THE VALUE OF LEGAL EDUCATION IN THE RESOLUTION OF MARITAL PROPERTY DISPUTES BY THE RELIGIOUS COURT OF KEDIRI CITY PERSPECTIVE COMPILATION OF ISLAMIC LAW (KHI)

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Abstract: This article aims to provide legal education to the public about the resolution of common property disputes from the perspective of the Compilation of Islamic Law (KHI). More specifically, the author reviewed casuistically the rulings produced by the Kediri City Religious Court regarding the resolution of marital property disputes. This article was compiled using qualitative methods with this type of case study. Data is collected through interviews, observations, and documentation. Next, the data were analyzed with Miles-Huberman's interactive model. This article concludes that the ruling of the Kediri City Religious Court is quite flexible and contextual. This is reflected in several cases, where on one occasion, the Kediri City Religious Court had given a ruling on the settlement of property disputes together regarding article 97 of the KHI while considering article 89 paragraph 1 of Law No. 7 the Year 1989 on Religious Justice. Then on another occasion, the Kediri City Religious Court has also ruled out article 97 of KHI as a consideration in the ruling regarding the settlement of marital property disputes because it is considered unfair based on the facts before the trial. That is, judges have the authority to position the principle of justice and contextual expediency as key in the resolution of common property disputes, which have far exceeded the normative side or formal legal aspects of the law.

Keywords: Article 97, Dispute, Marital Property, KHI.

Introduction

One of the legal consequences arising from divorce carried out by people who are Muslim in Indonesia is the division of marital property[1] *(gono-gini)* between divorced husband and wife. In Islam do not know the marital property or *gono-gini,* but the living iddah alone, dowry, and bread. So the concept of *gono-gini* stands for interpretation of the verse about the living iddah, which is the right obtained by the wife after divorce.[2] Therefore, the common property can only follow what is stipulated in the legislation. Because in Islam it is still not so detailed.

The laws and regulations in Indonesia for people who are Muslim stipulate that every property obtained during the marriage period is used as a common property without distinguishing who works and/or obtains the property, and in whose name. Property brought before marriage becomes a right that belongs (excluding marital property), while the property collected in marriage, is called the property of both [3]. this property is material that can be taken to the court in line with Article 35 This property can be tried in the trial. This is in line with Article 35 Paragraph (1) of Law No. 1 of 1974 on Marriage, that "property acquired during the marriage becomes a common property".[4]

In line with the UUP, the arrangement of marital property is also regulated in the KHI, stating, "the existence of marital property in the marriage does not rule out the possibility of the property of each husband

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[1] Kementerian Keuangan Republik Indonesia, "Keputusan Menteri Keuangan Republik Indonesia Nomor 914/KMK.01/2016 Tentang Standar Terminologi/Istilah Dalam Bahasa Inggris Di Lingkungan Kementerian Keuangan," Pub. L. No. 914/KMK.01/2016 (2016).

[2] Mark Cammack, Adriaan Bedner, and Stijn Van Huis, "Democracy, Human Rights, and Islamic Family Law in Post-Soeharto Indonesia," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, February 19, 2015), 7–8, https://papers.ssrn.com/abstract=2567571.

[3] Mardalena Hanifah, "Perkawinan Beda Agama Ditinjau Dari Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan," *Soumatera Law Review* 2, no. 2 (November 20, 2019): 297–308, https://doi.org/10.22216/soumlaw.v2i2.4420.

[4] Tim BIP, *Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 Tentang Perkawinan* (Jakarta: Bhuana Ilmu Populer, 2017).

and wife."[5] The arrangement of common property in Article 86 Paragraph (1) of the KHI states, "there is no mixture between the husband's property and the wife's property due to marriage,"[6] looking at this chapter, it will be seen in this article that the common property is not absolute in Islam.

The regulation of marital property in the UUP, excluded the innate property of each husband and wife, gifts, inheritance, as long as it is not specified otherwise.[7] As long as no other specified" in the UUP contains an understanding, as described in Article 87 Paragraph (1) of the KHI that is, as long as the parties do not specify the other in the marriage agreement.

The rules of sharing common property in the event of a divorce, UUP does not specifically explain the division, Article 37 UUP states, "if the marriage breaks up due to divorce, the common property is regulated according to their respective laws."[8] The explanation of Article 37 of the UUP relating to its "respective laws" contains understanding, based on religious, customary, and other laws.

