



APPLICATION OF CONTRA LEGEM PRINCIPLES IN JUDICIAL RULINGS ON JOINT PROPERTY CHARACTERISTICS

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Abstract: This article examines the nuanced application of the contra legem principle by judicial panels in the adjudication of community property cases, particularly in the context of marital property. It highlights the evolving legal landscape and the importance of equitable distribution in contemporary law, underscoring the need to understand judicial reasoning in an era increasingly focused on fairness and gender equality. The study closely examines cases from religious courts, highlighting a trend in which judges have awarded a disproportionate share of community property to wives. This observation raises important questions about the balance between legal norms and the pursuit of equity in family law, and provides a critical lens through which to explore the dynamics of asset distribution and its broader implications in current legal frameworks. The research aims not only to outline judges' distribution formulas, but also to offer insights into why such decisions are increasingly relevant in today's legal discourse, marking a significant shift toward recognizing the complexities of marital property division. This study uses qualitative research methods with a legal descriptive analysis approach. A thorough legal source is case number 413/Pdt.G/2021/PA.Tng and a number of other legal materials related to the author's research topic. The results of the study show that the panel of judges applied the contra legem principle in deciding this matter based on sociological considerations and distributive justice.

Keywords; *Contra Legem, Equitable Distribution, Family Law, Joint Property, Marital Property.*

INTRODUCTION

Based on the 2022 Annual Report of the Supreme Court of the Republic of Indonesia, the number of joint property cases entered in 2022 in the District Court was 215 cases, while in the religious court there were 2,234 cases. In the same year, 211 cases were filed for Cassation with details, 44 were decided in the General Civil Chamber and the rest were decided in the religious chamber (Mahkamah Agung Republik Indonesia, 2022).

Joint property matters often arise after a divorce. This is because after the dissolution of marriage between husband and wife, both parties want the property acquired during the marriage period to be distributed fairly between the two parties. Property acquired during marriage according to Law No. 1 of 1974 on marriage is categorized as joint property owned by husband and wife intended to meet household needs (Tim Penyusun Kompilasi Hukum Islam, 1974).

Joint property in law is always juxtaposed with a marriage, so that the understanding of joint property in a meaningful way is the property acquired and used together by married couples during the marriage took place in accordance with Article 35 paragraph (1) of the law of marriage No. 1 of 1974 (Kemenag RI, 1974). The definition can be understood that the regulation of joint property in Indonesia is not adopted from religious law but adopted from customary law or customary law. Vandijk (1974) as a scholar of customary law argues that "any property acquired during marriage is a common livelihood property and in itself becomes a common property institution commonly called company property". Vandijk's view is in line with the view of Ter Haar (1960) who in his view said that in a general sense joint property is property acquired by husband and wife during marriage. The nature of joint property in a marriage as stipulated in Law No. 1 of 1974, namely the property acquired by the husband is also the wife's property according to the State Gazette of the Republic of Indonesia of 1974 Number 1 (Government of Indonesia, 1974). This is because the position

of the wife as a household manager is considered equal or equivalent to the husband who seeks outside income. Wife as a housekeeper has provided services in terms of supporting the husband so that he can focus on earning.

Juridically, the joint property in the Marriage Act is not determined with certainty the portion received, while in the compilation of Islamic law (KHI), which is a guide within the scope of religious Justice, the portion is determined, namely 50:50. However, it seems that the judges in the religious courts in particular do not necessarily decide cases of common property with a predetermined portion. They try to explore the sense of justice that exists in society followed by social changes that occur.

Building on the initial discussion, this analysis further explores the contrasting legal approaches between civil and religious courts in handling joint property cases, a topic of increasing relevance in contemporary jurisprudence. While the Marriage Act in civil law remains ambiguous regarding the specific allocation of joint assets, the Compilation of Islamic Law (KHI) offers a more definitive guideline, advocating for an equal distribution (50:50) within the religious justice system. This divergence in legal frameworks presents a unique lens through which to examine the evolving nature of asset division in matrimonial disputes.

The religious courts, in particular, demonstrate a dynamic approach, often deviating from the strict 50:50 division mandated by KHI. This flexibility highlights a judicial tendency to align legal decisions with societal norms and evolving social values. Judges in these courts seem to prioritize a more context-driven interpretation of fairness, taking into account factors such as individual contributions to the marriage, the welfare of children, and the socio-economic realities of the parties involved. This approach suggests a move away from rigid legal prescriptions towards a more empathetic and socially responsive judicial process.

In contrast, civil courts often adhere more strictly to the legal frameworks set out in the Marriage Act, potentially leading to different outcomes in similar cases. The divergence in these approaches raises significant questions about legal consistency, the role of judges in interpreting the law, and the broader implications for gender equality and fairness in asset distribution. This exploration underscores the need for a deeper understanding of how different legal systems address the complexities of joint property, reflecting broader societal shifts and the evolving landscape of family law.

