

## **The Implementation of *Contra Legem* Principle in Dividing Joint Assets Post Divorce for Different Contributions *Maqāsid Sharī'ah* Perspective**

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### **Abstract:**

The dividing of joint assets after divorce plays a central role in the achievement of justice. This research explores the case of the dividing of joint assets at the Malang Regency Religious Court; the defendant opposed the claim for joint assets with the argument that the joint assets were realized more by the wife because her father assisted it. This study aims to analyze the judge's consideration in deciding the dividing of joint assets by using the contra legem principle in case number 1786/Pdt.G/2023/PA.Kab.Mlg and its analysis in *maqāsid sharī'ah*. This research is empirical research using a descriptive qualitative approach; this research was conducted at the Religious Court of Malang Regency using interview and documentation methods. The results showed that 1). The dividing of joint assets by 70% for the counterclaim defendant and 30% for the counterclaim plaintiff is based on distributive justice that looks at the legal facts in the trial. 2). The *maqāsid sharī'ah* analysis confirms that the decision supports the preservation of assets, offspring, and soul in the context of the basic needs of the *darūriyāt*. In addition, it provides convenience for both parties without having to start from scratch in the context of *hajiyāt* needs.

**Keywords:** *contra legem*, joint assets, *maqāsid sharī'ah*.

### **Abstrak:**

Pembagian harta bersama setelah perceraian memainkan peran penting dalam pencapaian keadilan. Penelitian ini mengeksplorasi kasus pembagian harta bersama di Pengadilan Agama Kabupaten Malang; tergugat menolak gugatan harta bersama dengan alasan bahwa harta bersama lebih banyak diwujudkan oleh istri karena dibantu oleh ayahnya. Penelitian ini bertujuan untuk menganalisis pertimbangan hakim dalam memutuskan pembagian harta bersama dengan menggunakan prinsip *contra legem* dalam kasus nomor

1786/Pdt.G/2023/PA.Kab.Mlg dan analisisnya dalam *maqāsid shari'ah*. Penelitian ini merupakan penelitian empiris dengan pendekatan deskriptif kualitatif; penelitian ini dilakukan di Pengadilan Agama Kabupaten Malang dengan menggunakan metode wawancara dan dokumentasi. Hasil penelitian menunjukkan bahwa 1). Pembagian harta bersama dengan 70% untuk tergugat rekonsensi dan 30% untuk penggugat rekonsensi didasarkan pada keadilan distributif yang melihat fakta hukum dalam persidangan. 2). Analisis *maqāsid shari'ah* mengkonfirmasi bahwa putusan tersebut mendukung pemeliharaan harta, keturunan, dan jiwa dalam konteks kebutuhan dasar *darūriyāt*. Selain itu, memberikan kemudahan bagi kedua belah pihak tanpa harus memulai dari awal dalam konteks kebutuhan *hajiyāt*.

**Kata Kunci:** *Contra legem*, harta bersama, *maqāsid shari'ah*.



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## Introduction

According to many people, the issue of joint assets is considered taboo.<sup>1</sup> This is because culture and religion have specific rules or values regarding dividing joint assets. Some societies may regard talk of joint assets as chaotic or disrespectful to their religious or cultural values. The dividing of assets can often lead to conflict between family members. Usually, there are different views or high expectations regarding dividing.

Such conflicts can damage family relationships, so talk of asset dividing is avoided to prevent conflict. In addition, some people consider the dividing of joint assets to be a personal and private matter.<sup>2</sup> While asset dividing is considered taboo in some cases, it is essential to note that every family and society has different norms. Some families may be more open to discussions about the dividing of assets, while others prefer to maintain privacy and prevent conflict.<sup>3</sup>

The mixing of assets in marriage cannot be separated because the issue of joint assets is susceptible and dramatically influences the household, especially in the event of divorce one of the legal consequences that arise when a couple divorces is the issue of joint assets.<sup>4</sup> Prospective couples who are getting married often do not think about the issue of dividing joint assets because they hope that marriage is forever, even though

<sup>1</sup> Zakiyah Salsabila, "Harta Bersama Akibat Perceraian di Indonesia dan Malaysia Dalam Perspektif Gender" (masterThesis, Fakultas Syariah dan Hukum Universitas Islam Negeri Syarif Hidayatullah Jakarta, 2021), <https://repository.uinjkt.ac.id/dspace/handle/123456789/55690>.

<sup>2</sup> Martha Eri Safira dan Udin Safala, "Analisis Pendekatan Teori Keadilan John Rawls Dan Teori Moralitas Immanuel Khan Terhadap Caleg Mantan Narapidana Yang Lolos Sebagai Anggota Legislatif Dalam Pemilu 2019," *Legal Standing : Jurnal Ilmu Hukum* 3, no. 1 (4 Juli 2019): 131–46, <https://doi.org/10.24269/ls.v3i1.1803>.

<sup>3</sup> Mega Wildatun Nur, "Analisis Hermeneutika Hukum Terhadap Putusan Hakim Pengadilan Agama Ngawi Tentang Pembagian Harta Bersama" (diploma, IAIN Ponorogo, 2019), <http://etheses.iainponorogo.ac.id/5666/>.

