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# Progressive Legal Justice Pa radigm in the Division of Joint Property

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**Abstract:** This article tries to outline the progressive legal justice paradigm in examining the issue of joint property distribution. This article is important to study considering that the civil law tradition adopted as a legal system in Indonesia is very vulnerable to presenting a legal face that tends to be positivistic which often forgets to address the sense of justice of the community. The concept of the division of joint property, which does not have to give half of the property to each party, should make judges have to think hard in digging up comprehensive information as a consideration in giving a fair decision on the division of joint property. Using inferential qualitative-descriptive methods and by utilizing a legal philosophy approach, this study concludes that to arrive at a just legal decision, it is not enough for judges to master the methodology of legal discovery, but must be supported by the intellectual morality of judges. Portraying the discussion of the division of joint property through the lens of progressive justice, means that judges do not only refer to the provisions of the right to half of each former husband and wife as stipulated in written legal regulations, but must elaborate in depth and comprehensively on the implementation of the role of former husband and wife during married life.

**Keyword:** Justice, Progressive Law, Joint Property

**Abstrak:** Artikel ini mencoba menguraikan paradigma keadilan hukum progresif dalam mengkaji persoalan pembagian harta bersama. Tulisan ini penting untuk dikaji mengingat tradisi *civil law* yang dianut sebagai sistem hukum di Indonesia sangat rentan menghadirkan wajah hukum yang cenderung positivistik yang seringkali lupa menyapa rasa keadilan masyarakat. Konsep pembagian harta bersama yang tidak harus memberikan separuh dari harta kepada masing-masing pihak, seharusnya membuat hakim harus berfikir keras dalam menggali informasi yang menyeluruh sebagai bahan pertimbangan dalam memberikan putusan pembagian harta bersama yang berkeadilan. Menggunakan metode kualitatif-deskriptif inferensial dan dengan memanfaatkan pendekatan filsafat hukum kajian ini menyimpulkan bahwa untuk sampai pada sebuah putusan hukum yang berkeadilan, tidak cukup dengan keahlian hakim dalam penguasaan metodologi penemuan hukum, melainkan harus ditopang dengan moralitas intelektual hakim. Memotret diskurus pembagian harta bersama melalui lensa keadilan progresif, berarti hakim tidak hanya mengacu pada ketentuan hak atas separuh bagian bagi masing-masing mantan suami istri sebagaimana ditetapkan dalam peraturan hukum tertulis, melainkan harus mengelaborasi secara mendalam dan komprehensif pelaksanaan peran mantan suami-istri selama hidup berumah tangga.

**Kata Kunci:** Keadilan, Hukum Progresif, Harta Bersama

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## A. Pendahuluan

Pound Law is believed to be an effective tool of social control. Roscoe Pound called law a tool of social engineering. There are two reasons according to Pound, (Pound, 1922, pp. 18-19) greatly influenced philosophical thinking about law. Firstly, the human desire for a guarantee of peace and order, encourages them to have a definite basic rule that regulates human behavior and ensures the realization of social stability. Second, the desire to respond to ever-changing social situations, encourages them to have principles of legal development. Law was also born because of the impetus of society's need for a rule that applies to all, such as Eugen Erlich, (Erlich, 1936, p. 17) who wrote that the law was born from the womb of public awareness of its needs (opinio necessitates). As a tool of social control, discussions about law are always closely related to the themes of legal certainty, expediency and justice. The law exists to ensure that a situation runs according to the rules, so legal certainty is a necessity. Law is also expected to provide benefits in terms of bringing happiness to society. At the same time, the law from the beginning is also a tool designed to guarantee the rights of everyone it regulates, so the law must not ignore the sense of justice.

Justice and legal certainty seem more paradoxical, which makes it impossible to unite the two in one legal frame. This is especially so in the civil law tradition, where the positivistic paradigm is so clear, that it seems that justice is not more important than legal certainty. This is of course strange when considering that the ideal of law is justice, so legal certainty should not ignore the sense of justice, and likewise the sense of justice must be reflected in legal certainty.