The division of marital property due to divorce both divorce talaq/defendant in INPRES No. 1 of 1991 on Compilation of Islamic Law (*Kompilasi Hukum Islam*/KHI), in contrast to the arrangement of the division of marital property due to divorce in Law No. 1 of 1974. INPRES No. 1 of 1991 on the KHI, in this case, is more straightforward in declaring it as contained in Article 97 of INPRES No. 1 of 1991 on the KHI which states, "widows or widowers divorce each entitled to one-second of the common property as long as it is not specified otherwise in the marriage agreement." Looking at the rules of the division of common property in the article, it requires a proportional division both for the husband and for the wife, with equal division regardless of who seeks and seeks the common property.

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[5] Laurensius Arliman, "Dispensasi Perkawinan Bagi Anak Di Bawah Umur Di Pengadilan Agama Padang Sidempuan," *Jurnal Al Adalah* 12, no. 4 (2015): 1–16.

[6] Direktorat Bina KUA dan Keluarga Sakinah, *Kompilasi Hukum Islam Di Indonesia* (Jakarta: Kementerian Agama Republik Indonesia, 2018).

[7] Peter Mahfud Marzuki, *Pengantar Ilmu Hukum* (Jakarta: Kencana, 2018), 78.

[8] Tomy Michael, "Alienasi Dalam Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 Tentang Perkawinan," *Mimbar Keadilan* 13, no. 1 (2017): 229.

Article 97 of the KHI seems to be inversely proportional to the existing reality, law *in* the *book* is different *from the law in action*. Further looking at the concept of justice itself, justice must not always be calculated equally, for example, the proportion of inheritance division in Islam between the parts of a man and a woman is 2:1. Justice in the customary law of the people also means that justice is not necessarily considered to be equal, it could be that justice means losing a right to the desired part.

For example, in Batak people who are entitled to be heirs are boys, this is because girls who have married by honest marriage then enter into the family of the husband, then he is not the heir of his parents who died.[9] Justice can also mean rejecting division because it assumes that the division received does not benefit those who receive it. For example, a wife who escapes from the division of common property to avoid the obligation to pay the debts of common property.[10]

Looking at the birth process of INPRES No. 1 of 1991 on the KHI, especially related to the article on the division of marital property after divorce (Article 97 INPRES No. 1 of 1991 on KHI) in terms of the regulation of the article elements of customary law and civil code is very strong. The framework of the division of common property is in proportion to the rules of Articlex97 INPRES No. 1 of 1991 on the KHI following the article of shared property division in the Civil Code, while if referring to the article that states that the KHI does not recognize the mixing of property in marriage then this is following the values of common property in customary law.

The contents of the shared property section are not arranged in detail along with the technicalities that govern. Thus, the division of common property does exist but is more inclined to the opinion of the judge following the facts of the parties. This indicates the general rules open wide the opinion

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[9] Eman Suparman, *Hukum Waris Indonesia Dalam Perspektif Islam, Adat, Dan BW (Edisi Revisi)* (Bandung: Refika Aditama, 2018), 41.

[10] Raden Subekti and Raden Tjitrosudibio, *Kitab Undang-Undang Hukum Perdata* (Jakarta: Pradnya Paramita, 2008), 32.

of judges *(legal opinion)* to consider the fairness of all decisions.[11] Although sometimes, the provisions of common property are contrary to the rules of the law.

As happened in Article 97 KHI (hereinafter written, KHI) seems to be inversely proportional to the existing reality, *das solen* is different from *das sein*. The article stipulates that the share of the property between the husband and the wife is the same as one second, regardless of the innate property and marriage agreement, or who works.[12]

There is a ruling of the Kediri City Religious Court that uses the provisions of Article 97 KHI, namely Case Decision No. 0398 / Pdt.G / 2019 / PA. Kdr dated October 30, 2019, and Case Decision Number 0320/Pdt.G/2019/PA. Kdr on December 19, 2019. While the Decision of the Kediri City Religious Court which does not use the basis of Article 97 KHI is the Verdict of Case No. 0168 / Pdt.G / 2014 / PA. Kdr dated December 2, 2014, which was strengthened by the Decision of the Surabaya Religious High Court Case Number 0086 / Pdt.G / 2015 / PT.Sby on February 13, 2015. Based on the above, researchers are interested in conducting further searches by researching the Implementation of Article 97 KHI in the division of property with marriage in the Religious Court of Kediri City.

