

Discourse of Joint Property In Riview of *Istinbath* Islamic Law

Watni Marpaung, M.Amar Adly

Universitas Islam Negeri (UIN) Sumatera Utara

watnimarpaung@uinsu.ac.id

Amaradly73@yahoo.com

ABSTRACT

This paper elaborates the concept of joint property as a unique Islamic legal entity in Indonesia. Positioning the meaning of shared assets with various views of classical fiqh and Indonesianism is a necessity. Even more than that, tracking the legal *istinbath method* formulated by Indonesian scholars on the concept of joint property is the focus of the article. Positioning the meaning and side of *istinbathi ushuly* gives strength in the continuity of the implementation of joint property in Indonesia.

Keywords: Joint Property, Istinbath Islamic Law

A. INTRODUCTION

Joint property is a study of Islamic law that is unique to the Indonesian people. In Arabic literature, the concept of Joint property is not found precisely against the backdrop of different cultures and local wisdom between Arab and Indonesian. Rich local wisdom in Indonesia makes joint property one of the studies of Islamic law that lives and continues to develop in Indonesia.

Shared assets as an original concept of Indonesian local wisdom, it is quite necessary to be seated together in interpreting joint property. On that basis, defining joint property in the study of classical fiqh and Indonesian fiqh becomes a necessity. The classical fiqh reference is not explicitly used as a benchmark for consideration in the study. The Compilation of Islamic Law (KHI) as a feature of Indonesian fiqh has properly accommodated the concept of joint property as well as being a guide for Islamic law in the Religious Courts in Indonesia.

In the framework of strengthening the foundation of the concept of joint property, it is necessary to re-examine the legal *istinbath* method when formulating joint property. Jurisprudence will not come with various concepts without the foundation of *istinbathi ushuly* studies being builtstrong one. At least, this paper

is in the framework of seeking an *istinbathy* study of the concept of joint property as a reinforcement by conducting literature tracking and interviews with the figurehead of the Compilation of Islamic Law (KHI).

B. DEFINITION OF JOINT PROPERTY

The discussion about joint property is indeed very interesting. This is indicated by a literature review related to the joint property itself. In classical fiqh literature the problem of joint property is not found at all. So, it can be said that joint property is a study of family law that appears in Indonesia. So the study of joint property is a typical product fiqh law Indonesia.

However, recently there have been attempts to try to justify the concept of joint property through the concept of *syirkah*. In the sense that the property is produced jointly between husband and wife so that there is a mixing of one property with another and cannot be distinguished anymore. (Abdul Manan, 2006: 109)

Etymologically, joint assets are assets that are owned jointly between husband and wife. Meanwhile, the terminology is very clear in the Law. No. 1/1974 article 35 paragraph (1) which states that joint property is "property acquired during marriage into joint

property." (Abdul Manan and M. Fauzan, 2001: 72).

The definition above illustrates that what is meant by joint property is property obtained after a legal bond between husband and wife occurs. Therefore, the property brought by each party cannot be called joint property, because it is not obtained after the marriage period.

So, the term joint property is only found in Article 35 paragraph I. Therefore, the term used in the Marriage Law no. I of 1974 is not the same as the term used in the Civil Code which uses the word "treasury of unity". Perhaps the freezing of the term "joint property" as a terminology in law with a national perspective, was only carried out after the emergence of the Marriage Law.

In Article 35 paragraph I of the Marriage Law (UUP) No. I of 1974 stated that, "property acquired during marriage becomes joint property." The word "property" at the beginning of the sentence in this article, in addition to showing a concept of property (not services), also explains its general meaning. This means that everything that is called property and is obtained in marriage can be called joint property.

This interpretation is actually not wrong. In the Indonesian Dictionary it is explained that what is meant by property is

to refer to something tangible or concrete such as goods, money, land and so on, so something that is still in an abstract form cannot be categorized as property. (Depdiknas, 1995: 360).

The principle of this joint property is the main point that all property acquired during the marriage is joint property and automatically becomes a joint property institution commonly referred to as company property. (M. Yahya Harahap, 1975: 117).

