

## CHAPTER II

### LITERATURE REVIEW

#### A. Definition of Marriage

Based on Article 1 of the Law No. 1 of 1974 on Marriage, marriage is an inner bond between a man and a woman as husband and wife in order to form a happy and eternal family (household) based on the One Godhead. While in the Compilation of Islamic Law, Article 2 it mentioned that marriage according to Islamic law is a very strong contract to obey Allah command and execute his worship.<sup>1</sup> Whereas according to Wirjono Prodjodikoro marriage is a coexistence of a man and a woman, who fulfill the conditions of marriage law.<sup>2</sup>

Based on the description above, it can be concluded that the meaning of marriage is an inner bond between a man and a woman to form a family in the long term. Marriage law is the law that regulates the terms and means of a marriage, along with the legal consequences for the parties that hold the marriage.<sup>3</sup>

---

<sup>1</sup> Article 2, Compilation of Islamic Law

<sup>2</sup> Wirjono Prodjodikoro, 1974, *Hukum Perkawinan di Indonesia*, Bandung, Sumur, p.7

<sup>3</sup> Simanjuntak, *Op. Cit*, p.34

According to Islam, marriage is based on the word marry which means doing a marriage contract between a man and woman to justify the sexual relationship between the two sides on a voluntary basis and *keridhoan*, to realize a happiness of family life that is filled with a sense of affection and peace in a way that is blessed by God.<sup>4</sup>

The purpose of marriage according to Islamic law is to achieve happiness, however, human beings cannot escape from the problem. The problem is a test that must be faced by husband and wife to strengthen each other. If one or both parties are not mutually reinforcing, then the problem will continue to grow until become more serious and lead to divorce. Actually in Islam divorce is hated but is justified. In Compilation of Islamic law divorce can occur if:

Article 116 of Compilation of Islamic law:

1. One party commits adultery or becomes a drunkard, compactor, gambler and so on that is difficult to purify.
2. One party leaves the other party for 2 (two) consecutive years without the permission of the other party and without a valid reason
3. One party is sentenced to 5 (five) years imprisonment or more than that penalty after marriage.
4. One party commits atrocities or severe maltreatment that endangers the other.
5. One party gets a disability or illness with the consequences of not being able to perform his duties as a husband or wife.
6. Between husband and wife continuously disputes and quarrels and there is no hope of living in harmony again in the household.

---

<sup>4</sup> Soermiyati, 1999, *Hukum Perkawinan Islam dan Undang-Undang Perkawinan*, Yogyakarta, Liberty, p.8

7. Husband broke the *taklik talak*.
8. Religious transfers or apostates that cause unreliability in the household.

The procedures of divorce are governed by Articles 39 and 40 Law Number 1 of 1974, which states:

Article 39 of Law Number 1 of 1974 about Marriage:

1. Divorce can only be done in front of the court after the court concerned and unsuccessfully reconcile both parties.
2. To divorce, there must be enough reason, that between husband and wife will not be able to live in harmony as husband and wife.
3. The divorce proceedings before the court session are governed by these laws.

Article 40 of Law Number 1 of 1974 about marriage:

1. A divorce lawsuit is filed with the court.
2. The procedure of filing the lawsuit as referred to in paragraph (1) of this article shall be regulated in a separate law.

## **B. Definition of Joint Property**

This definition refers to some Laws, namely:

1. According to the Compilation of Islamic Law

The existence of joint property in marriage does not rule out the property of either husband or wife.<sup>5</sup> Actually, there is no mixing of husband's and wife's property in a marriage. The property of each husband and wife as an inheritance or prize is the right of each individual. Husbands and wives have the full right to engage in a legal

---

<sup>5</sup> Article 85, Compilation of Islamic Law

act of their property in the form of inheritance or prizes. In a dispute between husband and wife regarding the joint property, the settlement of the dispute shall be submitted to the religious court.<sup>6</sup>

Basically in Islam mixing property between husband and wife by marriage is not known, the property of the wife is fully controlled by her and the wealth of the husband fully controlled by him. Therefore, a wife is still capable of acting without the help of her husband, including in taking care of the property, so that he can perform legal acts in society.

Islamic law also assumes that the property the husband acquires during marriage becomes his right, while the wife is only eligible for the maintenance provided by her husband. Then, the wife is directly having the right to the property. The study of scholars about joint property had risen the opinion that the joint property can be included in *syirkah*. *Syirkah* itself can be defined as mixing, while, according to *syara'* is the existence of the rights between two or more people about something. According to Ma'ruf Amin, the joint property can be classified into *syirkah* property, ie the property collected during the marriage must be divided proportionally if divorce occurs. Against joint property, the husband or wife has the same responsibility. The joint property will be divided equally or fifty-fifty if the marriage has been broken.