This article aims to provide legal education to the public about the resolution of common property disputes from the perspective of the Compilation of Islamic Law (KHI). More specifically, the author reviewed casuistically the rulings produced by the Kediri City Religious Court regarding the resolution of marital property disputes. This article was compiled using qualitative methods with this type of case study. Data is collected through interviews, observations, and documentation.

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[11] Ery Agus Priyono and Kornelius Benuf, "Kedudukan Legal Opinion Sebagai Sumber Hukum," *Jurnal Suara Hukum* 2, no. 1 (March 27, 2020): 54–70, https://doi.org/10.26740/jsh.v2n1.p54-70.

[12] Ahmad Imam Mawardi and A. Kemal Riza, "WHY DID KOMPILASI HUKUM ISLAM SUCCEED WHILE ITS COUNTER LEGAL DRAFT FAILED? A Political Context and Legal Arguments of the Codification of Islamic Law for Religious Courts in Indonesia," *JOURNAL OF INDONESIAN ISLAM* 13, no. 2 (December 1, 2019): 421, https://doi.org/10.15642/JIIS.2019.13.2.421-453.

Primary data and secondary data were used in this study. Primary data is data that comes from the field that is field data obtained from informants. An informant is a person who is used to provide information about the situation and background conditions of the research. [13] In this study, the primary data was obtained from interviews with the Chief Justice, judges, and clerks of the Kediri City Religious Court. Secondary data is not the primary data. In this study, for example, the Kediri City Religious Court Ruling related to the object of the study conducted by researchers.

Data analysis can be classified into two types including quantitative data analysis and qualitative data analyst. Quantitative data analysis is data analysis that is based on calculations or numbers or quantities for example using statistical numbers. Qualitative data analysis is data analysis that does not use numbers but rather uses images or descriptions with words on findings.[14] Data collected through interviews, observations, and documentation was analyzed with Miles-Huberman's interactive model.[15]

Marital Property according to the Laws

To find out how the system of regulating property in marriage according to Law No. 1 of 1974 on Marriage, it is necessary to conduct an assessment of the sound and content of the existing articles. In Article 35 paragraph (1) it is mentioned that "Property acquired during the marriage becomes a common property." Whereas in paragraph (2), "The marital property of each husband and wife and property obtained by each as a gift or inheritance is under the control of each recipient of the parties does not determine the other."[16]

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[13]Lexy J. Moleong, *Metode Penelitian Kualitatif* (Bandung: Remaja Rosdakarya, 2017), 132.

[14] Salim HS, *Penerapan Teori Hukum Pada Penelitian Tesis Dan Disertasi* (Jakarta: RajaGrafindo Persada, 2013), 22, http://library.stik-ptik.ac.id.

[15] Matthew B. Miles and A. Michael Huberman, *Analisis Data Kualitatif* (Jakarta: UI Press, 2010).

[16] Sufirman Rahman, Nurul Qamar, and Muhammad Kamran, "Efektivitas Pembagian Harta Bersama Pasca Perceraian: Studi Kasus Perkawinan Poligami," *SIGn Jurnal Hukum* 1, no. 2 (March 23, 2020): 104–18, https://doi.org/10.37276/sjh.v1i2.60.

Based on the provisions of the article it can be known that in essence in marriage there are two types of wealth, namely property obtained during the marriage called marital property, and property obtained by each husband and wife before marriage or at the time of marriage as an inheritance gift commonly called property. These two types of wealth cannot be mixed because they are different types unless the husband and wife have specified the other in the marriage agreement.

