



Legal Analysis of the Status of Joint Property Over a House Ownership Credit (KPR) Housing Unit That has not Been Paid off

Sahdan ^{1*}, Djumardin ², Diangsa Wagian ³

¹ Master of Laws (LL.M.), University of Mataram, Indonesia

²⁻³ University of Mataram, Indonesia

* Corresponding Author: Sahdan

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Abstract

This study aims to analyze the regulation of Joint Property based on positive law, so that it can determine the legal status of Joint Property of Housing Ownership Credit (KPR) units that have not been paid off after divorce. In addition, it is also necessary to know what kind of dispute resolution is used in cases of Joint Property of Housing Ownership Credit (KPR) units that have not been paid off. The method used is normative-empirical legal research with a statutory approach, case approach, conceptual approach, comparative approach and non-judicial behavioral approach. The technique of collecting legal materials uses literature studies and field studies, as well as legal analysis using literature and field analysis. Based on the results of the study, it can be concluded that in essence, joint property is property acquired jointly during marriage, and the ex-husband and ex-wife have the same rights to the property. A KPR house that has not been paid off normatively remains the status of joint property, but if it is disputed in court based on the Circular of the Supreme Court (SEMA) No. 3 of 2018, the judge will issue a decision stating that the lawsuit cannot be accepted on the grounds that the object of the lawsuit, the joint property, is still collateral for the debt.

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1. Introduction

Before marriage, a man or woman has complete rights and obligations. These include rights and obligations related to their life, property, and so on. Once they are married, their rights and obligations become one. This concept of "oneness" does not mean that the rights and obligations of each party merge, but rather that their rights and obligations remain intact even though they are now united in life.

Understanding these rights and obligations is very important and very fundamental, if we will examine more deeply about the consequences of married life, because in married life, it will give birth to rights and obligations including regarding children and rights and obligations regarding property. Even then there will be problems in the division of property if the marriage ends either due to divorce or death. In theory, resolving the problem of the division of joint property seems simple and easy to do, but in fact after the divorce, in addition to the problem of child custody, the problem that is also quite dominant, hanging, and often not resolved through deliberation or non-litigation is the problem of the division of joint property between the former husband and former wife, so that one of the parties will file a lawsuit in Court to seek legal certainty over the joint property.

If the dispute reaches the Court of assets, specifically in this study in the form of a house obtained by them during the marriage that was purchased on credit and or which is still in credit status at the Bank, all of that cannot be categorized immediately as joint assets after the issuance of the Circular Letter of the Supreme Court Number 3 of 2018 concerning the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber in 2018 as a Guideline for the

Implementation of Duties for the Court on page 14 of the Family Law section Point 4, in essence "Joint Property Lawsuits whose disputed objects are still pledged as collateral for debt or the object contains ownership disputes due to the second transaction and so on, then the lawsuit over the object must be declared inadmissible". So with the existence of the circular letter, there has been a lack of clarity in the norms that do not provide legal certainty for ex-husbands and ex-wives if they have a house but still have the status (credit) obtained during their marriage.

Law Number 1 of 1974 concerning Marriage is more explicit in regulating joint assets as per Article 35 paragraph (1) Assets acquired during marriage become joint assets jo. Article 37 explains that if a marriage ends due to divorce, joint assets are regulated according to their respective laws. Therefore, the Supreme Court Circular Letter Number 3 of 2018 contradicts Article 35 paragraph (1) jo. Article 37 of the Marriage Law, resulting in a conflict of norms that does not provide legal certainty.

Based on this, what if the joint assets owned during the marriage include a housing unit with a Home Ownership Credit (KPR) that has not been paid off, can the house be considered joint assets even though the credit process is still in progress and has not been completed.

Based on the background described above, the author formulates the problems including how to regulate joint assets based on Indonesian Positive Law, what is the legal status of joint assets in the form of a Home Ownership Credit (KPR) that has not been paid off after a divorce and how to resolve disputes regarding joint assets in the form of a Home Ownership Credit (KPR) that has not been paid off.

2. Research Methods

Research is a fundamental tool in the development of science and technology. This is because research aims to uncover the truth systematically, methodologically, and consistently. Through this research process, the collected and processed data are analyzed and constructed.^[1]

Research is basically a planned activity carried out using scientific methods with the aim of obtaining new data to prove the truth or falsity of an existing phenomenon or hypothesis.^[2]

3. Discussion

3.1. Regulation of Joint Property Based on Positive Law in Indonesia

A. Arrangement of Joint Property During Marriage

Until now, there have been no specific regulations or laws governing Joint Property in Indonesia, thus all legal actions related to Joint Property, in general, initially still refer to the Civil Code. After the enactment of Law of the Republic of Indonesia Number 1 of 1974 concerning Marriage, Joint Property is regulated more specifically in the Law on Marriage and in the Compilation of Islamic Law (KHI).

Joint property in Dutch is known as *gemeenschap van goederen*, which means a collection of property. In the Great Indonesian Dictionary, joint property, or Harta Gono Gini, is property accumulated during a marriage and thus becomes

joint property.^[3]

It should be noted that joint property is different from property brought in, property brought in is property in the form of a gift or inheritance, which has been brought by each party before the marriage was carried out and basically the property brought in remains the property of each party.^[4]

Article 119 of the Civil Code (*Burgerlijk Wetboek*) regulates marital assets based on an automatic property mix system. Article 119 of the Civil Code states that:

"Starting from the moment the marriage takes place, by law a complete union between the assets of the husband and wife applies, regarding that, other provisions are made with the registration marriage agreement."^[5]

This means that after the marriage is carried out, all assets belonging to each party, assets acquired during the marriage will become one unit of assets known as joint assets, unless otherwise specified in the marriage agreement.

The same provisions are also emphasized in Article 120 of the Civil Code (*Burgerlijk Wetboek*), namely:

"Just as regards the benefits, the union includes the assets of the husband and wife, movable and immovable, both present and future, as well as those they acquired for free, unless in this last case the testator or the donor expressly stipulates otherwise."

However, since the enactment of Republic of Indonesia Law Number 1 of 1974 concerning Marriage, Article 119 of the Civil Code in conjunction with Article 120 of the Civil Code is no longer valid and is regulated more specifically in Article 29 Paragraph (1), Paragraph (2), Paragraph (3), and Paragraph (4) in conjunction with Article 66 of the Law concerning Marriage.

