the burden of domestic responsibility is given to the wife while the husband bears the burden of living and household costs including children's education costs. This arrangement recognizes that contributions to the domestic sector are the same as those in the public sector. The implications of balanced

obligations imposed on husband and wife affect the amount of joint property distribution when they separate. In the facts of the trial, the Plaintiff/husband did not have a permanent job and his income was uncertain so he was limited to supporting his wife and children every month. If it is related to the quo case, the husband or Plaintiff cannot prove that there was a dominant contribution in carrying out the husband's obligations during the domestic relationship with the Defendant, both in terms of living, household costs, and children's education costs.

Based on documentary evidence and statements from witnesses, Plaintiff was unable to prove the Plaintiff's financial capability which had a dominant contribution in purchasing the disputed object, be it a plot of land and a house on it or a four-wheeled vehicle. In the trial facts, it was proven that the husband or Plaintiff was not proven to have made a dominant contribution to the purchase of the two objects of joint property above. However, it was proven that the funds for the purchase of the two objects of joint property came from the Defendant's money which came from a gift from his parents.

Furthermore, after reading the decision in this case, it turned out that there was a difference of opinion or Dissenting Opinion from one of the member judges who heard this case. The difference of opinion is in determining the object of the dispute as joint property. According to Judge RH, the Plaintiff's joint property claim against all objects of the dispute must be declared unproven and must be rejected.

This was based on the facts at trial that Plaintiff stated that the two objects of the case in the form of property, including land, a house, and a car, were obtained from Plaintiff's search as a seller of used motorbikes. However, this has been denied by the Defendant because according to him the land and house are the Defendant's personal property because they were purchased with the Defendant's mother's money. Likewise, the car is the Defendant's personal property which was purchased with the proceeds from the sale of the Defendant's car. Meanwhile, Plaintiff cannot afford all of this because he does not have a clear job and only earns IDR 1,500,000 per month to meet the family's needs. This objection cannot be rejected by the Plaintiff, because the Plaintiff cannot prove it with all the evidence presented at trial. After all, the evidence does not support the Plaintiff's argument so it must be declared not proven.

Thus, from the answers above, is it appropriate to state that the object of the dispute is joint property? According to Article 35 paragraph (1), property acquired during marriage becomes joint property. Then, in Article 1 of the Compilation of Islamic Law, it is explained that marital assets or *syirkah* are assets acquired either individually or jointly by husband and wife during the marriage, hereinafter referred to as joint assets, regardless of whether they are registered in anyone's name. The formation of joint assets in marriage is a form of *syirkah abdan mufawwadlah* that joint assets are formed from the contributions of husband and wife by their respective duties and roles.

If we analyze Article 35 paragraph (1) of the Marriage Law and Article 1 of the KHI, it is clear that assets in the form of land and houses on it are gifts or gifts from the Defendant's parents, even though these gifts were given during the marriage, they cannot be said to be joint assets because they are not from the husband's income. nor wife. Assets in the form of cars are not joint assets but assets inherited from the wife which are then replaced during the marriage with money earned by the wife. With these facts, it can be said that the two assets that are the object of the case are not joint.

## 2. Supreme Court Decision Number 605K/Ag/2019

Supreme Court Decision Number 606K/Ag/2019 determines the division of joint assets between the plaintiff and the defendant each getting 2/5 (two-fifths) and the defendant getting 3/5 (three-fifths) of the joint assets. This decision also does not refer to the provisions of Articles 96 and 97 of the KHI, and the Supreme Court determined the decision based on the request for a cassation memory and counter-cassation memory and its relevance to considerations of *judex facti*/Banjar Masin High Religious Court. Where *judex facti* establishes a law that is not justified because. Then the Supreme Court also considered the plaintiff's ability to prove that some of the objects sued in the quo case were joint assets between the Plaintiff and the Defendant which had never been divided after the divorce. Further considerations are based on absolute competence in the field of marriage by Article 89 Paragraph (1) of Law Number 50 of



2009 concerning Religious Courts and taking into account Law Number 48 of 2009 concerning Judicial Power (Asnawi, 2021).

### 3. Banjarmasin High Religious Court Decision Number 38/Pdt.G/2019/PTA.Bjm

In this decision, the Panel of Judges determined that the Plaintiff and Defendant were entitled to joint property with the details that the Plaintiff received 2/5 of the share (40%) and the Defendant received 3/5 of the share (60%). The decision of the Banjar Masin PTA is also not by the provisions of Articles 96 and 97 KHI which each should receive 1/2 (50%) of the joint assets. Without changing the meaning contained in the provisions of Article 97 of the KHI, the defendant must also be considered as a wife who not only takes care of herself but also has responsibilities that should be carried out by the Plaintiff, namely providing support/living costs for her children. Therefore, the provisions for the distribution of joint assets as stipulated in Article 97 of the KHI are deemed not to fulfill the sense of justice as implied by Article 2 of the Supreme Court Circular Number 3 of 2017 which determines that judges in adjudicating women's cases in conflict with the law are based on respect for human dignity, non-discrimination and based on justice (Asnawi, 2021).

