



Formulation of provisions of joint assets of husband and wife in the Indonesian legal system

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Abstract

The purpose of research and writing this article is to know the basis for the accommodation of joint assets in the Law Number 1 of 1974 on Marriage and the suitability of the provisions of joint assets regulated by laws and regulations with the Qur'an and hadith as well as the rules of argument in Islam. This research uses normative legal research or library research type, study the object of legal research in the form of legal principles, legal rules in terms of values, and laws and regulations. The main legal material is in the form of rules called secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials. The results showed the assets brought by the husband into the household did not necessarily become joint assets. Many hadiths show that Islam stipulates the concept of separation of assets of between husband and wife. The application of the concept of joint assets that applies in the society can overhaul some of the provisions that have been clearly regulated in Islam regarding the distribution of inheritance. Efforts to *ijtihad* the concept of joint assets so that it can be affirmed Indonesian *fiqh* need to be revisited. It is recommended to review the concept or arrangement of joint assets in the Indonesian legal system that is applied to the muslim society. Harmonization between Islamic law and customary law regarding joint assets can be done without clashing it with the arguments of the shari'a. Husband and wife can still have joint assets in the household, namely combined assets from the results of the two of them.

Keywords: joint assets, the Qur'an and hadith, the rules of argument, Indonesian legal system

Introduction

In Islamic teachings, marriage has many lessons. One of them is to regulate the relationship between a man and a woman based on the principle of exchanging rights and working together productively in an atmosphere of love and mutual respect for one another ^[1].

In marriage there are a number of rights and obligations between husband and wife reciprocally. Everything has been determined by the shari'a. The relationship between husband and wife must stand on the principle of justice, mutual bear, defend and love each other. It is illegal to deviate from these provisions ^[2]. One aspect of the relationship that exists in a marriage is joint assets. According to the Big Indonesian Dictionary, joint assets is property that has been collected during marriage so that it becomes the right of both husband and wife ^[3].

The Islamic marriage legal system as a very dominant legal domain for the Indonesian people, in principle does not recognize the existence of joint assets. Therefore, in the classical *fiqh* literature there is no provision regarding it.

We have seen that there is no verse in the Qur'an and hadith that talks about joint assets in the household. Likewise, when we look at *fiqh* books, especially marriage *fiqh*, which have been compiled by previous scholars, no one has discussed this issue. The problems of property in marriage that are known and have been discussed at length are the two things we have discussed previously, namely the husband's obligation to provide dowry and maintenance to his wife. The issue of joint assets has only emerged recently in some parts of the Islamic world after Western colonialism, while in other parts of the Islamic world it remains unknown and does not apply ^[4].

The absence of that regulation, for some Islamic jurists in recent times is considered a problematic thing so that it must be found. That is, through various sources of argument and existing *fiqh* rules, provisions regarding joint property can be determined.

There are several views expressed. First, joint assets are an integral part of the marriage contract. This opinion says that if the marriage contract is carried out, joint assets automatically occurs. This opinion is centered on the marriage contract which is a *mitsaqan ghaliza*, a strong, strong bond, which uses Allah's words to justify what was originally forbidden. This strong agreement does not only have an impact on the legality of the husband and wife relationship, but on all aspects of life, including the property obtained during the marriage bond.

Second, joint assets are realized through *syirkah*. This second opinion says that basically the mixing of assets due to marriage, the husband's property remains the property of the husband and the wife's property remains the property of the wife. The marriage contract does not cause an increase or decrease in assets by making the husband's property the wife's property or the wife's property into the husband's property because for each there is a share according to his business. However, the property of husband and wife can be united through the agreement of the two.

Third, the treasure of joint assets is realized through *'urf* or tradition. The third opinion is in principle in line with the second opinion, which views the ownership of husband and wife as separate from one another. This third opinion also recognizes that husband and wife can unite their assets through *syirkah* and marriage agreements. However, this opinion goes further by trying to find a way to apply the concept of joint property through *'urf* or a tradition that is recognized by some scholars as one of the legitimate sources of law in Islam other than the Qur'an, sunnah, *ijma'* and qiyas^[5].

The Indonesian marriage law system explicitly accommodates the provision of joint assets in marriage. Article 119 of the Civil Code (KUHPperdata) states that, "Since the time of the marriage, according to the law there is joint assets between husband and wife, as long as there are no other provisions in the marriage agreement. The joint assets, as long as the marriage is ongoing, may not be abolished or changed with an agreement between husband and wife. As for Article 35 paragraph (1) of Law Number 1 of 1974 concerning Marriage, it states, "Wealth acquired during marriage becomes joint assets." It was later emphasized by article 36 paragraph (1) that, "Regarding joint assets, husband or wife can act with the consent of both parties."