Therefore, the author feels that it is important to study and analyze judicial decisions related to joint property. With the aim of knowing how the judges consider the legal facts that occur during the trial and what considerations and theories are used to corroborate these considerations.

METHODS

This article uses qualitative research methods with juridical-descriptive analysis approach. The research data were divided into three types of legal materials, namely primary, secondary and tertiary (Harahap et al, 2023). Primary legal material is carried out through the study of legal literature, a list of relevant legislation, an inventory of legislation classified according to its level or hierarchy. Secondary legal material is done through literature review and literature search related to research. Tertiary law materials are collected through literature review, either by manual or electronic means over the Internet.

Materials that have been collected both primary legal materials, secondary legal materials and tertiary legal materials were analyzed using theories as contained in the theoretical framework in order to discuss or provide answers to the problems studied by the method of "Juridical qualitative analysis" which focuses on the work of "Juridical reasoning". Then an analysis of all aspects is carried out to understand the meaning of the relationship between one aspect and another and with all aspects of the main research problems conducted inductively (IE drawing conclusions from a concrete problem that is specific to

abstract problems that are general) so as to provide an overview of the results as a whole (Nasution, 2008).

The study's core involves a comprehensive analysis of various legal materials, categorized into primary, secondary, and tertiary sources (Sari et al., 2023). Primary legal materials include actual case law and statutes, specifically relevant judgments from civil and religious courts on joint property matters. These cases were carefully chosen based on their representativeness of the issues at hand, the diversity of judicial reasoning employed, and their relevance to current legal debates.

Secondary legal materials comprise scholarly articles, legal commentaries, and treatises that provide critical insights into the interpretation and application of legal principles in the context of joint property distribution. These sources were selected for their scholarly rigor, relevance to the research question, and their ability to provide a diverse range of perspectives on the subject.

Tertiary legal materials, such as legal dictionaries and encyclopedias, were utilized to ensure a comprehensive understanding of legal terminologies and concepts fundamental to this research. The integration of these varied materials enables a robust "Juridical Qualitative Analysis." This method involves a careful dissection of each case and legal commentary, with a focus on the juridical reasoning employed by judges and legal scholars. The selection process for these materials was guided by their relevance to the theoretical framework established in the study, ensuring that each piece of material contributes meaningfully to the overall analysis.

The inductive approach of the research, drawing specific to general conclusions, necessitates a careful selection of cases and materials that are not only representative of specific instances but also reflective of broader legal trends and principles. This meticulous selection and analytical process allows for a nuanced understanding of the relationship between different legal aspects and the overarching research questions, ultimately providing a comprehensive overview of the findings.

RESULT AND DISCUSSION

1.1 Joint property in positive law

The concept of joint property was originally derived from customary law that developed in Indonesia. This concept is then supported by Islamic law and positive law, so that it can be said that there has been a mixture of husband's wealth and wife's wealth in a marriage (Muhtar et al, 2023). In the Marriage Law No. 1 of 1974 article 35-37 explains that the property acquired during marriage is joint property outside of inheritance and property grants obtained. Each inheritance and grant property under the control of each of the parties shall not regulate the other.

The legal basis of joint property in marriage is outlined in various laws and regulations. The Marriage Law Article 35 paragraph 1 defines joint property as "property acquired during marriage," explicitly excluding property obtained before marriage. Article 119 of the Civil Code elaborates that a total joint property exists between spouses from the moment of marriage, unless otherwise stipulated in a marriage agreement. It further states that this common property cannot be altered or removed by mutual agreement during the marriage. Additionally, Article 121 of the Civil Code includes all debts incurred by either spouse, both before and after marriage, as part of the common property, highlighting that joint property encompasses both assets and liabilities arising from the couple's joint endeavors.

Islamic law, as per the 1991 regulation, article 85, acknowledges the existence of joint property in marriage while also recognizing individual ownership rights of each spouse. This article notes the presence of 'gono gini' property in marriage, indicating that while property may be united in marriage, it doesn't preclude the existence of separate assets owned by each spouse. Further, the Compilation of Islamic Law, Article 86 verses 1 and 2, reiterates

that marriage does not inherently merge the properties of husband and wife. It specifically maintains that a wife's property remains under her control and separate from her husband's property, and vice versa.

In accordance with the legal basis above, it can be understood that joint property includes all forms of both assets and liabilities during marriage, while in the management of joint property, husband and wife have the same rights. Husband and wife can act on joint property upon agreement with each other unless it has been stipulated in the marriage agreement as stipulated in Article 49 paragraph (1) and Paragraph (2) of the compilation of Islamic law. If the use of joint property is not approved by both parties, the action may be considered unlawful this is stipulated in the compilation of Islamic Law Article 92 which contains that a husband or wife without the consent of the other party is not allowed to sell or move joint property (Tim Penyusun Kompilasi Hukum Islam, 1974).