#### Progressive Law as an Effort to Reform Laws in the Field of Joint Property

The concept of progressive law looks for more significant means to overcome legal obstacles, such as quicker changes, fundamental reversals, liberations, breakthroughs, etc. The focus on "law for people and not the other way around, people for the law" characterizes these approaches. carried out "lawfully holistically, not skeletally" and "lawfully, not artificially." Legal procedures are progressive. This is a substitute and a way to ensure just law enforcement in the community (Al Arif, 2019). In this way, it is no longer positive "law as a tool of social engineering" that is happening, but has led to "dark engineering (Efendi, 2020)"

Progressive law seeks to establish substantive justice and break through the rigidity of legalism. Progressive law strives for justice to be applied even though it has to put aside aspects of legal certainty as is the will of the positivist school of thought. Currently, judges are not mouthpieces for the law, because judges are the spearhead of fulfilling justice for justice seekers. Judges can make legal discoveries through progressive legal theory, apart from the justice aspect of progressive law, it can also provide benefits for Justice Bellen. This progressive law has been widely applied by the panel of judges in various decisions in the field of criminal law, for example, the revocation of political rights in cases of criminal acts of corruption (Efendi et al., 2023).

Apart from criminal cases, the application of progressive law is also found in the field of civil law as in the case examples in the three court decisions above. In decision Number 657/Pdt.G/2022/PA.Pyk, can analyze the application of progressive law, namely the judge's courage to divide the joint assets. Plaintiff is entitled to 1/4 (a quarter) share and Defendant is entitled to 3/4 of the value of the joint assets. Based on the facts of the trial the judge placed a progressive legal position by overriding the provisions of Articles 96 and 97 KHI, thus this decision fulfills the aspects of justice, benefit, and non-discrimination against women as part of the domestic sector who need protection.

Furthermore, in the decision of the Supreme Court Number 606K/Ag/2019 and the Banjarmasin High Religious Court Number 38/Pdt.G/2019/PTA.Bjm, they also both denied the normative provisions in the distribution of joint assets. Both the Supreme Court decision and the decision of the Banjarmasin High Religious Court place progressive law as legitimacy to provide justice to the parties. The implementation of progressive law is certainly not just a judge's wish without being accompanied by regulations as a reference. Article 18B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia confirms that "Constitutional Judges and Justices in making decisions are obliged to explore the values that grow in society". This means that judges in deciding cases must not only refer to written law but also explore local wisdom values in society. So the three judge's decisions above have fulfilled the provisions of the 1945 Constitution as a grand norm or constitutional basis for upholding law and justice.

Furthermore, progressive law is also applied based on Articles 5 and 10 of Law Number 48 of 2009 concerning the Principles of Judicial Power that judges as State officials are given the authority to carry out legal discoveries and legal interpretations as long as they provide justice for justices. Thus, the existence of progressive law opens up opportunities for legal development using legal discovery for legal reform in the field of civil law, especially the division of joint property. That joint assets do not have to be divided into portions that each person gets 50% or  $\frac{1}{2}$  of the joint assets, because the nature of KHI is facultative, not imperative.

## Conclusion

The distribution of joint assets has been explicitly stipulated in Articles 96 and 97 of the Compilation of Islamic Law which stipulate that each person gets  $\frac{1}{2}$  of the joint assets. However, philosophically and sociologically, these provisions cannot provide aspects of justice and benefit to the justice bellen. Philosophically, joint assets are divided based on the portion and position of the parties in the domestic sector of the household, so dividing  $\frac{1}{2}$  of joint assets does not provide justice, in addition, the aspect of usefulness cannot be fulfilled if the judge's decision is only guided by KHI regulations. So setting aside KHI to achieve justice is permissible as per the 3 (three) judges' decisions, where each judge's decision was able to break away from the rigidity of legalism and decide based on progressive legal teachings. Progressive law seeks to provide a breakthrough in achieving justice and benefits for justice seekers. As a rule of law, this progressive law has a positive impact on legal reform, especially in the field of Indonesian Islamic civil law in the field of sharing joint property.

## Conflict of Interest

There are no conflicts of interest to declare.

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