So in a general sense, joint property is the goods obtained during the marriage in which the husband and wife are still living, trying to fulfill the interests of the needs of family life. Indeed, basically, based on customary law, the assets obtained during the marriage will automatically become the property of the company between husband and wife, even if in there are variations. For example, in a patrilineal society, assets that come from the wife's relatives in marriage by taking children who are not justified by law to be used as joint wealth institutions. Or for example the custom in Java, where a poor man marries a rich wife, so in this case the institution of joint property wealth does not materialize. (M. Yahya Harahap, 1975: 117)

However, in the subsequent meaning of joint property is a problem that

causes other problems as well. When giving meaning to joint assets owned during the marriage period, what is meant by concrete objects such as moving objects such as trains, cars, and so on. But what about debts that are on other people? And of course many more questions that can arise again. Therefore, the meaning of joint property must be understood and interpreted in a broader sense whose elements include debts. (J. Satrio, 1993: 91).

Then the problem again, is the joint property absolute income of the husband or together with the wife during the marriage? Therefore, we can see the explanation of the definition of joint property as explained by Henry Lee A Weng from the "Draft of Law on Muslim Marriages in 1958", that generally joint property is intended for three things, namely: (Henry Lee A Weng, t. th: 209). First, livelihood (property) that is cultivated together. Second, a person's livelihood, while others stay at home to take care of common needs. (Yafizham, 1977: 124). Third, the result of the property belonging to each that is cultivated together. Whereas in the second category, it can be seen that the material is a renewal of customary law.

According to the old customary law, joint property will only exist if a wife actively participates in the cultivation of

the property. That is, if the wife does not participate in managing the property, then the property is not referred to as joint property but is private property of the husband.

The process of changing from the old customary law provisions reached its peak in the 1950s with the birth of a court product in the form of the decision of the Supreme Court of the Republic of Indonesia No. K/Sip/1956 dated November 7, 1956. In this regard, according to Yahya Harahap, this is a reaction and strong criticism made by legal experts. Where criticism arises because it is basically in line with the development of views on women's emancipation and the flow of globalization in various aspects of life. (M. Yahya Harahap, 1993: 194).

Seeing the explanation given by Henry Lee A Weng above, that the joint property in the marriage law includes the husband's proceeds and income, the wife's income and income, as well as the results and income from the husband's and wife's personal assets, even though the main assets are not included in the joint property. .

However, even so, all assets obtained are of course provided that they are obtained as long as they are still in a legal marriage bond and as long as there is no written agreement before the marriage is carried out. Thus, whatever is obtained

during the marriage such as a carriage, house, land, rice field, shop, securities, and so on is counted as joint property.

If analyzed further, there are differences in the concept of unitary property in the Civil Code and joint property in UUP No. 1/1974 and KHI. In the Civil Code in articles 121 and 122 it is explained that joint assets or union assets are defined as comprehensive assets and include all assets, both those that already existed at the time of the marriage (ie items brought by the prospective husband and wife in the marriage) or that will exist during the marriage period, which assets can be in the form of profits, can also be in the form of losses or debt burdens.

It seems that the Civil Code does not distinguish between inherited assets and assets acquired during marriage. Presumably so that there is no misunderstanding in the matter of joint property, it is necessary to distinguish between the two.

In the Marriage Law. No. 1/1974 in Article 35 paragraph (2) after paragraph 1 explains joint property, then paragraph 2 explains the meaning of inherited property. It is stated that "inherited property is the innate property of each husband and wife and the property obtained by each as a gift or inheritance is under the control of each as long as the parties do not specify

otherwise. (Abdul Manan and M. Fauzan, 2001: 72)

Thus, it can be understood that the assets obtained before the marriage occurred whether through the provision of inheritance, wills and so on which later after marriage, remained the property of the person concerned. Except that both husband and wife parties enter into an agreement on the assets they carry, such as to be combined into one regardless of the background of the birth of the property.

In other words, the Marriage Law clearly distinguishes what is called joint property and what is called innate property. However, the Marriage Law provides room for a change in status from inherited property to joint property as long as there is a marriage agreement.

Furthermore, it must be understood that joint property and inherited property are both assets that must be protected in order to carry out married life in order to build a *sakinah* and *mawaddah* family life. That is, as long as husband and wife still have innate property and there is no agreement to make it a joint property, a form of clarity is needed for this which is built based on an agreement.

Without clarity and boundaries between joint property and innate property, it will lead to difficulties later in life. Because the marriage that is being lived is

sometimes not always harmonious or happy. A wave of trials in a family, squabbles, quarrels, misunderstandings, for example, do not rule out the possibility that the household ark will be destroyed. So that these indications do not lead to a divorce.