The legal positivistic paradigm above explains that law is not based on empirical and sociological dimensions, but rather on formal values that apply and have been positivized by the authorities. Satjipto Rahardjo revealed that a judge in addition to carrying out his duties according to his duties must also be a sociologist and leave the courthouse to hear the hustle and bustle of society, not imprisoned by legal texts, law enforcement which is not a definite action, the law is a reflection of society, the law is for the people not for the law itself, the law is for humans and not vice versa and several others are empirical and factual legal reasoning. The idea that law is for humans and not the other way around, (Satjipto Rahardjo, 2006). and the law is not an absolute and final institution, (Satjipto Rahardjo, 2002. Foundation that constructs Satjipto Rahardjo's idea of progressive law.

Progressive law is one of the most interesting ideas in Indonesian legal literature today. It is said to be interesting because progressive law has challenged the existence of modern law that has been considered established in our law. Progressive law reveals the veil and dissects the various failures of modern law based on positivistic, legalistic, and linear philosophy to answer legal problems as human and humanitarian problems. Modern law that contains a gaping chasm between law and humanity is shaken by the presence of progressive law that contains the spirit of liberation, namely liberation from conventional legalistic and liner traditions.

Progressive law enforcement is carrying out the law not only in the black and white of a regulation (according to the letter), but according to the spirit and deeper meaning (to the very meaning) of the law or law. Law enforcement is not only a matter of intellectual intelligence, but also involves spiritual intelligence.

The philosophical basis of progressive law is an institution that aims to lead humans to a just, prosperous and happy life. Progressive law departs from the basic assumption that hukuzzm is for humans and not the other way around. With this assumption, the law is only a tool not a goal, so that substantive justice must take precedence over procedural justice. In this way, the new law can be a solution to humanitarian problems.

As in this article. Judges hold the top role in law enforcement and justice. This is so because he has the power to change the legal situation of someone or something either in accordance with the legality of the legislation or through deviation from it (contra legem). The judge's efforts in deciding a matter must always pay attention to the values that live in society and not merely be textual. This has been mandated by Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power. The role of the judge is certainly an opportunity for progressive law in an effort to position the role of law for society ideally. (Rahardjo, 2006)

In the issue of the division of joint property, a progressive legal perspective is important to consider as a method of legal discovery, considering that the provision of rights to joint property should be linked to the implementation of the role of husband and wife in the household. With this understanding, it could be that a former husband or wife does not have to get half of the property, because he did not carry out his obligations in the household. Judges are required to work harder to penetrate the textual meaning of the law, dive into the issue by paying attention to the socio-legal dimensions that occur in the relationship between the roles of husband and wife. This study is expected to be able to slightly unravel the importance of presenting progressive reasoning in legal discovery, as well as how to describe the actualization of progressive law in the issue of joint property distribution.

There are several studies that are relevant to the study of this article, including research conducted by Fitroh Nur'aini Layly, (Layly, 2007) This research reveals that the problem of dividing joint property has been regulated in article 97 of the Compilation of Islamic Law, namely each husband and wife get half of the joint property. However, in the decision on the division of joint property, it turns out that there are deviations from article 97 of the Compilation of Islamic Law. As in the case decided in the Ponorogo Religious Court Number: 0745/Pdt.G/2009/PA.Po and Tulungagung Religious Court Number: 1993/Pdt.G/2012/PA. Ta which decided that the share of joint property was not ½ the same share between husband and wife but the panel of judges in these two decisions decided that the wife's share was more than the husband's share. Other research by M. Arwani, Sukresno and Subarkah, (M.Arwani, 2015) This research seeks to find legal findings as a progressive breakthrough without deviating from the applicable law, but instead supporting and contributing to the interests of the law.

The author tries to compile this research with the hope and purpose of providing solutions to wives who deal with the law. The conclusion of the research is that the decision on the reconpension of joint property which has permanent legal force, remains in effect, does not fall along with the expiration of the divorce verdict where the Applicant does not make a promise of divorce. So that the decision of the joint property reconpension lawsuit can be executed. The novelty of

this article is to capture the discourse of the division of joint property through the lens of substantive progressive justice.

## B. Metode

This writing study uses a descriptive-inferential qualitative method. This method is a combination; the researcher not only describes, describes, writes, and reports a situation, an object or an event without drawing a general conclusion, but also analyzes based on the research description, along with providing sufficient understanding and explanation. (Nyoman Kutha Ratna, 2004) To be more operational, this writing utilizes the approach of legal philosophy, and legal hermeneutics. The legal philosophy approach is used to see the law as a rule in the sense of ethical value judgment (etisch waardeoordeel), looking for the nature of the law, knowing the values behind the law and investigating legal rules as value considerations. After the necessary data is collected, the data will be analyzed based on the formulation of research analysis using the descriptive literature method, which is divided into two phases of analysis, namely critical analysis of the data collected and which is considered to have relevance to the theme and object of research material and critical interpretation of the data that has been collected and described in order to answer the predetermined problem.

