

Dispute Resolution of Joint Marital Property in Religion Court: Split on Burden of Proof

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Abstract Empirical experience has shown that dispute of joint marital property in Indonesian Religion Court put housewives in difficulties on fulfilling the burden of proof process because generally the post marital property is possessed under the husband name. Marriage itself is not built only to gain economy profit, thus the anticipation on evidences in such cases of dispute might be overlooked. Split on burden of proof is stipulated in article 163 HIR/283 RBg and article 1865BW. It explained principally that litigant must provide the evidence, and it makes housewives as litigant get into the weak position, difficult to obtain their right on joint marital property. The court verdict shall fulfill the sense of justice, therefore it will need special regulation of split on burden of proof that suitable with dispute characteristic of joint marital property by providing authority for judge and shifting the burden of proof, when all part of joint marital property were under defendant name and defendant possession.

Keywords Dispute, Joint marital property, Split on burden of proof

1. Introduction

The existence of new law is sorely depend on the dispute and act as a final instrument to solve legal dispute itself in the form of court verdict. In the whole process of dispute resolution, all parties are bound with rules of formal law/procedural law. Civil procedural law that apply in Indonesia still refer to the legacy of Dutch colonial system, because until now the draft of civil procedural law that has been drafted for more than ten years ago, has not been established as law, though article 24 A sub (5) Constitution of RI jo article 28 Law number 48 year 2009 [1] on Court Judiciary mandates that procedural law of Supreme Court and its below judicial bodies are regulates by law. Among all major issue in civil procedural law (including criminal law) is related with evidentiary issue, so that it would not be exaggerate if it is said that legal issue is related with evidentiary issue in court [2].

In the evidentiary phase, all parties provided with the widest opportunity to support their arguments and rebuttals. Certainty on the truth of events that presented in the court based on the truth of evidentiary that presented by litigants. After the examination of a case is considered to be finished, and the parties not submit any other evidences, then judge

may give its verdict. Related with this issue, the most important and main consideration for judge before give the verdict on a case, is legal fact or legal event itself and not on the law. Law and regulation is only a medium, while decision authority is on the legal event which cause the dispute among parties.

One of the important part in the evidentiary law system of civil case is burden of proof/*bewijst*. Which party would bear the burden of proof on a case? Miss charge on the burden of proof may violate the burden party and bring complimentary benefit to other party [3].

Similiarly, the split on burden of proof in joint marital property have distinctive specification with civil dispute in economy sector, and it ambiguous whether it is fair to apply the same legal regulation with other civil dispute. Because the applicative procedure of civil law in Religion Court is civil procedural law that apply in Public Court, except the ones that regulates specifically in Law No. 7 of 1989 [4].

Joint marital property is property that obtained during matrimony [5] – means joint marriage property that born due to matrimony bond. Islamic marriage is build based on sincerity for worship instead of gaining economy profit. Yet while the bond of marriage violates by many aspect and divorce is unavoidable, husband and wife will count their property and prevent violation on their rights. They also tend to over-claim their actual rights. Each of them will claim their dominant role and ask as much as they can for property after the divorce [6].

On the other hand, human also has strong tendency on

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Published online at <http://journal.sapub.org/ijas>

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property, so when the spouse togetherness reaches its climax, the passion on properties become less meaningful. Otherwise, when the togetherness with spouse reaches its anti climax, then the disastrous divorce is unavoidable and the agony on wealth will take over [6]. It will muster their greed to claim matrimony properties.

In dispute of joint marital property as explained previously, we found that housewives with no knowledge on law may suffer difficulties to fulfill the evidentiary process, due to the status of post marital property that under the name and ownership of the husband. Therefore, the split on burden of proof was based on general regulation as stipulated in article 163 HIR [7] /283 RBg [8] and article 1865 BW [9], which principally explained that litigant must provide the evidence, and it makes housewives in weak position will troublesome to obtain their right on joint marital property.