Expanding the discussion to incorporate international perspectives, it becomes evident that the approach to joint property in marriage varies significantly across different legal systems. While the legal framework in Indonesia, as outlined above, emphasizes a nuanced balance between individual and shared ownership in marriage, practices in other countries may offer contrasting views.

For instance, in many common law jurisdictions, the concept of 'marital property' is similar yet distinct in its application. Unlike the Indonesian model where joint property is explicitly defined by statutory provisions, common law systems often rely on judicial discretion and case law to determine what constitutes marital assets. This often leads to a more fluid interpretation, where factors like the duration of the marriage, contributions of each spouse, and future needs are heavily weighed.

In contrast, civil law countries like France and Germany have codified matrimonial regimes that distinctly categorize property into matrimonial and personal. These regimes offer couples the choice between different models of asset division, ranging from total community of property to complete separation of assets.

Looking at the international landscape, the principles underpinning the division of property during divorce proceedings in jurisdictions such as the European Union are also noteworthy. The EU regulations on matrimonial property regimes aim to harmonize rules across member states, providing clarity and predictability for international couples. These regulations recognize the diversity of matrimonial property systems in Europe and strive to provide a coherent framework for cross-border issues.

In the context of Islamic law, which significantly influences Indonesian jurisprudence, variations are also seen in different countries based on cultural interpretations and legal traditions. For instance, in some Middle Eastern countries, Islamic law is interpreted to offer more explicit protections for individual property rights within marriage, reflecting a different balance between communal and personal assets.

This comparative analysis underscores the diversity in legal approaches to joint property in marriage worldwide. It highlights how cultural, religious, and legal traditions shape the understanding and application of these concepts, offering a broader perspective on the topic that transcends local legal frameworks. Such a comparison not only enriches the understanding of the Indonesian context but also places it within the global discourse on marital property rights.

1.2 The Principle of Joint Property Regarding the Distribution of Husband's and Wife's Roles in Building a Household

The rules applicable in Indonesia relating to joint property as regulated in the Civil Code, Marriage Law, and compilation of Islamic law (especially various Islamic ones) are in line with placing the position of the husband as the head of the family and the wife as a housewife (Muhtar & Kasim, 2023). This is respectively contained in Book 1 (One) Chapter V Article 105 of the Civil Code, Article 31 paragraph (3) of the Marriage Law and Article 79 paragraph (1)

of the compilation of Islamic law. The third rule puts the wife limited to household managers (domestic) with rules that require the wife to manage household affairs as well as possible.

According to Abu Zahrah, as quoted by A. Fauzie Nurdin (2009), there are specific conditions under which a wife's work outside the home is deemed appropriate. These include scenarios where a woman possesses unique skills that are scarce among men but needed by society, or when the work aligns with traditional feminine roles. Additionally, it's considered suitable if the work aids or is conducted alongside her husband, and if the work is aimed at fulfilling family needs rather than personal enjoyment. This perspective underscores a multifaceted approach to understanding women's employment outside the home, intertwining societal needs, gender norms, marital cooperation, and family priorities.

Derlena May, as quoted by A. Fauzie Nurdin, revealed that the woman has a role that gives rise to a special set of rights and obligations. All of these rights and obligations are detailed in the rules of Sharia, both the Qur'an and the Sunnah. Related to this, the role of women can be divided into three categories, namely the role of women as members of the human race, the role of women as family members and the role of women as members of society. Thus, women are allowed to play a role in the public sphere (work) as long as the role is performed due to certain conditions that cause her to play such a role. This is the condition that makes the wives bear a double burden (double burden) in the family. This injustice is then burdensome on the part of the wife, where the wife works outside the home as a breadwinner (even as the main breadwinner) and is also burdened with household chores when she arrives home. Most husbands feel that housework is the wife's business only, husbands are generally reluctant to do housework even though their wives have been working outside the home since morning. Thus, it is unfair for women if the rules for the division of joint property are only limited to the division of half of the joint property because there are not a few wives who contribute more than their husbands (Nurdin, 2009).

The provisions for the division of joint property should be regulated proportionately and fairly in accordance with the contribution and role of each party. But it is important to remember that in making an agreement, the husband and wife must be free from all pressure, intimidation and threats. It is not impossible for a judge to decide a case by considering giving part of the joint property more to the wife because it is proven at the trial that the wife plays a role and more contributions in realizing the joint property in the family.

When you look at justice, you have to look at it comprehensively. Where in the process of assessing justice must look at the context of the problem. Because the proportional fair is not necessarily the same between the two parties. Proportionate in this context means that the judge considers the wife to be more dominant and contribute more to the realization of the common property in the household, while the husband has forgotten his responsibility as a head of the family, therefore when the judge determines that his wife gets a greater share than the husband's share in the common property, it is a value of Justice.

The equitable distribution of common property can be seen also from a judge's decision where the judge as a position given to someone to apply the law. However, a judge must understand that the purpose of making and forming a law other than to regulate and discipline is also to uphold justice so that no one is harmed by a judge's decision.

