



# **Juridical Analysis of the Position of Joint Property After Divorce (A Study in Review of National Law and Customary Law in Timor Tetun Tribe)**

**Febriani Yuianti Seran**

Faculty of Law, Universitas Widya Gama Malang, [febrianiyuliantiseran@gmail.com](mailto:febrianiyuliantiseran@gmail.com)

**Purnawan D. Negara**

Faculty of Law, Universitas Widya Gama Malang, [purnawan\\_dn@widyagama.ac.id](mailto:purnawan_dn@widyagama.ac.id)

## ***ABSTRACT***

Marriage is a bond between two men and women to form a family and be recognized as legitimate by society. Marriage can be carried out religiously, customarily, and statelily. However, a marriage that does not run harmoniously can lead to divorce. As a result of this divorce, the property owned by the married couple must be separated, there are several options for the legal system to divide the property during the marriage including using the Marriage Law, the Civil Code, the Compilation of Islamic Law and the customary law system adopted by the community. This study aims to compare common property after divorce according to national law and customary law in the Timor Tetun tribe. Based on this, the purpose of this study is to find out the arrangement of joint property according to national law and customary law in the Timor Tetun tribe after the occurrence of divorce, the form of joint property according to national law and customary law, and dispute resolution.

**Keywords:** Marriage, Comparison of Joint Property and Dispute Resolution

## **INTRODUCTION**

The Republic of Indonesia as a state of law based on Pancasila and the 1945 Constitution seeks to realize a prosperous, safe, peaceful, and orderly national life system. Because Indonesia is a country governed by the rule of law, all governments must obey the law. The law is the supreme authority and source of power. The 1945 Constitution is the supreme law.<sup>1</sup> “To protect all the people of Indonesia and the entire homeland of Indonesia and to promote the general welfare, the intellectual life of the nation and to participate in realizing a world order based on independence, lasting peace, and social justice”. This sentence reflects the idea of Indonesia as a state of law, which is the establishment of a state government that aims to protect the human rights of both individuals and communities.

Human rights are a set of rights related to the nature and existence of human beings created by God Almighty which is His gift to be respected, upheld, and protected by the state, government law, and every individual for the sake of honor and protection of human dignity.

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<sup>1</sup> Anugrahdwi, “Makna Indonesia Sebagai Negara Hukum,” pascasarjana.umsu, 2023, <https://pascasarjana.umsu.ac.id/makna-indonesia-sebagai-negara-hukum/#:~:text=Indonesia%2520negara%2520hukum%2520berati,yang20%25berada20%25di20%25atas20%25hukum.>

This definition is contained in Law No. 39 of 1999 concerning Human Rights.<sup>2</sup> The result of divorce is a dispute over the division of joint property. Joint property in a marriage is all property/assets obtained during marriage, whether obtained through joint labor or the efforts of one party, only the husband or wife, the property remains joint property.

According to Article 1 of Law Number 1 of 1974, marriage is a physical and mental bond between a man and a woman, to create a happy and eternal family (household) based on faith in God Almighty. The physical and spiritual bond that can be seen reveals a relationship between a man and a woman to live together as husband and wife or a real formal relationship, while the household relationship is a relationship between a man and a woman that cannot be avoided. Although this relationship is real, it is a strong foundation for forming and raising a happy and lasting family, reflected in everyday life. So the purpose of this marriage is to a country based on Pancasila where the first principle is God Almighty, so that marriage has a very close relationship with religion/spirituality, so that marriage not only has physical/physical elements, but the inner/spiritual elements also have an important role.<sup>3</sup>

Marriage will give rise to the status of husband and wife if a marriage is based on a legal marriage, namely a marriage that fulfills the conditions determined by the marriage law, namely Law Number 1 of 1974 and Government Regulation No. 9 of 1975. The legal basis is contained in Article 2 Paragraph (1) and Article 2 Paragraph (2) of the Marriage Law, the formulation of which states that: “A marriage is valid if performed according to the laws of each religion and belief. Each marriage is recorded according to the regulations, legislation in force”. As for what is meant by the laws of each religion and belief, including the provisions of the laws and regulations that apply to certain adherents and beliefs as long as they do not conflict with Law Number 1 of 1974 concerning Marriage. Thus we can know that there is no opportunity for a person to enter into a marriage by deviating and violating the provisions of the religion and beliefs he adheres to.<sup>4</sup>

Joint property according to customary law better known as gono gini property is considered almost the same for all regions, in this case, what is considered the same is the limited property that becomes joint property, while regarding other matters, especially regarding the continuation of the unitary property itself there are differences from each region.