---

<sup>6</sup> *Ibid.* Article 88

Based on the Compilation of Islamic law, joint property is divided into:

a. Tangible property

Tangible property may include movable objects, immovable objects, and valuable documents. The moving objects are such as household furniture, cars. The immovable objects are such as houses, land, factories. The valuable documents are such as deposits, bonds.<sup>7</sup>

b. Intangible property

Intangible property can be in the form of rights and obligations. Collective property may be used as collateral goods by one party with the consent of the other.<sup>8</sup>

---

<sup>7</sup> Sri Suwarni, "Kajian Tentang Pembagian Harta Bersama Sebagai Akibat Terjadinya Perceraian di Kabupaten Bantul" *Jurnal Kajian Hukum*, Vol 1, No 2 (2016) p 230

<sup>8</sup> *Ibid.* Article 91

### 1. According to Law No 1 of 1974 on Marriage

The property acquired during the marriage becomes a joint property. The property of each husband and wife as a gift or inheritance is under their respective control as long as the parties do not specify another.<sup>9</sup> The property acquired during a marriage, becomes a joint property, except inheritance and grant. The author of the marital property, Regarding joint property, the husband and wife can act upon the agreement of both parties.<sup>10</sup>

In the dispute of joint property in religious court, there are some ways to solve the problem. In the event of a dispute between husband and wife concerning joint property, the settlement of the dispute shall be submitted to the religious court.<sup>11</sup> The liability to the husbands' debt or the wife's debt will be borne by their property, and liability for the debt for the family's interest will be borne by the joint property. If the joint property is not sufficient to account for the family's interests it will be charged to the husband's property. If the husband's property is not sufficient then it is charged to the wife's property.<sup>12</sup>

---

<sup>9</sup> Article 35, Law No 1 of 1974 on Marriage

<sup>10</sup> *Ibid.* Article 36

<sup>11</sup> Article 88, Compilation of Islamic Law

<sup>12</sup> *Ibid.* Article 94

A husband or wife may ask a religious court to place confiscation of a property together with a divorce petition, if a husband or wife commits a harmful act and endangers mutual property, such as gambling, drunkenness, and extravagance. During the confiscation period, the sale of common property for the benefit of the family and the court's permission may be made.

Divorce because of death makes half the joint property becomes the right of the living spouse. The distribution of joint property to a husband or wife whose one of the parties is missing must be suspended until there is a certainty of the death with the basis of the religious court decision.<sup>13</sup>

---

<sup>13</sup> *Ibid.* Article 96

### C. Definition of Religious Court

Religious courts are one of the judicial body exercises for the justice seekers under Islamic perspective, regarding certain civil cases regulated in the law.<sup>14</sup> A Religious Court consists of :

1. Religious Courts as first-level courts located in the district capital with the jurisdiction of the district.
2. Religious High Court as an appellate court domiciled in the provincial capital, and its jurisdiction covers the province.<sup>15</sup>

The Religious Court culminated in a supreme court domiciled in the capital of the Republic of Indonesia, Jakarta. The main task of the Religious Courts as the executing agency of the judicial authority is to receive, examine and adjudicate and settle cases that go to religious courts, also solve voluntary cases.<sup>16</sup> Religious Courts are tasked and authorized to provide legal and justice services in the family and marriage property for those who are Islamic, based on Islamic law.

---

<sup>14</sup> Mukti Arto, *Op.Cit.* p.15

<sup>15</sup> *ibid*

<sup>16</sup> *ibid.* p.41



Based on the Compilation of Islamic law, the Religious Court has the duty and authority to solve marital problems, inheritance, and waqf. So the Religious Courts are in charge to uphold the Compilation of Islamic law as a material law that applies to Muslims in Indonesia. Legal and justice services can be provided through the settlement of family disputes and marital property, also the determination of the legal status of a person in the family and the status of a marital property.

In Religious Courts there are several types of cases, namely:

a. Volunteer case

The Volunteer case is a matter of petition and there is no dispute, so there is no opponent. Basically, the petition is unacceptable, unless the interest of the law so requires. Volunteer cases submitted to Religious Courts such as:

- 1) Determination of the guardian of the heirs for the heirs who are unable to take legal action.
- 2) Determination of the guardian's appointment.
- 3) Determination of adoption.
- 4) Determination of marriage certification (*isbat nikah*).
- 5) Establishment of *adhol* guardians, etc.<sup>17</sup>

---

<sup>17</sup> Mukti Arto, *Op. Cit*, p.41

Parties in the volunteer case were the applicant only. There is petitioner I, Petitioner II, Petitioner III, and so on because there is no dispute.

b. Contentious case

Contentious matters are cases containing disputes between parties. In contentious cases, there are two or more parties to the dispute. The party who filed the lawsuit is called the plaintiff, and the party being sued is called the defendant. If the plaintiff and the defendant are more than one person, they are called Plaintiff I, Plaintiff II, Plaintiff III and so on. Similarly, Defendant I, Defendant II, and so on. Sometimes there are also parties that participate in the Defendant that is the party who is not directly sued but there is a possibility of having rights in the disputed object, but he does not want to also sue.<sup>18</sup>

Religious Court has the organizational structure that consists of:

- 1) Chief of judge
- 2) member judges
- 3) clerks
- 4) secretaries and
- 5) bailiffs.