At such a level, husband and wife have blamed each other and are trying to claim their respective rights and obligations. So this is where a discussion and study is needed which one is actually a joint property and which one is an innate property. As an attitude of anticipation of problems that can occur at any time.

Although the issue of joint property is part of a series of problems that must be resolved when a divorce occurs, in reality very few legal experts pay serious attention to the issue of joint property. This is especially so for legal practitioners who are more closely in touch with this issue. For every divorce between husband and wife, joint property must be a very urgent discussion. (Abdul Manan, 2006: 103)

C. JOINT PROPERTY ACCORDING TO THE COMPILATION OF ISLAMIC LAW (KHI)

In regulating how the mechanisms and rules for joint property are carried out in the community. We will see that the

rules that have been set are not only in the law but also in customary law. In the legislation, we can see for example in Article 119 of the Civil Code which explains the unification of assets between husband and wife starting from the time of marriage.(Abdul Manan, 2006: 104). Thus the joint property that is not small sometimes becomes a dispute in the family is a problem that must also receive attention from all parties, because everyone has a family in their life.

In addition to the rules contained in the law, there are also rules used in viewing, analyzing and even deciding cases based on the Compilation of Islamic Law (KHI), in which the material and contents are taken and abstracted from various fiqh books. The books that are used as references do not only come from the books of the Shafi'i school of thought, but also books of fiqh from other schools of thought which are the formulations. Finally, KHI is considered to be a new school in the world of fiqh, because it is a formulation of various schools of thought in seeing a problem that is being faced.

Regarding joint property in the Compilation of Islamic Law (KHI) we can see in Chapter XIII on assets in marriage in articles 85 to 97.(Depag RI, 2002: 183-185). In these articles it is clear that the rules made regarding assets in such a way

start from the rights of each party to joint property to the rules for their distribution.

As the material on joint property in Law no. 1 of 1974 in article 35 is no different from the material in the KHI in article 86, both of which still state that innate property is property that is produced after the marriage period. Likewise, the innate property of both parties is the right of each without any other rights. The case is different, if both parties enter into an agreement that regulates it so that there are agreements that allow them to combine their assets.

Meanwhile, the responsibility for the maintenance of this joint property is left to both parties. However, in the KHI the statement to take responsibility for joint assets is different in the article. The husband's responsibility for joint property is contained in article 89, while the wife is also responsible for maintaining joint property including her husband's property which is contained in article 90.(Depag RI, 2002: 184)

Furthermore, the relationship between debt and joint assets can be seen in Article 93. In that article it is stated that if the debt is related to the husband, the responsibility is also on the husband. On the other hand, if the wife is in debt, then the responsibility is to the wife. But if the debt is done because of factors for the

benefit of the family, not personal interests, of course the responsibility for payment is with joint assets.(Depag RI, 2002: 184)

If you look closely, the issue of joint property is indeed closely related to common interests or family interests. The importance of the regulation in the use of the allocation of joint assets is that it is not allowed to pay the husband's debts, even though the husband's position in the family is still responsible for all problems in the family, whether it concerns economic affairs, children's education, and so on.

Here KHI is very strict in the limitations outlined in the article above. However, we can understand further that there is a positive impression of the existence of a common property. Thus, neither husband nor wife can use the joint property arbitrarily. While in Law no. 1 of 1974 in article 36 also states that regarding joint assets, husband and wife can act with the consent of both parties.(Depag RI, 2002: 124)

Article 36 of Law no. 1 of 1974 above, even though it provides conditions for the use of joint assets, namely with the permission of both parties, the property will be used. So, if we compare what is contained in the KHI, it is more strict and strict. The strictness of KHI in managing joint assets is proven by not only the issue

of whether or not one of the two parties permits the use of the property. However, as mentioned above to the limit the use of personal interests that give rise to debt should not be at all.

Although KHI is in the rule of law in the country Indonesia limited to Presidential Instruction No. I in 1991 dated June 10, 1991, then organically anticipated by the Decree of the Minister of Religion No. 154 of 1991 dated July 22, 1991. However, the content of the material is much broader and more explicit than what is contained in Law no. 1 of 1974 to be exact, Article 35.