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<sup>2</sup> Pemerintah RI, “Undang-Undang No. 39 Tahun 1999 Tentang Hak Asasi Manusia,” n.d.

<sup>3</sup> Sormiyati, *Hukum Perkawinan Islam Dan UU Perkawinan (UU No.1 Tahun 1974 Tentang Perkawinan)* (Yogyakarta: Liberty, 1982).

<sup>4</sup> Pemerintah RI, “Undang-Undang Nomor 1 Tahun 1974 Dan Peraturan Pemerintah No. 9 Tahun 1975 Tentang Perkawinan,” n.d.

<sup>5</sup> One such case is the Timorese custom of the Tetun Fehan tribe in East Nusa Tenggara, which largely adheres to the matrilineal (maternal) kinship system, namely the kinship system according to the female or maternal line. The structure of community life according to the matrilineal system applies from generation to generation because it is a local custom. This system places the rights and position of daughters in the family ahead of sons in regulating inheritance property wherein a relationship between a husband and wife if there is a dispute in the household such as domestic violence (KDRT), adultery if it can still be resolved in deliberation between the two parties so that the marriage can be maintained, but if it cannot be maintained between the two parties then there is nothing that means the division of joint property.

According to customary law, divorced men return to their parent's homes without bringing children and goods without getting gono gini rights. and for this area, it is stated that the legal concept of gono gini property is not applied so that if a divorce occurs the property cannot be distributed without being by the Marriage Law and only applies Customary law. Unlike the case with the provisions of the Law by Article 35 and Article 36 of the Marriage Law, property obtained during the marriage period is joint property and is divided between husband and wife.

Based on the description above, several main issues become the main discussion, namely how is the regulation of joint property according to national law and customary law in Tetun tribal Timor after divorce? What is included in the form of joint property according to national law and customary law? and How is the settlement of post-divorce joint property disputes according to national law and customary law in the Tetun tribe? The purpose of this legal writing is to find out the regulation of joint property according to national law and customary law in the Tetun tribe after divorce. To explain what is included in the form of joint property according to national law and customary law. and To analyze how to resolve post-divorce joint property disputes according to national law and customary law in Tetun tribal Timor.

## **METHODS**

In this type of legal research, the author uses a sociological juridical legal approach method, empirical legal research (Emperial Law Research). <sup>6</sup> The author took the location of this research in Lasaen Village, West Malacca District, Malacca Regency, East Nusa

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<sup>5</sup> Sembiring Rosnidar, *Hukum Keluarga Harta Benda Dalam Perkawinan* (Jakarta: Rajawali Press, 2016).

<sup>6</sup> Muhaimin, *Metode Penelitian Hukum* (Mataram, 2020).

Tenggara Province (NTT). The author chose this location to collect data according to the formulation of research problems and to make it easier for researchers to mobilize. There are two types of data used in empirical research, the first is primary data, which is the type of data obtained directly from the field based on respondents (online interviews) and the results of observations. The data source is from the Tetun Indigenous People, the Customary Chief, and the Village Head. Second, secondary data is a type of supporting data from literature and documentation. The source is in the form of information obtained from books, legal journals, legal articles, research results in the form of reports, opinions of scholars, laws, and legal cases that become the footing and reference material related to the research topic. Method of determining respondents Sampling in this study was carried out by purposive sampling, namely the withdrawal of samples using subjects based on certain objectives to several subjects relevant to the research topic. The reason for this sampling is due to the limited time, cost, and energy available to the researcher. The respondents in this legal research are Indigenous Peoples, Customary Chiefs, and Village Heads.