## C. Discussion

### Progressive Law Efforts to Find Substantive Justice

The idea of progressive law was initiated by Satjipto Rahardjo which is a long struggle of thought against the application of the legal system in Indonesia which is always static, corrupt, and has no structural alignment with the laws that live in society. Law in Indonesia has lost its social base, its multicultural base and is enforced centrally in the building of the legal system. The law is then imposed, enforced and applied with structural violence by law enforcement officials. (Rahardjo, 2010).

Progressive law is an idea to counter the power of the status quo legal madhhab that has long been applied in the legal system in Indonesia. Maintaining the status quo means accepting normativity and the existing system without any attempt to see the various weaknesses in it which then encourage action to overcome them. (Rahardjo, 2006). There is almost no attempt to make improvements, only to carry out the law as it is and in a mediocre manner. Maintaining the status quo in these conditions will be even more evil as well as surviving in a corrupt and decadent situation in a system that obviously has weaknesses. The status quo also survives one of the reasons because of the doctrine of legal autonomy, even though the law is actually also a fortress of protection for the established people so that the approach to the goal of justice can only be achieved by using the approach of a system of rules and objective procedures. Such a view and approach practiced in the rule of law system will never achieve social justice. (Bernard L. et al., 2010).

Satjipto Rahardjo argues that the power of progressive law is a scientific provocation for its aggression over the hegemony of posistivism and legal centralism which then has an impact on structural violence, marginalization of society and its laws and keeps law away from the social life of a multicultural society. Satjipto Rahardjo's statement has created polemics and confrontational

debates with the legal paradigm that is still applied in Indonesia. At least, one of the theorists he opposed was Hans Kalsen, who said that legal norms are not merely applied by organs or obeyed by subjects, but also become the basis for specific value considerations that qualify an act to be judged based on law or not outside the law. The validity of the application of law depends on its norms, primary or secondary. (Kelsen, 2008).

Law can be classified in two senses; law means objective and law means subjective. Objective law is the rules that regulate relations between people in society, while subjective law is the authority or rights obtained by a person based on objective law. (Daliyo & Dkk, 1996). Meanwhile, progressive means forward, desire to advance and always progress. From these two terms, it can be said that progressive law is the rules governing relations between fellow citizens made by a person or group who has the authority to make laws based on the desire to move forward.

Satjipto Rahardjo interprets progressive law with a sentence, first, the law is for humans and not the other way around. Law does not exist for itself but for something broad, namely for human dignity, happiness, welfare and human glory. (Rahardjo, 2006). Second, law is not an absolute and final institution, because law is always in the process of becoming (law as a procces, law in making). (Rahardjo, 2002).

The law is for the people and not the other way around. A judge is not only a technical mouthpiece of the law but also a social being. The judge's task is very noble, because he not only plays with his mind but also his conscience. So that the existence of progressive law stems from two basic components in law, namely rules and behavior. Law is placed as an aspect of behavior but also as a rule. Rules will build a positive legal system, while behavior or humans will drive the rules and systems that have (will) be built. (Rahardjo, 2006).

Progressive law, as described above, has a desire to return to legal thinking in its basic philosophy, namely law for humans. Humans become the determinant and orientation point of the existence of law. Therefore, the law should not be an institution that is separated from the interests of dedication to human welfare. Legal actors are required to prioritize honesty and sincerity in law enforcement. They must have empathy and concern for the suffering experienced by the people and their nation. The interests of the people, both their welfare and happiness, must be the point of orientation and the ultimate goal of the administration of law. In this context, the term progressive law actually adheres to the ideology of pro-justice law and pro-people law.(Bernard L. et al., 2010)

## Joint Property in Positive Law

The provisions governing property in marriage are contained in Law Number 1 of 1974 concerning marriage, the 1945 Constitution, the Civil Code, Law Number 39 of 1999 concerning Human Rights and the Compilation of Islamic Law (KHI). In these regulations, there are discussions related to property in marriage, both the rights of men and women after the breakup of marriage due to death or divorce. Normatively, Law Number 1 of 1974 concerning Marriage states in Article 35 paragraph (1) what is meant by marital property. The article explains that property obtained during marriage is categorized as joint property. In the sense

that the efforts they acquire jointly or individually during marriage are categorized as joint property and become part of the marital property. (Rofiq, 2013, p. 161).

