

Settlement of Common Property after Divorce in the *Sharia* Court in Aceh, Indonesia

Abd. Manaf¹, Rusydi Ali Muhammad², Pagar,³ and Zulkarnaini^{4*}

¹(Ph.D Scholar in Islamic Law, Islamic State University of North Sumatera, Indonesia, and the Head of Department of Constitutional Law, Islamic State Institute of Langsa, Indonesia)

²(Professor, Ar-Raniry Islamic State University, Aceh, Indonesia)

³(Professor, Islamic State University of North Sumatera, Indonesia)

⁴(Senior Lecturer, Islamic State Institute of Langsa, Indonesia)

*Corresponding author: zul.abd.ch@gmail.com

ABSTRACT: This study aims to descriptively explain the settlement process of common property after divorce in the *Sharia* Court in Aceh, Indonesia. Apart from collecting data from the relevant documents, interviews were conducted with respondents consisting of Judges of the *Sharia* Court, the Governing Council of Custom (*Adat*) of Aceh, and the Head of the *Ulama* Consultative Assembly in Aceh. This study found that the settlement of common property at the Custom Assembly in Aceh is commonly settled through consultation and consensus on the basis of voluntary without coercion. The legal basis of the decision-making is the ruling clerics in analogy to the law of inheritance (*faraidh*) that is two portions for husband and one portion to wife. According to the Custom Assembly of Aceh and *Ulama* Council, wife or husband who is *nusyuz* [a wife (husband) unreasonably refuses to obey the lawful wishes or commands of her husband (wife)] lost their property rights or reduced their part. The method of property settlement must be on the basis of mutual benefit, thus it is advisable that to avoid the conflict, the premarital agreement relating to the property should be agreed upon. According to the Law No. 1 of 1974 and Compilation of Islamic Law (*KHI*), the settlement of common property should be divided equally between the husband and wife, regardless of *nusyuz*. The different decision of the judges to the Law was simply due to the judges' interpretation of Article 37 of the Marriage Act, which states that "When the marriage broke up because of divorce, the common property is governed by the each law". Besides, the judges take into the consideration of the benefit, local wisdom, and cultural life of Acehnese when making the judgements.

KEYWORD: Common property; Divorce, *Sharia* Court; Customary law, Aceh.

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I. INTRODUCTION

In the perspective of the classical Islamic thought, especially in the books of the sectarian jurisprudence of *Shafi'i* schools did not discuss the daily activities and routine chores such as cooking and washing as the part of the obligation of the wife, while in reality, in the social life domestic activities is attached and be part of the wife duties. Viewing this, the majority of traditional scholars in Aceh, Indonesia (in Aceh called as the *Ulama Dayah*) opined that for carrying such duties the wife's should be given salaries and wages, a current phenomenon in Aceh where the husband does not provide wages and salary to his wife (Gadeng, 2016).

To respect and glorify women who have contributed a lot in social life, especially in the household life, custom (*'uruf*) sets the right to the common property, irrespective of the husband who only working to support family while the wife carrying duties at home, or both wife and husband working to support family, or the wife only working to support family while the husband does not, thus they acquired property in marriage, which is called as the common property (Syarifuddin, 2008).

The question of common property is often less scrupulous attention of the Muslim jurists. Supposedly, it should get serious attention, given the common property as an issue of enormous influence in the life of husband and wife when they divorced either intentionally divorced or dead divorce. The dispute about the common property is just beginning to be debated during a divorce, so it impacts to various legal issues that lead to different views of the legislation.

Settlement of the common property in the context of indigenous Aceh adheres to the principles of consultation, willingness and justice, and it is not resolved in the form of a ruling. Thus, the settlement of common property cases that occurred in the community can be resolved amicably without causing social

problems that leads to the conflict between the parties, especially the divorced spouse still get along, both families are well preserved, and the bonding remains intact (Yusuf, 2016).

In addition to the custom solutions for the common property settlements, some cases were also brought to the *Sharia* Court for the settlement. This is opted by the party was simply due to the assumption that it could not be solved through traditional media. Where customary justice has not functioning optimally, or the supposition of the customs agreement is not binding and would rule of law.