According to the issue, it is needed to find such efforts to protect the rights that difficult to prove. Specific regulation is needed to construct the split on burden of proof to solve the dispute of joint marital property, e.g. by providing authority for judge to apply the concept of *shifting burden of proof* through litigant request. The concept of shifting burden of proof regulated in Law No. 8 of 1999 [10] on consumer protection. Business actors are responsible for providing compensation for consumer's disadvantages due to the consumption of their sold product; unless the business actors can prove that the mistake was consumers' fault (Article 19 paragraph 1, 2 and 5) [11]. This law is purposed to protect the rights of consumers who are generally in a weaker position than producers.

A similar trend is also conceptualized in *Strict Liability* in Law No. 32 of 2009 [12] on the Environment Protection and Management. These provisions consider as *lex specialis*. The concept of *strict liability* was also designed to protect litigant who demand their civil rights which has a weaker position compared to the sued company.

Mertokusumo [11] stated that the concept of strict liability also referred as "*omkering van bewijslast*" or shifting of burden of proof, although Santosa [13] concludes that strict liability is not identical to the reversing evidentiary, because the burden of proof on the general causalities relation is according to the postulate (vide 163 HIR [7] /283 RBg [8] and 1865 BW [9]). If the government and the Representative Parliaments have the political will to ease the social, politic and economic burden of the victims which generally in a weak position, besides the confession of strict liability, they should also strictly regulates the shifting burden of proof as in Sweden. The arrangement of reversing evidentiary that regulates specifically in law would apply as *lex specialis* of general provision (*lex generalis*) in Article 163 HIR [7] /283 RBg [8]. Considering the previous explained issues, we would like to analyze the ideal construction of the split on burden of proof of joint marital property in Indonesian Religion Court.

2. Research Method

This research is juridical normative research by assessing legal norms, legal principle and the *in-concreto* efforts on legal finding for solving the legal issue. According to Wignyosoebroto in Ali [14], this type of research consider as doctrinal research [14].

We used *statute approach* to obtain the truth in the issue, by assessed various regulation related to evidentiary. We also used *historical approach* which analyzed related histories with Indonesian civil procedural law and the initial history of the joint marital property which arranged by Indonesian Islamic Ulama (religious leaders). Last, we used *case approach*, which assessed some related verdict on joint marital property by deductive or inductive logic to get objective truth.

All the legal materials obtained from literature and were analysed descriptive-qualitatively to build deductive or inductive argument. Descriptive-qualitative method present, analyse and connect all relevant materials in systematic, comprehensive and accurate answer on the posed problems.

3. Result and Discussion

The purpose for someone to settle the arising legal dispute in their life in society through judiciary power is to obtain a fair verdict. Judge in carrying out their duties for evaluating and solving a case with fair verdict will ascertain the problem to find what and who is considered right between the parties according to the submitted proofs. It means that efforts to find the truth to provide fair verdict and fulfill legal certainty in the submitted case, the judge also helped with the submitted evidence by the litigant parties [15].

Evidentiary law is a part of procedure that has material and formal elements. The law of material evidentiary were regulated to consider whether some specific evidence is accepted or not in the court and has strength of proof, while formal evidentiary law regulates the process to provide the evidence [16].

In civil law case, evidentiary is a followed court phase after sufficient interview process. Evidentiary of a case only needed in the court. If there is absence of case or dispute after the court related with one's civil case, then related person does not need to proceed to evidentiary phase. In solving a case, there are two main issues for judge, i.e. event of dispute and the law itself [17].

Therefore, what is needed to be stated by the parties in the process is the event instead of the law, because in *ex officio*, law considers to be known and applied by judge (*ius curia novit*). Judge duty is assessing whether the legal relation which become the case is exist or not. This legal relation need to be proved in front of the judge and the related parties must provide evidence as needed by the judge. Disputed events obtained from the interview process. Since this

interview process is aimed to provide knowledge for judge in which events shall become the dispute itself or judge may determine the main case itself. Events that become the subjects in the interview process are still a complex event that should be selected.