<sup>4</sup> Arina Adalatal Hukmi, "Analisis Masalah Mursalah Terhadap Putusan Nomor: 6091/Pdt.G/2013/PA.KAB.MLG tentang Pembagian Harta Bersama di PA. Kabupaten Malang" (undergraduate, Surabaya, Universitas Islam Negeri Sunan Ampel, 2018).

divorce can happen to all couples. As a result, many couples do not consider pre-nuptial agreements important, which can be used as a legal tool to protect the rights and obligations of husband and wife in the event of divorce.<sup>5</sup>

A pre-nuptial agreement allows couples to clearly define asset ownership and dividing rights during marriage and after divorce. In this agreement, the couple can jointly determine how the joint assets will be divided in the event of a divorce. This can avoid disputes and conflicts that may occur in the future. The provisions in Article 35 Paragraph (1) of Law Number 1 Year 1974 stipulate that "assets obtained during marriage are called joint assets". This means that if there is no marriage bond, the assets obtained by each party have not been declared joint assets.<sup>6</sup> As stated, the Compilation of Islamic Law (Article 97) stipulates that "divorced widows or widowers are each entitled to half of the joint assets unless otherwise specified in the marriage agreement." So, if there is no other agreement in the marriage agreement, half of the joint assets will be divided into two parts.<sup>7</sup>

In deciding a case regarding joint assets, the judge must use the current regulations by considering the legal aspects of the case, especially regarding the distribution of common assets equally. Each husband and wife is entitled to half of the joint assets, as stipulated in KHI Article 97.<sup>8</sup> However, in resolving cases of joint assets, judges do not necessarily divide the combined assets in half but consider the contribution of the husband and wife. Therefore, the Religious Court often makes decisions regarding joint assets that are not divided equally. The laws and regulations have regulated the dividing of joint assets clearly and explicitly, but sometimes judges in deciding cases need to be by or contradict the applicable laws and regulations (*contra legem*). This is categorized as an effort to take a new step in the judicial system in Indonesia through law discovery (*rechtvinding*) and law formation (*rechtsvorming*) by judges.

The Malang Regency Religious Court is one of the law enforcement agencies in Indonesia that examines and decides civil cases between Muslims.<sup>9</sup> As is the case in Decision 1786/Pdt.G/2023/PA.Kab.Mlg is one example of the dividing of joint assets that are not always divided equally (50:50). In this decision; the defendant filed a reconvention. The convention defendant/reconvention plaintiff's husband demanded half of the joint assets. However, the convention plaintiff/reconvention plaintiff, namely the wife, objected because the joint assets was realized more by the wife because her father assisted her.

In this case, mediation was conducted as a procedural matter but failed. As a result, the trial process continued with the outcome of the decision of the panel of judges, in this case, determining the dividing of joint assets divided into 30% for the rights of the convention defendant/reconvention plaintiff and 70% for the rights of the convention plaintiff/reconvention plaintiff from the joint assets owned by the husband and wife after

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<sup>5</sup> Wati Rahmi Ria dan Amara Yovitasari, "Akibat Hukum Pembagian Harta Bawaan Dan Harta Bersama Akibat Meninggalnya Pasangan Dalam Perspektif Hukum Islam," *Justicia Sains: Jurnal Ilmu Hukum* 7, no. 2 (1 Desember 2022): 261–72, <https://doi.org/10.24967/jcs.v7i2.1973>.

<sup>6</sup> Safira Maherani Putri Utami dan Siti Nurul Intan Sari Dalimunthe, "Penerapan Teori Keadilan Terhadap Pembagian Harta Bersama Pasca Perceraian," *JURNAL USM LAW REVIEW* 6, no. 1 (25 Juni 2023): 433, <https://doi.org/10.26623/julr.v6i1.6899>.

<sup>7</sup> Happy Susanto, *Pembagian Harta Gono-Gini Saat Terjadi Perceraian* (Jakarta: Visi Media, 2008), 1.

<sup>8</sup> Melia Melia, Muzakkir Abubakar, dan Darmawan Darmawan, "Pembagian Harta Bersama Setelah Perceraian (Studi terhadap Putusan Mahkamah Agung Nomor 597K/Ag/2016)," *Jurnal IUS Kajian Hukum dan Keadilan* 7, no. 3 (5 Desember 2019): 506–18, <https://doi.org/10.29303/ius.v7i3.665>.

<sup>9</sup> Abdul Manan, *Aneka masalah hukum perdata Islam di Indonesia*, Cet. 2 (Jakarta: Kencana, 2008), 280.

the marriage, with consideration to fulfill the elements of justice and benefit for the husband and wife. This article uses *maqāsid sharī'ah* as a perspective to analyze the decision of the Malang District Religious Court. This is done because *maqāsid sharī'ah* is the core of *sharī'ah* determination, which is oriented towards the realization of the benefit of humanity.<sup>10</sup>

This study is interested in a concrete case in the Malang District Religious Court, where the judge's verdict number is 1786/Pdt.G/2023/PA.Kab.Mlg did not follow the equal dividing of joint assets but instead considered the contribution factor of the husband and wife so that the dividing was 70% for the wife and 30% for the husband. Therefore, this article will further review the judge's consideration of dividing joint assets after divorce, significantly when the wife contributed more to the collection of common assets during the marriage. By analyzing the *maqāsid sharī'ah* perspective, which emphasizes the realization of the benefit of humanity, we can evaluate the extent to which the judge's decision achieves justice in this context.