So marital property is a term for property obtained by the husband and wife during marriage and becomes the right of ownership of both between the husband and wife. As for the property that has been owned by the husband or wife before marriage, as well as dowry for the wife, as well as inheritance, wills, and grants belonging to the wife or husband do not include marital property. So, if the wife works and obtains property, then the wife has full rights to her property. Unless the wife uses her property for family purposes and is made a common property (*Syirkat Amlak*).[17]

The marital property of the husband and wife is determined by the factor of the length of the marriage. This means that when the marriage takes place, then automatically all property obtained during the marriage becomes marital property after the breakup of the marriage, either because of divorce, death, or by the court decision, then the marital property is divided fairly to the husband and wife with a division of 50:50 or half portion for the husband and a half for the wife.[18]

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[17] Ayi Abdurahman Sayani, Ahmad Mulyadi Kosim, and Sutisna Sutisna, "Penerapan Asas Ius Contra Legem Dalam Pembagian Harta Bersama; Analisis Pertimbangan Hakim Pengadilan Agama Kota Depok," *Mizan: Journal of Islamic Law* 1, no. 2 (December 13, 2017), https://doi.org/10.32507/mizan.v1i2.8.

[18] Mohammad Taufik Kurniawan, "TINJAUAN YURIDIS TERHADAP PEMBAGIAN HARTA BERSAMA YANG DIPEROLEH SELAMA PERNIKAHAN (ANALISA PUTUSAN NO. 2191/PDT.G/2018/PA.MEDAN)," *Kumpulan Karya Ilmiah Mahasiswa Fakultas Sosial Sains* 2, no. 02 (May 6, 2021), https://jurnal.pancabudi.ac.id/index.php/jurnalfasosa/article/view/1336.

Marital Property according to the Compilation of Islamic Laws (KHI)

The problem of shared property is a contemporary study, not explained in classical jurisprudence. Property in marriage are known only by innate property and living only. The property owned by the wife either when brought before marriage or the result of the wife's hard work is the property of the wife. While the property after the stabbing of the husband's work belongs to the wife as well.[19] So it can be traced, that the common property is not born from the thoughts of jurists, but rather a bias of the emancipation of women who are asking for equal rights in divorce. Including the properties generated during the wedding.[20]

Speaking of Islamic law, especially regarding common property, it is juridically formally inseparable regarding the KHI which is the result of ijtihad which contains Islamic legal regulations that are under the conditions of legal needs and legal awareness of Muslims in Indonesia. But the KHI is not a new school in Islamic fiqh, but is a form and application of various existing schools of *fiqh* and is equipped with other institutions such as fatwa ulama in response to problems that arise, court decisions through trials of a case by judges, and laws made by the legislature, to answer the problems that exist in Indonesia following the legal awareness of the Indonesian Islamic community itself.[21]

Based on the KHI, the wealth in marriage is regulated in Articles 85 to Article 97 in Book I (one). The formulation of Articles 85 to 97 KHI has been approved by Islamic jurists in Indonesia to take *syirkah abdan* as a basis for the formulation of the rules of common property. The framers of the KHI approached the path of *syirkah abdan* with customary law. This approach

[19] Ismuha, *Pencaharian Bersama Suami Istri Di Indonesia* (Jakarta: Bulan Bintang, 1978), 38.

[20] Risma Nur Arifah, Siti Zulaichah, and M. Faiz Nasrullah, "Membuka Rahasia Bank Dalam Pembagian Harta Bersama Perspektif Maqashid Syariah," *Journal de Jure* 11, no. 2 (December 31, 2019): 113–27, https://doi.org/10.18860/j-fsh.v11i2.7999.

[21] Andi Herawati, "KOMPILASI HUKUM ISLAM (KHI) SEBAGAI HASIL IJTIHAD ULAMA INDONESIA," *HUNAFA: Jurnal Studia Islamika* 8, no. 2 (December 17, 2011): 321–40, https://doi.org/10.24239/jsi.v8i2.367.321-340.

does not contradict the ability to make *'urf* (custom/ tradition) as a source of law and in line with the rule that says *al-adatu muhakkamah*.[22]

Some Islamic jurists consider that common property is the will and aspiration of Islamic law. According to them, marital property is a consequence of a marital relationship between a man and a woman that then produces the wealth from the efforts they both make during the marriage bond. They base on the word of Allah in the Qur'an Surah An-Nisa: 21 which calls marriage a holy, strong, and firm covenant *(mitsaqan ghalizhan)*. That is, marriages that are carried out through *ijab qabul* and have qualified and get along well is a sham between husband and wife. Therefore, the consequences of the law that appeared later, including property became common property.

So against this marital property, the husband or wife has the same responsibility and the marital property will be divided equally if the marriage has broken up due to death or divorce and because of the court's decision. Based on the analysis, the articles governing the common property are Articles 88 and 95. Article 88 stipulates that if there is a dispute over common property, it will be submitted to the competent Religious Court.