There have been different decisions made on the common property settlement between the customs agreement and the *Sharia* Court pertaining to the right portion of spouses in common property, *nusyuz* spouse, working husband, working wife, both husband and wife who are working, and the execution of the decision. These differences have led to polemic and conflict in the life of the community, especially the spouses. Thus, it is interesting and important to analyze the driving forces lead to the different decisions on the common property settlement after the divorce in Aceh. For this purpose, this study is aimed at descriptively discuss the decision made both by the *Sharia* Court and Customary Law of Aceh on the common property after divorce in Aceh, Indonesia. The finding of this study are hoped to shed some lights on the common property settlement after divorce, thus it avoid the dispute among the divorcees.

The rest of this study is structured into the following sequences. The next section discusses the different laws and opinion on the common property settlement. Section 3 highlights the research method of the study. Section 4 provides the practice of common property settlement after divorce. Finally, Section 5 concludes the paper.

II. REVIEW OF SELECTED PREVIOUS STUDIES

The Dictionary of Indonesia defines common property as goods and money acquired by husband and wife together in marriage. In Arabic, it is known as *al-Amwal al-isytirak* (Fairuz, 2007). In Encyclopaedia of Islamic Law, as mentioned by Hasan (2004), common property is the properties of the spouse acquired during the marriage (Shadily, 2002). The concept of the common property in Indonesia arises as part of the customs of Indonesian and the people of Aceh in particular.

Basically, the common property has long been known in various regions in Indonesia. In the East Java is known as a "campur kaya" (*rich mix*), in the Minangkabau, West Sumatera it is known as "*suarang*", in Aceh is known as "*hareuta seuhareukat*" (Rofiq, 2001), in Sunda, West Java is known "*guna kaya*" or "*tumpang kaya*", or "*raja kaya* (Sumedang District), in Jakarta is known as "*harta pencaharian*", in Java is known as "*barang gana*" or "*gono gini*". Additionally, in Bali it is known "*drube gabro*", in Kalimantan it is known "*barang berpantangan*", in Sulawesi (Bugis and Makassar) it is called "*barang cakar*", and finally, in Madura it is called "*ghuna-ghana*" (Hasan, 2004).

The Article 119 of the Civil Code described in the Article 119 of the Civil Code states the following: "Since the time of the marriage took place, then according to the law of the case property-shared between husband and wife, as long as it is not ruled in other provisions in the marriage covenant. Property with it, as long as the marriage goes, cannot be abolished or amended by an agreement between the spouses".

Since the marriage took place, legally act unanimously union between husband and wife property, just about the wedding was not held in the agreements with the other provisions. The association of such property throughout the marriage is executed and shall not be omitted or varied by an agreement between the husband and wife. If intending to deviate from that provision, a spouse must go through a marriage agreement set forth in the Article 139-154 of the Civil Code (Hasan, 2004).

Later in the article 128-129 of the Civil Code, otherwise "when breaking a marital relationship between husband and wife, it is the common property divided between the spouses; regardless of where the goods were previously obtained wealth. On the wedding arrangements permitted by laws the invitation does not violate the moral order and public tranquillity prevailing in society".

The Marriage Law No. 1 of 1974 defines property that is acquired during the marriage. Unlike their respective treasures as gifts or legacies called personal property that are fully under the control of each party as long as the parties do not specify otherwise (Nasution, 1997). On the common property, the husband and wife can act on the basis of the consent of both parties, whereas the inherent property of each husband and wife has the right to carry out legal acts of his property, so in the event of divorce between the husband and wife, the collective property is settled according to the Islamic law for spouses or religious spouses and according to the Civil Code for non-Muslim couples (Ramulyo, 1999).