Regarding implementing the *contra legem* principle in dividing joint assets due to divorce, several scientific works generally have similar problems. Still, there are also some differences in perspective. In this article, the similarities and differences in research have been included to show the originality of this research.

First, a thesis written by Taufik Hidayatul Rahman entitled "Implementation of Joint Assets Dividing as a Result of Divorce (Analysis of Case Decision No: 0025/Pdt.G/2017/PA.Pbr)".<sup>11</sup> The similarity between Taufik's research and this article is that they both examine the dividing of joint assets due to divorce. The difference between this research and the author's research lies in implementing the decision. Taufik's research discusses a court decision on joint assets that have been interacting, but it could be carried out better in its implementation. In contrast, this article discusses dividing common assets between husband and wife who get unequal shares but between the plaintiff and the defendant carry out the court's decision perfectly.

Second, a thesis written by Zakiyah Salsabila entitled "Dividing of Joint Assets Due to Divorce in Indonesia and Malaysia in a Gender Perspective."<sup>12</sup> Zakiyah's research and this article are similar in that they both examine the dividing of joint assets due to divorce. The difference is that Zakiyah's research discusses the difference in the dividing of joint assets between Indonesia and Malaysia, which does not see a person's gender. In contrast, this article discusses dividing joint assets between husbands and wives who get unequal shares.

Third, a thesis written by Fahmi Fauzi Rahman entitled "Dividing of Joint Assets Due to Divorce in the Religious Court (Study of Decision No. 964/Pdt.G/2016/PA.Pdlg)".<sup>13</sup> The similarity between Fahmi's research and this article is that they both examine the dividing of joint assets due to divorce. The difference is that Fahmi's research discusses the process of resolving joint assets cases and the *ijtihad* method used by judges in making

<sup>10</sup> Afrizal dan Al Kodri, "Pembagian Harta Bersama (Studi Analisis Pasal 97 Kompilasi Hukum Islam Dalam Persepktif Maqashid Syariah)," *Islamic Law Journal* 1, no. 01 (1 Januari 2023): 47–61.

<sup>11</sup> Taufik Hidayatul Rahman, "Pelaksanaan Pembagian Harta Bersama Akibat Perceraian (Analisis Terhadap Putusan Perkara No:0025/PDT.G/2017/PA.PBR)" (undergraduate, Universitas Islam Riau, 2019), <https://repository.uir.ac.id/1340/>.

<sup>12</sup> Salsabila, "Harta Bersama Akibat Perceraian di Indonesia dan Malaysia Dalam Perspektif Gender."

<sup>13</sup> Fahmi Fauzi Rahman, "Pembagian Harta Bersama Akibat Perceraian di Pengadilan Agama (Studi Putusan No. 964/Pdt.G/2016/PA.Pdlg)" (diploma, UIN SMH BANTEN, 2021), <http://repository.uinbanten.ac.id/6449/>.

KHI-based decisions. In contrast, this article discusses the dividing of joint assets between husband and wife who get unequal shares and the legal basis used by the judge in deciding the case.

Fourth, a thesis written by Alwi Sahroni entitled "The Concept of Justice in the Dividing of Joint Assets for Working and Non-Working Wives (Study of Decisions of the South Jakarta Religious Court in 2021)".<sup>14</sup> The equation of Alwi's research with this article is that they both examine the dividing of joint assets. The difference is that Alwi's research discusses a wife who works and does not work getting the same portion of the distribution by article 97 KHI. In contrast, this article does not base its decision on article 97 KHI because it sees the parties' contribution to the collection of the joint assets.

Fifth, a thesis written by Thaliah Sagita Falah Razak entitled "Juridical Review of Joint Assets in Polygamous Marriages (Study of Decision No.2359/Pdt.G/2021/PA.MKS)".<sup>15</sup> The similarity between Thaliah's research and this article is that they both examine the dividing of joint assets. The difference is that Thaliah's research discusses the dividing of joint assets due to polygamy, while this article discusses the dividing of common assets due to divorce.

This article aims to provide in-depth insight into the judge's consideration in deciding the dividing of joint assets using the contra legem principle in case number 1786/Pdt.G/2023/PA.Kab.Mlg and its analysis from the perspective of *maqāsid sharī'ah*.

### **Method**

This article is a type of empirical research using a qualitative descriptive approach. The location of the research was conducted in Malang Regency, precisely at the Malang Regency Religious Court, because the case that occurred was located at the Malang Regency Religious Court case number 1786/Pdt.G/2023/PA.Kab.Mlg. The data sources obtained from this research are primary data from the Malang Regency Religious Court Decision and interviews, as well as secondary data obtained from books and documents related to the research. The empirical research method uses data obtained from field studies through interviews and documentation. Then, the data goes through several stages, editing, classifying, verifying using methodological triangulation, analyzing, concluding.