From the explanation above, it can be seen that joint property is the union of all assets owned by the husband and wife, which were acquired jointly starting from the time the marriage was carried out. This joint property includes immovable property which is explained in detail in Article 506 of the Civil Code and movable property which is also explained in detail in Article 511 of the Civil Code. Meanwhile, property obtained for free such as gifts or inheritance is also not included in the category of joint property, but is instead acquired property, where the property remains the personal property of each party even though the marriage has taken place.

Joint property reflects the existence of objects that are jointly owned or owned by more than one person. Legally, ownership of an object by more than one person can be found in legal regulations in articles 526 and 527 of the Civil Code, the essence of which is that joint property is divided into "bound joint property" and "free joint property". However, the normative weakness in the Civil Code is that it does not provide a clear definition of bound joint property and free joint property.^[6]

Apart from that, the assets brought in are also not included in joint assets, because the origin of these assets brought in was owned by each party before the marriage took place, so that the assets brought in remain the personal property of each party.

The same provisions regarding joint assets are also regulated

¹ Soerjono Soekanto & Sri Mamudji, *Normative Legal Research: A Brief Review*, Raja Grafindo Persada, Jakarta, 1985, p. 1.

² Bambang Waluyo, *Legal Research in Practice*, Sinar Grafika, Jakarta, 1991, p. 13.

³ Department of National Education, *Big Indonesian Dictionary, Language Center*, Jakarta: PT Gramedia Pustaka Utama, 2008, p. 410.

⁴ Subekti, *Marriage Law*, Jakarta: Intermasa, 2008, p. 37.

⁵ Civil Code (*Burgerlijk Wetboek*), Article 119.

⁶ Muhammad Syaifuddin, Sri Turatmiyah, Annalisa Yahanan, *Divorce Law*, East Jakarta, Sinar Grafika, Second Edition, 2014, pp. 408-409

in Article 35 paragraph (1) of the Republic of Indonesia Law Number 1 of 1974 concerning Marriage, namely that assets obtained during the marriage become joint assets.^[7] This is regulated more clearly in Article 35 paragraph (2) regarding assets brought in, where all assets, whether in the form of gifts or inheritances obtained by each party before the marriage, remain under the control of each party, as long as the parties do not determine otherwise.

It is reaffirmed in Article 36 paragraph (1) that each husband and wife has the full right to carry out legal actions regarding their assets.

Meanwhile, according to Sayuti Thalib, marital assets can be divided into 3 (three), namely:

1. Brought-in assets are assets that each husband and wife have acquired before the marriage, whether from inheritance, gifts or the respective businesses of the husband and wife.
2. Acquired assets are assets of each husband and wife that are obtained after the marriage, but are not obtained from efforts either individually or jointly, but are gifts, wills or inheritances belonging to each husband and wife.
3. Joint property is property obtained after marriage, originating from the efforts of the husband and wife.^[8]

Meanwhile, on the other hand, Article 1 letter f of the Compilation of Islamic Law provides a different understanding regarding Joint Property, where Joint Property or Assets in marriage are assets obtained individually or jointly during the marriage, without questioning whether they are registered in whose name.

In reality, there are no specific rules under positive law governing the division of joint assets during a marriage, including how they are managed or the form of the assets. According to Yahya Harahap, the term "joint assets" encompasses several areas, including:

- A. Assets purchased during marriage, namely all items purchased during the marriage, including if the person registered is one of the parties, are still considered joint assets;
- B. Assets that can be proven to have been obtained during the marriage, meaning that the origin of the assets can be proven to be from business results during the marriage, even if the name is transferred to another party;
- C. Assets built or purchased after divorce means that if the parties build or purchase something at joint expense even though the act was carried out after the divorce, it is still considered joint property. This is in accordance with Supreme Court Decision Number 803 K/Sip/1970 dated May 5, 1970, which states that the origin of the money for the purchase or construction of an item determines whether the item is joint property or not, even if the item was purchased or built after the divorce.
- D. Income from joint assets and personal assets means that all income from the husband and wife will automatically become joint assets, even income originating from the personal assets of each party is also considered joint assets, even though ownership of the assets remains the personal assets of each party.

Based on the explanations above, joint assets are formed from

the time the marriage takes place, unless each party determines another agreement. Here, the husband and wife have the same rights to the joint assets, both ownership rights and use rights, according to the agreement of each party during the marriage. This is in accordance with Article 36 paragraph (1), namely:

"Regarding joint property, husband or wife can act with the agreement of both parties"

The same provisions are also regulated in Article 92 of the Compilation of Islamic Law, which reads:

"A husband or wife is not permitted to sell or transfer joint property without the consent of the other party."

B. Legal Effects of Divorce on Joint Assets

According to Article 37 of Law No. 1 of 1974 and its Explanation, the legal consequences of divorce on joint property are regulated according to their respective laws, which include religious law, customary law, or other laws. This means that Law No. 1 of 1974 leaves it up to the divorcing parties (former husband and former wife) to choose which law and what law will apply, and if there is no agreement, according to Hilman Hadikusuma, the judge in the Court can consider according to a sense of reasonable justice.^[9]

From the explanation of Article 35 of Law No. 1 of 1974, it has a broader scope than Article 37, so it is very possible to make an agreement before the marriage takes place, or what is better known as a pre-nuptial agreement, where the agreement can be a guide or basis for each party, husband and wife, in the future if a divorce occurs.

A prenuptial agreement is a legal instrument that can be used to clearly regulate the division of assets. Article 29 of Law Number 1 of 1974 concerning Marriage provides for couples to enter into a prenuptial agreement before or during the marriage.

Constitutional Court Decision No. 69/PUU-XIII/2025 expanded this provision, stating that a prenuptial agreement may be entered into after the marriage has taken place, provided it is certified by a notary and does not violate any law.¹⁰ The prenuptial agreement can detail the separation or consolidation of assets, asset management, debt liability, and the distribution of assets in the event of divorce.

The importance of a prenuptial agreement is to minimize disputes regarding the division of joint assets in the event of divorce, because Law of the Republic of Indonesia Number 1 of 1974 concerning Marriage does not explain in detail regarding the division of joint assets. In accordance with Article 37, if a marriage ends due to divorce, joint assets are regulated according to the laws of each party. Therefore, it can be interpreted that the division of joint assets after a divorce can be resolved through customary law, religious law, Positive Law, General Civil Law, Religious Civil Law, and jurisprudence in Indonesia.