Article 35 of Law Number 1 of 1974 has clearly divided marital property, which consists of joint property and inherited property. (J.Satrio, 1993, p. 189) This article explains that in marital property there are two forms of property, namely joint property and personal property. Furthermore, Article 35 paragraph (2) of Law Number 1 Year 1974 explains about innate property. Congenital property is property obtained by a husband or wife as a gift, inheritance during marriage, or will, where these assets become the rights and are fully controlled by each party, both husband and wife.

Then in KHI it is also explained what is meant by joint property, namely in Article (1) letter (f) (Manaf, 2006, p. 25)The property in marriage, which is called joint property, is property that is obtained by the husband and wife either individually or jointly without regard to whose name the property is registered. (Manaf A. , p. 27) Furthermore, more details are explained in Articles 85, 86 and 87 KHI which explain the assets included in the marital property and the separation between joint property with inherited property and personal property.

In contrast to the provisions regulated by Law Number 1 of 1974 concerning Marriage and KHI which separate several assets in marital property, Article 119 of the Civil Code explains that the assets of husband and wife become one unit unless there is a marriage agreement. Husband and wife who have entered into marriage have indirectly united the assets of both of them without being determined otherwise by the agreement, both the assets brought by the husband and wife and the assets obtained during the marriage. (Manan, 2014, p. 10)

Article 124 of the Civil Code explains that only the husband has the right to manage the joint property between husband and wife, so that the husband has the power to manage and transfer the property without the wife's consent. However, the wife can participate in managing joint property if there is an agreement between husband and wife (marriage agreement). (Hadikusam, 2007, p. 113) Rules relating to joint property in the Civil Code are found in the field of civil law in the section on marital agreements. (Yaswirman, 2013, p. 216)

Joint property and inherited property (personal property) are two separate or different forms of property. The results obtained from joint property will become joint property, this is something that should be. However, the results of personal property become joint property if the business of the personal property takes place during the marriage period, but the essence of personal property remains private property. The results of the business of personal property become joint property to function to meet family needs. This provision remains in effect as long as the husband and wife do not specify otherwise in the marriage agreement. (Simanjutak, 2016, pp. 60-61).

In relation to marriage agreements, Article 24 of the Marriage Law explains that marriage agreements can be made before the marriage takes place or during the marriage. The marriage agreement cannot be ratified if it violates the limits of religious law and morality and is valid since the marriage took place. The content of the marriage agreement made by the husband and wife can contain anything. In addition, rights and obligations in terms of property, be it inherited property or personal property or joint property, may be made an agreement. Although the

Marriage Law does not explicitly explain, a marriage agreement may be made in any case. The conditions for the permissibility of making a marriage agreement are; (1) The marriage agreement is made before or at the time of marriage between those who make the agreement, (2) Made with the mutual consent of both parties, (3) The marriage agreement must be made in writing, (4) The marriage agreement must be legalized by an authorized Marriage Registrar, (5) The marriage agreement must not conflict with religious law, (6) The marriage agreement shall be made by a person who has been categorized as legally competent, (7) The marriage agreement shall be valid since the marriage takes place, (8) The marriage agreement shall also apply to third parties, (9) The marriage agreement cannot be changed during the marriage, unless both parties agree to change it and the change does not harm third parties. (Darmabrata & Sjarif, 2004)

Based on the description above, marital property that can be divided by half or in accordance with the law chosen by the parties, whether positive law, customary law or Islamic law unless there are other agreed provisions. Meanwhile, property obtained before marriage (inherited property) and personal property (inheritance, grants, wills and gifts) remain the property of each party. (Manan, 2014) Husbands and wives can divide joint search property during marriage in accordance with the marriage agreement they make. As KHI Article 88 which explains that if the husband and wife previously did not make a marriage agreement then a dispute occurs after the breakup of the marriage either due to death or divorce, then the issue of joint property can be resolved in the Religious Court.