So important is the contribution of KHI in the development of Islamic law in Indonesia, which includes joint property, so if we look at Presidential Instruction No. I in 1991 dated June 10, 1991, then organically anticipated by the Decree of the Minister of Religion No. 154 of 1991 dated July 22, 1991 there are at least three important notes that we need to pay attention to, namely: (Abdul Gani Abdullah, 1994: 62.)

First, the order to disseminate KHI is nothing but the obligation of the Islamic community in the context of functionalizing the explanation of Islamic teachings as long as they are normative as living laws.

Second, The legal formulation in KHI seeks to end the double perception of the applicability of Islamic law as indicated by Article 2 paragraph (1) and (2) of the Law. No. 1 of 1974, the formal legal aspect in the Law. No. 7 of 1989 as a perfectly enforced law.

Third, clearly shows the applicable area to government agencies and the community in need. (Abdul Gani Abdullah, 1994: 62.)

The essence of the important note above, is that KHI has provided a solution to the variations of opinion in the fiqh book which is then used as a general guide for courts on issues of marriage, endowments, inheritance, and joint property. Thus, KHI should be understood by all Muslims Indonesia in order to establish clear and unquestionable laws.

In other words, it can be said that KHI in the matter of joint property has clearly provided a description of the conditions as well as the procedures and technical implementations in the midst of society. Because KHI is a compilation or collection of various schools of jurisprudence, especially the four namely Hanafi, Maliki, Shafi'i and Hanbali, it will certainly provide a broad understanding and determination in its articles.

D. JOINT PROPERTY LIMITS

Every husband and wife is still entitled to the property which he brought into the marriage or which he obtained himself during the marriage. Property other than that becomes their joint property. When they want to confirm their marriage, those who will become husband and wife may make an agreement that the property they bring into the marriage and the property they acquire in their marriage will become their joint property. (T. Jafizham, 1977: 88).

Furthermore, joint property and inheritance must be seriously discussed between husband and wife. The existence of an agreement or some kind of deed is an effort at the level of prevention when unexpected things happen. After the agreement, husband and wife are no longer faced with the problem of solving property problems, but have moved on to other things.

Thus the size and boundaries between shared and innate property must be clear and clear. So that there are no more doubts that can eventually lead to misunderstandings that are not only for the benefit of husband and wife but for the benefit of the wider community. Therefore, it is felt that it is very necessary to set limits on joint property from a legal point of view.

Basically the definition of joint property that has been stated above is in accordance with the sound of paragraph I article 35, namely property acquired during marriage. In line with this definition, for the realization of joint assets, only one condition is needed, namely that the property is acquired during the marriage. In other words, the joint property is calculated when a person has entered the marriage period.

So there are no other conditions other than that one condition. It is not necessary for the wife to be actively involved in collecting and obtaining it. (M. Yahya Harahap, 1975: 119) But that is just a theory. Because of course, however in practice, the wife is actually still involved at least in order to take care of the household and their children. What happens if the wife does not care about the house and the children. Can the husband work as well as possible in search of wealth? So, what the wife does at home must be called part of the work itself. In fact, every wife at least participates in providing moral support. It's just that it is not used as a legal requirement.

In relation to where and to what extent the limits and scope of the joint property are, if we look at it from the definitional point of view, it is very clear. This means that theoretically it is no

longer disputed among legal experts. However, the concrete possibilities in the field are sometimes different from existing theories.

Therefore, in addition to theory, it is necessary to present cases or jurisprudence in the field that occur as an explanatory contribution to the boundaries of joint property. As contained in Yahya Harahap's book as follows:

1. All assets that can be proven to be obtained during the marriage, even if the assets or goods are registered in the name of one husband and wife, then the assets in the name of the husband or wife are considered joint assets. What is stated is in accordance with the Medan High Court Decision dated November 20, 1975 No. 393/1973. (M. Yahya Harahap, 1975: 117)
2. If the property is maintained/operated and the name has been transferred to the name of the husband's younger brother, if such property can be proven by the results obtained during the marriage period, then the property must be considered joint property of husband and wife. This is in line with the decision of the Medan High Court dated December 30, 1971 No. 389/1971, that even though the goods in it have been exploited and have been transferred to the name of the

husband's younger brother. However, it is evident that these items were purchased during the marriage with the wife. Even though it has been renamed, it is still joint property.