For those who are Muslim, of course they will refer to the Compilation of Islamic Law which is regulated in Article 96 paragraph (1), namely:

"In the event of a divorce, half of the joint assets become the rights of the spouse who survives longer."

Likewise, Article 97 states that divorced widows or widowers

⁷ Republic of Indonesia Law Number 1 of 1974 concerning Marriage, Article 35.

⁸ Sayuti Thalib, *Indonesian Family Law*, Jakarta: UI Press, Fifth edition, 1986, page 85

⁹ Muhammad Syaifuddin, Sri Turatmiyah, Annalisa Yahanan, Op. Cit. p. 425

¹⁰ Constitutional Court Decision No. 69/PUU-XIII/2015, accessed via www.mahkamahkonstitusi.go.id.

are each entitled to half of the joint property, unless otherwise specified in the marriage contract. This means that if a husband and wife divorce, the joint property will be divided into two equal shares.

"Property acquired during marriage becomes joint property and in the event of a divorce, each party is entitled to half of the joint property, unless otherwise specified in the marriage contract."

In Indonesian Religious Court practice, in cases of divorce, joint assets are divided fairly, although not always equally. This means that the judge's judgment will determine the division of joint assets, and this judgment is based on strong evidence and reasons from each party regarding the acquisition of the joint assets. This is based on the Principle of Justice in Islamic Law and Supreme Court jurisprudence.¹¹ Based on the above explanation regarding the provisions regarding joint property, it can be seen that the provisions regarding joint property under positive law in Indonesia reflect the diversity of applicable legal systems, namely the Civil Code, the Compilation of Islamic Law, and customary law or community law. Nevertheless, in general, the principle of joint property remains recognized based on the legal systems adopted by each husband and wife.

4. Legal Status of Joint Property in The Form of A House Unit With A Home Ownership Loan (Kpr) That Has Not Been Paid Off After Divorce

Marriage is a legal act that has legal consequences. From the moment the marriage takes place, the husband and wife indirectly have their respective rights and obligations in building a household. A valid marriage is one that is conducted in accordance with the teachings of the respective religions and must be registered with the state administration in accordance with applicable laws and regulations.

One of the legal consequences of marriage is the relationship between the husband and wife's assets. A common phenomenon in society is the lack of a home for married couples, leading many to choose to purchase a home in installments or through a housing loan, a banking facility that allows them to purchase or renovate a home through installments.

Before there is approval from the Creditor on the Application from the Credit Applicant (Debtor) first the Creditor will see who submitted the application. Is it someone who is not married or someone who is married, then if someone who is married submits the Credit application and meets the requirements determined by the Creditor then the Creditor will prepare a Credit Agreement document, so that the Debtor together with the Creditor will sign the Credit Agreement Letter either on behalf of the Husband and or on behalf of the Wife and one of them must be present and sign the agreement as the Husband or Wife in the Credit Agreement Letter.

Based on Law Number 7 of 1992 concerning banking, as amended by Law Number 8 of 1998 concerning amendments to the banking law, the term credit agreement is not recognized. The term credit agreement is determined in the Cabinet Presidium instruction number 15/EK/10 dated October 3, 1966 Jo Circular Letter of Bank Negara Indonesia Unit I No. 2/539/UPK/Pemb dated October 8, 1966 which instructs the banking community that in providing credit in

any form, banks are required to use a credit agreement.¹²

The Credit Agreement Letter will be set out in an Authentic Deed, according to Article 1868 of the Civil Code, an authentic deed is a deed in the form determined by law, made by or before an authorized official (public official) for that purpose, at the place where the deed is made. From this understanding, it can be concluded that an authentic deed is called if it meets the following requirements:¹³

1. A deed made by or a deed made before a public official, appointed by law.
2. The form of the deed is determined by law and the method for making the deed must be in accordance with the provisions stipulated by law.
3. At the place where the authorized official makes the deed.

In making a Credit Agreement, the parties described in the comparison are:

1. Banks as Creditors. Banks are legal entities, meaning they are legal subjects. As legal entities, banks cannot carry out their activities independently. Because legal entities are abstract, they cannot carry out legal acts themselves and must be represented by their respective bodies.
2. Meanwhile, if the debtor is an individual, the identity includes name, home or office address and if the individual debtor is married, then the comparison must include a letter of approval from the wife or husband.

So if the Debtor buys a house on credit or installments and the Debtor is still married, the house will become joint property as regulated in Article 36 Paragraph 1 of Law No. 1 of 1974 concerning Marriage.

Problems generally arise when a married couple decides to divorce while the house is still under mortgage. Therefore, the legal issue here concerns the legal status of the mortgaged house as joint property after the divorce is officially declared by both the religious and state authorities.

In marriage, of course, the husband and wife will exercise their respective rights and obligations to maintain their household. One way to do this is by jointly purchasing a house, even on credit, to serve as a family residence. The purchase of the house is based on an agreement between the husband and wife for the benefit of the family, whether the house is purchased outright or on credit.

In fact, currently there are many cases of married couples who choose home credit by mutual agreement, whether only one party pays the installments or both. However, even so, the acquisition or effort to buy and build the house was carried out after the marriage, so that the house automatically becomes joint property and its dependents.

This is something that the general public is unaware of. When a marital dispute that leads to divorce arises, there's a fight over the house, which is still under mortgage. Each party will insist on dividing the house fairly without first considering repayment.

This is where it is important to know that whatever is obtained during the marriage and the acquisition is based on the agreement of both parties for the benefit of the family, then it is appropriate for the parties, even though they are

¹¹Jurisprudence of the Supreme Court of the Republic of Indonesia, Decision No. 271 K/AG/2003 concerning the Division of Joint Assets

¹²Sutarno, *Legal Aspects of Credit in Banks*, Bandung: Alfabeta, Fifth Edition, 2014, p. 97

¹³Ibid, p. 101

divorced, to remain obliged to jointly pay off the house loan. In accordance with Article 93 paragraph (2) of the Compilation of Islamic Law which states that "Responsibility for debts incurred for the benefit of the family, is borne by joint assets."

Home ownership loans, where the ownership certificate is still held by the bank as collateral until the loan is paid off, are generally considered joint property. In practice, ownership of the home under these loans is usually "conditional," as the buyer does not yet have full ownership rights to the property.

