

## JOINT PROPERTY AFTER DIVORCE IN POLYGAMOUS MARRIAGE: Comparative Research in Indonesia and Malaysia

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**Abstract:** This research analyzes the concept and law formulation of the joint property after divorce in an Indonesian and Malaysian polygamous marriage. The problem that often arises is when the first, second, third, and fourth wives live under the support of the husband. However, issues with dividing up the joint property are likely to arise when one of the women decides to get a divorce. This research uses a normative juridical approach to achieve the research aims by collecting secondary, primary, and tertiary legal materials. The concept of marriage in Indonesia is regulated based on article 35, paragraph 1, Indonesia Law Number 16 of 1974, marriage law number 16 of 2019, and instruction of President number 1 of 1991. In Malaysia, this concept is regulated based on the Islamic Family Law Enactment, section 122:2, and the *Fatwa* authority of the National Council for Malaysian Islamic Religious Affairs (MKI). Furthermore, the regulation of joint property in Indonesia is regulated in article 94 of the Islamic Law Compilation and Malaysia in MKI 2003, section 122:2. In these regulations, the two countries have similarities in regulating joint property after divorce, as sourced from Al-Qur'an and Hadith. However, some deficiencies should be corrected to reinforce and explain legal certainty.

**Keywords:** Divorce, Joint Property, Marriage, Polygamy, Indonesia and Malaysia

**Abstrak:** Penelitian ini menganalisis konsep dan rumusan hukum tentang harta bersama setelah perceraian dalam perkawinan poligami Indonesia dan Malaysia. Masalah yang sering muncul adalah ketika istri pertama, kedua, ketiga, dan keempat hidup di bawah tanggungan suami. Namun, masalah pembagian harta bersama kemungkinan besar akan muncul ketika salah satu wanita memutuskan untuk bercerai. Penelitian ini menggunakan pendekatan yuridis normatif untuk mencapai tujuan penelitian dengan mengumpulkan bahan hukum sekunder, primer, dan tersier. Konsep perkawinan di Indonesia diatur berdasarkan pasal 35

ayat 1 Undang-Undang Nomor 16 Tahun 1974, Undang-Undang Perkawinan Nomor 16 Tahun 1999, dan Instruksi Presiden Nomor 1 Tahun 1991. Di Malaysia, konsep ini diatur berdasarkan syariat Islam. Pemberlakuan Hukum Keluarga, pasal 122:2, dan otoritas Fatwa Dewan Nasional Urusan Agama Islam Malaysia (MKI). Selanjutnya pengaturan harta bersama di Indonesia diatur dalam pasal 94 Kompilasi Hukum Islam dan Malaysia dalam MKI 2003 pasal 122:2. Dalam peraturan tersebut, kedua negara memiliki kesamaan dalam mengatur harta bersama setelah perceraian, yang bersumber dari Al-Qur'an dan Hadits. Namun, beberapa kekurangan harus diperbaiki untuk memperkuat dan menjelaskan kepastian hukum.

**Kata Kunci:** Perceraian, Harta Bersama, Perkawinan, Poligami, Indonesia dan Malaysia

## Introduction

Marriage is a physical and spiritual bond between a man and a woman as husband and wife to form a happy and eternal family built by love and mutual understanding. It is considered legal based on religious regulation and belief.<sup>1</sup> Husband and wife have roles and responsibilities, including primary and secondary economic needs. Secondary conditions collected during the marriage can become the joint property according to religious and state law.<sup>2</sup> The determination of common assets aims to create a sense of justice, protect the rights of husband and wife and avoid discrimination during marriage and after a divorce. However, this joint property often creates polemics when divorce occurs. Women are usually disadvantaged because they are seen as not having an essential role in building the family economy. This issue has been regulated by law and can be resolved through a judicial process when assets are divided. The issue in polygamous marriages, where a man has

more than one wife, is how the couple's shared property is divided.

State and religious regulations have regulated the rights of husbands and wives after a divorce. However, these regulations have to crystallize into the issue of determining the number of assets acquired by the first, second, third, and fourth wives. From a juridical and normative point of view or *das sollen* and *das sein*, the implementation of joint property distribution is not effective by the regulated rules of Indonesia and Malaysia. Many factors influence why the measure of effectiveness in implementing the distribution of joint assets after the divorce is inadequate.