## Joint Property in Fiqh

The issue of joint property between husband and wife is not explicitly found in fiqh books, but its description has a connection with the concept of rights and obligations of husband and wife. This issue is related to the maintenance that is placed on the husband, while the wife has the obligation to take care of the household. So far, fiqh scholars have not really highlighted matters relating to property in marriage. The assets obtained by the husband are all under the husband's control, while the wife only has the obligation to take care of the house and children and serve the husband.(Yaswirman, 2013) Although the fiqh books do not regulate joint property, the benefits to the household can be proven, this can be seen with a sense of equality in the rights and obligations of husband and wife in the household which is then regulated in KHI.

Islamic law only explains the existence of property belonging to men and women and mascawin when marriage takes place. So it is possible that in the marriage the husband and wife have their own property or personal property. The husband is not allowed to use the wife's property without her permission first. When living a household life, husbands and wives may help each other in family affairs, because this is highly recommended. However, in principle, the maintenance of the wife and children remains the obligation of the husband. (Zamzami, 2013) Islamic law does not regulate the merging of assets between husband and wife during marriage, so that the assets of both in the perspective of Islamic law are separate. (Projodikoro, 1991)

The absence of discussion of joint property in fiqh literature is because the Al-Qura>n and hadith specifically do not explain the institutionalization of joint property between husband and wife. (Mesraini, 2012). Some fiqh books explain related to property or household furniture (mata>' al-bayt), al-Sarkhasi> states that household furniture is divided according to the needs of each party, if the furniture is the needs of the woman or wife then it belongs to the wife as well as the man or husband Syams al-Din Al-Sarkhasi, Al-Mabsu>t} (Beirut: Da>r al-Ma'rifah, 1989). Imam Shafi'i is of the opinion that if there is a dispute between husband and wife regarding household furniture, whether it is due to marriage dissolution or divorce, both parties are asked to take an oath. If one party is reluctant to swear then the furniture belongs to the party who is willing to swear. Meanwhile, if both parties are willing to take an oath then the property or household furniture can be divided in half, whether the property is commonly used by men or specifically for women or commonly used together. Muh}ammad Idris Al-Sya>fi'i, Al-Umm (Beirut: Da<r Ibn H{azm, 2001). The two opinions above are not much different from the opinion expressed by Imam Ma>lik, who stated that husbands and wives who disagree regarding household furniture can resolve it first by dividing objects specifically used for men and women. However, Imam Ma>lik emphasized related to furniture that is used together such as a house then it is the property of the male party. But the house can belong to the woman if she can show accurate evidence of the ownership of the house. (Imam Sahnu, 1994).

Basically, the assets between husband and wife are separate, both their respective assets and assets obtained jointly or individually during marriage.(Thalib, 1974) There is no pooling of assets in marriage except in the form of a shirkah, which is done with a special contract, namely a shirkah contract. Without such a contract, the assets remain as each other's personal assets or separate assets.(Mardani, 2016) Shirkah etymologically is al-ikhtilat} which means mixing and merging. While in terminology shirkah is defined by several fiqh scholars, including according to sha>fi'iyyah, shirkah is an agreement related to the rights to property owned by two or more people in a way that is known. (Ibn Qudamah,1997). Meanwhile, according to the Compilation of Sharia Economic Law (KHES) (Agung, 2008) explains that what is said to be shirkah is cooperation between two or more people in terms of capital, skills or trust in a particular business with profit sharing based on a ratio.

Pada umumnya, shirkah dibagi menjadi dua: *shirkah amwa>l* dan *shirkah abda>n. It can also be divided into two forms: shirkah amla>k (ownership) and shirkah 'uqu>d (contract).* (Hasanudin & Mubarok, 2012). Shirkah amwa>l and shirkah abdan are part of shirkah 'uqu>d. Both forms of shirkah are further divided into two, namely mufa>wadah and 'ina>n. Sharing with property (shirkah amwa>l) is a form of agreement made by two or more people by providing capital and investing with that capital and each party gets a clear share according to the existing profits. Shirkah amwa>l is divided into two as well, namely shirkah mufa>wadah fi> alamwa>l and shirkah 'ina>n fi> al-amwa>l*. (Abdurrahman, 2003)*.