Article 85 of the Compilation of Islamic Law explains that joint property in marriage does not preclude the possibility of property belonging to the husband and wife, meaning that even though the marriage has taken place, personal property such as property brought and acquired remains the property of each party, unless the property is obtained through joint efforts of the husband and wife, in which case it becomes joint property. This interpretation is outside the context of a marriage agreement in accordance with the agreement of the parties.

This also applies to home loans. If a husband or wife takes out a loan while married, the monthly installments are automatically paid by both parties for their efforts, or by one of the parties, either the wife or the husband. Therefore, in the event of a divorce, each party has equal rights to a portion of the house, as it is joint property. The division can be done through deliberation to form a consensus, or through legal action in the Religious Court for Muslims and in the District Court for non-Muslims.

Ex-husbands and ex-wives often don't understand why a house still under mortgage can become joint property and must be divided fairly, even though only one party, the husband or wife, is paying the installments. Therefore, it's important to emphasize that, regardless of the payment process for a house or other property, as long as the sale and purchase took place during the marriage and was based on mutual agreement, its legal status is joint property.

In the case where the name listed on the Certificate of Ownership of the credit house is only one party, this still does not result in the loss of joint property status, because the object purchased provides economic benefits for the family.

5. Settlement of Disputes Over Joint Property in The Form of A House Unit Or A Home Ownership Credit (Kpr) That Has Not Been Paid Off After Divorce

Marriage has legal implications for the assets of both husband and wife, including homes acquired through mortgages (KPR). In many divorce cases, the subject of disputes is unpaid mortgages.

Divorce disputes involving unpaid mortgages will naturally involve several parties, including the creditor, the third party—the bank. The bank generally holds a lien on the mortgage, as the property purchased with the mortgage serves as collateral. Therefore, the bank has priority to sell the home if the mortgage is not paid off.

The crux of the matter is what steps a husband and wife should take after a divorce to ensure the mortgage can be divided, even if the mortgage payments are still outstanding. Several Supreme Court decisions have also emphasized that an unpaid mortgage is still considered part of the joint estate and must be divided fairly. Here are some options:

1. Pay off the remaining debt to the bank, then the house is divided in two;

2. One party continues to pay the house installments, by providing fair compensation to the other party according to the portion of joint ownership;
3. Cooperation to pay off the debt installments, during which time the house remains the property of both parties, once it is paid off it can be sold or the rights transferred later.

Based on the above review, a mortgage home that has not been paid off can still be classified as joint property if purchased during the marriage. The unpaid status of the mortgage home does not eliminate the property's status as joint property, and each party retains the right to a portion of the home. This can be determined by mutual agreement or through the courts, and must take into account fairness, the home's economic value, and the ability to repay. The court plays a crucial role in determining who is entitled to continue paying installments and how to establish a fair and equitable distribution mechanism for each party.

Article 35 paragraph (1) of Law of the Republic of Indonesia Number 1 of 1974 concerning Marriage states that assets acquired during marriage become joint assets, while Article 36 paragraph (1) states that each party has the right to use joint assets with the agreement of both parties.

However, in practice, resolving disputes related to jointly held property, such as mortgaged houses still under bank collateral, becomes more complicated because the property cannot be sold immediately without full payment. Often, one party to the dispute refuses to continue paying the mortgage payments but also refuses to relinquish their rights to the property. Furthermore, some parties may not agree to the sale of the house at a price that does not meet their expectations, making the physical division of the house extremely difficult. In reality, the conflict over unpaid mortgages often stems from the issue of repayment. This means that when the parties mediate regarding the division of the joint assets, the parties immediately seek a larger or equal share. However, when asked to reach an agreement regarding the installments, the parties mutually refuse to continue. Furthermore, the bank, as a third party with an interest, is not directly involved in the divorce process and division of joint assets, which are usually processed in court.

Basically, positive law in Indonesia always prioritizes justice, where Article 97 of the Compilation of Islamic Law explains that in the event of divorce, the wife and husband each have the right to half of the joint property, unless otherwise specified in the marriage agreement.

However, the division must take into account which party pays the installments and from when they are paid, then whether the house is occupied jointly or only by one party, and which party will continue the payments after the divorce, as well as considerations related to the rights of the children which must be prioritized if the child's custody remains in the house.

The mechanism for resolving outstanding mortgage disputes can be pursued through both non-litigation and litigation. Non-litigation efforts are carried out through deliberation to reach a mutual agreement. The results of this deliberation are then formalized in a written agreement before a notary and witnesses, for example:

1. One party continues the installments on the house, then buys the other party's share in cash;
2. The house remains jointly owned, and there is an agreement regarding the right of use or management.

This approach aligns with the principles of kinship and efficiency in time and costs. The principle of kinship in joint property emphasizes cooperation and fairness, meaning that assets acquired during the marriage remain jointly owned and their management must be based on mutual agreement, especially in the event of divorce. The division doesn't have to be equal, but rather depends on who contributed the most. Everything will be aligned with applicable positive and customary laws.

If non-litigation efforts do not provide the best solution for the parties, then the problem of joint property can be resolved through litigation. Litigation is a method of resolving disputes regarding the division of joint property through legal proceedings in court. Parties who feel the division of joint property is unfair can file a lawsuit with the Religious Court for Muslims and the District Court for non-Muslims.

Non-litigation proceedings typically require a relatively shorter timeframe than litigation. This is because non-litigation proceedings only require the presence of the husband and wife, a mediator, and witnesses. If the dispute involves a mortgage, a notary can be used, as an authentic deed is required.

In addition, there are several forms of non-litigation dispute resolution as Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution regulates dispute resolution outside the court which can be used, however, if non-litigation dispute resolution does not produce results or fails, the parties will proceed to the litigation stage.

Meanwhile, litigation efforts can take months to resolve due to the lengthy process, including filing a lawsuit, hearing, proving the verdict, then there are appeals and cassation, and extraordinary legal remedies, namely judicial review at the Supreme Court of the Republic of Indonesia. The costs incurred are clearly very different. Non-litigation efforts do not require a lot of money to resolve the problem, but litigation efforts can require costs many times that much to resolve the dispute.