In article 35 of the Marriage Law Number 1, Year 1974 and the Article 86 Paragraph 1 of Law Number 7, Year 1985 and the article 85 KHI, to property with husband and wife who are in the period of marriage, have been named "Common Property"; the name illustrates the practice of justice (Harahap, 1989). The Article 37 states: "When a marriage breaks out of divorce, mutual property is regulated according to its own law", that is a religious law, customary law and other laws (Pagar, 2010). The Article 97, compilation of Islamic Law states: "the widow or widower of each entitled to half of community property to the extent not otherwise

stipulated in the marriage contract. Under any circumstances the spouse's part is obviously a half. A half is for husband and a half is for his wife. Only the other arrangements in the marriage may change the sharing of common property other than the content of the agreement.

In the perspective of Islamic jurisprudence, some scholars consider that mutual property in marriage is categorized into *Sharia* property. Etymologically, *shirkah* (contract) is a *mix of a spread* and *nearby* either by using a contract or another (al-Jaziri, 2003). *Shirkah* including one form of trade cooperation with certain principles and conditions, which in law called the trade unions. In short, *shirkah* is a partnership between two persons of their property begins with a certain agreement so that no one suffers after the *shirkah* is agreed upon.

According to the scholar of Hanafi, *shirkah* is divided into *shirkah amlak* (milk) and *shirkah al-'uqud* (al-Jaziri, 2003). *Shirkah amlak* is the expression of ownership of two people or more in the absence of agreement, both intertwining *shirkah* it through effort and willingness (*ikhtiyari*) and down with no effort and compulsion (*ijbari*). It is exemplified as does the concept of inheritance, where between the heirs and the other one against the estate beneficiary association that has not been shared, and two or more people who get prizes for contest where they get their partner to the efforts of all parties.

In the household, husband and wife work together as a team both physically and morally. This cooperation is more than cooperation in *shirkah abdan* (Manan, 2006). Even though the husband goes for working, the wife is obliged to keep her husband's property at home. Wife also plays a role in preparing all her husband's needs to earn a living and take care of their children. It seems clear that the role of the spouse in the household are complement each other, so intertwined *musyarakah* between them.

Hitherto, the common property is still adhered to and held by the public. *Al-Uruf* or the the customs is prevailing in a society, so that it becomes legal in the public acknowledgment. The scholars agreed that *al-Uruf* can be used as a reference law. In one of the legal maxims says: "A custom can be used as the basis for the law". According to Wignjopoero (n.y), the custom prevailing within the Acehnese society, the income earned by husband become the private property of the husband if wife did not provide physical and moral support to her husband (Adian, 2016).

III. RESEARCH METHOD

This study is conducted in Aceh, Indonesia. Aceh is a province of the most remote regions in the western part of Indonesia. It is located at the north-western tip of Sumatra, with a capital city of Banda Aceh. Aceh has an area of 56,758.85 km² or 5.68 million ha, 12-mile territorial sea with the size of 7,479,802 ha, and with a coastline of 2,666.27 km². The population of this province is about 4,500,000. It is located near the Andaman and Nicobar islands in India and separated by the Andaman Sea. Aceh is bordered by the Bay of Bengal in the north, the Indian Ocean to the west, the Strait of Malacca in the east, and North Sumatra in southeast and south.

Aceh is the first place that embraced Islam in Indonesia and it plays a vital role in spreading Islam in Southeast Asia. In the early 17th century, the Sultanate of Aceh is the richest, strongest, and most prosperous in the Straits of Malacca. Aceh history was marred by political independence and fierce resistance on the control of foreigners, including former colonial Dutch. Compared to other 33 provinces in Indonesia, Aceh is a very conservative province to uphold the religion of Islam. The percentage of Muslim population in Aceh is the highest (more than 90 percent) in Indonesia and they live according to the *Sharia* law. Aceh is one the provinces in Indonesia that has been granted the special autonomy to implement the *Sharia* law in all aspect of daily lives by the central government of Indonesia for reasons of history (Wikipedia. org). The name of Aceh has changed few times. From 1511-1959, Aceh was known as the *Aceh Darussalam*, *Aceh* (1959-2001), *Nanggroe Aceh Darussalam* (2001-2009), and *Aceh* (2009-present). In the history, *Aceh's* name was usually written as *Acheh*, *Atjeh*, and *Achih*.