The article is an article in the KHI that regulates the division of common property in the event of a dispute. The KHI submits all matters relating to the sharing of common property to the Religious Court which is authorized to resolve the application for the marital property dispute. Submitted to the Religious Court means the determination of the case faced is in the hands of the judge who decides the case based on the evidence in the trial and also the witnesses submitted by each party.

This court settlement is an alternative to the settlement of the case. Couples can choose a more elegant way, namely by peaceful or deliberative. This method is much better because it does not need to be convoluted, time-consuming, costly, and or also eat the feelings of the parties. This method can be used as long as it is done fairly. In deliberation, the parties can agree

[22] Abd. Rasyid As'ad, "Gono-Gini Dalam Perspektif Hukum Islam," *Jurnal Pengadilan Agama* 2, no. 1 (2010).

on the percentage of the division of common property, not necessarily half-and-half.

Wives can earn a percentage of one-third and husbands two-thirds or vice versa as long as no one feels aggrieved or cheated. But if indeed the way of resolving disputes through peaceful channels cannot be carried out and the legal path (court) is considered more appropriate in terms of obtaining justice, then it can be done.

Contra Legem Foundation in Verdict

Contra legem comes from Latin which means to investigate the law, this word is used to describe court rulings that are disquieting and override the laws set by the government. In another sense, *contra legem* is defined as a court ruling that overrides existing laws and regulations, so that judges do not use it as a basis for consideration or even contrary to the article of the law as long as the article of the law is no longer following the development and sense of justice of the community. The *contra legem* ruling means the judge's ruling that overrides existing laws and regulations to bring about justice.

Contra legem is a decision of the Judge of the court that overrides existing laws and regulations so that the Judge does not use it as a basis for consideration or even contrary to the article of the law as long as the article of the law is no longer per the development and sense of justice of the community. Meanwhile, according to K. Wantjik Saleh, *Contra Legem* is the authority of a judge to deviate from the provisions of existing written law that have been used outdated so that they are no longer able to fulfill the sense of justice of the community. In the idea of progressive law, the law is for a man, not the other way around, although the law begins with the text, then the work of the law is taken over by man. It means that the man will seek deeper than the text of the law and then make a verdict.[23]

For the sake of the creation of justice, the judge can act *Contra Legem,* it is permissible on the grounds. If in a case no clear rules or rules are

[23] Satya Arinanto and Ninuk Triyanti, *Memahami Hukum* (Jakarta: RajaGrafindo Persada, 2011), 4.

governing a legal problem cannot meet the sense of justice, then the judge has the authority to do *contra legem,* that is, the judge is obliged to dig, follow, and understand the values of law and the sense of justice that lives in society. This principle is by the provisions of Article 28 paragraph (1) of Law Number. Article 5 paragraph (1) of Law No. 48 of 2004 on Judicial Power, mentioned that the provision is intended so that the judge's decision can be by the law and the sense of justice of the community.

The basis of the discovery of *contra legem* law in positive law, in Article 1 paragraph 1 of Law No. 48 of 2009 specified that judicial power is the power of an independent state to conduct justice to uphold law and justice based on Pancasila for the implementation of the State of Law of the Republic of Indonesia. "Free" here means free. So the power of the judiciary is free to hold a trial.

Freedom of judicial power or judicial freedom or freedom of judges is a universal principle that exists everywhere, both in Eastern European countries, as well as in America, Japan, Indonesia, and so on. The principle of judicial freedom is the desire of every nation. What is meant by the freedom of the judiciary or judges is free to try and free from interference from extra-judicial parties.

The implementation of *contra legem* by the judge is the implementation of progressive law. In progressive law, it is not permissible to be too *positively legalistic* in answering a legal question. Progressive legal efforts are needed, which provides expediency and justice for the seekers of justice. Judges in the law of events are said to be the mouthpiece of the law, judges are expected to be able to be progressive by not always assuming legal certainty will provide justice. A rule of law that is the main thing sought is justice and expediency, if it has been realized then there will be another legal problem.

According to Sartjipto Rahardjo, the judges are not legislators, because of their duties to adjudicate or examine and prosecute. The task of making the law is in the realm of legalization, however, the judge determines

what the law wants. The judge must decide by law, but in fact, he not only spells out the text of the law but decides what is stored in the text.