Furthermore, in litigation efforts related to the division of joint assets, where the subject of the dispute is a mortgage on a house that has not been paid off, the dispute resolution indirectly involves not only the divorcing parties but also requires the approval of the bank, as the mortgage holder. The transfer of the debtor must therefore go through existing banking regulations.

In banking, there's no such thing as interfering in the division of joint assets, even if it concerns an outstanding mortgage. The bank essentially positions itself as the creditor, with the husband and wife as the debtors. Therefore, the obligation to repay the mortgage remains with both parties. The bank will continue to demand that payments be made according to the agreed-upon schedule.

However, in cases of dispute resolution regarding mortgages that have not been paid off, the bank usually provides a solution for the parties so that they can still pay off their installments even though they are divorced, including:

1. Divorced parties are obligated to confirm the situation with the bank and discuss how to resolve it. Transparency and honesty from the debtor significantly impact the bank's assessment.
2. Both parties remain obligated to pay installments, either individually or jointly, in accordance with the agreement between the debtor and creditor. This is done to prevent the debtor from experiencing bad debt status and/or

having existing assets seized.

3. The parties can negotiate or take over credit, with the note that the party willing to take over the mortgage house must meet the requirements and comply with the bank's provisions;
4. The parties can sell the mortgage home if they are no longer able to make the monthly installments. Therefore, the proceeds from the sale will be used to pay off the remaining mortgage, and any remaining funds will be divided according to the agreement between the husband and wife.
5. Parties who have absolutely no good intentions to continue paying installments will be forced to have their assets confiscated and auctioned by the Bank as a last option.

In essence, the bank remains committed to its right to collect debtor obligations, regardless of the problems that arise. The best solution is communication with the bank and a clear agreement that the debtor can fulfill. However, if the ex-husband and ex-wife and the bank cannot reach a compromise in resolving the dispute, the next step is to file a lawsuit in the Religious Court regarding joint assets and a lawsuit in the District Court regarding the dispute over the rights to the unpaid mortgage. The stages and/or agenda in the first-level trial, namely the District/Religious Court, are as follows:

1. Registration of a lawsuit in court by the plaintiff or his attorney;
2. Mediation Agenda in the Court Environment;
3. Reading of the Lawsuit by the Plaintiff;
4. Reading of Exceptions and Answers in the Main Case by the Defendant;
5. Submission of Reply by the Plaintiff;
6. Duplicate Submission by Defendant;
7. Submitting evidence in the form of letters, witnesses and experts by the Plaintiff and Defendant;
8. Local inspection hearing;
9. Making and submitting Conclusions by the Plaintiff and Defendant; and
10. Decision by the Panel of Judges Examining the Case.

That before the reading of the verdict by the Panel of Judges examining the case, the more important thing in the judge's verdict is the judge's legal considerations, so that the panel of judges will examine the appropriate and relevant legal basis related to the arguments of the lawsuit and exception as well as the Reply and Duplicative then consider the written evidence, witnesses and experts of the plaintiff and defendant, therefore the judge will look for the appropriate rules and follow previous decisions that are related to the case which is usually referred to as legal jurisprudence which can be used as reference material related to the settlement of joint property disputes where each decision is different depending on the judge's considerations, especially in joint property disputes whose object is the Housing Unit of the Home Ownership Credit (KPR) which has not been paid off.

So by referring to the Elucidation of Article 1, Fifth Paragraph of Law no. 14 of 1970, amended by Law no. 35 of 1999 and now in the explanation of Article 4 of Law no. 4 of 2004 which reads:

"Freedom in exercising judicial authority is not absolute because the judge's duty is to uphold law and justice based on Pancasila so that his decision reflects the sense of justice of

the Indonesian people."

So if we refer to SEMA Number 3 of 2018 on page 14 of the Family Law section, Point 4, in essence, "A lawsuit for joint property where the disputed object is still pledged as collateral for a debt or the object contains an ownership dispute due to a second or subsequent transaction, then the lawsuit for the object must be declared inadmissible." Therefore, the judge does not have the freedom to decide a case.

In court practice, in the division of joint assets where the object of the dispute is a mortgage that has not been paid off, in most similar cases, the judge usually declares that he cannot accept the case or makes another decision with various provisions such as ordering which party is obliged to continue paying the installments, or how the repayment and distribution mechanism will be. All of this depends on the judge's considerations based on the arguments and evidence available from the parties and must also consider the best interests of the child.

Numerous court cases involve the division of joint assets, which typically result in varying decisions depending on the family's circumstances. For example, Supreme Court Jurisprudence Number 714 K/Ag/2020, dated November 17, 2020, stated that the division of the disputed property, whether a house or vehicle, was still secured by bank collateral as collateral for a debt, was unacceptable because it involved the interests of a third party or creditor.

In contrast to the Supreme Court Jurisprudence Number 266 K/Ag/2010 dated July 12, 2010, where the division of joint assets was not in equal proportions, the judge's considerations were based on the provision of maintenance and the size of the contribution of the parties in the family, where in the decision the Supreme Court carried out a fair division, fair here does not mean divided in two or equally.

In Supreme Court Decision No. 266 K/Ag/2010, which essentially ruled on the division of joint assets after divorce, the Supreme Court Justice did not apply Article 97 of the Compilation of Islamic Law regarding equal distribution, namely half, but divided it in different proportions, namely 2/3 for the wife and 1/3 for the husband. This was certainly based on consideration of the wife's greater contribution during the marriage.

Here the Supreme Court applies the principle of *contra legem*, where the Supreme Court's decision overrides Article 97 of the Compilation of Islamic Law in order to achieve more substantial justice. In the mortgage housing case here, if we refer to the Supreme Court's decision above, the judge will make a distribution based on each party's contribution to the settlement of the mortgage housing payment. This means that if one party contributes by paying installments while the other party never helps pay the installments, then the judge can decide on a distribution outside of Article 97.

Although a mortgage is considered joint property, for the sake of social justice, the judge will render the fairest possible decision. The principle of *contra legem* aims to provide substantive justice rather than applying rigid laws. While the applicable regulations must be applied in law enforcement, the judge must not be trapped by written norms without considering the legal implications.

Another provision regarding joint property is in the Supreme Court decision Number 112K/AG/2015, in this case, a mortgage house was purchased in the husband's name, but some of the installment payments were funded by the wife. The Supreme Court then ruled that the status of the house is

joint property, and each party has equal rights to a portion of the house's value, a portion of the house's value is given after deducting the remaining debt to the Bank. The decision also stipulated that the husband remains obliged to continue paying the mortgage installments and is also obliged to provide compensation to the wife.