1.3 The principle of the *contra legem*

Contra Legem is a decision of a court judge who overrides existing legislation, so that the judge does not use it as a basis for consideration or even contrary to the article of the law as long as the article of the law is no longer in accordance with the development and sense of Justice of the community, but decides with his own (Gobel et al, 2022).

For the sake of creating a justice, the judge can act *Contra Legem*. It is permissible, on the grounds that, if in a case there are no clear rules or rules governing a legal issue, the judge has the authority to *Contra legem*, that is, the judge is obliged to explore, follow, and understand the values of law and the sense of justice that lives in society. This principle is

in accordance with the provisions of Article 28 (1) of Law Number.4 of 2004 jo. Article 5 Paragraph (1) of the Act.No. 48 of 2009 concerning judicial power, and elucidation of Article 30 paragraph (1) of the law.No. 5 of 2004 on the Supreme Court.

Based on elucidation of Article 28 paragraph (1) of the law.Number 48 of 2009 on Judicial Power and Article 5 Paragraph (1) of the law.No. 5 of 2004 on the Supreme Court Act, it is stipulated that the provision is intended so that the judge's decision can be in accordance with the law and the sense of Justice of the community. Added to the explanation of the general part of the Nagera Constitution of the Republic of Indonesia in 1945 (UUDNRI 1945), "that the Constitution is the written Basic Law, while in addition to the Basic Law also applies the unwritten Basic Law."This means that in addition to being known as written law (national law), there is also an unwritten law that lives and grows in Indonesian society, known as customary law. This customary law is in accordance with the provisions of Article 28 paragraph (1) of Law Number 48 of 2009 concerning judicial power, the law is explored by the judge when he encounters the problem of the absence of rules governing an issue. Based on the above principle, Indonesian judges should not be legalistic, that is, they should only be the mouthpiece or mouthpiece of the law, although it must always be legalistic. The judge's decision should serve to encourage improvement in society and build social harmony in society. Only then, in his opinion, will the verdict of the judges be correct and fair.

In relation to this principle, if the provisions of the existing law are contrary to public interests, propriety, civilization and humanity, namely the values that live in society, then according to Yahya Harahap, judges are free and authorized to act *contra legem*, namely taking decisions that are contrary to the article of the law in question (Harahap, 2009).

The implementation of *contra legem* by a judge in deciding a case that has no regulation or lack of clear rules, is the implementation of progressive law. In the teachings of progressive law is not allowed to be too positivist legalistic in answering a legal issue. Progressive efforts are needed in which these efforts provide a benefit and justice for the Justice Seeker. Judges who in procedural law are said to be the mouthpiece of the law, are expected to be progressive by not always assuming legal certainty will provide justice. A rule of law that is primarily sought is justice and benefit, if it has been realized then there will no longer be legal problems.

Justice and legal expediency are reflected in a judge's decision that considers all aspects of a case he is trying. Therefore, the author will analyze the judge's decision on the common property that seeks and promotes justice and legal expediency.

1.4 General description of the case

On February 05, 2021 Mr. Asyari Jamar bin Jamaan Angku Laut as the plaintiff filed a lawsuit with the Tangerang religious court over the joint property case against Ermiza binti Kasoema as the defendant, with Case register number 413/pdt.g/2021 / PA.Tng. plaintiff and defendant had entered into a marriage on June 18, 1987 in West Sumatra with a marriage certificate citation number: 72/20/VI/1987 issued by the Office of Religious Affairs District IV lift Candung, Agam Regency, West Sumatra. Then, on November 04, 2020, both of them had a divorce between the plaintiff and defendant based on the decision of the Tangerang religious court with number : 2236/Pdt.G/2020 / PA / Tng. During the marriage period, the plaintiff and defendant were blessed with 2 children.

After the divorce, the plaintiff has already applied for a settlement of the division of common property on a family basis, but over time, the intention has not been carried out. Thus, the plaintiff filed resolving the division of joint property acquired during the period of their marriage through a religious court. The assets that have been acquired during the marriage are as follows: (1) in the form of a plot of land with a building measuring 57 M2 located at Komp Buana Gardenia Blok A.At No. 33, Rt. 010 / Rw. 004, Tangerang City, based on the certificate (proof of Rights) on behalf of Dra. Ermiza. (2) a plot of land with a building measuring 33 M2 located in Komp Buana Gardenia Block A.At No. 33, Rt. 010 / Rw. 004,

Tangerang City, based on the certificate of land registration of property rights in the name of Dra. Ermiza (3) in the form of 1 (one) unit of vehicle, namely Toyota Rush Type 1.5 S brand car with license plate : B-1981-VKD and (4) in the form of 1 (one) unit of vehicle, namely Honda GL Pro III brand motorcycle with license plate : B-4322-VZ. During the trial, the plaintiff and defendant have submitted evidence to substantiate the plaintiff's claim.