One of the influencing factors is religious injunction concerning the husband's obligation to provide for the wife during the marriage. The assets collected within this period will become joint property for the entire household. This property will be shared jointly by the wives identified as *syirkah*<sup>3</sup> and *mufawwadhah* in Islam.

<sup>1</sup> Victor Situmorang, "The Position Of Women In The Eyes Of The Law, Jakarta 1988 Literacy Development," 1988.

<sup>2</sup> Afifah Amalia Hadi, "Maqasid Sharia Analysis Of Decisions Of The Blitar Religious Court Judges Concerning Determination Of Collective Assets In A Polygamy License Case," *Iain Ponorogo* 1, No. July 2020 (2020): 5-6.

<sup>3</sup> There are four types of *syirkah*, i.e., a. *syirkah 'inan*, i.e., the union of two people in a number of their property for trading capital and the profits are shared between the two of them. b. *syirkah mufawadhah*, namely a partnership or *syirkah* of two or more people who enter into a contract to share in a work provided that both of them put in the same capital and both parties are equally responsible for the other party's obligations relating to buy-

Another problem is the absence of verses that detail the number of shared assets between husband and wife. The Qur'an only emphasizes that a husband may not take away the rights of a wife who has been released, as explained in Surah al-Nisa' verses 20:

"When you desire to replace a wife with another and you have given the former 'even' a stack of gold 'as a dowry', do not take any of it back. Would you 'still' take it unjustly and very sinfully?"

Al-Qur'an also explains how to share their property and avoid envy between husband and wife in surah al-Nisa verse 32:

"Do not crave what Allah has given some of you over others. Men will be rewarded according to their deeds, and women 'equally' according to theirs. Instead, ask Allah for His bounties, and surely Allah has 'perfect' knowledge of all things."<sup>4</sup>

In the laws and regulations in Malaysia, joint property refers to assets accumulated throughout the marriage. Sharing joint assets according to the Family Law in Malaysia has been recognized after being enacted with special provisions. According to the conditions determined by Sharia Law, these properties are acquired jointly by husband and wife during marriage."<sup>5</sup>

The Department of Shariah Justice Malay-

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ing and selling or in other words in other words, each party has the same rights and obligations. c. *syirkah wujuh*, namely the partnership of two people without a capital to buy something in debt with the guarantee of their position, then they sell the goods in cash and the profits they get are divided according to the conditions they have determined, as well as borne losses in accordance with the guarantee of each party. d. *Syirkah Abdan*, namely the union of two people to accept a job they do together, such as sewing, blacksmithing, washing and others.

<sup>4</sup> "Q.S. Surat An-Nisa' (4) Ayat: 32," n.d.

<sup>5</sup> Najibah Mohd Zin, "The Family (Islamic) Law A Series of Legal Developments in Malaysia, Selangor: Dawama Sdn," 2007.

sia (JKSM) has also issued Practice Instruction No. 5 of 2003 concerning the time allowed to make joint property claims.<sup>6</sup> However, the lack of specific and clear provisions related to claims after death in the State Islamic Family Law Enactment has caused the emergence of various interpretations.<sup>7</sup> The Committee of the National Council for Islamic Religious Affairs of Malaysia (MKI) explained marital property in its fatwa as follows:

1. The marital property after the death of one of the parties in the state of Selangor can be divided before the *faraidh*, including after the deceased's dependents are released.
2. The division of marital property should be given according to the extent of direct/indirect contribution from both parties.
3. Agreement on division should be made through a court order.<sup>8</sup>

Based on the cases decided by the judge from 2015 to 2019, various aspects and the basis of determination have been taken and emphasized in deciding the extent of the division of marital property. Most cases involve divorce between husband and wife caused by the death of one of the parties. The criterion for deciding how much to divide shared property is unique to this scenario. Unless otherwise stated in the marriage contract, a widow or widower who has recently been divorced is entitled to an equal share of the marital properties. This can be accepted when the husband and wife earn a living, and the income is the same. However, when the wife has a greater income, the Sharia

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<sup>6</sup> The Malaysian Sharia Justice Department (JKSM) has issued Practice Instruction No. 5 of 2003.

<sup>7</sup> Ahmad Nizam Abbas, "The Islamic Legal System in Singapore," *Pacific Rim Law & Policy Journal* 21, no. 1 (2010): 164-87.

<sup>8</sup> Fatwa of the Office of the Authority of the Fatwa of the National Majlis for Malaysian Islamic Religious Matters (MKI).