### **The Judges Consideration in Deciding the Dividing of Joint Assets to Applying the Principle of Contra Legem in Case Number 1786/Pdt.G/2023/PA.Kab.Mlg**

Judges, as one of the law enforcement instruments, are tasked with receiving, examining, adjudicating, and resolving all cases submitted to them. Judges must help justice seekers and strive to overcome obstacles to create simple, fast, and low-cost justice.<sup>16</sup> In making a decision, the Judge will certainly make considerations. The Judge's consideration is one of the most important aspects in determining the realization of the value of a judge's decision that contains justice (*ex aequo et bono*) and contains legal

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<sup>14</sup> Alwi Sahroni, "Konsep Keadilan Dalam Pembagian Harta Bersama Terhadap Istri Bekerja dan Tidak Bekerja (Studi Putusan Pengadilan Agama Jakarta Selatan Tahun 2021)" (Jakarta, Universitas Islam Negeri Syarif Hidayatullah, 2023),

<https://repository.uinjkt.ac.id/dspace/bitstream/123456789/73582/1/ALWI%20SAHRONI%20-%20FSH.pdf>.

<sup>15</sup> Thaliah Sagita Falah Razak, "Tinjauan Yuridis Atas Harta Bersama Dalam Perkawinan Poligami (Studi Putusan No.2359/Pdt.g/2021/Pa.Mks)" (Universitas Muslim Indonesia, 2023), <http://fh.umi.ac.id/>.

<sup>16</sup> "Tugas Pokok dan Fungsi Pengadilan Negeri Serui," diakses 9 Januari 2024, <https://pns-serui.go.id/2021/03/10/tugas-pokok-dan-fungsi/>.

certainty; besides that, it also contains benefits for the parties concerned that the Judge's consideration must be addressed carefully, well, and carefully.<sup>17</sup>

The Judge's consideration of the subject matter handled will be outlined in a decision. According to Prof. Dr. Sudikno Mertokusumo, S.H., a judge's decision is a statement by a judge, as an authorized official, pronounced in Court, aiming to end and resolve a case or dispute between the parties.<sup>18</sup> The opening of the trial and the hearing for the verdict must be in an open session for the public. Decisions not pronounced in an open session for the public are categorized as actions that fail to meet the requirements outlined by the law, which the law itself threatens with the cancellation of the decision by law.<sup>19</sup>

The author's research was a decision regarding a joint Asset lawsuit. The lawsuit of joint Assets is included in the absolute competence of the Religious Court as stipulated in Article 49 of Law Number 3 of 2006 concerning Religious Courts. A Joint Asset is an Asset that has been collected during the household so that it becomes the right of both husband and wife. Meanwhile, in the Big Indonesian Dictionary, what is meant by joint Asset is jointly acquired Asset while married to a wife.

In the case of the Dividing of joint Assets, efforts to reconcile between the Plaintiff and the Defendant have been taken through mediation with the mediator Drs. H. Sholichin, S.H, Legal Practitioners of the Malang Regency Religious Court as referred to in Article 2 paragraph (2) and (4) of PERMA RI number 1 of 2008, as well as peaceful efforts as referred to in article 130 HIR, have been made by the panel of judges in front of the trial. However, these reconciling efforts have yet to be successful, so the trial process continues with the results of a decision *contra legem* with the existing rules, namely in Article 97 of the Compilation of Islamic Law.

According to Mr. Khairul's explanation about the basis for the Judge's consideration in deciding the case of dividing joint assets number 1786/Pdt.G/2023/PA, Kab.Mlg, namely:

"Based on the principle of distributive justice, who participates more in the collection of assets is adjusted to the level of participation when realizing the joint assets between husband/wife which is greater contribution."<sup>20</sup>

From the above statement, it can be seen that the basis for the Judge's consideration in deciding the joint assets distribution is case number 1786/Pdt.G/2023/PA.Kab.Mlg is based on distributive justice. Distributive justice itself is justice that looks at the contributions made by the parties. The party who contributes more will get a larger share of the joint assets than the other party. In this case, the wife's contribution is more significant than the husband's in realizing the joint assets. Distributive justice was used as the basis for considering this decision; the Judge did not base it on one philosopher. However, the explanation given by the Judge in the interview was more likely to refer to Aristotle's distributive justice. Justice from Aristotle is the distribution of goods and services according to their position; in this case, the same proportion will be given to the

<sup>17</sup> Mukti Arto, *Praktek-Praktek Perdata pada Peradilan Agama* (Yogyakarta: Pelajar Pustaka, 2008), 140.

<sup>18</sup> Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia* (Yogyakarta: Liberty, 1993), 174.

<sup>19</sup> Syarif Mappiasse, *Logika Hukum Pertimbangan Putusan Hakim* (Jakarta: Prenada Media Group, 2015), 43.

<sup>20</sup> Muhammad Khoirul, Interview, (Malang, 05 Desember 2023).

same people. Otherwise, people who are not the same will certainly get different parts, so everyone is treated the same for the same thing and treated differently for different things.