Events that presented by the litigant parties, is not necessarily consider being important for judge as the basis of legal reasoning in its decision, because judge must conduct an assessment of these events. Then the judge separates the important or relevant events from irrelevant events. Important/relevant events need to be proved, while the unimportant events shall not proven. For example, in debt case, it is irrelevant for law to explain the color of clothes worn by the Litigant and the Defendant at the time they bound in the debt agreement. Yet, it is relevant whether the Litigant and the Defendant at certain time and place for real to conduct a legal debt agreement [16].

After the judge selected the relevant event, then the relevant events must be proved through the evidentiary process to obtain certainty about the occurred dispute or concrete events. Relevant events are events that are important to the law, which means that the events can be regulated by the law [11].

According to the theoretic, normative and practical perspective on whole court phase of civil cases, evidentiary is a specific and decisive phase. It is specific because on this evidentiary phase, the opportunity is given to the parties to demonstrate the truth on facts of law that become the subject of dispute. It is also called a decisive phase because the judge verdict depends on the hearing process of submitted evidence by the parties.

An important issue in the law of evidence is a matter of split the burden of proof. The split on the burden of proof must be fair and equal, because unequal burden of proof means a biased prior to the party who has more burden and risk of defeat. Related with the matters of split on the burden of proof may consider as a legal issue or juridical issue, that need to be struggled until the cassation process. Unfair split on the burden of proof deemed as a violation of law which become the reason for the Supreme Court to cancel the judge or related court decision [18].

As a general guideline or rule regarding the burden of proof in the sector of civil law regulates in Article 163 HIR [7] (Article 283 R.Bg [8]):

‘They who say they have the right, or they mention something that works to strengthen their rights or to deny the right of another person, that person must prove the existence of such rights or that event’

The same rule also stated in Article 1865 BW [9]/ Civil Code, which is:

‘Anyone who argues that they have right, or in order to enforce its own right or denied the rights of others, which refers to an event, required proving the existence of such rights or event’

Judicially, the points of above articles summarized as

follows:

- One who is postulating a right, to them shall be charged evidence to prove what right they are postulated, and
- Who is filed rebuttal arguments of the rights in order to violate the other parties’ right, to his/her given the burden of proof to prove the referred rebuttal proposition.

These points are the burden of proof guideline which outlined by law. These guidelines are the foundation for the general rule in applying the split on burden of proof. The application of split on burden of proof is required if the parties has been disputing one to another. However, if the parties meet the deal or other party admits the object of dispute, then the burden of proof guidelines have no urgency or relevance again since the absence of right to be proved.

In *common law systems*, the principle of split on burden of proof are formulated in a short sentence *he who asserts must prove* – who stated something has to prove it [19]. These guidelines are called the standard *burden of proof* that applies as a *general rule*. Thus who *assets must prove* is *cogent guiding principle* in the split on the burden of proof.

Principle or *Common law* guidelines is the same as outlined in Article 1865 of Civil Code, Article 163 HIR [7] (283 R.Bg [8]). Law obliges the burden of proof for someone to prove or rebuttal the argument of the lawsuit. Guidelines of common law system are similar with the article 1865 Indonesia Civil Code and article 163 HIR [7] (283 R.Bg [8]). Law also required a burden of proof for someone to prove what has become their claim or rebuttal.

Guidelines of wide article 1865 Indonesia Civil Code and article 163 HIR [7] (283 R.Bg [8]) also been a guidelines of split on burden of proof on dispute settlement of joint marital property in Religion Court. Since civil procedural law that applies in Religion Court is the procedural law applies in General Court, therefore it regulates specifically [4].