Court may be visited to decide the case fairly.

The task of the Sharia Court to resolve cases of shared assets according to the Enactment of the Islamic Family Law Section 122 of 2002 is to examine, decide and settle cases at the first level, including in matters of dividing assets according to Islamic law. Considering that the division is based on the *ijtihad* of the judges of the Sharia Court in Malaysia, it is necessary to determine the effectiveness of the regulation in resolving joint-property disputes.

## Method

This research uses qualitative methods to explain the phenomena to uncover social aspects.<sup>9</sup> It describes and identifies important factors related to the research and its impacts.<sup>10</sup> This research focuses on studies related to collective property after divorce in a polygamous marriage. Comparative research was conducted by finding research models through literature, observation, and in-depth analysis of polygamous marriage.

The data collection technique began with literature excavation and interviews, then identified several report documents, journalism, and various documents related to research.<sup>11</sup>

## Result and Discussion

### *The Concept of Joint Property After Divorce in Polygamous Marriages in Indonesia and Malaysia*

The concept of joint property, acquired during a polygamous marriage, can be detrimental to the other wife because assets shared are from the hard work of one of the wives who has contributed to obtaining the property. This issue is different when the distribution is seen from the assets acquired by the husband. The concept can have a value of justice compared to the combination of assets acquired during the marriage.

Since the joint property is not found in the Al-Quran and Hadith texts, *qiyas* can be made with existing *fiqh* concepts, namely the *syirkah* or partnership.<sup>12</sup> The Qur'an does not stipulate the concept of joint property between husband and wife. However, in classical *fiqh*, it is possible to have *syirkah* on the assets of husband and wife, involving the combination of assets known in trade books. The term *harta gono gini* (joint property) can only be found in Indonesia and Malaysia through positive law. In contrast, it is not in classical *fiqh*, or other Islamic countries such as Saudi Arabia, Yamen, Kuwait, and Afghanistan. Other Islamic countries use the concept in *nash* and classical *fiqh*, which include the separation of marital property between husband and wife.<sup>13</sup>

From the provisions above, an explanation can be obtained that the formation of joint assets is from the marriage date to the divorce. At the time of marriage, there was a unity of assets acquired individually or together. The concept of equal division, as

<sup>9</sup> Alison B. Hamilton and Erin P. Finley, "Qualitative Methods in Implementation Research: An Introduction," *Psychiatry Research* 280 (2019): 112516, <https://doi.org/10.1016/j.psychres.2019.112516>.

<sup>10</sup> Kristi Jackson and Patricia Bazeley, *Qualitative Data Analysis with NVIVO*, *Journal of Education for Teaching*, 2nd ed. (SAGE Publications, 2014), <https://doi.org/10.1080/02607476.2013.866724>.

<sup>11</sup> Omotayo Olubiyi et al., "A Qualitative Case Study of Employee Turnover in Retail Business," *Heliyon* 5, no. 6 (2019): e01796, <https://doi.org/10.1016/j.heliyon.2019.e01796>.

<sup>12</sup> Robi'atul Adawiyah, *Islamic Family Law Reform and Its Implications for Women's Rights in Indonesian and Malaysian Marriage Law*, Cirebon, 2019.

<sup>13</sup> Salsabila Firdausia, "Hadhanah in the Concept of Compilation of Islamic Law and Law," *Nurani: Jurnal Kajian Syari'ah Dan Masyarakat* 20, no. 2 (2020): 317-22, <https://doi.org/10.19109/nurani.v20i2.4849>.

stipulated in Law Number 16 of 2019 concerning marriage and the Compilation of Islamic Law, is not a *qath'i* provision in sharia, hence, changes are accepted. Article 97 of the Compilation of Islamic Law states that a divorced widow or widower has the right to half of the joint property as long as it is not otherwise specified in the marriage agreement.<sup>14</sup>

The research of joint property in Islamic law is inseparable from discussing the concept of *syirkah* in marriage. Many *Ulama* argues that joint property is included in the idea of *syirkah*.<sup>15</sup> In the classical *Fiqh* books, it is defined as the wealth that comes from husband and wife following the bond of marriage, and is generated in the *syirkah* (share).<sup>16</sup> This is understandable because the wife's position in the Compilation of Islamic Law is equal to the position of the husband in household (Article 79, paragraph 2). Therefore, the amount of joint property ownership is also equal.