Furthermore, according to Mr. Khairul's explanation regarding the location of distributive justice from the decision on the dividing of joint assets case number 1786/Pdt.G/2023/PA, Kab.Mlg, namely:

"The location of distributive justice is based on evidence at trial, evidence submitted by the parties including witnesses, and other written evidence. So looking at the evidence presented at trial (legal facts that exist at trial), the Judge can judge that to realize the joint assets, it turns out that the wife is more dominant than the husband".<sup>21</sup>

From the above statement, it can be seen that the location of distributive justice is based on the evidence at trial. The evidence submitted by the parties includes witnesses and other written evidence. In this case, what is used as a claim for joint assets is a plot of land along with a permanent house building that stands on a plot of land. More details are described in the sitting of the case of dividing joint assets as follows: The Plaintiff (husband), age 36, religion Islam, private sector occupation, residence in Malang Regency. The Defendant (wife) is 29 years old, is Muslim, is in the private sector, and resides in Malang Regency. The Plaintiff in Reconvention filed her lawsuit with the Registrar of the Religious Court of Malang Regency with the following (summarized) claim:

1. That during their marriage, the Plaintiff and the Defendant have not been blessed with children.
2. That during the marriage between the Plaintiff and the Defendant had joint assets in the form of a piece of land title No. 02191, measurement letter dated 18/11/2021 No. 02620/Sidorahayu/2021, covering an area of 118 M2 located in Malang Regency.
3. On this land, there is a permanent building (house), which is also a joint asset and was built through the hard work of the Plaintiff and the Respondent.
4. That a piece of land on which a house is built, certificate of ownership No. 02191, measurement letter dated 18/11/2021 No. 02620/Sidorahayu/2021 Area 118 M2 located in Malang Regency is joint assets, if a divorce occurs, it must be divided by  $\frac{1}{2}$  each party.
5. This lawsuit is about the Dividing of joint assets, so it is reasonable for Plaintiff to demand dwangsom from Defendant Reconvention in the amount of Rp25,000,000.

In response to the claim of the Reconvention Plaintiff, the Reconvention Defendant submitted the following rebuttal:

1. Formally, the object of the dispute is a plot of land with an area of 10 x 12 m<sup>2</sup> located in Malang Regency obtained by Defendant Reconvention from a sale and purchase dated August 10, 2016. In the sale and purchase transaction, the Defendant Reconvention did not involve the Plaintiff Reconvention at all, considering that the Plaintiff Reconvention at the time of the purchase of the land was not married.
2. That it is based on the law if the land and building belonging to the Defendant Reconvention are not divided between the Plaintiff Reconvention and the

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<sup>21</sup> Muhammad Khoirul, Interview, (Malang, 05 Desember 2023).

Defendant Reconvention because the land and building are juridically formal, not joint marital assets.

3. On the basis of this explanation, Def, pendant Reconvened, she objected to dividing the joint assets by 1/2 part each because the disputed object is inherited assets.
4. Defendant Reconvention strongly and firmly rejects the arguments and reasons for Plaintiff Reconvention's request for Dwangsom because the request for Plaintiff Reconvention is not based on actual legal facts.

Based on the facts at trial, starting from the lawsuit, answer, replication, duplicates, and evidence submitted by the parties, which are then connected to the principles or theories of proof, it can be found:

1. The claim regarding a piece of land measuring 10x12 M2 is not joint assets but inherited assets that were purchased before the marriage took place.
2. The claim regarding the permanent house with an area of 10x12 M2 is joint assets because it was acquired during the marriage, and Plaintiff and Defendant each contributed to the realization of the joint assets.
3. This joint assets case was not divided in accordance with the normative provisions in Article 97 of the Compilation of Islamic Law, namely divided by ½. Still, it divided 70% for the reconvention defendant and 30% for the reconvention plaintiff because the contribution of the reconvention defendant was more significant in realizing the joint assets than the reconvention plaintiff.
4. Joint assets claims, inheritance claims, and maintenance claims cannot be followed by dwangsom (forced money).

The verdict of the Judge of the Religious Court of Malang Regency, which was read out on July 10, 2023 M, coinciding with 22 Zulhijjah 1444 H, is as follows:

1. Granting the Plaintiff's claim for Reconvention in part;
2. Establish that the Plaintiff and Defendant, during the marriage bond, have obtained joint assets (gono gini) in the form of :
  - a. A permanent house standing on land belonging to the Respondent (assets) with SHM No 02191 located in Malang District with measurements of Length: 12 m and Width: 10 m, with the following boundaries:
    - North: village road.
    - South side: land of P. Budi.
    - West side: land of P. Hari.
    - East: footpath.
3. Determine a share for the Plaintiff Reconvention of 30% and the Defendant Reconvention of 70% of the joint assets mentioned above;
4. Punish the Defendant Reconvention to hand over 30% (thirty percent) of the value of the price of the joint assets mentioned above to the Plaintiff Reconvention, and if it cannot be handed over in person, then the assets are sold in public or auctioned, and the proceeds from the sale of the auction will be distributed to the Plaintiff Reconvention and Defendant Reconvention in accordance with their respective portions;

5. Reject the lawsuit of the Plaintiff Reconcensively other than and the rest;
6. Charges the Convention Plaintiff/Reconvention Defendant to pay court costs in the amount of Rp2,063,000.00 (two million sixty-three thousand rupiah).

The decision certainly comes with logical legal considerations. One of the critical considerations is as follows:

Considering that from the testimony of witnesses and written evidence of the Defendant at trial, the panel assessed as follows:

1. The Defendant's argument that the 10x12 M2 plot of land was not joint assets but rather assets purchased before the marriage took place was corroborated and supported by two of the Defendant's witnesses as well as written evidence TR.1 in the form of a receipt for the purchase of a plot of land by the Defendant.
2. Regarding the Defendant's argument that the permanent house measuring 10x12 M2 is joint assets, the Defendant's contribution in realizing the house was more significant, which is reinforced by the existence of evidence TR.2 to TR.7 in the form of receipts for the purchase of building materials in 2017 purchased by Mr. Panut (stepfather of the Defendant).

