

# Women's Rights in Acquiring 1/2 of Joint Matrimonial Property Post Divorce and Separation

*By International Development Law Organisation, 2007*

Joint matrimonial property (*Harta Bersama* or *hareuta sihareukat* in Acehnese) is the wealth acquired during marriage. This term is often misinterpreted, especially when there is only one breadwinner in the family, whether the husband or the wife. Further misunderstandings are made when the property is registered in the name of the husband or wife only. Despite all of these misperceptions, joint matrimonial property should be understood as the wealth possessed by a man and a woman bound by marriage even though one spouse does not earn any income to contribute to the acquisition of the wealth.

Many cases post tsunami show that joint matrimonial property such as saving account, bank deposit, houses and land parcels are often registered in the name of the husband or the wife only, which subsequently is also often used in determining ownership of property during division of inheritance and joint matrimonial property.

In a number of cases, *harta bersama* is often distributed among the husband's line of heirs because in most cases bank saving account, land certificates, house ownership are registered in the name of the husband. In such cases, it often happens that the wife and the children do not receive any share during division of inheritance of *harta bersama*. In other cases where both husband and wife were killed during the tsunami and leave behind joint matrimonial property, the property is distributed only among the husband's surviving heirs.

## **Joint Matrimonial Property under Indonesian Law**

Article 35 paragraph (1) of the Marriage Act No. 1/1974 provides that *harta bersama* (joint matrimonial property) is "the wealth acquired during marriage". Joint matrimonial property may consist of tangible and intangible assets or entitlements. Tangible assets may consist of movable and immovable property and bonds or securities while intangible assets may comprise of obligations and entitlements. The Marriage Act and the Compilation of Islamic Law (*Kompilasi Hukum Islam/KHI*) articles 91-92 also prevent such property from being used as collaterals, sold, or transferred without the consent of both husband and wife.

Indonesian law also requires that *harta bersama* is distributed between husband and wife when they separate through death or divorce. Article 97 of the KHI stipulates that *harta bersama* is equally divided into two shares unless otherwise stated by a prenuptial agreement.

According to the Vice Head of the *Mahkamah Syar'iyah* (Islamic Court) of the Nanggroe Aceh Darussalam (NAD) Province Drs. H. Jufri Ghalib, S.H, M.H, application for divorce is usually lodged at the same time with application for division of joint matrimonial property. However, this often delays decision of cases as many applications are then appealed to the Provincial level court. Therefore says Ghalib, during the National Meeting of the Supreme Court with the Court of Appeals (*Pengadilan Tingkat Banding*) and Courts of First Instance (*Pengadilan Tingkat Pertama*) of Indonesian provincial capital cities in Makassar in September 2007, the judges present suggested that joint matrimonial property cases should be resolved separately from divorce cases to expedite legal processes.

While not yet fully enforced, in a number of cases registered at the *Mahkamah Syar'iyah*, applicants already file an application concerning joint matrimonial property separately from divorce application. Within the records of *Mahkamah Syar'iyah* of Banda Aceh, during 2007 there were 9 cases of joint matrimonial property, 54 cases of *cerai talak* (husbands initiate the divorce) and 93 cases of *cerai gugat* (wives initiate the divorce).

Following the decision regarding joint matrimonial property, the disputing parties should subsequently be willing to distribute the property. However, a number of cases have had to be

resolved at the *Mahkamah Syar'iyah* because one party was not willing to hand over the joint matrimonial property. The Clerk of Court (*Panitera Muda Hukum*) of *Mahkamah Syar'iyah* of Banda Aceh, Basri, S.H, says that in cases where parties in dispute refuse to hand over the property, security forces are hired to facilitate the hand over.

In the event that one spouse dies, Article 96 paragraph (1) of the KHI provides that the surviving spouse is entitled to half of the joint matrimonial property. The other half is divided among the surviving heirs, including the surviving spouse. The portion of the entitlement from the remaining half is determined according to agreement and in line with the Islamic rules of *faraidh* (inheritance) or based on the agreement among the surviving heirs.

Further, Article 96 paragraph (2) of the KHI stipulates that division of joint matrimonial property in the event of a missing (*mafqudi*) husband or wife should be postponed until death is confirmed or the Religious Court/*Mahkamah Syar'iyah* certifies that death is presumed. Since the tsunami, *Mahkamah Syar'iyah* of Aceh has issued many decisions regarding *mafqud* cases. Some of the decisions are issued individually while other decisions are issued in relation with cases concerning confirmation of legal heirs. However, decisions on *mafqud* cases are mostly related to the surviving spouse wanting to remarry than to the division of joint matrimonial property. *Mafqud* cases can be resolved in relation to decisions concerning confirmation of legal heirs and applications for resolution of *mafqud* can be submitted by anyone, including distant relatives of the husband or the wife.