Concerning the distribution of joint assets, a judge, in adjudicating and examining cases, should be able to consider juridical, philosophical, and sociological aspects to achieve justice based on legal, moral, and social justice.<sup>17</sup> To distribute joint property, *syirkah*

*abdan* becomes an important guide provided justice is reflected. Other types of *syirkah* can also be implemented to be a guide to distribute joint property, such as *Syirkah Milk*, which include a partnership between two or more people without any *aqad* or agreement, and *syirkah 'uqud*.

The problem of joint property is an *ijti-hadiyah* that Islamic law scholars have not discussed. Therefore, *ijtihad* is needed to explore the law regarding joint property based on the al-Qur'an.

*Syirkah* between husband and wife can also occur, and the method is only specific to joint assets or *syirkah* through business. In reality, husband and wife are expected to be united in finding life and making a living. The division of labor that causes a person to move forward also depends a lot on the excellent distribution of work.

From the description above, a conclusion can be drawn that the issue of shared assets is not regulated implicitly between husband and wife belonging to *syirkah abdan* and *syirkah mufawadah*. The arrangement regarding sharing is permissible as long as it reflects justice. Yusuf Qardhawi argues that individual or collective rights should be respected and not abused following the teaching of Islam. In the *syirkah* contract, both parties have fulfilled their achievements. However, when an unlawful act resulting in a loss to the joint venture is committed, the other party cannot be burdened to share in the loss. This is what is meant by the requirement of a causal relationship between the debtor's errors and the creditor's losses, common to contract law and sharia agreements. Furthermore, the debtor cannot be burdened with compensation when the loss suffered by the creditor is not caused by the fault of the debtor. The debtor cannot be burdened with compensation when the loss

<sup>14</sup> Article 97 Compilation of Islamic Law

<sup>15</sup> The word *syirkah* (شركة) (in Arabic comes from the word (شرك) *fi'il madhi*), (يشرك) *fi'il mudhari*), (شركة) *mashdar*), means to be an ally or union. In language, the meaning of *syirkah* is (ikhtilat) the mixing of one asset with another so that the two cannot be distinguished anymore. See Wahbah az-Zuhaili, *Islamic Fiqh Wa Adillatuhu*, Volume 5, Cet. I, Jakarta: Human Echo, 2011, page 441.

<sup>16</sup> Selfianus Laritmas, I Gede Yusa, and Ahmad Rosidi, "The Use Of The Erga Omnes Principle In The Implementation Of Decisions Of The State Administrative Court (PTUN) With Permanent Legal Power," *International Journal of Educational Research & Social Sciences* 3, no. 1 (2022): 248-60, <https://doi.org/10.51601/ijersc.v3i1.258>.

<sup>17</sup> Ibnu Santoso, "The Transformation of the Qur'an Translation of Mushaf Al-Qur'an Tashih Institution in Two Issues," *Advances in Social*



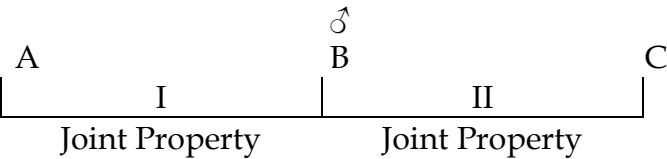
suffered by the creditor is not caused by the failure to perform obligations.

Referring to the Qur'an surah al-Nisa' verse 32 and surah Al-Baqarah verse 228 explain the shared property.

“Do not be jealous of what Allah has bestowed upon some of you more than others. For men and women, there is a share of what is earned, and they ask Allah for some of His bounties. Verily Allah is an All-Knower of all things.”<sup>18</sup>

Meanwhile, the concept of joint property is well known in the life and culture of Indonesian society, and this is one of the many kinds of traditional values. The concept of how a husband with two wives might divide their joint assets after divorce is depicted graphically in the accompanying chart.

Figure 1. The case of joint asset distribution in the post polygamous marriage divorce



Explanation:

1. A man married a woman in 1993 and has children and property in marriage
2. A man submits a second marriage with another woman to the Religious Court with the consent of the previous wife after an agreement regarding marital assets with the second
3. Marriage was held in 2014
4. Problems arose when the second wife denied the agreement when the marriage ended due to divorce.