The Islamic Law Compilation itself has taken a compromising approach to the provisions of joint assets in the customary law system. In this case, the basis for the accommodation of shared assets in the Islamic Law Compilation includes the *fiqh* rule *al-'aadatu muhakkamah*^[6]. Through this rule, customs, which in this case are provisions regarding joint assets, are considered to be able or necessary to be accommodated as part of sharia law.

In the discourse on marriage law in Indonesia, one of the sources of argument used to accommodate the provisions of joint assets in Islamic marriage law is the qiyas (analogy) methodology. In connection with that, marriages that occur between husband and wife are for example the concept of *syirkah* which is the basis of Islamic law on capital unions in business or joint ventures^[7].

The question that can arise then is, is the application of the rules of *fiqh* and qiyas in accommodating the provisions of joint assets legally valid (so they are accommodated in The Islamic Law Compilation)? In the case of the application of the *al-'aadatu muhakkamah* rule, for instance, have the conditions been met so that the accommodation can be considered valid under the sharia assumptions? One of the important requirements in implementing this application is that a stipulation must not conflict with the limits that have been determined through the texts of the Qur'an and hadith. Likewise in the case of qiyas, does the accommodation fulfill the pillars of qiyas and the conditions of *illat* (something that is the cause of the law)?

Research Methods

This research uses normative legal research. Meanwhile, this research uses several approaches. The approaches taken are the statutory approach, the historical approach, and the comparative approach. Legal materials for normative legal research come from secondary data or library data (library research). In other words, the main legal material in the form of a rule called secondary data consists of primary legal material, secondary legal material, and tertiary legal material.

Discussion and Analysis of results

A. The arguments from the Qur'an and hadith relating to the provisions of joint assets

The discussion of joint assets—as in the concept that applies in society and the rule of law—is not explicitly contained in the Qur'an or hadith, nor is it found in classical *fiqh* reference books, especially from the four schools of thought. It shows that this question is indeed a completely new matter that comes from the cultural elements of the society where Islam is intertwined, which in this case is the people of the Archipelago, such as Java, Minang, Aceh, and so on. This is as stated by Ratno Lucito in the following footnote of his book.

These regulations show the efforts made by the exponents of Islamic law in Indonesia to accommodate Islamic law with customary law. Since most books on *fiqh* do not explain the institution of joint property in marriage, which is an institution that has long been entrenched and lives in the local community, the ulama felt obliged to incorporate this community institution into the Islamic legal system. The compromising stance taken by these exponents of Islamic law towards customary law is driven by the fact that, in the reality of everyday life, Indonesians do not stop practicing rules derived from adat^[8].

Nevertheless, there are arguments, both from the Qur'an and hadiths that relate directly to the concept of joint assets. From these arguments, it can actually be seen how the compatibility between the concept of joint assets and the principles of sharia governing property ownership and its relationship with the concept of marriage and other related laws, such as inheritance law in Islam can be seen.

The Islamic concept of the allocation of assets in the household

There are many hadiths that clearly explain that a wife is indeed given a role to take care of property in the household. However, she does not simply have ownership of the property under his stewardship. That is, the property brought by the husband into the household does not necessarily become joint property (belongs to husband and wife). Because, if the wife has the same ownership rights to the property, the wife does not need to ask permission from her husband when she wants to give alms with the property, as the hadiths above require that except for alms in the form of food.

From the assets under his management, his wife and children are entitled to a sufficient and proper living allowance. In fact, when the husband rations an unworthy portion, a wife may take (without the husband's knowledge) for the needs of her and the children.

Therefore, it can be concluded that Islam does not regulate joint property because Islam has emphasized the concept of separation of property between husband and wife in the household. The Islamic Law Compilation itself actually—on the consciousness of its formulator—also stipulates an article that is in accordance with the concept of separation of assets, namely Article 85 paragraph (1) and paragraph (2). However, the influence of the Law Number 1 of 1974 on Marriage which firmly stipulates the concept of joint property, makes The Islamic Law Compilation also follow the flow of the concept of joint property—in article 85—so that, on the one hand, The Islamic Law Compilation stipulates, on the other hand, it seems to be fun.

Provisions for the inheritance of a wife

If only the property is joint assets, when the husband dies, the wife gets all the property left behind or half of the property. However, this rule has never existed in the Qur'an, in the hadiths, the opinions of the companions, and the *fiqh* books of the previous scholars. In fact, the issue of inheritance is one of the issues that are so important and quite detailed in the Islamic Sharia so that the main things (related to the rights of the heirs) have all been determined and discussed by the scholars. Today's practice—especially in muslim societies that adhere to the concept of joint assets—when a husband dies, generally the property is immediately divided in half, half to the wife and half to the heirs (here the wife gets another share). This model of division clearly affects the rights of the other heirs.