Based on the above explanation can be concluded that *contra legem* is a decision of a court judge who overrides existing laws and regulations so that the judge does not use it as a basis for consideration or even contrary to the article of the law as long as the article of the law is no longer following the development and sense of justice of the community. *Contra legem* is the description of progressive legal values carried out by judges in deciding or answering a legal problem by deviating from laws and regulations or legal issues that do not have the rule of law or are not yet clear the rule of law.

Legal Education in Several Rulings of Religious Court Judges of Kediri City on The Resolution of Marital Property Disputes

Based on the results of research as the verdict of the marital property dispute case Number 0398/Pdt.G/2019/PA.Kdr dated October 30, 2019, and Case Decision Number 0320/Pdt.G/2019/PA.Kdr dated December 19, 2019, which in essence the decision of the panel of judges in adjudicating this case includes two things. First, determine the joint property of the Plaintiff and the Defendant. And second, punishing the Defendant for handing over one-second of the marital estate to the Plaintiff and if it cannot be shared naturally, it can be assessed at the price, then the Defendant provides compensation half of the price value to the Plaintiff or through the sale at the price agreed by the Plaintiff and the Defendant or the auction whose result is one-second submitted to the Plaintiff and one-second to the Defendant.

Based on the two verdicts of the case, the panel of judges used the consideration of the provisions of Article 35 paragraph (1) of Law No. 1 of 1974, on Marriage and following the jurisprudence of the Supreme Court of Indonesia Number 1448 K/Sip/1974, dated November 9, 1976, which abstracted the law states, that property obtained during the marriage bond becomes common property. In addition, the panel of judges used legal considerations namely Article 97 KHI which states, that: "Widow or

widower divorce each entitled to one-second of the common property as long as it is not specified otherwise in the marriage agreement".

So based on the article, the Panel of Judges stipulates that the object of the dispute must be divided 2 (two) between the Plaintiff and the Defendant each gets 1/2 part and if in the division of the common property cannot be shared naturally, it must be sold through auction and the result is divided between plaintiff and defendant with the division of 1/2 (one-second) part of the proceeds of the sale. Thus, the judge in examining and adjudicating the case implements Article 97 of the KHI.

While according to Article 2 paragraph 1 of Law No. 48 of 2009 on The Power of Justice "Justice is carried out for the sake of justice based on the Supreme Divinity" and Article 5 paragraph 1 of Law No. 48 of 2009 on the Power of Justice "Judges and constitutional judges are obliged to dig, follow and understand the values of law and a sense of justice that lives in society" and in Article 229 KHI "Judges in resolving cases brought to him must be Pay close attention to the legal values that live in a society so that the verdict is under the sense of justice of the community. So it can be concluded in this discussion, the judge who examined and adjudicated case Number 0398 / Pdt.G / 2019 / PA.Kdr and case Number 0320/Pdt.G/2019/PA.Kdr has a legalistic view that implements Article 97 KHI Jo Article 35 paragraph 1 of Law No. 1 of 1974 on Marriage.

In the Decision of the Religious Court of Kediri City Case Number 0168 / Pdt.G / 2014 / PA. Kdr dated December 2, 2014, and The Decision of the Surabaya Religious High Court Case Number 0086 / Pdt.G / 2015 / PT. On February 13, 2015, the Panel of Judges did not use the basis of Article 97 of the KHI as a consideration of the verdict. Based on the consideration of the Panel of Judges following the facts before the trial of the application of Article 97 of the KHI in case Number 0168 / Pdt.G / 2014 / PA.Kdr is not fair. By adhering to the principle of justice and expediency as the purpose of the law and the word of Allah in the Qur'an Surah An Nisa Verse 58 below:

۞ اِنَّ اللّٰهَ يَأۡمُرُكُمۡ اَنۡ تُؤَدُّوا الۡاَمٰنٰتِ اِلٰٓى اَهۡلِهَا ۙ وَاِذَا حَكَمۡتُمۡ بَيۡنَ النَّاسِ اَنۡ تَحۡكُمُوۡا بِالۡعَدۡلِ ؕ اِنَّ اللّٰهَ نِعِمَّا يَعِظُكُمۡ بِهٖ ؕ اِنَّ اللّٰهَ كَانَ سَمِيۡعًاۢ بَصِيۡرًا ﴿۵۸﴾

Meaning:

"Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice. Excellent is that which Allah instructs you. Indeed, Allah is ever Hearing and Seeing."