Figure 2. Calculation of marriage years in serial polygamy without divorce

1980	1984	1994	2017	2020				
A	—	B	—	C	—	D	—	E

Based on figure 2 above, a conclusion is drawn:

1. The first wife (A⇒E) married in 1980, and the joint assets from 1980 to 2020 are 40 years of marital wealth,
2. The second wife (B⇒E) married in 1984, and the joint assets calculated up to 2020 was 36 years of marital wealth,
3. The third wife (C⇒E) married in 1994, and the joint assets calculated up to 2020 was 26 years of marital wealth,
4. The fourth wife (D⇒E) married in 2017, and the joint assets calculated up to 2020 was 3 years of marital wealth.<sup>19</sup>

Figure 3. Procedure for sharing joint assets in serial polygamy due to death and or divorce

A	1/2	B	1/3	C	1/4	D	1/5	E
	1 wife		2 wives		3 wife		4 wives	

Identifying shared assets requires considering the history of each purchase and how it came to be part of the financial agenda. Figure (2) above concludes that in the event of divorce or death, the method of calculating joint assets in polygamous series is as follows:

1. First wife: All properties obtained as a couple are divided in half, with a decrease in the husband's part of the property when entering subsequent marriage contracts.
2. Second wife: All the properties obtained by the husband and the first and second wives are divided by one-third. There will be a separation and reduction in the percentage of joint assets when the husband enters the third and fourth marriage contracts.
3. Third wife: All properties acquired by the husband and the first, second, and third wives are divided by one-fourth.
4. Fourth wife: All properties acquired by the husband with the first, second, third,

<sup>18</sup> Ministry of Religion, *Al-Qur'an and Translation*, Jakarta: Thoha Putra, 1998.

<sup>19</sup> <https://journal.lldikti9.id/plenojure/article/view/328/233>, accessed April 7, 2022

and fourth wives are divided by one-fifth.<sup>20</sup>

Based on the explanation above, the division of joint assets in polygamous marriages is separated between the husband and each wife. The assets are calculated during the second, third, and fourth marriage contracts to provide legal certainty to the first polygamous wife.

Malaysia recognizes the principle of joint property for husband and wife as regulated in the law on the Management of Islamic Assets. The *shari'atan* of seeking a property is based on Malay custom, which has long been practiced with fatwas broadcasted throughout Malaysia. This joint property is regulated by the AUKISWP Law 1984 (Deed 303), Article 58, Article 122 (2) EUKIS, EUKI Perak, Negeri Sembilan (N.9), and EKIM.

The concept of joint property came from customs or traditions developed in Malaysia, which are supported by Islamic and positive law imposed by the kingdom. Traditionally, Malay law was used as the basis for shared assets, and a claim to a portion was also considered justifiable when settled in the Civil Court and upheld by the Sharia Court.<sup>21</sup> Joint assets in Malaysia are jointly acquired during a legal marriage.

### ***Arrangement of Joint Assets in Post-Divorce Polygamous Marriages in Indonesia and Malaysia***

In Indonesia, joint property arrangements in post-divorce polygamous marriages are seen from the registration of marriages as an acknowledgment of the legality by the state. The institutions authorized to carry out the registration are the Office of Religious Affairs and the Office of Civil Registry. In this case, the marriage registration institution has four objectives, namely:

1. To create legal certainty
2. To establish law and order
3. For proof
4. To expedite the Government's activities in the population or administration field.<sup>22</sup>

Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia states that "Indonesia is a country of law."<sup>23</sup> Due to the complexity of marriage issues, regulations regarding marriage have been formed in Law Number 16 of 2019 concerning Marriage. Divorce is the breakdown of a stable marriage in which the husband and wife live apart or are formally recognized by relevant law as no longer being married. This can occur for various reasons, including death or the parties' decision.<sup>24</sup>

Assets from before and after the marriage's legal consummation would be combined, and the wife's property would become that of the husband. In a divorce, the joint property should be divided equally between husband and wife. All earnings and expenditures made throughout the marriage are considered when dividing the property. A separate property agreement should be made through a Marriage Agreement (*Huwelijke Voorwaarden*) which is regulated in Article 139 of the Civil Code:

"By entering into a marriage agreement, both husband and wife have the right to prepare several deviations from the statutory regulations regarding the union of

<sup>20</sup>

<https://journal.ildikti9.id/plenojure/article/view/328/233>, accessed April 7, 2022

<sup>21</sup> Ahmad Ibrahim, *Islamic Family Law in Malaysia*, pages 212-213.