It is clear that the current practice of applying the concept of joint assets has overhauled some of the provisions that have been clearly defined in Islam regarding the distribution of inheritance. This concept, in reality, has reduced the rights of many heirs, even though their rights have been specified in detail in the sharia.

B. Joint Assets and the rules of arguments in Islam

The arguments from the Qur'an and the hadiths are actually very clear to position the position of the concept of joint assets in Islam. That is, when the arguments from the Qur'an and hadith have provided a clear understanding, *ijtihad* (regarding the concept of joint assets) is no longer needed.

The Companions, who were direct disciples of the Prophet, were very careful to enter the door of *ijtihad*. Among other things, this can be understood from Umar bin Khattab's reply when Qadhi Shurayh, the Qadhi in Kufa at that time, sent a letter to ask him about a problem. Umar replied,

"Decide the matter with the Book of Allah, if it is not in the Book of Allah, then decide with the sunnah of the Messenger of Allah, if it is not in the Book of Allah and His Messenger, then decide with the decisions that have been used by the pious people in the past. If the problem is still not found in the three types of references, then it is up to you whether you want to decide it immediately with your *ijtihad*, or you want to postpone it. And I think it's better if you defer." ^[9].

Umar's answer shows that, firstly, *ijtihad* can only be done when there is no evidence or *ijma`* or practice of the *salafus shalih* (the companions of the prophet) that can be referred to. Second, it takes caution and deep consideration to enter the door of *ijtihad*.

The *ushul* scholars have indeed set limits for *ijtihad*. It is not permissible to do *ijtihad* in matters where there are clear texts. That is, if the issue for which the law is to be known has been shown by a valid argument and a clear meaning, there is no longer any chance for *ijtihad* ^[10].

Therefore, in this case, the accommodation of the concept of joint assets on the grounds of "Indonesian *fiqh* *ijtihad*", according to the author, is unacceptable. *Ijtihad* to accommodate the concept of joint assets originating from customary law, is often put forward with argumentation instruments such as *al-maslahah mursalah* or with the *fiqh* rules of *al-`aadatu muhakkamah*. In fact, the scholars have set an important limitation for the two models of argumentation, namely that there should be no conflict with the arguments from the Qur'an or hadith or consensus (especially the consensus of the companions of the apostle) ^[9].

In using *maslahah mursalah* as evidence, scholars are very careful so as not to result in the formation of sharia, based on hidden passions and interests. Based on this, the scholars compiled the conditions for *maslahah mursalah* which were used as the basis for the formation of law. There are three kinds of conditions. First, must really produce *maslahah* or not based on making up. The point is to realize the formation of laws regarding problems or events that give birth to benefits and rejects harm. If the *maslahah* is based on suspicion, or the formation of the law brings benefits without considering whether the benefit can be born due to the formation of the law or not, it means that the benefit is only taken based on suspicion. For example, it is *maslahah* in terms of

depriving the husband of the right to divorce his wife, then the right of divorce is used as the *Qadhi's* right in all circumstances.

Then, *maslahah* is general, not individual. The point is, that in relation to the formation of law on an event or problem, it can produce benefits for most of humanity which can actually be realized or can reject harm, or not only bring benefits to one or a few people. Therefore, the law cannot be prescribed because it only produces special benefits for the leadership or certain people by not paying attention to the benefit of the people. In other words, the benefit must provide benefits for all people. The last, the formation of law by taking advantage of this is not contrary to the legal system or the basic provisions of texts and *ijma*. Therefore, the demand for the benefit of equalizing sons and daughters in terms of the distribution of inheritance is a benefit that cannot be justified. Because such benefits are null and void ^[11].

Thus, the effort to *ijtihad* about the concept of joint property so that it can be affirmed in Islamic jurisprudence, in a state that Shari'a itself has established the concept of separation of property between husband and wife, is quite necessary to be reviewed. Moreover, in practice, in the context of the distribution of inheritance, the application of the concept of joint property results in a reduction in the rights of certain parties, which in fact the sharia has given a clear portion to them.

Conclusions

There are many hadiths that explain that a wife is given a role to take care of assets in the household. However, it does not simply have ownership rights over the assets under its stewardship. That is, the assets brought by the husband into the household does not necessarily become joint assets (belongs to husband and wife). These hadiths show that Islam stipulates the concept of separation of assets between husband and wife in the household. The application of the concept of joint assets that applies in our society can overhaul some of the provisions that have been clearly determined in Islam regarding the distribution of inheritance. In reality, this concept has stripped away the rights of many heirs, even though their rights have been specified in detail in the sharia. Efforts to *ijtihad* about the concept of joint assets so that it can be confirmed in Islamic jurisprudence in Indonesia, under the circumstances of the shari'a itself has established the concept of separation of assets between husband and wife based on the arguments from the Qur'an and hadith, it is quite necessary to review it.

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