Based on the object of the joint property, the plaintiff asks the panel of judges to divide the joint property by the division of $\frac{1}{2}$ for the plaintiff, and $\frac{1}{2}$ for the defendant, as stipulated in Article 97 of Presidential Instruction No. 1 of 1974 concerning the compilation of Islamic law which states widows or widowers divorced life each entitled to one-second of the joint property as long as not otherwise specified in the marriage agreement. In addition, the plaintiff filed a marital confiscation of the object of common property.

As for the defendant's answer, the defendant refused to share the common property in accordance with what is stipulated in the compilation of Islamic law. The defendant based on the fact that the Toyota rush car was paid a down payment by the defendant's child and the installments were also paid by the defendant. The car has been given to the defendant's child. As for the common property in the form of land and buildings located in the Buana Gardenia complex, the defendant bears more of the installment payment of the house than the plaintiff. The defendant also stated that the plaintiff had never received birth support in the form of plaintiff's income during the marriage, so the defendant had to bear a double burden as a housewife and breadwinner.

Based on these facts, the defendant applied to *contra legem* against the decision of the panel of judges as allowed in law No.4 of 2004 article 28 paragraph 1. In addition, the defendant pleads to provide the defendant with a $\frac{3}{4}$ share of the common property and $\frac{1}{4}$ share for the plaintiff as per the jurisprudence ruling of the Supreme Court decision no. 266 / AG / 2010. For this reason, in his provision, the defendant requested to give the defendant a share of the common property and a share for the plaintiff. and issued a Toyota rush car as a joint treasure.

1.5 Judge's Consideration and Decision

According to case number 413 / pdt.g/2021 / PA.Tng, the litigants exercise their right to appeal and Cassation after receiving the results of the verdict from the court of First Instance. For this reason, in this sub-chapter, the author will briefly describe some of the things that are considered by the panel of judges in deciding the case of joint property number number 413/pdt.g/2021 / PA.Tng. both at the first level, the level of Appeal, as well as at the Cassation level.

1.5.1 Considerations and decisions of judges in the Court of First Instance

After the judge studied the plaintiff's lawsuit filed with the Tangerang religious court and following the trial, from some of the evidence submitted by the plaintiff, some of the evidence could not be proven because the evidence submitted in the form of a copy of the letter of ownership while the original letter is still controlled by the opponent (defendant). Nevertheless, the evidence submitted by the plaintiff was not refuted by the opposing party so that the judge considered it as preliminary evidence (Tangerang Religious Court, 2021).

The judge also accepts evidence in the form of witness statements submitted by the plaintiff. However, the witness submitted by the defendant to strengthen his application to issue a Toyota rush car as joint property, was rejected by the judge because he was the defendant's son. This is in accordance with the provisions of Article 145 paragraph 1 HIR explaining that witnesses who cannot be heard in civil cases include blood relatives and *semenda sari* families, one of the parties in a straight lineage (Tangerang Religious Court, 2021).

According to the panel of judges, the allegation put forward by the defendant that the plaintiff never gave birth maintenance, could not be accepted. This is based on evidence submitted by the plaintiff in the form of a photocopy of the plaintiff's newspaper account,

which transfers the money to the defendant's account. In addition, the plaintiff also included his pay slip. Based on the divorce case between the plaintiff and the defendant, evidence was found that the reason for the divorce was not even the negligence of the plaintiff towards the defendant in providing for the family. While the defendant cannot prove his arguments regarding the plaintiff's negligence in providing for the family.

The panel of judges considered that four-wheeled vehicles in the form of toyota brand cars were included in the common property. The judge's consideration was based on the plaintiff also contributed to the installment payment of the car until it was paid off. The reason the plaintiff transferred the installment fee to the defendant was because the car was in the name of the defendant so that the payment was using the defendant's account (Tangerang Religious Court, 2021).

In addition, regarding the argument put forward by the defendant that the car had been given to his son, it no longer has legal force because the grant was made without the knowledge of the plaintiff. Regarding the portion of the division of joint property, the panel of judges considered dividing by $\frac{2}{5}$ of the share or by 40% to the plaintiff and 60% to the defendant. This is based on the facts in the trial regarding the wife's considerable contribution to meeting the needs of the family during marriage, especially when buying objects in the form of land and buildings. The panel of judges considered using the Cassation decision number 266k/AG / 2010 by agreeing to deviate from the provisions of Article 97 of the compilation of Islamic law and Article 119 of the Criminal Code (Tangerang Religious Court, 2021).