The panel of judges uses these legal considerations in resolving property disputes together by establishing the division of property that is proven as property along with a ratio of 2 (two) to 1 (one) namely the Defendant (wife) gets 2 parts or 2/3 part of the marital property and 1 part or 1/3 of the marital property becomes part of the Plaintiff (husband). In the legal consideration of the panel of judges this case is included in the field of marriage, then based on the provisions of article 89 paragraph 1 of Law No. 7 of 1989 concerning Religious Justice which has been amended by Law No. 3 of 2006 and Second Amendment of Law No. 50 of 2009, the verdict, in this case, adjudicates, establishes marital property and establishes the respective parts of Plaintiff and Defendant on the marital property for Plaintiff (husband) 1/3 part and Defendant (wife) 2/3 part and punish to Plaintiff and Defendant to divide and hand over 1/3 part marital property to the plaintiff (husband) and 2/3 part to the Defendant (wife) and if it cannot be shared naturally then the Marital property is sold at public auction and the result is 1/3 part handed over to the Plaintiff (husband) and 2/3 part into the part for the Defendant (wife).

But in Case Decision Number 0168/Pdt.G/2014/PA.Kdr dated December 2, 2014 Plaintiffs appealed to the Surabaya Religious High Court listed in the case register number 0086 / Pdt.G / 2015 / PTA. Sby. In its legal considerations, the Surabaya High Court of Religious Affairs conveyed the consideration that the Decision of the First Level Religious Court based on what has been considered and mentioned as the opinion of the first-tier judges in its ruling can be approved for consideration from the appeal-level

judges. Nevertheless, the Court of Appeal judges consider it necessary to add consideration.

The Court of Appeal judges using the consideration of Jurisprudence in its decision No. 266K / AG / 2010 dated July 12, 2010, contains a legal abstract, that if the evidence and facts in the trial all marital property obtained by the wife from the results of her work then for the sake of a sense of justice, it is appropriate for the wife to get a greater share of the property from the husband. In this regard, the Court of Appeal judges agreed with Abdul Manan's opinion, that "There needs to be special consideration about the participation of the husband in realizing the common property of the family so that the part that establishes half of the common property for the wife and husband needs to be flexed again as expected article 229 KHI."[24]

Thus the Decision of the First Level Religious Court in this case which has considered the contribution of the husband in the acquisition of the marital property which further divides the property together by not using the basis of the provisions of article 97 of the KHI can be justified because to fulfill the sense of justice following the provisions of Article 229 KHI that requires the judge in resolving the cases brought to him to pay attention with The values of the law live in a society so that the verdict is following the sense of justice.

The panel of judges of the appeal level considers this case included in the field of marriage then based on Article 89 paragraph 1 of Law No. 7 of 1989 on Religious Justice as amended by Law Number 3 of 2006 and Second Amendment to Law No. 50 of 2009 then the Judges of the High Court of Religious Affairs tried to strengthen the Ruling of the Religious Court of Kediri City Number 0168 / Pdt.G / 2014 / PA. Kdr on December 2, 2014.

In the second ruling of the case, the legal consideration of the judges of the Kediri City Religious Court in adjudicating and deciding marital property disputes did not use the basis of Article 97 of the KHI. Such considerations can be justified for the sake of justice. This is based on basis of the discovery of *contra legem* law in positive law, in Article 1 paragraph 1 of

[24] Abdul Manan, *Aneka Masalah Hukum Perdata Islam di Indonesia* (Jakarta: Prenada Media, 2017), 129.

Law No. 48 of 2009 it is determined that judicial power is the power of an independent state to hold a judiciary to uphold law and justice based on Pancasila for the sake of the implementation of the State of Law of the Republic of Indonesia. "Free" here means free. So, the power of the judiciary is free to hold a trial.

Freedom of judicial power or judicial freedom or freedom of judges is a universal principle that exists everywhere, both in Eastern European countries, as well as in America, Japan, Indonesia, and so on. The principle of judicial freedom is the desire of every nation. What is meant by the freedom of the judiciary or judges is free to try and free from interference from extra-judicial parties.