In practice, judge also bound by the related guidelines of procedural law, as the law finding in procedural law is closed, thus when a judge gives a verdict that contradict the rules, then the judge consider to be the *unprofessional* one. Therefore, the theory of split on burden of proof is based on propriety. It is stated that judge must put aside rules of burden of proof as it is stated by 163 HIR [7] /283 RBg [8] and Indonesia Civil Code of 1865, if a concrete event brought unfairness. Then judge may apply the official propriety-based burden of proof on judge consideration [3]. Since it is rarely applied by judge, yet the defiance from the procedural law will be under the *unprofessional conduct*.

The tendency of evidentiary in civil case is finding the formal truth, though the paradigm of this principle shifted by the existence of various opinion that persuade practitioner to change the concept of formal truth into find the material truth, from procedural justice into substantial justice. The mindset in the frame of finding the truth in civil case that only look for formal truth has brought civil case in the corridor of procedural truth.

The new paradigm that has been stated by some local legal

experts does not much change our evidentiary system. Our reference on civil procedural law mostly use the HIR [7] and RBg [8] law (inheritance of Dutch law from hundreds years ago), whereas the last Act of Judicial Power has been amended several times the by Law No. 48 of 2009 [1] which include mandates in Article 5 paragraph (1) "Judge and Constitutional Judge shall explore, adhere and understand the legal values and sense of justice that live in the community." The description of the article stated that this provision is aimed to make the judge and constitutional judge's decision appropriate with the constitution and the society's sense of justice.

It is a judge's burden to formulate an appropriate decision according to the laws and community's sense of justice. It is different from the law of the old judiciary system [20]. Previous law only requires judge to consider the law in society as a reference in decision-making, while the new law also concerns the 'sense of justice in the community'.

One of the key point whether judge decision appropriate to the sense of justice or not in a civil case is a matter of split on the burden of proof. The substance of split on the burden of proof is burden assignment to the party to convince the judge on the truth of the postulated events [2]. So when the party – which in more difficult position to prove – got the burden of proof, it will harm the sense of justice.

The split on the burden of proof must fair and equal, because unequal burden of proof means a biased priori that violates the party that receives more burden [18]. Therefore, from the aspect of epistemology, evidentiary system that arrange the judge authority in making the burden of proof determines whether the legal products in accordance with the sense of justice or not.

In the axiology side, evidentiary was purposed to obtain truth on event or right that submitted to judge [11], by putting the burden of proof to parties that shall reveal the truth, and when it is not proper, truth will be hard to reveal.

Table 1. Joint Marital Property Case vs. Divorce in Indonesia, 2012

Religion Court Area	Case		Joint Marital Property (%)
	Divorce	Joint Marital Property	
Praya	548	10	1,82
Selong	839	8	0,95
Garut	2216	14	0,63
North Jakarta	1416	9	0,63
Batam	1469	9	0,61
Surabaya	5472	25	0,45
Bima	1329	6	0,45
Kediri	697	3	0,43
Semarang	2815	12	0,40
West Jakarta	1634	6	0,36
Lamongan	2720	6	0,22
South Jakarta	3006	3	0,09

Joint marital property is a part of civil dispute in marriage

that becomes judge authority in Religion Court, a different dispute that has specification compared to other civil dispute in economy field. This issue is different with civil dispute in economy aspect that begins with an agreement to gain profit and it has anticipated the possibility of dispute. Thus, the evidentiary issue in joint marital property that was not specifically regulated led to some problem in its implementation. Joint marriage property (< 2%) dispute's number is smaller than divorce case (Table 1). It implies that people mostly pessimistic with the success of dispute on joint marriage property, so they would not rather submit the case to the court.

Joint marital property shall never be a problem if the marriage goes well, and husband and wife never overestimated their right, since it is for their happiness. Yet, joint marital property shall become problem when marriage goes worse and resulted on divorce.

Joint marital property concept is a contemporary Fiqh (Islamic jurisprudence) concept as a result of Indonesian scholars' *ijtihad* (consensus) as outlined in the Compilation of Islamic Law, as it is previously stated in Law No. 1 year 1974 about Marriage [5]. This concept is an appreciation for the housewives who do not work as a career woman and choose domestic activities instead – dedication to her husband and educating their children.