As the consideration of the judge in accordance with the facts, as well as evidence during the trial, the panel of judges decided: adjudicate the plaintiff's lawsuit in part; reject the marital confiscation, stipulate that the joint property of the plaintiff and defendant that has not been divided consists of; 1) a plot of land measuring 57 M² and a house building on it located in the buana Gardenia Blok a complex. At No.33, Rt 010/RW. 004, Tangerang City. 2) a plot of land of 33 M² in the name of Ermiza as well as the building of a house on it located in comp. Buana Gardenia Blok A. At No. 33, Rt. 010 / Rw. 004, Tangerang City. 3) (One) Unit of four-wheeled vehicle Toyota type Rush 1.5 s white with BPKB number Q-01732431, license plate: B-1981-VKD on behalf of Yuanita Vinalisa Eras. 4) 1 (one) unit of a Honda GL Pro III motorcycle vehicle with BPKB number 0946673 and license plate number: B-4322-VZ on behalf of Asyari Jamar; stipulates that the plaintiff is entitled to $\frac{2}{5}$ of the share or 40% and the defendant is entitled to $\frac{3}{5}$ of the share or 60% of the joint property mentioned above (Tangerang Religious Court, 2021).

1.5.2 Considerations and Decisions of Judges in the Court of Appeal

On September 23, 2021, the defendant appealed to the Banten religious High Court. In memory of his appeal, the comparator objected to the decision of the Tangerang religious court which included movable property in the form of a Toyota rush car into a common property object that must be divided. Even though the car has been given as a grant to the comparator's child during the marriage period, which is rational, of course, it is also known by the comparator / ex-husband (Banten high Religious Court, 2021).

As for the portion of the division of common property that has been decided by the Tangerang religious court, which is equal to $\frac{3}{5}$ to the comparator (defendant) and $\frac{2}{5}$ to the comparator (plaintiff), the comparator feels that the efforts of the judge who has *contra legem* in the decision are appropriate. It's just that the portion of the distribution still does not meet the sense of justice to the comparator considering that during the marriage, the comparator sacrifices more in supporting household needs. For this reason, the comparator asks to divide the joint property by a division of $\frac{3}{4}$ or 75% to the wife (comparator) and $\frac{1}{4}$ to the husband (comparator). As for the comparison in the *Contra*-memory of the appeal, it rejects in its entirety the memory of the appeal filed by the comparator (Banten high Religious Court, 2021).

The panel of judges of the Tangerang religious High Court after studying and paying attention to the memory of the appeal filed by the comparator considers the consideration of the judge in the decision issued by the Tangerang religious court. However, in some cases, the Banten high religious court judges have some considerations that are quite different, namely; inserting moving objects in the form of Toyota rush cars into the common property object but with a note, in the distribution must first issue a down payment fee that has been paid by the comparison and compared children. In addition, the panel of judges also considered that the object in the form of land and its building measuring 57 M2 located in the Buana Gardenia complex as well as a plot of land and a building measuring 33 M2 located in the Buana Gardenia complex, based on local examinations as in the minutes of the Hearing dated June 4, 2021, was located in the same location with the exact same land boundaries so that the panel of judges of the Banten high religious court considered the object to be seen as vague or obscur libel (Banten high Religious Court, 2021).

The panel of judges of the High religious Court of Banten in its decision to adjudicate; receive a comparative appeal, overturn the decision of the Tangerang Religious Court No. 413 / Pdt.G/2021 / PA.Tng., dated August 19, 2021 ad, further adjudicating itself with Amar in full ; granting the plaintiff's lawsuit for a portion, determining the joint property of the plaintiff and Defendant that has not been divided as follows ; 1 (one) unit of four-wheeled Toyota type Rush 1.5 s white with BPKB number Q-01732431, license plate: B-1981-VKD on behalf of Yuanita Vinalisa Eras; 1(one) unit of Honda GL Pro III motorcycle vehicle with BPKB number 0946673 and license plate number: B-4322-VZ in the name of Asyari Jamar; stipulates that the plaintiff is entitled to 2/5 part or 40% and the defendant is entitled to 3/5 part or 60% of the joint property mentioned above after the additional Down Payment from Yuanita Vinalisa Eras (the plaintiff's and defendant's thousand five hundred rupiah) ; Instruct the plaintiff and defendant to divide the joint property in accordance with the provisions in point 3 of this ruling (Banten high Religious Court, 2021).

1.5.3 Considerations and Decisions of Judges in the Court of Cassation

On December 17, 2021, the applicant has filed a cassation application to the Supreme Court regarding the case of joint property which has been decided by the Banten high religious court. In the content of the Cassation application, the applicant submits to the panel of judges to conduct marital confiscation of joint property consisting of; a plot of land and buildings with an area of 57 M2 , a plot of land and buildings with an area of 33 M2 one unit of Toyota rush cars, and one unit of two-wheeled motor vehicles Honda GL Pro brand. In addition, the applicant applied to the panel of judges to distribute the common property with a division of 1/4 to the plaintiff and 3/4 to the defendant (Supreme Court, 2022).

As for the Supreme Court judges consider that in the decision made by the High religious Court of Banten, the Supreme Court judges argued that the panel of judges at the appeal level has been wrong in applying the law in the form of objects two pieces of land and buildings on it are considered unclear or obscuur libe. According to the Supreme Court judges, the two plots of land have been certified and have been carried out a local examination by the Tangerang religious court. The Supreme Court held that it should not be necessary to declare the object of the dispute to the category of obscuur libe, but only enough to correct the error of the boundaries of the land (Supreme Court, 2022).