---

<sup>18</sup> *Ibid.* p 42

The head of the Religious Court consists of a chairman and vice chairman. The judge is an official who exercises judicial power. The Religious High Court also has the organizational structure that consists of:

- 1) Chief of judge
- 2) member judges
- 3) clerks and
- 4) secretaries.

The head of the Religious High Court consists of a chairman and a representative. The judge of a member of the Religious High Court is a high judge. To submit a case in, it requires several conditions, namely:

1. Divorce case

In the divorce case the necessary conditions are:

- a. 1 sheet photocopy of Plaintiff's Identity Card that is valid and given a stamp of IDR 6000 which has been legalized.
- b. 1 sheet photocopy of Deed of Marriage and given a stamp of IDR 6000 which has been legalized.
- c. Submit 6 copies of the lawsuit/petition
- d. The amount of the case fee is in accordance with the calculation of Attorney Power to Pay.
- e. For those who use a legal counsel must enclose a special power of attorney and 1 sheet copy of the applicant's Advocate Card.

- f. For those who use a substitution, lawyer includes a Letter of Permission from the Chair of the Religious Courts.
- g. For the Plaintiff/Applicant who is a Civil Servant must attach a divorce letter from his/her superior.

## 2. Lawsuit joint property

In the field of joint property, the necessary conditions are:

- a. 1 sheet photocopy of Plaintiff's Identity Card that is valid and given a stamp of IDR 6000 which has been legalized.
- b. 1 sheet photocopy of Deed of Marriage and given a stamp of IDR 6000 which has been legalized.
- c. 1 sheet photocopy of a certified of divorce given a stamp of IDR 6000 which has been legalized, if filing a joint property lawsuit after the Plaintiff's divorce with the Defendant.
- d. The amount of the case fee is in accordance with the calculation of Attorney Power to Pay.
- e. For those who use a legal counsel must enclose a special power of attorney and 1 sheet copy of the applicant's Advocate Card.
- f. Submit 6 copies of the lawsuit/petition.<sup>19</sup>

---

<sup>19</sup> Roy Al Minfa, Syarat-Syarat Mengajukan Perkara Pengadilan Agama, <https://advokatcerai.wordpress.com/2015/08/23/syarat-syarat-mengajukan-perkara-pengadilan-agama/> Accessed on Tuesday, December 5th, 2017, at 01:43 a.m.

#### **D. The Concept of Procedures Dispute Settlement of Joint Property**

The marital property disputes after a divorce would generally make the joint property divided into two equally.<sup>20</sup> Based on Article 128 of the Civil Code which states that "After the dissolution of marriage, then the entire estate is divided between husband and wife, or between heirs respectively, with no regard to the question of which side the goods he obtained". Meanwhile, the possessions and the acquisition property automatically remain the rights of each person without being shared.

Based on the interviews with the judges of Bantul religious court Yuniati Faizah, she said in Bantul Religious Court the lawsuit of joint property is applied in a separated file. Although there is a lawsuit about the joint property and a divorce that applied at the same time the judge would give advise to separate the file.

Based on article 130 HIR and supreme court regulation no 1 of 2016. mediation is a way of dispute resolution through negotiation process to get an agreement of the parties assisted by a mediator.<sup>21</sup> The mediator is a neutral party who helps the parties in the negotiation process to seek possible dispute resolution without forcing the settlement. The step of

---

<sup>20</sup> Felicitas Marcelina Waha, "Penyelesaian Sengketa Atas Harta Perkawinan Setelah Bercerai", *Lex et Societatis*, Vol.1, No.1 (Januari-Maret 2013) p.59

<sup>21</sup> Article 1, Supreme Court Regulations No 1 of 2016

dispute settlement of joint property in the Bantul religious court is as follows:

- a. Mediation
- b. The reading of the lawsuit
- c. Defendant's response
- d. Counter-response (*Replik*)
- e. Rebuttal (*Duplik*)
- f. Evidence
- g. Conclusions
- h. Deliberation of the panel judges
- i. Decision reading

As for the execution, it has been written that both parties would divide the property as equal directly or by auction. The auction will occur if one of the parties submits the execution of the joint property.<sup>22</sup>

---

<sup>22</sup> Interview with Yuniati Faizah on 6 July 2018 in Bantul Religious Court.