The civil case that has been decided by the Praya Religious Court of Central Lombok Regency is as per the Praya Religious Court Decision No. 264/Pdt.G/2014/PA.Pra dated March 30, 2015, which in essence the Panel of Judges Examining the Case at the Praya Religious Court examined the lawsuit filed by the Plaintiff (Hj. Elmi Nuraida) against the Defendant (her ex-husband). The judge decided to grant the Plaintiff's lawsuit in part. The Panel of Judges stated that it was legally valid that the object of the dispute submitted was joint property acquired during their marriage. One of the objects mentioned in the ruling was a plot of land measuring 90 m² (ninety square meters) located in the Tampar-ampar Housing area, Jalan Sonokeling, Jontlak Village, Praya District, Central Lombok Regency.

In addition, there is Decision Number 2802/Pdt.G/2018/PA.Dpk. Dated January 21, 2020 Jo. Decision of the Bandung High Religious Court Number 117/Pdt.G/2020/PTA.Bdg. dated June 10, 2020 which in essence Grants the Claim of the Counterclaimant (Former Wife) in Part and determines that the joint assets in the counterclaim dictum number 2 above, the portion for the Counterclaimant is 70% and the portion for the Counterclaimant is 30% (Former Husband). Then the former husband filed a cassation appeal because at the appeal level the Religious Court's decision was upheld so that the former husband filed a cassation appeal where the Cassation Decision Number 78 K / Ag / 2021 dated March 26, 2021 rejected the former husband's cassation and upheld Decision Number 2802 / Pdt.G / 2018 / PA.Dpk. dated January 21, 2020 Jo. Decision of the Bandung High Religious Court Number 117 / Pdt.G / 2020 / PTA.Bdg. June 10, 2020 with Legal Considerations which are essentially "However, if the wife carries out two functions at once, namely trying/working to meet household needs and also taking care of the household and raising children as in the *a quo* case, then it is unfair for each party to receive 1/2 (half) of the joint assets, therefore the division of joint assets as determined by *Judex Facti*, namely 70 (seventy) percent for the Counterclaimant/Conventional Defendant and 30 (thirty) percent for the Counterclaimant/Conventional Defendant is appropriate and correct."

From the several decisions above, it is in line with the statement of the judge at the Mataram District Court, namely MAHYUDIN IGO, SHMH which is linked to SEMA Number 3 of 2018, which explains "That the judge's duty is to uphold the law that reflects the sense of justice of the Indonesian people, so that the judge must use a Justice approach. If SEMA Number 3 of 2018 is contrary to higher regulations, then the SEMA should be set aside, so that progressive judges are needed who are brave in upholding the law that reflects a sense of justice even to go against SEMA which is a guideline for judges under the auspices of the Supreme Court"

In addition, SEMA Number 3 of 2018 also regulates the Absolute Competence of Religious Courts and District Courts in joint property cases, one of the important points in this SEMA is that if a third party who is not Muslim files a lawsuit related to joint property, then the lawsuit is submitted

to the District Court. This means that the Religious Court is not authorized to examine and adjudicate joint property disputes if one of the parties involved is a non-Muslim (for example, a company/bank), so the lawsuit must be submitted to the District Court.

However, this SEMA does not specifically regulate how to resolve disputes over unpaid mortgages when the creditor is uncertain about which party should be responsible for continuing to pay installments after a divorce, if there is a default due to an internal dispute between the former husband/wife, and if the collateral object is confiscated, but there is resistance or objections by one of the parties. Then SEMA No. 3 of 2018 limits the rights of former husbands and former wives to demand their respective rights, so in this case there is a legal vacuum, because civil procedural law does not provide a direct mechanism that can protect the rights of creditors when a debtor's family relationship is divorced.

This kind of thing is what is called a legal vacuum, namely the absence of technical rules that protect the legal rights of creditors in civil disputes regarding joint property that have a direct impact on credit agreements.

In this case, there are several solutions offered by several legal experts, namely by requiring the inclusion of the creditor in every case of KPR house division, the Court must provide a fair decision without harming the Bank, and encourage amendments or regulation of the Supreme Court Regulation (PERMA) specifically regarding KPR house disputes in Joint Property disputes.

The Supreme Court's ruling in case No. 112 K/Ag/2015 ordered the division of the house, but the execution could not be carried out immediately because the bank had not yet given its approval. This indicates the need for synchronization between the Religious Court and the bank in dividing the outstanding mortgage home.

In another case, Supreme Court Decision No. 801/K/Pdt/2018 also shows the case where the bank sued the debtors, a former married couple, because one of the parties used the collateral as a sale and purchase object. However, the Supreme Court emphasized that the mortgage cannot be removed without the bank's consent, and the debtor, as the buyer, cannot enforce his rights over the object that is still collateral. The Supreme Court stated that the house cannot be transferred or sold without the consent of the third party as the creditor, and the sale carried out by one party is considered invalid.

Based on the explanation above, comprehensive legal reform is needed to address the legal vacuum in resolving disputes over the division of joint assets for mortgages that have not been fully paid off. Unclear ownership status and responsibility for installment payments can lead to injustice for both debtors and creditors. This reform is crucial for creating certainty and balanced legal protection for all parties, so that disputes involving mortgages as joint assets can be resolved fairly, transparently, and in accordance with applicable Indonesian legal principles.

Apart from that, SEMA Number 3 of 2018 also limits judges in making legal discoveries (*rechtsvinding*) if there is a legal vacuum in trying a case, especially civil cases, as on page 14 of the Family Law section, Point 4, in essence "A lawsuit regarding joint property where the object of the dispute is still being used as collateral for a debt or the object contains an ownership dispute due to a second or subsequent transaction, then the lawsuit regarding the object must be declared inadmissible."

The term "legal formation" refers to the formulation of regulations that apply generally to everyone. While lawmaking is typically carried out by legislators, judges are also permitted to create laws if their legal findings serve as guidelines for society, namely decisions containing legal principles formulated in concrete events but generally applicable.

So that SEMA Number 3 of 2018 On page 14 of the Family Law section, Point 4 prevents judges from making legal discoveries as one of the judge's powers.