<sup>22</sup> Putri Hafidati, "Legal Protection of Population Administration in The Recording of Deeds The Birth of A Street Child in Indonesia," no. 23 (2002): 25-30.

<sup>23</sup> Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia

<sup>24</sup> Sekar Anggun Gading Pinilih, "The Green Constitution Concept in the 1945 Constitution of the Republic of Indonesia," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 30, no. 1 (2018): 200, <https://doi.org/10.22146/jmh.28684>.

assets, provided good morals or public order are not violated.”<sup>25</sup>

Therefore, a marriage agreement can be made regarding the separation of assets, which includes all inherited and acquired assets between the husband and wife. In a divorce, the husband or wife only obtains the assets registered in each other's name.

Article 35, paragraph 1 of Law Number 16 of 2019 stated that assets acquired during the marriage become joint property.<sup>26</sup> Decree of the Minister of Religion of the Republic of Indonesia Number 154 of 1991 concerning Implementation of Presidential Instructions Number 1 of 1991, in Article 94 paragraph 1 states, “in a polygamous marriage the form of shared assets is separate, between the husband and each wife.” This is reaffirmed in Article 94, paragraph 2 of the Decree of the Minister of Religion Number 154 of 1991 concerning the Implementation of Presidential Instructions Number 1 of 1991, which states, “the ownership of joint assets from the marriage of a husband with more than one wife as referred to in paragraph (1), calculated at the time of the second, third and fourth contract.”<sup>27</sup> In this case, legal certainty should exist as a rule made and enacted with certainty for clear and logical regulation. Therefore, there is no ambiguity of norms or doubts and logic in interpreting a system with legal principles.

Legal certainty refers to the application of clear, firm, consistent law, and the implementation cannot be influenced by subjective circumstances. It is achieved when the law's words and sentences are structured without

different interpretations.<sup>28</sup> Law enforcement is a process to make legal wishes come true.<sup>29</sup> Arrangements for joint assets in the marriage are regulated as follows:

1. In a monogamous marriage, there is no division of joint assets except when stipulated in the agreement.
2. In a polygamous marriage, the joint property of each wife stands separately.<sup>30</sup>

These positive legal provisions are written in laws and regulations. According to the sociological jurisprudence school, legal positivity in codification makes the law rigid and outdated in answering cases. This is where judges consider the importance of law discovery in court decisions. A lack of understanding of the legal provisions governing joint property can make it difficult to function properly. Therefore, it is necessary to put forward some understanding of joint property.<sup>31</sup>

The regulations for shared assets in Malaysia are broadly different from those in Indonesia, where each party is entitled to a half share. In contrast, the distribution of shared assets in Malaysia is not focused on the level of the portion received. It analyzes the various factors in acquiring joint property, such as each party's contribution. The

<sup>25</sup> Article 139 of the Civil Code of Marriage agreements

<sup>26</sup> Article 35 paragraph 1 of Law Number 16 of 2019

<sup>27</sup> Decree of the Minister of Religion of the Republic of Indonesia Number 154 of 1991 concerning Implementation of Presidential Instructions Number 1 of 1991

<sup>28</sup> Decree of the Minister of Religion of the Republic of Indonesia Number 154 of 1991 concerning Implementation of Presidential Instructions Number 1 of 1991

<sup>29</sup> Abdul Rachmad Budiono, *Introduction to Law*, Malang, Bayumedia Publishing, , 2005, p. 22.

<sup>30</sup> From Cadra's Journal with the Title Legal Certainty of Joint Assets in Polygamous Marriage Based on Compilation of Islamic Law, Faculty of Law, University of Brawijaya Accessed May 10, 2022 <https://media.neliti.com/media/publications/35644-ID-kepastian-Hukum-harta-bersama-dalam-perkawinan-poligami-berdasarkan-kompilasi-hu.pdf>

<sup>31</sup> Norazlina Abdul Aziz et al., “Duty of Paternal Family Members in the Maintenance of Children According To Section 73(2) of Islamic Family Law (Selangor) Enactment 2003,” *IIUM Law Journal* 29, no. (S1) (2021): 111–34, [https://doi.org/10.31436/iiumlj.v29i\(s1\).638](https://doi.org/10.31436/iiumlj.v29i(s1).638).



judge will also consider when a wife does not work but still takes care of the household. Consideration may be given when only the husband is working. Therefore, the scope of joint property regulations in Malaysia is wider because the distribution of the portion received by each party is not specified in the regulations.