3. Then in a formulation of the rules it is stated that the existence of joint property of husband and wife does not require proof, that the wife must actively participate in helping the realization of the joint property. The principle of origin of the property is proven to be obtained during the marriage.
4. Furthermore, property or a house that is built or purchased after a divorce is considered joint property of husband and wife if the cost of building or purchasing an item is obtained from the joint venture during the marriage (compare and see P. Neg. Magelang dated 18 November 1968 No. 54/Perdat / 1968; P. Tinggi Bandung dated July 16, 1970 No. 456/1969; M. Agung dated May 5, 1970 No. 8033 K/Sip/1970 West Java Jurisprudence 1969-1972); So the main thing is that the origin of the buyer's money or the construction of something is actually financed from the money earned during the marriage, property or house built is joint property during the marriage, property or house built is joint property even if the goods or

building were purchased and built after the divorce. (M. Yahya Harahap, 1975: 120)

5. Assets purchased by a husband or wife in a place far from their place of residence are joint property of husband and wife if the purchase was made during the marriage (compare with the decision of the Majalengka District Court dated 18 November 1968 No. 18/1968 No. 54/1968; P Tinggi Bandung dated July 16, 1970 No. 54/1968; M. Agung dated May 5, 1971 no. 803 K/Sip1970. (M. Yahya Harahap, 1975: 121)
6. Among the items that are included in the joint property of husband and wife are: (M. Yahya Harahap, 1975: 121)
 - a. All income from property obtained during the marriage, including income derived from goods of origin and goods produced by the joint property itself.
 - b. Likewise, all personal income of husband and wife, both from profits derived from each other's trade or the results of each individual's personal income as employees.
7. As for joint property if the husband and the first wife before his marriage with the second wife, then the determination of joint property can be

taken as a dividing line, namely: (M. Yahya Harahap, 1975: 121)

- a. All the assets that existed between the husband and the first wife before his marriage with the second wife, then the second wife does not have any rights over the property;
- b. Therefore, the joint property that exists between the husband and the second wife is property that is obtained later after the marriage. So, the property that already exists between the first wife and her husband is a joint property which is an absolute right between the first wife and her husband, where the second wife is separated and does not have the right to enjoy and have family life, namely assets obtained from the second wife. officially as wife.
- c. Or if their lives are separated in the sense that the first wife and her husband live in an independent residence, likewise the second wife is separated from living in her own household with her husband, what is the property of the first wife and her husband in domestic life becomes joint property between the wives.

The first is with the husband, and likewise what is the property in the household of the second wife with the husband being joint property between the second wife and the husband being the joint property between the second husband and wife and the husband. (compare with the decision of the PNBogordate. 18 July 1960 No. 165/1967; PT Bandung dated. 10 February 1971 No. 89/1969; MA on. March 11, 1971 No. 454/1970).

8. It is different if a husband dies and before he dies they already have joint property. Then the wife remarries with another man, so even in this situation the joint property between the husband who has died and the wife is still separated, which is inherited by their descendants, and there is no right of children/heirs born from the marriage of the wife with her husband. that second one. However, the children of the first marriage have the right as heirs of the joint property of the second marriage. And vice versa if the wife dies, then the joint assets they get are separated from the assets obtained later after their marriage with the second wife.

The eight points above, are the limits and sizes of what is called the institution of joint property in a marriage, theoretically, legally and practically. However, even so these points are not something that is final but only as an identifiable measure so far. However, it is possible that these sizes and boundaries can change and expand according to the demands of the wider community after contact with new problems.

E. JOINT PROPERTY LAW *ISTINBATH METHOD*

In Islamic law, the existence of joint property, both in the Shafi'i school of which the majority is adhered to in this country, and the fiqh school other than the Shafi'i school, then none of them discusses the topic of joint property in marriage as in customary law. However, from a technical point of view, the ownership of joint property between husband and wife in marriage can be equated with a form of cooperation (*syirkah*). Even though this discussion is not part of the discussion on marriage, it is included under the sub about *buyu'*. (Syahrizal, 2004: 278).