Joint property in mu'a>malah terms is called shirkah or joint husband and wife. In the conventional context, the economic burden of the family is the result of the husband's livelihood, while the wife is in charge of managing the household economy. However, given the times, wives can also work outside the home. The

two forms of involvement of both parties can be categorized into shirkah abdan (cooperation between husband and wife, capital from the husband while the wife is the manager) and shirkah ina>n (husband and wife both have capital and are managed together). In marriage, the term work is not only defined by activities outside the home, because without realizing the wife's task of managing household needs is a form of work. So that in a marriage, where the wife is only a housewife and the husband earns money outside the home is a form of relationship between the two parties. So the results of the husband's livelihood belong to the husband and wife, and are managed together. (Rofiq, 2003)

Ismuha explains that joint property or joint search property of husband and wife is categorized as shirkah al-abdan al-mufa>wad}ah. The argument is that in general, in reality, husband and wife help each other in meeting family needs. This can be seen from the situation of husband and wife who both work to provide for the family and invest together. Although the work they do is different, it is seen according to the ability of each party.(Ismuha, 1986)

In addition to being analogous to shirkah, marital property, especially joint property between husband and wife, can also be discussed using legal ijtihad, namely istihsa>n. Combining or analogizing joint property into istihsa>n is caused by "needs" such as making agreements related to husband and wife's property to avoid disputes between husband and wife over property, namely in the event of separation either due to death or divorce. The agreement can also be categorized into istihsa>n using ijma>', some scholars also categorize it into istih}sa>n with 'urf'. (Umar, 1994). As is known, the review of the joint property of husband and wife is not explicitly explained in the Koran and hadith. The word of Allah only mentions the property of men and women in general, the meaning of QS: An-Nisa> verse 32 explains that men and women have their respective shares according to their efforts. Likewise, the hadith does not discuss marital property, while the scholars of the madhhab only discuss the settlement of household furniture in the event of a dispute between husband and wife, there is nothing about the agreement of husband and wife in the issue of joint property, especially the division of property during marriage between husband and wife in the event of divorce or death. However, related to this matter only exists in the customs of the community, one of which is in Indonesia itself. The process of resolving property disputes during the marriage of husband and wife is usually in accordance with 'urf.

From the explanation above, it can be concluded that joint property in Islamic law is not clearly mentioned, but only mentions that everyone, both men and women, has the right to their respective property. So that originally the assets of the husband and wife are separate, there is no mixing of assets. The issue of joint property usually occurs in communities that recognize the mixing of assets between husband and wife, especially in Indonesia itself such as the Javanese, Acehnese and Minang communities. The naming of joint property was originally based on'urf or custom in a country that did not separate property between husband and wife. Unlike the case with Islamic societies whose customs separate the property of husband and wife. (Zein et al., 2005). However, husband and wife can mix assets by making a shirkah (partnership) contract with agreed agreements

either before or after the marriage contract, in accordance with the provisions of Islamic law.

## Photographing the Division of Joint Property from a Progressive Law Perspective

The law on the division of joint property in the Compilation of Islamic Law (KHI) includes laws that are regulating in the function of deductive, textual and normative laws. While the case of division of joint property submitted to religious judges is casuistic, inductive, contextual and empirical, which is called case law. In connection with the above case law, Article 229 KHI states that: "Judges in resolving cases submitted to them, must pay serious attention to the legal values that live in society, so that their decisions are in accordance with a sense of justice".

The philosophical aspect in the division of joint property filed in the Religious Court cannot be separated from the aspect of justice. Justice is the goal of Islamic law and many in the Qur'an to enjoin to do and uphold justice. The nature of justice which is closely related to the principle of justice in family law including in the division of joint property is fundamental.

In this regard, when studied about Islamic law in the construction of Fazlur Rahman's thought, namely understanding the expressions of the Qur'an to be generalized to social-moral principles by linking specific expressions of the Qur'an along with the socio-historical background and by considering the ratio-legis ('illat hukum) stated in the expressions of the Qur'an and then by formulating these general principles into the actual socio-historical context today. (Efrinaldi, 2001).

Considering the actual socio-historical context in the division of joint property is a necessity, so that legal problems arise between the text, namely Article 97 KHI as das solen with the socio-historical context as das sein, this illustrates the concept of Islamic law in the construction of application thinking in the Religious Courts in aspects of community life relations, especially between husbands and wives in terms of economic law, more clearly the law of maintenance.