The panel of judges in its decision decided to grant the appeal of the applicant cassation appeal and overturn the decision of the High Religious Court of Banten No. 91 / Pdt.G/2021/PTA.Btn. the date of November 17, 2021 ad coincides with the date of 12 Rabiulakhir 1443 Hijriah which overturned the decision of the Tangerang religious court number 413/Pdt.G/2021 / PA.Tng. dated August 19, 2021. In addition, establish the joint property of the plaintiff and the defendant who have not been divided, namely; a plot of land with an area of 57 (fifty seven) square meters located in the city of Tangerang, a plot of land with an area of 33 M2, a unit of Toyota Rush cars, and a unit of Two-Wheeled Vehicles

Honda GL Pro. As for the plaintiff, he is entitled to a share of 2/5 share or 40% and the defendant of 3/5 or 60% (Supreme Court, 2022).

1.6 Analysis of the Use of Contra Legem Case in Court Decision No. 413/PDT.G/2021/PA.TNG

The court may not refuse to examine, adjudicate and decide a case on the grounds of absence or lack of clear legal arguments, but shall be obliged to examine and adjudicate in accordance with Article 10 paragraph (1) of Law No. 48 of 2009 on Judicial Power (Government of Indonesia, 2009). Article 5 explains that the judge as the executor of judicial power is obliged to make legal discoveries on cases that are not found to have legal arguments. As there is a law on Judicial Power which explains that 'judges are obliged to explore, follow and understand the legal values and sense of justice that live in society (Gol, 2009).

When looking at Case Number 413 / Pdt.G/2021 / PA.Tng can be seen in the judge's decision that the judge granted the defendant's answer and request to distribute the common property object using contra legem. Contra legem itself is a method used to establish law without reference to existing legislation. Contra legem is a finding of law outside the law, carried out by judges by utilizing legal rules from jurisprudence, it can also be legal rules derived from laws that live in society according to their sense of justice, as well as principles that are demanded by society (Mappiase, 2021).

Urgency contra legem used by the panel of judges is a method of legal discovery that aims to answer questions related to how to qualify the law against concrete events both submitted to the court and outside the court environment (such as in the academic field). In the trial, the process of finding the law on an event is not easy so that sometimes in some case studies, the panel of judges requires several other methods that must be taken, because practically in court there are several different issues and will injure the sense of justice when applying based on existing regulations. Such issues such as, the written rule of law exists, but it is still unclear or incomplete so that when applied it is feared that it will not meet the sense of justice, and can no longer be applied to the development of the current era (Fauzan, 2014; Sutiyoso, 2012).

If referring to Article 97 of Law No. 1 of 1974 and with the compilation of Islamic law as a reference in resolving joint property cases, then the regulated division is equal, namely $\frac{1}{2}$ part to the wife and $\frac{1}{2}$ to the husband. However, in consideration of the Tangerang religious court judge decided to give the defendant (wife) as much as 3/5 and the plaintiff (husband) as much as 2/5 part. This is based on considering the position of the wife who during the marriage period contributes more to meeting household needs, especially in the purchase of joint property that is the object of the case. In addition, the wife during the marriage plays a role in making a living to meet the needs of the household during marriage even though the husband continues to fulfill his responsibilities in making a living and gives the results of his salary to the wife even though the amount is not as much as the salary earned by the wife. So the judge tries to dig up the law with the division of joint property that does not refer to the provisions of the law. This is done in an attempt to satisfy the sense of justice between the two parties (plaintiff/defendant).

Consideration of judges by distributing joint property without using existing regulations as contained in law no. 1 of 1974 on marriage and the compilation of Islamic law is an attempt to find the law that can be done by the method of legal interpretation. The discovery of law with legal interpretation is to excavate the law by understanding the context of existing rules, if the text of the rule cannot meet the needs of the community. One other form of legal discovery is to the exclusion of applicable rules, this legal discovery can be called the principle of IUs contra legem. The existence of the contra legem principle, the judge automatically does not use the applicable regulations as a basis for consideration and even contradicts articles of the law. This is permissible as long as the regulation is no longer in accordance with the development and sense of Justice of the community (Rogaiyah,

2018). The purpose of this principle is to realize Justice sebagaimana conducted by the panel of judges of the Tangerang religious court in dividing the case of joint property under study by researchers.

According to the researcher, the legal excavation effort carried out by the panel of judges both in the first instance, appeal, and Cassation is an effort to dig up the law based on the facts found during the case and based on the excavation of legislation. This is as in the mandate contained in Article 5 (1) of Law No. 48 of 2009 on Judicial Power which determines 'constitutional judges are obliged to explore, follow and understand the values of law and a sense of justice that lives in society. The word 'digging' in the article explains that the law already exists, in the rules of law but it is still vague, difficult to apply in concrete cases, so to find the law must try by digging for legal values that live and develop in society. If the law has been found from the excavation of the law, the judge must follow it and understand it and then make it as a basis for legal consideration in its decision to be in accordance with the sense of justice that lives in society (Manan, 2013).