In relation to joint property, the most recent regulations concerning joint property are found in the Compilation of Islamic Law in chapter XIII concerning

property in marriage. Efforts to improve the quality of the regulations regarding joint property contained in the previous marriage law have encouraged the emergence of no less than 13 detailed articles (articles 85-97) in the compilation governing joint property in marriage. These articles can be summarized as follows: (Syahrizal, 2004: 278)

- i. Joint assets are formed automatically with the start of the marriage bond regardless of which party will get the property
- ii. Joint assets must be separated from assets owned by the husband or wife before the marriage takes place.
- iii. Debts that arise as a result of financing married life must be paid with joint assets.
- iv. In the case of polygamy, the joint property between a husband and one of his wives must be separated from the joint property between a husband and his other wives.
- v. In the case of divorce, joint property must be divided equally between the two husband and wife parties when one dies before the other. Then half of the joint property bequeathed to the living.
- vi. The husband or wife has the same right to file a lawsuit with the Religious Court to confiscate joint property if one of

the parties misuses the property, such as for gambling, drinking, and so on.

If viewed from the rules above, it shows the efforts made by Islamic jurists in Indonesia to accommodate between Islamic law and customary law. This is because most fiqh books do not explain the institution of joint property in marriage, so the scholars feel obligated to incorporate this community institution into the Islamic legal system. This effort is carried out on the basis that the joint property institution is an institution that is deeply entrenched and lives in the local community.

The compromising attitude taken by Islamic jurists towards customary law is driven by the fact that in the reality of everyday life the Indonesian people do not stop practicing the rules derived from adat. The abolition of the institution of joint property in marriage is clearly impossible. Because it is actually not in accordance with the spirit of Islamic law which allows customary law to be practiced as long as it does not conflict with the main source of Islamic law.

Thus, it can at least be understood that the joint property method *istinbat* Islamic law based on '*urf*. It cannot be denied that joint property is a characteristic of fiqh law Indonesia who have lived and taken root in people's lives Indonesia.

'urf known in the *usuliyah* method.

العرف هو ماتعارفه الناس وساروا عليه من قول أو فعل
أو ترك ويسمى العادة

Meaning: 'Urf is something that is known and carried out by humans either from words, actions, or leaving something and this is called adat. (Abdul Wahab Khallaf, 1942:89).

As for the argument that the substitute heirs are customs that live in the Indonesian Islamic community and customs that do not conflict with syara' law, do not justify what is haram and do not invalidate what is obligatory, then the substitute heir is a *'urf* valid.

Meanwhile, the valid *'urf* is obliged to maintain it in law and the mujtahids are obliged to maintain it in establishing Islamic law. The judge is obliged to maintain it in his decision because the custom that has been applied in the community is a necessity, agreement and benefit for them as long as it does not conflict with syara' law. (Abdul Wahab Khallaf, 1942:89) This provision is in accordance with the *usuliyah* rules which read:

العادة محكمة

Meaning: The custom (custom) is punished. (Zainal Abidin bin Ibrahim Ibn Nujaim, 1968: 93).

This method implies that in fact the legislator (God) views that the laws are

subject to custom in relation to human beings with one another in the implementation of legal actions. Therefore, the legal provisions are adjusted to what is determined by custom as long as the custom does not conflict with the legal text (*nas*). (Juhaya S. Praja, 1995: 131). This method also gave birth to the following legal rules:

المعروف عرفا كالشروط شرطا

Meaning: Something that applies '*urf* as something that has been required. (Zainal Abidin bin Ibrahim Ibn Nujaim, 1968: 93)

استعمال الناس حجة يجب العمل بها

Meaning: The implementation of the law that is practiced by humans can be an argument that requires its implementation. (Zainal Abidin bin Ibrahim Ibn Nujaim, 1968: 100)

تعيين بالعرف كالتعيين بالنص

Meaning: Provisions decided by adat are like legal provisions established by texts. (Zainal Abidin bin Ibrahim Ibn Nujaim, 1968: 100)

On the basis of the approach to the legal *istinbat* method above, it can be emphasized that a case that is legally determined based on the '*urf* way of existence is the same as a case determined based on the text.

In other words, that joint property as one of the legal materials in KHI is produced and formulated using the 'urf legal istisbat method. Abdullah Syah, as one of the team formulating the material for KHI, emphasized the same thing. One of the reasons stated by the formulator of KHI is that the concept of joint property is a custom and tradition that lives in society Indonesia. (Abdullah Shah, interview: 11 August 2021).