Islamic Family Legislation enforces joint property as part of the case regulated in Islamic law, which is set forth through Easemen No. 2 of 2003 Section 122. Husband and wife acquire joint property during the valid marriage period<sup>32</sup> under the conditions stipulated by the Syarak Law Deeds of the 1984 Islamic Family Act and the Selangor State Easemen No. 2 of 2003 Section 122 As explained below:

1. The court has the power to justify the pronouncement of divorce. The court may order that all marital assets be liquidated and the revenue split evenly when the couple runs into financial trouble after divorce.
2. In exercising the powers conferred by sub-section (1), the court should take note of the following:
  - a. The number of contributions each party makes in the form of money, property, or work to acquire these assets.
  - b. Any debt incurred by either party for the advantage of the other .
  - c. Needs of minor children from the marriage, and subject to these considerations, the court should make an equal share.
3. The court has the authority to grant a divorce and, as part of the decree, to order the equitable distribution of any marital

property that was gained through the sole work of one spouse.<sup>33</sup>

4. In exercising the powers conferred by sub-section (3), the court should pay attention to the following:
  - a. Takat contributions have been made by parties who do not get the assets for the family's good by maintaining the household or looking after the family.
  - b. The court may divide the assets or the earnings from the sale when there are children from the marriage who are subject to these factors. However, the party that has obtained these assets with their efforts should receive a higher rate.
5. For this section, references to assets have been advanced for the most part during the marriage by the other party or through joint efforts.

The Selangor State Enactment No. 2 of 2003 Section 122<sup>34</sup> regarding the joint assets stated that the process of dividing joint assets has several assumptions. The first possibility is that the judge is justified in dividing the assets with equal shares between the husband and wife. Additionally, the two judges may be within their rights to divide the assets in a manner proportional to each party's contribution. Meanwhile, a larger portion of the joint assets, is received by the spouse with the highest earning.

The Islamic Family Law has recognized that joint property does not contradict or conflict with the wishes of Sharia. Therefore, the designation of joint property is accepted and used as law in Malaysia. In Islamic Family Law, assets acquired before marriage may also be defined as a joint property<sup>35</sup> and

<sup>32</sup> Delicousmen No. 2 of 2003 Section 122. Joint property is property jointly acquired by husband and wife during the valid marriage period.

<sup>33</sup> The Act on the Islamic Family (Federal Territory) Act 1984 and the Selangor State Enactment No. 2 of 2003 Section 122.

<sup>34</sup> See further Enactment of the Islamic Family Law (State of Selangor) 2003 Section 122.

<sup>35</sup> Najibah Mohd Zin, "The Family (Islamic) Law A Series of Legal Developments in Malaysia, Selangor: Dawama Sdn."

each Region or Province has made certain laws regarding this concept.<sup>36</sup> The law clearly shows that the court has the authority when a divorce decree has occurred or decided. As long as the assets in question were acquired during the marriage, the court will treat them as "joint assets" and require their equitable distribution upon divorce.

### ***Legal Formulation of Joint Property Arrangements in Post-Divorce Polygamous Marriages in Indonesia and Malaysia***

Juridically, the weakness of the law governing joint property in polygamous marriages is still weak, hence, there is a need for a special law regulating polygamy. The consequences and impacts occur in society, such as cases of the arbitrary division of assets and custody of children resolved in a family manner.

Therefore, the cases of distribution of joint assets in polygamous marriages do not reach the court of law or the *syar'iyah*. In most decided cases, the Sharia Court does not specifically differentiate between joint venture assets or a single business. The court's standard procedure is to take into account the efforts of both sides, and half of the properties may be given to the wife after making a direct contribution. However, when an indirect contribution is made, only one-third of the property may be released.

Previous research found uncertainty and legal justice and benefit in the Compilation of Islamic Law Article 97, which says, "Divorced widows or widowers have the right to half of the joint property provided there is no external specification in the agreement."<sup>37</sup>

The advantages of Article 97 of the Compilation of Islamic Law used in the distribu-

tion of joint assets allows equal sharing of properties between divorced widowers (ex-husbands) and widows (ex-wives). Concerning the drawback, it does not regulate the distribution of joint assets due to divorce when the wife has more contribution.