In Article 4 paragraph 1 of Law No. 48 of 2009, it is determined that judges must judge according to the law by not distinguishing people. This means that the judge must essentially remain in the system, not be out of the law so must find the law. Article 10 paragraph 1 of Law No. 48 of 2009 specifies that the court should not refuse to examine and adjudicate a case filed on the pretext that the law is not or is less clear, but rather obliged to examine and prosecute it. However, the judge is obliged to examine and hand down the verdict, which means that the judge is obliged to find the law.

In addition to being based on the provisions mentioned above, finding the legal basis clearly and firmly in Article 5 paragraph 1 of Law No. 48 of 2009, which reads: "Judges as law enforcement and justice are obliged to explore, follow, and understand the legal values that live in a society". The word dig is assumed that the law exists but is hidden. To reach the surface, it still has to be excavated. So, the law exists, but it still has to be dug up, searched, and found, not nonidentity, then created.

Paul Scholten says that in human behavior itself there is a law. Whereas every time humans in society behave, do or work, therefore the law already exists, just dig, search, or find it.[25] Likewise in Article 229 of the KHI states "The judge in resolving the cases brought against him, must pay

[25] M Sudikno Mertokusumo and Adriaan Pitlo, *Bab-Bab Tentang Penemuan Hukum* (Bandung: Citra Aditya Bakti, 1993), 7.

close attention to the legal values that live in a society so that the verdict is following the sense of justice."[26]

Furthermore, it should be emphasized here, based on the above principles, Indonesian judges should not be legalistic, namely just to be a mouthpiece or mouth of the law, although it must always be legalistic. Added by Bagir Manan, the judge's decision should not merely fulfill the formalities of the law or simply maintain order. The judge's ruling should serve to encourage improvement in society and build social harmonization in an association. Only with that car, according to him, the judge's decision will be right and fair.[27] In connection with this principle also, if the provisions of existing laws are contrary to the public interest, propriety, civilization, and humanity, namely the values that live in society, then according to Yahya Harahap, the judge is free and authorized to perform *contra legem* actions, namely taking decisions that deal with the article of the law concerned.[28]

The implementation of *contra legem* by the judge is the implementation of progressive law. In progressive law, it is not permissible to be too positively legalistic in answering a legal question. Progressive legal efforts are needed, which provides expediency and justice for the seekers of justice. Judges in the law of events are said to be the mouthpiece of the law, judges are expected to be able to be progressive by not always assuming legal certainty will provide justice. A rule of law that is the main thing sought is justice and expediency, if it has been realized then there will be another legal problem.

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[26] Muhammad Helmi, "Penemuan Hukum oleh Hakim Berdasarkan Paradigma Konstruktivisme," *Kanun Jurnal Ilmu Hukum* 22, no. 1 (May 4, 2020): 111–32, https://doi.org/10.24815/kanun.v22i1.14792.

[27] Bagir Manan, *Suatu Tinjauan Terhadap Kekuasaan Kehakiman Dalam Undang-Undang Nomor 4 Tahun 2004* (Jakarta: Mahkamah Agung RI, 2005), 212.

[28] M. Yahya Harahap, *Hukum Acara Perdata: Tentang Gugatan, Persidangan, Penyitaan, Pembuktian, dan Putusan Pengadilan* (Jakarta: Sinar Grafika, 2017), 856.

Conclusion

Judges have the authority to prioritize the principle of justice and expediency over the normative side or formal legal aspects of the law. That is, through the principle of *contra legem,* judges have the right to prioritize contextual justice as a key in the resolution of marital property disputes. This is reflected in several cases, wherein the Verdict of Case Number 0398 / Pdt.G / 2019 / PA. Kdr dated October 30, 2019, and Case Decision Number 0320/Pdt.G/2019/PA.Kdr dated December 19, 2019, the Kediri City Religious Court gave a ruling on the settlement of property disputes together concerning article 97 of the KHI as well as considering article 89 paragraph 1 of Law No. 7 the Year 1989 on Religious Justice. Case Number 0168/Pdt.G/2014/PA.Kdr dated December 2, 2014, the Kediri City Religious Court also ruled out article 97 of KHI as a consideration in the decision on the settlement of marital property disputes because it was considered unfair if based on the facts before the trial.

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