### ***Harta Bersama* according to Acehese customary law**

*Harta bersama* (joint matrimonial property *hareuta sihareukat* in Acehese customary law), is defined as the wealth acquired and managed by both husband and wife as is therefore the same as that defined in Indonesian national law.

According to Acehese customary law, *harta bersama* cannot be divided as long as both spouses are still bound by marriage. The property can only be divided between husband and wife upon divorce or death. In the event that one spouse dies or in the event of a divorce, *harta bersama* should be separated from the deceased spouse's personal property. Only after this separation can the property can be distributed or inherited by all legal heirs, including the surviving spouse. At this point, there is little difference between provisions in the customary law and those within the formal law.<sup>1</sup>

However, there are different methods of division of joint matrimonial property under Acehese customary law. According to Syahrizal, these can be divided into 6 different processes depending on the status of separation and the culture of each region, as follows:

- 1) In the event of a divorce with no children, the wife receives 50% and husband receives 50%;
- 2) In the event of a divorce with children, wife receives 50%, husband receives 25% and children receive 25%.
- 3) In the event of separation through death without children and with other surviving legal heirs, surviving spouse receives 75% and the remaining 25% is divided among legal heirs.
- 4) In the event of separation through death without children and without other surviving legal heirs, surviving spouse receives 75% and the remaining 25% is distributed to the *Baitul Mal* (Islamic treasury)
- 5) In the event of separation through death with son(s), the property is to be shared by the surviving spouse and the son(s)
- 6) In the event of separation through death with daughter(s), the property to be shared among surviving wife, daughter(s) as well as the guardian.

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<sup>1</sup> Syahrizal, *Hukum Adat dan Hukum Islam di Indonesia: Refleksi terhadap Beberapa Bentuk Integrasi Hukum dalam bidang Kewarisan di Aceh* h, pp. 274-275).

Meanwhile in the Aceh Besar district where IDLO conducted research on joint matrimonial property, the following methods of distribution of the property are recognised:

1. Divided equally between husband (50%) and wife (50%)
2. Husband receives two third (2/3) and wife receives one third (1/3). This method is based on the rationale that husband contributes more to the acquisition of wealth because they are perceived to be working harder than the wives. Such practice is common among the *gampongs* in the coastal areas, where most of the population depend on their livelihood as fishermen while women spend more time at home to take care of the household and to raise children.

In addition to saving accounts and bank deposits, pension money is also classified as joint matrimonial property. However, provisions in Article 41 paragraph (1) and Article 41 paragraph (6) of the Law (UU) No. 40 year 2004 concerning The Social Security System and Article 10 paragraph (2) of the Government's Regulation (PP) No. 25/1981 require that pension money must be paid in cash on a monthly basis to one of 3 heirs as follows:

1. Widow/widower of the deceased until the widow/widower dies or remarries.
2. Children of the deceased until the children reach 23 years of age, or are permanently employed or married.
3. Fateher or mother, when the deceased is unmarried for a period of time to be specified through the regulations.

In the event that the three heirs above are not alive or missing (such in most post-tsunami cases), the pension monies will not be paid to the any other relatives. Apart from pension moneies, civil servants are also entitled for pension savings/superannuation, which is commonly known as TASPEN. Payment of such pension savings is not limited to heirs only; other relatives are also entitled for the savings. However, the Supreme Court decision No. .97/AG/1994 has held that a life insurance policy is not classified as joint matrimonial property or the deceased's own property.

While more women are increasingly becoming aware of joint matrimonial property regulations, many more are still lacking this knowledge. Therefore, women who are still in the process of divorce and are in conflict with division of joint matrimonial property may seek the help of the Acehnese Working Group for Gender Transformation (*Kelompok Kerja Transformasi Gender Aceh/KKTGA*), at telephone number 0651-7408922, Mitra Sejati Perempuan Indonesia (MiSPI) at 0651-635531, LBH APIK 0645-43150, and LBH Banda Aceh at 0651- 22940.

Correction to *Anda dan Hukum dalam Keseharian* column **edition 57** on *Customary Ownership Rights to Land* published in *Serambi Indonesia* on 6 February 2008: article 6 of Law (UU) No. 5/1960 on Basic Agrarian Law in column two should read Article 6 of the State Ministry for Agrarian Affairs' Regulation (*Permene*) No.5/1999.