According to research, there is a renewal of Article 97 of the Compilation of Islamic Law<sup>38</sup> and it becomes a statutory regulation with three provisions as follows:

1. Distribution of joint assets when the husband is the breadwinner and the wife is the housewife. For a husband who provides everything necessary for married life has the right to half of the joint property.
2. Distribution of joint assets when the wife provides maintenance and the husband is unemployed. In this circumstance, the divorced widow is entitled to a larger share of joint property compared to the widowers.
3. The distribution of joint assets when the wife is more dominant in meeting the family's needs. The provisions of Article 97 of the Compilation of Islamic Law regarding the division of joint assets upon divorce, namely half for the widower and the widow, are deemed unfair when the wife's income is greater.

According to the description, the wife is often disadvantaged and experiences injustice in the distribution of joint assets. This injustice is related to the problem of standardizing the role of husband and wife in Law Number 16 of 2019 concerning marriage.<sup>39</sup> Furthermore, the wife's role in society has been defined by marriage law, which imposes a number of responsibilities, such as the efficiency of running a home.

Due to a lack of employment opportunities, many spouses are unable to put their skills to use and generate an income outside

<sup>36</sup> Sigit Somadiyono, "Legal Protection of Minority Shareholders (Acquisition Company in Indonesia and Malaysia)," *Wajah Hukum* 4, no. 1 (2020): 129, <https://doi.org/10.33087/wjh.v4i1.88>.

<sup>37</sup> Compilation of Islamic Law Article 97

<sup>38</sup> Article 97 Compilation of Islamic Law

<sup>39</sup> Law Number 16 of 2019 Concerning Marriage

the home. In this case, the wives experience economic dependence on their husbands. A woman who has been divorced believes it will be challenging to achieve economic independence. Therefore, the wife's burden is increased when dependent children are born into the union, and in this injustice, it is common for the woman to play dual roles. Sometimes the wife works outside the home as a breadwinner and goes home to be saddled with household duties.

It is unjust to women when the laws for sharing joint property are confined to distributing half, as few wives are more dominating or contribute more to domestic life than the household's head. Provisions for the distribution of joint assets should be regulated proportionally and fairly according to the role of each party. For example, in the distribution of joint assets, there is a dispute between husband and wife, which can be resolved through mutual agreement. However, it is necessary to remember that in agreeing, the parties should be free from all pressure, intimidation, and threats.

The wishes are contrary to the law of the distribution of mutual assets that already exist. Even though joint property is not regulated in Islamic jurisprudence, its existence is accepted by most scholars. This is further strengthened by the fact that the economies of Indonesia and Malaysia are complementary, and most the husband and wife work together to earn a living for the family.

## Conclusion

The concept of sharing joint property in post-divorce polygamous marriages was conducted as comparative research between Indonesia and Malaysia. This benefits the first wife because the second is married without legal certainty, which impacts joint assets and weaknesses in the distribution with polygamous marriages. The weakness is related to the distribution of joint assets in

the event of divorce hence it becomes an obstacle in the distribution.

The rules for dividing marital property are stated in Article 94 of the Compilation of Islamic Law on the Division of Marital Property when a man has more than one wife. The party who brings assets into the marriage retains control and ownership of the properties. Meanwhile, the properties acquired during the marriage become joint assets unless obtained by inheritance and grants. In Malaysia, it is regulated in the Enactments of the Malaysian Islamic Family Law 2003, Section 122:2 with the Bureau of Power of Attorney at the National Majlis for Malaysian Islamic Religious Matters (MKI).

The legal formulation to manage joint property in post-divorce Indonesian and Malaysian polygamous marriages is fair. Certain Indonesian marriage rules should be strict to ensure that nobody is injured in this instance. Usually, this happens because there is no meeting point between who are about to get divorced. There should be a legal formulation, which necessitates renewal to reinforce and clarify the enforcement of the legislation in the Compilation of Islamic Law's Article 97 Paragraphs (1) and (2). This article has many shortcomings and advantages, in regulating the joint distribution property. The similarities between Indonesian and Malaysian marriage laws stem from their shared legal basis, the Qur'an and Hadith, as well as the stipulations of Article 2, paragraphs (1) and (2) of Law Number 16 of 2019. These are neighboring countries with vastly distinct legal systems despite their proximity.

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