In addition, the panel of judges has changed their paradigm in resolving common property cases that are no longer nominated by legal-positivistic, but have gone to the paradigm of thinking legally-sociologically in interpreting the law. The legal-sociological paradigm is a paradigm in looking at legal issues that go beyond the legal text (meta-judicial). Every legal issue always has its own social context. Thus, when making legal interpretations, the judge has tried to understand the social context that surrounds the dispute or conflict that he is examining and deciding. The panel of judges can give a fair verdict by looking at the context of the case in this context (case number 413/Pdt.G/2021 / PA.TNG) the aspect of the wife's contribution during the marriage period is a strong consideration of the panel of judges. In the end, through its decision, the panel of judges gives a greater portion in terms of the share of joint property to the wife than the husband's share which tends to be small.

Thus, the judge has the authority to create and find laws if the laws are deemed no longer relevant to be applied. By finding the law, the judge can seek to obtain the law from an existing law, or obtain the law outside the legislation. Judges have a role in changing, shaping and finding the law (rechtvinding) by using the interpretation and construction of law (Mulyadi, 2009).

1.7 The Judge's Approach to Case Decisions

The decision of the judge in the case of joint property disputes as described by the researcher can be concluded that there have been differences of view in considering the division of joint property. The process of the judge in applying and analyzing the common property, the bwaan property is appropriate and there is no difference in understanding the status of the property, it's just that the accuracy of the judge in seeing and analyzing it is different. Although all judges agree and are equal in analyzing the status of disputed property such as joint property, namely property acquired during marriage, all judges are not necessarily the same in applying the division of joint property as the researcher explained above.

The difference in judges in applying the division of common property is caused by the existence of different educational backgrounds and environments so that the understanding of each judge is also different. In this case, the researchers divided the views of judges into two, namely judges with normative views and judges with sociological views.

Judges who hold normative views clearly try to solve problems in accordance with applicable law. As the judge in applying the rules of the division of common property in the case of the division of common property that is 50: 50 or each party gets a portion $\frac{1}{2}$. Meanwhile, judges who have a sociological view try to solve problems by digging justice through the law and digging outside the law. This can be seen from the decision of the judge who carried out the *contralegem* in the case of the division of common property.

The difference between judges in seeking justice in the division of common property is due to changes in people's lifestyles that result in changes in values in society, values that were once established are shifting and taking on new forms and so on. Just as in the past a wife who works for a living with the aim of helping the family economy gets a bad image in society, this is certainly different from now where a wife helping the family economy is considered commonplace in urban areas that today many people actually become the foundation of the family economy.

The judge in deciding a case must refer to a law in which the judge believes there is a value of justice in the law as well as the application of the division of common property in which a judge must refer to Article 119 of the Civil Code.

The shift in the pattern of life in society also has an impact on the paradigm shift of judges towards the value of Justice. The judge paradigm shift is motivated by the existence of knowledge, power relations, and fundamental fanaticism about what is at the core of the problem. This paradigm shift is possible as in Thomaskhun's theory that the lawsuit over the deviation (anomaly) of science will always exist continuously. Anomalies occur when a theory cannot answer or explain a phenomenon, resulting in a new truth. Once a new truth is discovered, one cannot blame the old truth used in the past, because it belongs to a theory that was considered correct in its time. Similarly, a new theory that is considered true today will not necessarily be considered true in the future.

The paradigm shift of judges in applying the equitable distribution of common property is due to changes in the lifestyle of the community without following changes in the law so that judges for the sake of a sense of Justice have their own views in applying the equitable distribution of common property.

CONCLUSION

The application of the *contra legem* principle in the Tangerang religious court case No. 413 / pdt.G/2021 / PA.Tng offers significant insights for both future legal practices and academic research. For legal practitioners, this case underscores the importance of incorporating sociological understanding into judicial decisions, especially in matters of joint property where contributions and circumstances vary significantly within a marriage. This calls for a paradigm shift in legal training, emphasizing the need for a more empathetic and context-sensitive approach. In terms of research, the case opens new avenues to explore the delicate balance between legal certainty and justice.

Future studies could investigate the broader implications of such judicial decisions on societal perceptions of fairness and legal equity. Additionally, this case highlights the potential for legislative reform, suggesting that lawmakers revisit and possibly revise statutes governing joint property to better reflect the diverse realities of modern marriages. This could be informed by empirical research focusing on the outcomes of varying asset division approaches across different jurisdictions. Moreover, integrating discussions on the practical application of *contra legem* principles into legal education curriculums would better prepare future legal professionals for navigating complex ethical and legal landscapes. Finally, fostering a broader public discourse involving legal practitioners, academics, policymakers, and the public is crucial for developing a more nuanced understanding of how judicial decisions impact individual rights and societal values, ultimately leading to a more just and empathetic legal system.

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