Furthermore, according to Mr. Khairul, the reason for the panel of judges in deciding the joint assets case number 1786/Pdt.G/2023/PA.Kab.Mlg does not refer to article 97 of the Compilation of Islamic Law, namely:

"Normatively, the Dividing of joint assets when a divorce occurs is divided in accordance with article 97 of the Compilation of Islamic Law, namely 50:50, but the Judge does contra legem or deviates from this rule by dividing 70% 30%. This is because the Judge will prioritize justice in each of his decisions if indeed the current rules are less relevant to the case being decided."<sup>22</sup>

From the above statement, the reason for the panel of judges in decision number 1786/Pdt.G/2023/PA.Kab.Mlg is contra legem with the existing rules, namely, in article 97 of the Compilation of Islamic Law, which reads, "Widows or divorcees are each entitled to one-half of the joint assets as long as it is not specified otherwise in the marriage agreement." The Judge, in each of his decisions, will prioritize justice if, indeed, the current rules are less relevant to the case being decided. However, basically, every decision issued by the court must represent the conscience of the justice-seeking community. Judges' decisions are needed to examine, resolve, and decide cases submitted to the court. The decision should not confuse the problem or even cause controversy for the community or other legal practitioners. Things that might cause controversy in the Judge's decision are the Judge's lack of mastery of various fields of science that are currently developing rapidly, along with the changing times and the Judge's need for more accuracy in processing a case.

Furthermore, according to Mr. Khoirul, the reason for the panel of judges to divide the joint assets is 70% for the wife and 30% for the husband in case number 1786/Pdt.G/2023/PA.Kab.Mlg is:

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<sup>22</sup> Muhammad Khoirul, Interview, (Malang, 05 Desember 2023).

"The Dividing of 70% for the wife and 30% for the husband is based on the contribution in realizing the joint assets, 70% for the wife because in realizing the joint assets is assisted by the wife's parents and the wife also participates more in realizing the joint assets. The dividing of 30% for the husband, in this case, was that the husband also contributed but only made a little contribution."<sup>23</sup>

From the above statement, the reason for the panel of judges in decision number 1786/Pdt.G/2023/PA.Kab.Mlg to divide the joint assets 70% for the wife and 30% for the husband is based on the fact that in realizing the joint assets, the wife contributes more; in this case, what is being sued is a plot of land on which a permanent house building stands seeing from the legal facts in the trial that a plot of land is inherited assets purchased by the wife in 2016 and married to her husband in 2018. So, when he purchased the land, there was no husband's intervention. The plot of land cost RP25,000,000 in two installments, namely RP15,000,000 and RP10,000,000, as evidenced by proof of receipt of land purchase on behalf of the wife called TR.1. Furthermore, for a permanent house that stands on a plot of land, based on the consideration of the panel of judges is joint assets, in this case, the panel of judges divides the joint assets 70% for the wife and 30% for the husband. The Dividing was based on different contributions between the parties. Before the marriage took place, precisely six months earlier, the defendant reconvention had built the foundation of the house, and the defendant reconvention stepfather had purchased many materials for the construction of the house. This is evidenced by material purchase receipts in the form of TR.2 to TR.7. The construction of the permanent house continued after marriage. However, the wife's contribution was more significant in the construction of the house because the plaintiff reconvention only worked as a builder. In addition, the Plaintiff had lousy behavior, namely drinking and gambling.

Furthermore, according to Mrs. Masrifah, decision number 1786/Pdt.G/2023/PA.Kab.Mlg regarding the Dividing of joint assets, 70% for the wife and 30% for the wife is very fair for the parties to the dispute:

"This decision by the Judge is very fair because if it is divided 50:50, it is not even fair according to the law because this case is casuistic. In addition, the Judge, in deciding the case, prioritized justice over the existing rules in accordance with the irah-irah of the decision, which reads "For the sake of justice based on God Almighty" instead of reading "For the sake of law based on God Almighty."<sup>24</sup>

From the above statement, the Dividing of joint assets is very fair because this case is casuistic. A judge, in examining, adjudicating, and deciding cases, does not always have to stick to just one principle. In a casuistic case, the Judge may change from one principle to another principle that is deemed relevant to be stated in his legal considerations. In making legal considerations, it must be with sound reasoning; this is what makes the reason for judges to prioritize certain principles without leaving other principles, of course. Thus, the quality of the Judge's decision can be assessed from the weight of the reasons and legal considerations used in the case.

Judges' decisions that reflect justice challenges find benchmarks for the parties to the dispute. Because fairness for one party is not necessarily fair for the other party, the Judge must uphold justice in accordance with the irah-irah made at the head of the

<sup>23</sup> Muhammad Khoirul, Interview, (Malang, 05 Desember 2023).

<sup>24</sup> Masrifah, Interview, (Malang, 05 Desember 2023).

decision, which reads "For the Sake of Justice Based on God Almighty." Justice intended in the Judge's decision is impartial to one of the parties to the case, recognizing the equal rights and obligations of both parties. In making a decision, the Judge must be in accordance with existing regulations so that the decision can be in accordance with the justice desired by the community. The winning party can demand or get what he is entitled to, and the losing party must fulfill his obligations. In order to uphold justice, the Judge's decision in court must be in accordance with its true purpose, namely to provide equal opportunities for litigants in court.