There are 3 data collection techniques used in this study. The first interview is a technique for asking for sources and must be done to get information from the entire academic community and not deviate from the subject matter to be studied. Second, observation is an observation activity on an object directly and in detail to get correct information related to the object. and the third literature study is a data collection technique by reviewing books, literature, notes, and various reports related to the problem to be solved. Furthermore, the data analysis method used in this research is a qualitative descriptive analysis method, namely data from the results of field research and from the results of library research, connected and collected to solve a problem.<sup>7</sup>

## **RESULTS AND DISCUSSION**

### **A. Joint Property Arrangement Under National Law After Divorce**

Law No.1 of 1974 contained in Article 1 states “Marriage is a physical and mental bond between a man and a woman as husband and wife and has the aim of forming an eternal and happy family based on God Almighty”. As the main basis for marriage in Indonesia, Law No. 1 of 1974 and Government Regulation No. 9 of 1975 contain several articles on joint property, to be precise in Chapter VII Articles 35 to 37. Article 35 Paragraph (1) Property acquired during marriage becomes joint property. Whereas Paragraph (2) The inherited

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<sup>7</sup> Moleong J. Levy, *Metodelogi Penelitian Kualitatif* (Bandung: Remaja Rosdakarya, 2014).

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 determine otherwise. Article 36 Paragraph (1) Regarding joint property, the husband and wife may act with the consent of both parties. Paragraph (2) Regarding their respective assets, husband and wife have the full right to perform legal actions regarding their property. Article 37 states that: “If the marriage breaks up due to divorce, the joint property is regulated according to their respective laws”. According to their respective laws, this is religious law, customary law, and other laws. Regarding the property obtained during the marriage, this is what will be divided if the marriage breaks up, either due to divorce, death, or a court decision.<sup>8</sup>

The regulations regarding marriage agreements have been explained according to the Civil Code and the Marriage Law, namely; In the Civil Code, the marriage agreement is stated in Article 119 Paragraph (1), that when a marriage is entered into, by law a complete union between the assets of the husband and the wife applies, related to this with a marriage agreement, no other provisions are made. The agreement is made because in general there is an amount of property of one party that is greater than the other party. With the existence of marriage, the benefits that have been agreed upon by both parties can be obtained, as in article 154 of the Civil Code which explains that the marriage agreement will not be valid if it is not included in the implementation of marriage.<sup>9</sup>

The rules of the Compilation of Islamic Law (KHI), the chapter that regulates property in marriage are placed after the rights and obligations of husband and wife, thus this indicates a close relationship between the two. It is known that the regulation of joint property cannot be completely separated from the regulation of the obligations of husband and wife in marriage. In general, Islamic law does not see the existence of gono gini property. Islamic law sees more separation between the assets of the husband and wife. What the husband produces is his property, and vice versa, what the wife produces is her property.

### **B. Joint Property Arrangement According to Customary Law in Timor Tetun Tribe after Divorce**

Marriage is the bond of living together between a man and a woman who are communal to obtain the next generation so that the life of the alliance or clan does not become extinct, which is preceded by a series of traditional ceremonies. In customary law, marriage is

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<sup>8</sup> Pemerintah RI, “Undang-Undang No. 1 Tahun 1974 Tentang Perkawinan,” n.d.

<sup>9</sup> Amin R. Ang, “Pembagian Harta Bersama,” badilag.mahkamahagung, 2022, <https://badilag.mahkamahagung.go.id/artikel/publikasi/artikel/pembagian-harta-bersama-oleh-ang-rijal-amin-s-h-29-7>.

not a private affair of the person performing the marriage, but also a matter of family, tribe, community, and caste. Among the Indigenous people in the Tetun tribe, the arrangement of joint property is a very important asset in family life, but when there is a dispute in the household that results in divorce or the breakup of the marriage rope, the property cannot be divided because in customary law there are no rules regarding the division of joint property.