In addition, joint property can be categorized as 'valid urf that does not conflict with syara' and must be maintained. However, in essence, it is not easy to categorize something formulated with 'urf unless it has met the predetermined criteria. The Hanafi school which is said to put forward the concept of 'urf explains the criteria of 'urf as follows:

1. Does not conflict with the shari'a arguments'
2. Applicable generally and evenly among the people around him
3. What was used as a basis for the determination of the law was in effect at that time, not what appeared later.

Ahmad Azhar Basyir also explained the same thing as follows: (Ahmad Azhar Basyir, 1983: 30).

1. It is a habit of a society

2. Does not conflict with the shari'a arguments'
3. It is binding on its supporters

Meanwhile, according to Satria Efendi, there are at least five requirements that something can be categorized using the 'urf method, namely: (Satria Efendi, 1999: 346).

1. Accepted by common sense and can be recognized by the general view
2. It must happen repeatedly and be widespread and have become common
3. It's been and is running and it can't be that custom will apply
4. It is unacceptable if there are different conditions between the two parties
5. It does not conflict with the texts, because the provisions of the texts are stronger than customary law.

At least with the above requirements it can be said that the distribution of joint property fulfills these requirements. According to Ibn Nujaim al-Hanafi, joint property does not conflict with the Qur'an or Hadith with no explicit prohibition found. Furthermore, the common treasure in practice in Indonesia has been applied in general without exception by looking at the role of husband and wife in family life. And

common property are traditions and customs that have existed for a long time and not traditions that have emerged recently.

Thus, it can be understood that joint property is an Islamic law rooted in the customs and traditions of the community Indonesiawhose legal istinbat method is based on 'urf. This is marked by quite a contrast to the differences in the family life of the Arab community whose fiqh orientation refers to the tradition.

Meanwhile, in Indonesia, the role of the husband, which is known in classical fiqh, is absolutely to provide physical and spiritual support, starting to shift. This is indicated by both of them having careers and having a salary so that after marriage their assets are put together. Even though the wife does not work, her role in the household is also understood as part of her work which causes the birth of joint property. (Syahrizal, 2004: 290) So that when he dies the property must first be divided in two, after that it is divided among the heirs according to their respective portions.

However, it cannot be denied that there is also a view that understands that joint property is already contained in classical fiqh studies contained in the concept of syirkah. Syirkah or syarikat in Indonesian comes from Arabic which

means syarikat. Etymologically, shirkah is the mixing of one property with another so that it cannot be distinguished from one another. (Ismail Muhammad Shah, 1984:153). While syirkah according to Islamic law is the right of two or more people to something. (Ismail Muhammad Shah, 1984:55-56)

Including the notion of shirkah is a trade union, namely a cooperative bond carried out by two or more people in trade. With the syirkah contract agreed by both parties, all parties who bind themselves have the right to take legal action on the union's assets and are entitled to receive benefits in accordance with the agreed agreement. (A. Rahman Ritonga, 1999:1712).

The fiqh scholars in justifying the legal basis of shirkah based on the letter al-Nisa verse 12:

...فإن كانوا أكثر من ذلك فهم شركاء في الثلث... (النساء\3: 12)

Meaning: ...So if there are more than one mother of one, then they are allied in that third... (Depag RI, 1989:943).

The scholars divide *syirkah* into two parts, namely *syirkah al-amlak* (union in ownership) and *syirkah al'uqud* (union based on a contract).

Syirkah al-amlak two or more people have property together without

going through 'aqad syirkah. Syirkah in this category is divided into two forms: (A. Rahman Ritonga, 1999:1711)

First, Syirkah Ikhtiyar. This union is an association that arises as a result of the legal actions of the people who associate, such as two people agreeing to buy an item, or receiving a grant, will, or waqf from another person.

Second, Syirkah Jabr. This union is something that is determined to belong to two or more people without their will, such as inheritance they receive from a person who dies.

Meanwhile, syirkah al-'uqud is a syirkah whose contract is agreed upon by two or more people to bind themselves in a capital, work, and profit association. (A. Rahman Ritonga, 1999:1711) The forms of *syirkah al-'uqud* consist of:

First, syirkah al-inan. *Syirkah al-inan* is an association in capital (wealth) in a trade carried out by two or more people and the profits are shared together. The capital combined in this union does not have to be the same amount. Likewise the problem of work responsibilities. Meanwhile, all losses suffered in this union are the responsibility of the unionized persons in accordance with the percentage of their respective capital/shares. Seen in the form of syirkah

al-inan there is a capital factor from each, although not the same in magnitude and work activities are also not the same as agreed upon in the contract.