#### **Analysis of *Maqāsid Sharī'ah* on the Dividing of Joint Assets in Decision Number 1786/Pdt.G/2023/PA.Kab.Mlg**

A Joint Asset arises in a marriage between a man and a woman. With marriage, joint Assets will be obtained due to the efforts of the husband or wife. A joint Asset case is a type of lawsuit case, a lawsuit is a case filed by the Plaintiff or his attorney to the Court in which there is a conflict or dispute to ask the Judge to hear and decide who is suitable from the parties to the dispute or conflict.<sup>25</sup>

The joint assets lawsuit was resolved at the Malang Regency Religious Court in Decision Number 1786/Pdt.G/2023/PA.Kab.Mlg certainly provides a way out for the parties to the dispute, after previously the parties resolved through family channels and found no common ground. The panel of judges decided in Decision Number 1786/Pdt.G/2023/PA.Kab.Mlg will determine the distribution of 70% for the reconvention defendant (wife) and 30% for the reconvention plaintiff (husband). The dividing was based on different contributions between the parties. Before the marriage took place, precisely six months earlier, the foundation of the house had been built by the defendant reconvention, and the defendant reconvention stepfather had purchased many materials for the construction of the house. This is evidenced by receipts for the purchase of materials in the form of TR.2 to TR.7. The construction of the permanent house continued after marriage. Still, the wife's contribution was more significant in the construction of the house because the reconvention plaintiff only worked as a builder. In addition, the Plaintiff had lousy behavior, namely drinking and gambling. The judges, in their reasoning, also based their decision on the theory of distributive justice, which gives each person a portion according to their achievements and contributions. If the husband or wife contributes more to the collection of joint assets, it will fulfill a sense of justice if one party gets more than the other.<sup>26</sup>

With regard to the Judge's consideration in Decision Number 1786/Pdt.G/2023/PA.Kab.Mlg, the author analyzes the decision using the *maqāsid sharī'ah* theory approach proposed by Ash-Syatibi. Ash-Syatibi stated that the benefits to be realized by Islamic Law from the five cases (*hifz al-din*, *hifz al-nasl*, *hifz al-aql*, *hifz al-nafs*, *hifz al-mal*) have three ranks of needs consisting of the needs of *darūriyāt*, *hajiyāt* and *tahsiniyāt*. The case of joint assets in decision number 1786/Pdt.G/2023/PA.Kab.Mlg is included in *maqāsid sharī'ah* in the level of *darūriyāt* and *hajiyāt*. Needs at the level of *hajiyāt* are intended to facilitate life, eliminate difficulties, and make the maintenance of the five essential elements of human

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<sup>25</sup> Irene Svinarky, *Bagian-Bagian Penting yang Perlu Diketahui dalam Hukum Acara Perdata di Indonesia* (Batam: CV. Batam Publisher, 2019), 1.

<sup>26</sup> Putusan Nomor 1786/Pdt.G/2023/PA.Kab.Mlg.

life better. In terms of the level of *hajiyāt*, the dividing of joint assets in this decision has benefits in terms of making it easier for the husband and wife to fulfill household needs. Besides that, a divorce facilitates the economy of each party because they do not have to make a living from scratch.

In addition, the case of dividing of joint assets in decision number 1786/Pdt.G/2023/PA.Kab.Mlg, if it is related to the objectives of *maqāṣid sharī'ah*, is included in the level of *darūriyāt*, which includes three elements of *hifz al-mal*, *hifz al-nasl*, and *hifz al-nafs*. The dividing of joint assets due to divorce with different contributions between husband and wife can be explained in the context of *maqāṣid sharī'ah*. *Maqāṣid sharī'ah*, which are the goals or values desired by Islamic law. In the case of divorce, some of the benefits of the dividing of joint assets that can be linked to *maqāṣid sharī'ah* include:

1. *Hifz al-Maal* (Maintenance of Asset)

The Legal Objective of Preserving assets and wealth is one of the *maqāṣid sharī'ah Hifz al-Maal*. With fair Dividing, each party's rights are maintained, and joint Assets are not misappropriated or unauthorized taken.

2. *Hifz an-Nasl* (Maintenance of Descent):

The legal objective, namely the maintenance of offspring or family, is one of the *maqāṣid sharī'ah Hifz an-Nasl*. With a fair Dividing of assets, the needs of children and families can be met so that their welfare is maintained despite divorce.

3. *Hifz an-Nafs* (Maintenance of the Soul):

The legal objective of maintaining family members' mental and emotional well-being is one of the *maqāṣid sharī'ah Hifz an-Nafs*. A fair Dividing of Assets can reduce the potential for conflict and tension between ex-husbands and ex-wives to maintain mental balance and relationship harmony.

*Maqāṣid sharī'ah* in terms of terms are the objectives of Islamic law in each rule. Imam Syatibi revealed about sharia and its functions for humans as he said in the book al-Muwafaqat:

“Indeed, the *sharī'ah* is established to establish (realizing) human benefit in this world and the hereafter”.<sup>27</sup> Suppose it is related to the author's research. In that case, the fair distribution of joint Assets by their contribution to the collection of joint Assets already reflects a true sense of justice because the distribution is divided equally without looking at existing conditions and other aspects.