### **C. Form of Joint Property According to National Law**

The formation of joint property in marriage is from the date of marriage until the marriage bond is broken, meaning that at the time of marriage between husband and wife, there is a unity of property in property which can ultimately be divided fairly between husband and wife in the event of divorce.<sup>10</sup> The form of joint property according to Law No.1 of 1974 concerning marriage recognizes 3 kinds of property, namely: joint property, inherited property, and acquired property. Regarding inherited property and acquired property, although determined by law, they can still be used as joint property by entering into a marriage contract by Article 29 of Law Number 1 of 1974 concerning Marriage which states that: “Every property obtained by the husband and wife after a legal marriage becomes joint property”. This means that property obtained during marriage is considered joint property unless it can be proven that the property belonged to one of them before the marriage.

The form of the Civil Code in the marriage agreement is found in several forms made by the parties. As explained in the Civil Code Article 139 states that: “A marriage agreement is not allowed to violate legal restrictions, as well as decency”. Marital property according to the Civil Code can be found in Article 119 of the Civil Code which states that: “When the marriage is entered into by law, there is a unanimous union between the assets of the husband and wife, regarding this matter with a marriage agreement no other provisions are made”.

The Compilation of Islamic Law has no explicit statement regarding the formation of joint property automatically, especially in Article 86 Paragraph (1) “Basically there is no mixing between the husband’s property and the wife’s property because of marriage”. As mentioned earlier the motive or purpose of joint property in Indonesian society can be said to be by *maqashid al shari’ah*, but in the mechanism of the formation of joint property automatically. There are several points of joint property law in Chapter XIII of the Compilation of Islamic Law, namely; Joint property is separated from each other’s personal property, joint property is realized from the date of marriage, and without mutual consent the

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<sup>10</sup> Djuniarti Evi, “Hukum Harta Bersama Ditinjau Dari Prespektif Undang-Undang Perkawinan Dan KUH Perdata,” *Jurnal Penelitian Hukum* 17, no. 4 (2017): 448.

husband or wife may not alienate or transfer. and debts for joint interests are charged to joint property.<sup>11</sup>

#### **D. Form of Joint Property According to Customary Law**

According to customary law, what is meant by marital property is all the property controlled by the husband and wife while they are bound in marriage, both controlled kin property, as well as individual property derived from inheritance, grants, self-income property, and gift items. Everything is influenced by the principle of kinship adopted locally and the form of marriage that applies to the husband and wife concerned. The existence of joint property in a legal marriage does not rule out the possibility of the existence of the property of each husband and wife. Joint assets include all immovable objects and securities.

<sup>12</sup> The assets of the husband and wife in a family can be divided into four types, namely:

- 1) Property acquired or controlled by a husband or wife before marriage is innate property.
- 2) Assets obtained or controlled by the husband or wife individually before or after marriage, namely income assets.
- 3) Assets acquired or controlled by husband or wife together during marriage, namely livelihood assets.
- 4) Property acquired by the husband and wife together during the marriage ceremony as a gift, i.e. a wedding gift.

#### **E. Settlement of Post-Divorce Joint Property Disputes Under National Law**

Joint property disputes in Indonesian society can be said to never recede and even the tendency is often to increase the divorce rate which continues to increase. With the existence of joint property disputes having an impact both economically and socially, economically, joint property disputes force the parties to the dispute to spend energy, time, and money. The longer the dispute resolution process takes place, the more energy, time, and costs that must be spent. Likewise, the social impact is the estrangement of silaturahmi relations between the disputing parties in terms of ex-wives and ex-husbands.

Settlement of joint property disputes according to the Civil Code (KUHPerdata) in Indonesia can be done in several ways, especially in the context of marriage and divorce. There are several methods of resolving joint property disputes according to the Civil Code, among others: separation of property, property separation agreements, lawsuits for the

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<sup>11</sup> Rahmania Amelia, "Harta Bersama Dalam Perkawinan Di Indonesia Menurut Perspektif Hukum Islam," *jurnal.uin-antasari*, 2015, [https://jurnal.uin-antasari.ac.id/index.php/syariah/article/view/546/pdf\\_6](https://jurnal.uin-antasari.ac.id/index.php/syariah/article/view/546/pdf_6).