In addition, the position of the Supreme Court Circular Letter (SEMA) in the hierarchy of laws and regulations is outside the formal hierarchy, SEMA is included in the category of policy regulations (*beleidsregel*) or internal guidelines that bind judges and judicial apparatuses under them internally, not as a formal legal source that is generally binding such as Laws or Government Regulations, and SEMA must not conflict with laws and regulations that have a higher position. However, the Panel of Judges should use a legal logic approach method in deciding cases, as stated firmly by Harris JW that the legal method generally used in logic is the deductive method. When a case with clear facts is to be decided, the rules that apply deductively will produce logical conclusions/decisions. Therefore, every argument that produces a specific conclusion supported by general justification can be called a logical argument. In terms of applying law to legal cases, legal logic is not significantly different from practical logic, but in the relationship between various legal rules, legal science has its own logic.

Then, In short, Prof. Martin P. Golding said that the forms of logic in arguments are divided into deductive and non-deductive arguments and several logical characteristics related to these forms.

Why, The above is important because logic functions as a method for examining the truth or accuracy of a reasoning, while reasoning is a form of thinking. This reasoning moves from a process that begins with the creation of a concept (*conceptus*), then followed by the creation of a statement (*propositio*), which is then followed by reasoning (*ratio cinium/reasoning*).

Meanwhile, Irving M. Copy Carl Cohen argues in the book written by Nurul Qarar on page 36, that in using logic in the legal field, one should always pay attention to the three main differences relating to the nature of law, sources of law, and types of law, as follows:

- **The nature of laws**

The nature of laws, also known as the essence of law, means that in a country or social community there are rules or regulations of behavior in the form of positive law and moral norms or moral rules.

There may be a discrepancy between positive legal norms and moral norms. In such circumstances, the application of logic is limited to enforcing positive legal norms as formal rules.

- **The resource of laws**

The resource of laws, which is defined as sources of law, is found in various types, both those originating from legislative and jurisprudential sources, which should be considered hierarchically.

In the event of a conflict or disagreement regarding interpretation or application, it is deemed necessary to formulate principles to solve the problem at hand.

- **The kinds of laws**

The kinds of laws which are also interpreted as types of law, in the sense of the division of law into public and private law, it is necessary to note that the principles of public law are different from the principles of private law.

Meanwhile, Article 10 paragraph (1) of Law Number 48 of 2009 states that:

"The court is prohibited from refusing to examine, try, and decide on a case submitted on the grounds that the law does not exist or is unclear, but is obliged to examine and try it."

The intent of this article is to interpret the judge as a judicial organ as being presumed to understand the law (*ius curia novit*). If the judge finds no written law or a statutory regulation that is unclear, the judge must act on his or her own initiative to resolve the case. The judge must play a role in determining what constitutes law, even if the statutory regulation is unclear. The judge is also obliged to explore unwritten law to make a decision based on the law. This judicial action is called "legal discovery" or "rechtvinding."

In what way can judges explore and discover what can become law? The provisions of Article 5 paragraph (1) of Law Number 48 of 2009 indicate that judges as enforcers of law and justice are obliged to explore, follow, and understand the legal values that exist in society. The provisions as in the context above must be interpreted as an obligation for judges because judges are the formulators and diggers of legal values that exist among the people.

Thus, a judge's important duty is to adapt the law to the realities of society. If the law cannot be implemented according to its literal meaning, the judge must interpret it. In other words, if the law is unclear, the judge is obliged to interpret it so that he can make a just decision that aligns with the law's intent, namely achieving legal certainty. Therefore, one could say that interpreting the law is a judge's legal obligation.

Specifically, judges must study various methods for discovering the law, as determined by legal science, through methods of legal interpretation and legal construction. This aspect of discovering the law through legal interpretation and construction is not only recognized in Indonesia; various national courts in other countries also have the obligation to discover the law. Courts in Malaysia, Singapore, the Philippines, Jerusalem, and Constantinople share a similar pattern in discovering the law through legal interpretation and construction. Courts in Indonesia and the other countries mentioned above also examine the laws or rules that exist in practice and then construct them through the acceptance of customary law and general legal practices.

From a conceptual perspective, the legal discovery process grants the courts the freedom to create new legal rules or formulate general legal principles. Although interpretation is a legal obligation for judges, there are several limitations on their freedom to interpret the law.

Logeman states that judges must submit to the will of the legislator. If that will cannot be simply deduced from the wording of the statutory regulations, judges must seek it in the history of those words, both within the legal system and in the meanings of such words used in everyday life. Judges are obliged to seek the will of the legislator because they are not permitted to interpret anything that is inconsistent with the legislator's will. Therefore, judges are not permitted to interpret laws arbitrarily.

People are not permitted to arbitrarily interpret binding rules. Only interpretations that are in accordance with the intent of the legislator are correct interpretations. Therefore, according to Polak, the method of interpretation is determined by:

1. The relevant statutory regulatory material;
2. Place where the case is filed; and
3. According to the times

By discovering the law through interpretation and legal construction, judges create new law to resolve specific cases presented to them. Therefore, this dimension, where unclear regulations and the absence of legal provisions, allows judges to fill in the "empty spaces" to resolve a case. Strictly speaking, jurisprudence serves as an aspect of filling legal gaps.

The legal basis for judges (courts) in finding the law is contained in Law Number 48 of 2009 concerning Judicial Power, namely:

- **Article 1**

Where in upholding law and justice based on Pancasila by interpreting the law and seeking the foundations and principles that form its basis so that the decision reflects the sense of justice of the Indonesian nation and people.

- **Article 10 Paragraph (1)**

"The court is prohibited from refusing to examine, try and decide on a case submitted on the grounds that the law does not exist or is unclear, but is obliged to examine and try it."

This context dictates that judges, as judicial organs, are presumed to understand the law. Those seeking justice come to them to seek justice. If a judge cannot find written law, he or she is obligated to explore unwritten law to adjudicate based on the law.

- **Article 5 Paragraph (1)**

"judges are obliged to explore, follow and understand the legal values and sense of justice that exist in society"

The basic assumption of this article determines that in a society that still recognizes unwritten law, judges are the formulators and diggers of legal values that exist in society. The essence of the provisions of Article 1, Article 5 Paragraph (1), and Article 10 Paragraph (1) of Law Number 48 of 2009 concerning Judicial Power has been implemented by the judge in adjudicating the *a quo* case. The basic conclusion is that interpreting and constructing the law is the judge's obligation.