The possibility of the danger of the subjectivity of the interpreter (such as the Compilation of Islamic Law) to avoid or at least to minimize the danger of subjectivity, Rahman proposes a methodology consisting of three approaches, namely (Efrinaldi, 2001): First, the historical approach to find the meaning of the text. Second, the contentual approach to find the goals and objectives contained in legal-specific expressions and third, the sociological background to strengthen the findings of the contentual approach to find goals and objectives that cannot be revealed by the contentual approach or abbreviated as a series of approaches: "historical, contentual and sociological". The main idea contained in the first movement, as mentioned above, is the application of inductive thinking methods, thinking from specific KHI articles, towards principles or in other words, thinking from specific legal rules towards the general social morals contained therein.

The social morality that progressive law promotes has the understanding that the law should be able to keep up with the times in order to serve the interests of society based on the moral aspects of law enforcement resources. Meanwhile, if progressive law is connected to legal interpretation, this means that progressive interpretation understands the legal process as a process of liberation of an

ancient concept that cannot be used in serving today's life. The power (interpretation) of progressive law is the power to reject and break the status quo.(Ali, 2013)

The use of progressive law allows judges to give decisions on the division of joint property by dividing half or not dividing half.(Hasyim & Dkk, 2008) Both forms of decision look at the fulfillment of the rights and obligations of both parties. If the rights and obligations are fulfilled, then the provisions for the division of joint property by half can be implemented. However, if the rights and obligations are not fulfilled, then the division of half a share for each party is considered not to fulfill a sense of justice. Therefore, it can be concluded that both substantive and procedural juridical justice can be fulfilled if the rights and obligations during the marriage can be implemented. However, if the rights and obligations are not fulfilled properly, juridical justice cannot be implemented, then the judge must look in terms of social and moral justice by looking at the conditions at the time the marriage took place. for example, the wife works hard and takes care of the household while the husband does not work and does not participate in taking care of their household. Then the former husband is not entitled to get as much as the former wife's share.

Justice is not only seen in terms of being equal to the meaning of equal, but how much they are in carrying out their respective responsibilities. As initiated by Aristotle, justice can be assessed by the obligations or services that have been carried out by a person and get equal rights, known as distributive justice. Likewise, John Rawls' idea of justice is by revisiting the negotiation position. A position that does not discriminate against the other party or the aggrieved party. If the negotiation position does not show a balance, then there must be actions in defense of one of the parties. The judge must take affirmative action in light of the circumstances of this case. This can be done by seeing which party is weakened in running the household during the marriage bond, which still reassesses the rights and obligations of each party without being disadvantaged. These two opinions are in line with the idea of justice put forward by an Islamic thinker, namely Majid Khadduri, which states that procedural justice (in accordance with applicable provisions) cannot be realized if it does not consider substantive justice (justice by extracting the law or legal ijtihad). Substantive justice can be implemented with the aim of prioritizing benefits for the achievement of the objectives of shari'ah maqasid shari'ah.

Islam also explains that it is not permissible to mistreat fellow human beings so that we are required to prioritize benefits for the public interest and minimize the occurrence of harm. Being fair is a form of realization of maqas}id shari'ah. In order for the purpose of shari'ah to be properly implemented, each party must pay attention to the benefit of the people and avoid harm (the essence of mas}lah}ah). The judge is very likely to divide the joint property more for the ex-wife than the ex-husband in this case by looking at the existing mas}lah}ah. If the judge decides to keep dividing the property equally between the ex-husband and the ex-wife, it is feared that there will be arbitrariness later for the benefit of the community. The general public knows about the condition of the parties' household in this case, that the husband does not work but still gets the joint property equally.

## D. Conclusion

Progressive law is an important idea to be taken into account by judges, because seeing the process of legal discovery not only lies in the intellectual competence of judges in handling a case, but also how human ethics and morals color these intellectual activities. The use of progressive law allows judges to make decisions on the division of joint property by looking at the fulfillment of the rights and obligations of both parties. In the event that the rights and obligations are fulfilled, the provisions for the division of half of the joint property can be implemented. Conversely, if the rights and obligations are not fulfilled, the division of half a share for each party does not fulfill a sense of justice. Both substantive and procedural juridical justice can be fulfilled if the rights and obligations during the marriage can be implemented. However, if the rights and obligations are not fulfilled properly then juridical justice cannot be implemented, then the judge must look in terms of social and moral justice by looking at the conditions at the time the household took place.

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