There are two opinions on joint Assets in Islamic law. The first opinion says that in traditional fiqh books, a joint Asset is defined as an Asset produced by husband and wife as long as they are bound by the rope of marriage, or in other words, a joint Asset is an Asset produced by way of *syariah* between husband and wife so that there is a mixture of assets with one another and cannot be distinguished anymore. The case of joint Asset is included in the *syirkah abdan* and *mufawadlah* category. *Syirkah abdan* is an alliance of two or more workers to do a job; the results or wages from work are divided according to their agreement. At the same time, *syirkah muwafadlah* is an alliance where the position

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<sup>27</sup> Ahmad Suganda, “Urgensi Dan Tingkatan Maqashid Syari’ah Dalam Kemaslahatan Masyarakat,” *Jurnal At-Tadbir: Media Hukum Dan Pendidikan* 30, no. 1 (31 Januari 2020): 1–16, <https://doi.org/10.52030/attadbir.v30i01.28>.

and composition of the parties involved are different in terms of capital, work, and risk of loss.<sup>28</sup>

The second opinion of Islamic law experts states that Islam does not regulate joint Assets in the Qur'an. Therefore, it is left to them to regulate it. Islamic law regulates the Dividing of joint Assets in the Compilation of Islamic Law and Law Number 1 of 1974 concerning Marriage. The Compilation of Islamic Law states that "widows or widowers of divorce are each entitled to one-half of the joint Asset as long as it is not determined otherwise in the marriage agreement." In other words, the Compilation of Islamic Law mandates the Dividing of joint Asset by half or divided by two.

According to Syathibi, to save Assets based on the concept of *maqāṣid sharī'ah* then what a person must obey the provisions of Allah's law, such as forbidden stealing and punishment of the perpetrator, cheating or betraying, excess, usury, eating other people's Asset by false means, so that thus the Asset will be preserved and saved. Therefore, in the context of joint Asset ownership, it must be by the provisions of ownership in Islamic law to protect and save Assets. When comprehensively reviewed through the concept and method of determining *maqāṣid sharī'ah*, according to the researchers, verdict number 1786/Pdt.G/2023/PA.Kab.Mlg has fulfilled the benefits in accordance with the objectives of *maqāṣid sharī'ah* because the purpose of *maqāṣid sharī'ah* itself is to bring benefit and prevent harm.

Furthermore, according to Mr. Sutaji, in deciding case number 1786/Pdt.G/2023/PA.Kab.Mlg, the Judge used the perspective of *maslahah mursalah* in basing his decision, namely:

"The Judge, in deciding to use *maslahah mursalah*, is to bring goodness or benefit and reject mudharat. This is in accordance with the application of the case in case number 1786/Pdt.G/2023/PA.Kab.Mlg."<sup>29</sup>

From the above statement, the Judge used the *maslahah mursalah* perspective in dividing joint assets in decision 1786/Pdt.G/2023/PA.Kab.Mlg because it is to bring goodness or benefit and reject *mudharat*. The *maslahah mursalah* used by the Judge to base his decision is in accordance with the analytical knife used by the author to analyze the decision. *Maqāṣid sharī'ah* has a goal, namely *jalbul mashālih wa dar'ul mafāsid* (realizing the good and avoiding the evil), so *maqāṣid sharī'ah* has the objective of *jalbul mashālih wa dar'ul mafāsid* that researchers use for analysis is in accordance with the *maslahah mursalah* of the judges of the Malang Regency Religious Court in their decision in case number 1786/Pdt.G/2023/PA.Kab.Mlg.

## Conclusion

The judge's consideration in deciding the dividing of joint assets using the *contra legem* principle in case number 1786/Pdt.G/2023/PA.Kab.Mlg is to consider the facts in the trial, both from witnesses, the evidence presented by the Plaintiff Reconvention, and the Defendant Reconvention in the trial. If Article 97 KHI is applied, lettering is irrelevant; therefore, the panel thinks that 70% for the reconvention defendant (wife) and

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<sup>28</sup> Manan, *Aneka masalah hukum perdata Islam di Indonesia*, 109.

<sup>29</sup> Sutaji, Interview, (Malang, 05 Desember 2023).

30% for the reconvention plaintiff (husband) is considered fair because the panel of judges based its consideration on distributive justice. This was based on the consideration that the wife contributed more to the collection of joint assets by building the foundation of the house and purchasing materials before the marriage took place. The *maqāṣid sharī'ah* review in Malang District Religious Court Decision Number 1786/Pdt.G/2023/PA.Kab.Mlg is included in protecting assets (*hifz al-mal*), protecting offspring (*hifz al-nasl*), and saving the soul (*hifz al-nafs*) in terms of *darūriyāt*. Judging from the level of *hajiyāt*, the dividing of joint assets in this decision has the purpose of making it easier for the husband and wife to fulfill their household needs; besides that, after a divorce, it facilitates the economy of each party, because they do not have to make a living from scratch. The *maqāṣid sharī'ah* that researchers use for the analysis knife is by the *maslahah mursalah* of the judges of the Malang Regency Religious Court in their decision in case number 1786/Pdt.G/2023/PA.Kab.Mlg.

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