So with the existence of SEMA Number 3 of 2018 on page 14 of the Family Law section Point 4, it is clear and obvious that the Supreme Court of the Republic of Indonesia automatically turns off the power of analysis and legal discovery by judges in every concrete case in the court environment, both at the Review Level at the Supreme Court of the Republic of Indonesia, Cassation at the Supreme Court of the Republic of Indonesia, Appeal Level at the High or Religious Court and or at the First Instance at the District or Religious Court throughout Indonesia because of the nature of the SEMA which applies internally or within the environment of the Courts Under the Supreme Court of the Republic of Indonesia.

In essence, from a theoretical and practical perspective, the quantity of legal discovery (*rechtvinding*) by judges in

Indonesia is relatively small. This raises a fundamental question: why is this so? What is the ideal policy formulation to maximize the role of judges in Indonesian legal discovery (rechtvinding) in challenging times?

That the position of SEMA Number 3 of 2018 in the Republic of Indonesia Law No. 12 of 2011 concerning the Formation of Legislation as an improvement to Law Number 10 of 2004 concerning the Formation of Legislation (State Gazette of the Republic of Indonesia 2004 Number 53, Supplement to the State Gazette of the Republic of Indonesia Number 4389) specifically in CHAPTER III TYPES, HIERARCHY AND CONTENT OF LEGISLATION in Article 7 Paragraph (1) namely as follows:

1. The 1945 Constitution of the Republic of Indonesia;
2. Decree of the People's Consultative Assembly;
3. Law/Government Regulation in Lieu of Law;
4. Government regulations;
5. Presidential decree;
6. Provincial Regional Regulations; and
7. Regency/City Regional Regulations.

That from the description above based on Law of the Republic of Indonesia No. 12 of 2011, the position of SEMA Number 3 of 2018 is not contained in the Hierarchy of Article 7 Paragraph (1), but is regulated in Article 8 Paragraph (1) which reads as follows:

" Types of Legislation other than those referred to in Article 7 paragraph (1) include regulations stipulated by the People's Consultative Assembly, the People's Representative Council, the Regional Representative Council, the Supreme Court, the Constitutional Court, the Audit Board, the Judicial Commission, Bank Indonesia, Ministers, agencies, institutions or commissions of the same level established by law or by the Government on the orders of law, the Provincial People's Representative Council, the Governor, the Regency/City People's Representative Council, the Regent/Mayor, the Village Head or those of the same level. " Meanwhile, Article 8 Paragraph (2) reads as follows:

" The statutory regulations as referred to in paragraph (1) are recognized as existing and have binding legal force as long as they are ordered by higher statutory regulations or are established based on authority. "

So by looking at the position of SEMA as (Policy Regulation) it only functions as a guideline for judges to fill legal gaps or uniformity in the application of law and may not create new legal norms that limit, add, or change the contents of the Law so that SEMA Number 3 of 2018 on page 14 of the Family Law section Point 4 has exceeded its function and violates Article 35 of the Republic of Indonesia Law Number 1 of 1974 concerning Marriage and violates Article 7 paragraph 1 Jo. Article 8 Paragraph 2 of the Republic of Indonesia Law No. 12 of 2011 concerning the Formation of Legislation as an improvement to Law Number 10 of 2004 concerning the Formation of Legislation (State Gazette of the Republic of Indonesia 2004 Number 53, Supplement to the State Gazette of the Republic of Indonesia Number 4389).

Therefore, SEMA Number 3 of 2018 on page 14 of the Family Law section Point 4 must be revoked by the Supreme Court of the Republic of Indonesia for the reasons as explained above.

6. Closing

6.1. Conclusion

1. The regulation of joint property is regulated in Law Number 1 of 1974 concerning Marriage and the Compilation of Islamic Law. Basically, all these regulations emphasize that all property acquired during the marriage is joint property, whether in the form of income, movable or immovable objects. Positive law in Indonesia still has many legal gaps in it, so that many interpretations of judges arise in order to obtain legal certainty. Therefore, it is important to have new regulations that specifically regulate joint property. This is done to provide justice and benefits for the parties. In addition, it is necessary to socialize the importance of making a marriage agreement or better known as a prenuptial agreement (huweslijkse voorwaarden) which contains an agreement on the division of property in accordance with Article 29 paragraph (1) of Law of the Republic of Indonesia Number 1 of 1974 concerning Marriage and the Compilation of Islamic Law;
2. If a mortgage unit is purchased during a marriage, the house automatically becomes joint property, even though the Ownership Certificate remains collateral at the bank. However, because the certificate remains collateral, the house cannot be divided immediately in the event of a divorce until the debtors have fully paid off the mortgage.
3. If the subject of the dispute is a mortgage, the dispute can be resolved through non-litigation or litigation. Essentially, the crucial issue is how to fairly divide the value of the house without harming third parties or creditors, given the complexities of matrimonial law and banking law.

6.2. Suggestion

1. The importance of submitting a restructuring request for Home Ownership Loans, so that its legal status is clear. Here the rules must be firm so as not to harm either party, especially if this involves the company in it, by carrying out regulatory reform and a solution approach, it is hoped that it can be a real contribution to resolving the legal vacuum regarding the division of joint assets on unpaid mortgages after divorce. Legal reform in this case, including the possibility of revoking SEMA No. 3 of 2018 on page 14 of the Family Law section Point 4, can be an important initial step to ensure protection and legal certainty for all parties involved, both debtors and creditors. This research is expected to be an initial reference for the development of legal policies that are able to be more fair, comprehensive and responsive to the evolving legal needs of society.
2. Issue a Supreme Court Regulation (PERMA) that regulates the technicalities of resolving mortgage disputes across jurisdictions (Religious Courts and District Courts), with a one-stop shop mechanism for the process of distributing and paying off mortgages, which integrates judicial institutions and financial institutions.
3. It is crucial to involve a mediator, who acts as a neutral and impartial third party to assist and guide the disputing parties in deliberation and reach a consensus.

4. Furthermore, the parties must involve a notary when making agreements, especially those involving immovable assets, because deeds issued by a notary are authentic, as stipulated in Article 1868 of the Civil Code. This authentic deed serves as strong evidence for the disputing parties, ensuring legal certainty.

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