In order to understand the settlement process of common property after divorce in Aceh, Indonesia, the study gathered data from the relevant documents, interviews with respondents consisting of divorcees, Judges and the *Sharia* Court Decision, the Governing Council of Custom (*Adat*) of Aceh, and the Head of the Aceh's Ulama Consultative Assembly. The findings from relevant documents and interviews are then analysed descriptively.

IV. FINDINGS AND DISCUSSION

The settlement of common property in the *Sharia* Court was only conducted when the customary of Aceh failed to resolve the issue through discussion and consensus. The failure of settlement of common property along with custom assemblies, because the parties failed to arrived at the consensus where each party claimed about their innate property. The most common term used to portray this condition is as a saying in the Acehnese language "*daripada meutunggeng got roe*" (*rather than sloping, it is better to spill*)" (Daud, 2015).

The process of execution of the court verdict is common when there is resistance by the parties who did not satisfied with the court decision. This could happen because some people argue that property is the default

property or the property given by others. Similarly, when the trial in the answer process answered, each retained its argument and said that the property decided was obtained before the marriage (Yasir, 2015).

In the *Sharia* Court decision, there is no division of property together than divided between husband and wife. According to the *Sharia* Court, the common property still be shared to the wife, irrespective the wife are working or not working outside the house, and vice versa. The question that rests on the court was more often unresolved. Demands for demands from couples cannot be avoided, so the extension of the settlement process continues and takes time. So the formation of a bloc between husband and wife is increasingly taking the attention of the parties especially the children who should not see this quarrel.

The *Sharia* Court decided that the husband's part as the plaintiff obtains one-third of the common property and the wives receive two-thirds. The judgment considered that the wife works and finances the household needs. While at the beginning husband is unemployed, and when the husband has a job he never gives home a living expenses. Husband performs acts prohibited by the Religion and the state. In other words, husband has been *Nusyuz*.

The basis for the determination of the judge's decision is: (1) The Article 1 of Letter (f) of the Compilation of Islamic Law, which states that "Intellectual property in a marriage or *shirkah* is property acquired either individually or joint spousal During marriage lasted hereinafter referred to as the common property, without questioning registered in the name of anyone". (2) The Article 35 of Paragraph (1) of the Law No. 1 of 1974, which states that "the property acquired during the marriage is community property". (3) The Article 91 of Paragraph (2) the Compilation of Islamic Law, which states that "tangible property as may include immovable, movable and securities", and (4) The Article 37 of Law No. 1 of 1974, which states that "When the marriage broke up because of divorce, the common property is governed by the law of each".

The judge in this case did not use the rules in the law that sets out what the common property of husband and wife shared equally. This is due to the consideration of judges on the justice and benefit, especially the physical and mental suffering experienced by the defendant's wife during their marriage.

The opposite of the above decision, the *Sharia* court establishes the decision on the common property of the spouses is divided equally, half to the husband and half to the wife, without questioning the wife's *Nusyuz* over her husband's confession. Because according to the judge that the presumption of plaintiff (husband) that the wife of ill conduct, so it is not entitled to the property along a portion of the community believes this is not based on the law, because, according to the provisions of the Article 35 of Paragraph (1) and the Article 37 of the Law No. 1 of 1974 Jo. Article 1 of the Letter f, the Article 88, articles 96 and 97 of the Compilations of Islamic Law in 1991 can be interpreted that the property obtained by a spouse or both during the marriage is a common property regardless of who and on behalf of any such property is registered. *Nusyuz* is not a wife or husband has no relevance and its relation to common property both in terms of division and quantity of each division, as far as it can be proved that the object of the property being sued there is sufficient evidence as a common property. Thus the defendant's statement stating that the plaintiff's right to claim as a result of *Nusyuz* is not based on the law and must be set aside and declined.