<sup>12</sup> dkk. Kutbuddin Aibak, "Pengaturan Harta Bersama Pasca Perceraian," *Jurnal Hukum Islam* 22, no. 2 (2022): 82.



division of joint property, mediation or conciliation, and division of property by the court. Joint property disputes in society in their implementation have their variations and forms, namely: Settlement of joint property disputes through non-litigation. Dispute resolution outside the court (non-litigation), especially through arbitration and other dispute resolution mechanisms can be chosen voluntarily by the parties to the dispute. Dispute resolution in this way is acceptable to the parties to the dispute because the process is based on self-regulation and is still strongly colored by local customs. and Settlement of joint property disputes through litigation. The meaning of litigation is a legal term related to the resolution of a dispute that is faced through court channels. The advantages of litigation settlement are that the court's decision has final legal force, creates legal certainty with the position of the parties winning or losing (win and lose position), and can be enforced if the losing party does not want to carry out the contents of the court's decision (execution).<sup>13</sup>

Islamic law regulates the system of separation between the husband's property and the wife's property as long as the parties do not determine otherwise (not specified in the marriage agreement). Islamic law also gives leeway to the two parties to make a marriage agreement according to the wishes of the two parties, and in the end, the agreement binds them legally. The settlement of disputes over the division of joint property is by deliberating until reaching a consensus and even peace (Islah). Settlement of disputes by deliberation and consensus can be said to be a settlement according to Islamic law because one of the principles of Islamic law is to prioritize deliberation and consensus, but settlement by deliberation and consensus can only be deliberation to choose the law of distribution of joint property that will be used in dispute resolution, thus the parties submit to the judicial body, meaning that the husband and wife are given the right to resolve the property problem.

#### **F. Settlement of Post-Divorce Joint Property Disputes According to the Law of the Timor Tetun Tribe**

Marriage is a bond between two men and women to form a family and be recognized as legitimate by society. Marriage can be done religiously, customarily, and by the state. However, marriages that do not run harmoniously can lead to divorce. As a result of this divorce, the property owned by the husband and wife must be separated, there are several choices of legal systems for dividing property during the marriage, but here the researcher uses the customary law system adopted by the community.

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<sup>13</sup> Soemartono Gatot, *Arbitrase Dan Mediasi Di Indonesia* (Jakarta: PT Gramedia Pustaka Utama, 2018).



Customary dispute resolution is determined by customary law values, customary leaders, and customary institutions. The customary law community in resolving disputes is based on the philosophy and style of the customary law community itself, namely through deliberation and consensus. This path is prioritized in resolving disputes because the settlement is made based on an amicable agreement by both parties without anyone feeling disadvantaged to realize peace for the entire Indigenous community.<sup>14</sup>

The mechanism for resolving marital disputes in the Indigenous community in Timor of the Tetun tribe by deliberation can be carried out by several parties. First. Settlement between individuals, families, and neighbors. To restore family and social balance, if there is a marital dispute experienced by members of the Indigenous community, it is first resolved by the person concerned. Both parties to the dispute are asked to reconcile to resolve the dispute before seeking assistance from other parties. If the dispute cannot be resolved by the parties concerned, a meeting is held between the families of the disputing parties with the main aim of negotiating for peace. In marital disputes, to preserve the family's disgrace, parents or relatives of both parties are usually the first to help the disputing parties. This is because marriage in indigenous societies is not just a matter for the husband and wife, but carries the interests of the entire extended family and even the indigenous community. Therefore, with the presence of customary leaders, indigenous people, and village heads who are elders and respected by both parties to the divorce, the settlement of the dispute over the division of joint property can be handled by traditional leaders and community leaders, thus between the two divorced parties without seeing the division of property.

## CONCLUSION

The position of joint property after divorce is important to understand the legal context that applies in the area, both national law in Indonesia and customary law in Timor Tetun. We know that when a marriage breaks down due to divorce, the position of the joint property is regulated according to the respective laws. According to their respective laws, these are religious law, customary law, and other laws. Therefore, the researcher suggests that to protect husbands and wives, a prenuptial agreement should be made regarding the property they own.

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<sup>14</sup> Thomas J. Benedictus, "Kedudukan Hukum Perkawinan Adat Dalam Sistem Hukum Perkawinan Nasional," *Jurnal Kewarganegaraan* 7, no. 2 (2023): 227.

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