Second, syirkah al-mufawadah. *Syirkah al-mufawadah* is an association of two or more people on an object with the condition that each party enters the same amount of capital and takes the same legal action. So that each party can act legally on behalf of the people in the association. This syirkah is not limited based on people's beliefs where other members are responsible for the others. What is an important element in this union is working capital, as well as profits. Each party who binds himself in this association has the same rights and obligations.

If the capital, labor, and profit are different then this union turns into an 'inan union. Therefore, in an al-mufawadah union, if one of the unionized parties conducting a transaction has consulted with its union partner, the transaction is valid. Therefore he acts on behalf of the unionized and is the representative of the other party. The most important feature in this union is that in taking legal action against union assets, each party may only carry out a transaction, if it obtains the approval of the other party.

Third, syirkah al-abdan. *Syirkah al-abdan* is an association carried out by

two parties to accept a job such as a blacksmith, tailor, barber, and so on. The results or rewards received from the work are divided equally according to their agreement. Each only has a work business, even though the type of work done is not the same. They join in a union then the profits and the results of the work are divided equally according to the agreement.

Fourth, syirkah al-wujuh. Syirkah al-wujuh is a union made by two or more people who have no capital at all and they make a purchase on credit and sell it for cash. Meanwhile, the profits are shared. Today, this kind of union is almost the same as a broker, the union buys goods on credit only on the basis of trust, then sells cash so that they make a profit. In this *syirkah al-wujuh*, neither the capital nor the work in this union is clear. There is no capital for those who bind themselves in *syirkah al-wujuh*. Therefore, this transaction includes a transaction for something that does not exist.

Fifth, syirkah al-mudharabah. Syirkah al-mudharabah is an agreement between the owner of capital and a worker to manage money from the owner of capital in certain trades and the profits are divided according to the agreement. Meanwhile, the losses suffered are the responsibility of the owner of the capital.

In this *syirkah al-mudharabah*, there is an association between parties who have capital and the workers/managers of the union. The calculation of profits is shared according to the agreement, but in the case of losses it is solely the responsibility of the owner of the capital.

From the description above, regarding *syirkah* with various kinds, there are also several views that position joint assets including:

Ismail Muhammad Shah states:

“...and looking at the practice of gono-gini in Indonesian society in Java, Siharaekat Aceh and other terms throughout Indonesia, we can conclude that joint livelihoods between husband and wife, gono-gini, siharaekat, and others belong to the group *syirkah abdan/mufawadah* (Ismail Muhammad Shah, 1984:78).

Likewise, Ahmad Rafiq concludes in reviewing the term joint property as follows:

"So, the definition of joint property is assets obtained during marriage apart from gifts or inheritance. That is, the assets obtained for their efforts, or individually during the period of the marriage bond. In terms of *muamalah* can be categorized as *syirkah* or a joint between husband and wife. In the conventional context, the

family's economic burden is the result of the husband's livelihood, while the wife as a housewife acts as a manager who regulates household economic management. In a broader sense, in line with the demands of development, the wife can also do work that can bring wealth. If the former is classified as *syirkah al-abdan*, capital from the husband, wife contributes services and labor. The second, where each brings in capital, is managed together, called *syirkah inan*. (Ahmad Rafiq, 1995:200-201).

Furthermore, Sayuti Talib said, *syirkah* between husband and wife during the marriage period is classified as *syirkah abdan*. (Sayuti Talib, 1986:84-85).

At least, Islamic legal thought also sees the case of joint property as something new that does not need legal *istinbat* at all, but has been included and is included in the discussion of *syirkah* even though they do not agree on what type of *syirkah*. Maybe someone saw it on the type of *syirkah al-abdan*, *syirkah 'inan*, and so on.

However, it should be noted that joint property can be said to be set in two ways of legal stipulation. First, by using the method of *istinbat 'urf* law with an approach that is generally used in the Hanafi school, and second, by approaching the concept of *syirkah* in the study of *fiqh*.

F. Conclusion

Joint property is a living legal concept that has developed in Indonesian society. Legal products will not appear and be born without a strong legal basis. At the very least, joint property as reference *istinbath* can be formulated by the figures according to two methods, namely first, the concept of 'urf and second, the concept of *syirkah* which applies in the field of *muamalah*.

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