The Judgmental basis of the Judge in deciding the common property relating to the above mentioned regulation is the Article 35 of Paragraph (1) of the Law Number 1 of 1974 concerning Marriage, stating that "The property acquired during the marriage into a common property". Article 1 of Letter f of the Islamic Law Compilation (KHI) of 1991, states: "the property of marriage or *shirkah* is the property acquired either alone or together with the spouse during the marriage bond taking place without question being registered in the name of anyone; Law No. 1 of 1974 Jo Article 96 and 97 KHI mentions: "each spouse gets half of the common property"; Article 88 KHI states: "In the event of a dispute between a spouse of common property, the dispute is filed to court".

Traditionally, if wife worked, while the husband does not work or earnings less than the income of the wife in this case be honoured *shirkah* property or common property because without the support of a husband, a wife cannot work well as the husband's work. Here the husband has given his wife permission to work. This means that if the husband forbids his wife to work in jurisprudence certainly the wife cannot work. Thus the contribution of the husband in this case must be counted and cannot be ignored at all.

The pattern of settlement of common property through customs in Aceh has been focusing on the principle of consultation, consent, justice, and gender equality. But the husband or wife who is *Nusyuz* would not get the rights to the common property (Sulaiman, 2015). Although in reality only the husband is working. This is done as a sanction for violating the order of life in the household, and to uphold the supremacy of customs in social life. The custom only solves the problem of the common property if the husband and wife sincerely agreed to solve the dispute. It is intended that divorce between spouses does not come to the split and conflict that destroys the relationship between societies. When the parties objected to the solution customarily, they are allowed to bring and solve the issue to the *Sharia* Court.

According to the custom of Aceh, the common property in the form of house is not divided but remains the right of divorced wife, either in the case of live divorce or death divorce. However, if the wife is *Nusyuz*

according to the custom of Aceh, she must leave the home. While according to the Islamic law in Indonesia, the share of common property is still divided regardless of home or other assets. While in the sub-district of West Aceh, considering the benefit, the home was excluded as an asset to be shared because the house provide shelter, safeguarding of various distresses, and safeguarding the spouses of divorced spouses and children (Sulaiman, 2015). There have been some interesting to note with regards to the common property settlement with customary, namely: indigenouse people of Aceh feel embarrassed when their problem of home affairs was known by public, the good relationship is maintained, promoting the principles of voluntary, cost-effective and time, emphasizes the importance of child and wife, there is no element of coercion and minimize conflict between his wife and the family of both, thus the decision made from the parties' agreement. The common property settlement is not done after the death of one of the spouses. It is applied to respect the corpse and the family he left behind, as in the case of inheritance.

V. CONCLUSION

This study aims to descriptively explain the settlement process of common property after divorce in Aceh, Indonesia. In general, there have been two patterns of solving common property matters in Aceh, Indonesia, namely: (i) Through *al-Shulhu* (peace) and deliberation, which is the decision of the Traditional Assembly within the Acehnese society; and (ii) Through *al-Qadha`* (judicial institution). This alternative is done by the people in the case of the customary law was less effective, or the parties are not satisfied with the decision through deliberation and customs.

In terms of the common property division, majority of the Customs Assemblies in the Districts of Southwest Aceh, West Aceh, and East Aceh decided that the share of the common property was two to one, where the husband gets two parts and the wife gets one part, as in the division of the inheritance. Given the husband as a breadwinner, and has a greater responsibility than his wife. While some of the Customs Assemblies in Aceh decides the same distribution should be given both to husbands and wives, as the Law and the rules apply. As for the *Nusyuz* (disobedience) wife or husband, according to the Aceh's Customs Assembly, it is like she r he has conducted big sins or neglected the obligations, and the husband or wife has advised her or him in accordance with religious rules would not be given rights to common property.

Finally, the *Sharia* Court in Aceh in its decision on the common property has referred to the Law No. 1 of 1974 and KHI of Article 97. The widow or widower of each divorced shall be entitled to a half of the common property as long as not otherwise specified in the marriage agreement. However, there are some cases in the form of the decision of the *Sharia* Court in the North Aceh that decided two-thirds of the common property for wife and one-thirds for the husbands on the basis of the judge's discretion.

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