Post-divorce lead to the loss of income for housewives, because she relied on the husband's income before. Therefore, the share of joint marital property will become the capital for her business.

The concept of joint property is truly wonderful to be applied, because it is rare on the Indonesian culture that a man gives *mut'ah* (property) to his ex-wife in significant amount, or in sufficient quantity as capital in the post-divorce life. But unfortunately the provisions of this material law are not supported by a formal/procedural law which should also base on the protection of women who choose professions as housewives. Judge authority was not specifically regulates the burden of proof in property disputes, whereas the terms of the burden of proof that generally applied (*vide* Article 163 HIR [7] / 283 RBg [8] jo ps 1865 BW [9]) is often complicate to meet the evidentiary process. Therefore we need an ideal construction of the split on the burden of proof in dispute of a joint marital property.

Therefore, disputes of joint marital property have different specification with other economic civil matters (as mentioned previously), then the "key" (*burden of proof*) that is used to unlock the truth of events or proposed rights should also in harmony with the specifications of this type of dispute.

Law No. 1 of 1974 on Marriage [5] and the Law No. 7 of 1989 [4] on Religious Courts have arranged some special provisions related to civil procedure in marital disputes, including relative jurisdiction on filing a divorce which must be proposed in wife residence. Unless the wife left the husband without permission (*vides* Article 66 paragraph (2) and Article 73 paragraph (1) of Law No. 7 of 1989). This provision is *lex specialis* of Article 119 HIR [7] / 142

paragraph (1) RBg [8]. It is clearly stated that this law is a special provision on the protection of women / wives which economically depend on her husband.

Ideally, the burden of proof in dispute resolution on joint marital property in the possession and the name of Defendant is charged to the defendant because when all the property on the behalf of the Defendant implies that litigant is in a weak position. Even to find data about the property itself is not easy, present appropriate evidence would be more difficult.

Thus the ideal procedure as adopted in the agenda of evidentiary hearings- if all of the joint marital property on the name and possession of the Defendant's – is: the litigant get the right to apply for a shifting the burden of proof system in the agenda of evidentiary hearing. Litigant request the judges to apply the system of shifting on the burden of proof and must be accompanied by alibi and subsequently at litigant request, and judges may conduct incidental court and impose interlocutory.

4. Conclusions

The ideal construction of split on burden of proof in the dispute settlement of joint marital property is generally followed the general term. Yet in the case of joint marital property in the name and possession of the Defendant, then the burden of proof charged to the Defendant. If all the property on behalf of the Defendant, it means that the litigant in a weak position.

The procedure of this construction must be adopted in evidentiary hearing agenda, where joint marital property in the name and possession of the Defendant, as follows:

1. Litigant is granted with the right to apply for a shifting on the burden of proof systems that applied in the agenda of evidentiary court.

2. Request for the implementation of this system (the shifting on the burden of proof) must be accompanied by alibi.

Based on litigant request, the judges must conduct hearings and impose incidental injunction that granted or reject the request to implement the system in a shifting on the burden of proof on the case, so that the burden of proof still priory with litigant. Judges may also partially grant and reject the rest.

5. Recommendations

Related with an issue of evidentiary – specially related with split on burden of proof in dispute of joint marriage property in Religion Court that has been a part of divorce dispute – should be specifically regulated as the marriage dispute.

There have been various regulations that recommend applicative work of shifting burden of proof in civil dispute. For example Law No. 8 of 1999 on consumer protection as stipulated in article 19 (1), (2) and (5), and the concept of

strict liability in Law No. 32 of 2009 on Environment Protection and Management. As in this research, we also recommend the concept of shifting on burden of proof in dispute of joint marital property in Religion Court. In order to complete the implementation of these provisions, it needs to formulate civil procedural laws that regulate the application of the concept of shifting burden of proof in certain civil disputes. This provision may be considered to be submitted in the draft of Civil Procedural Law which is in the discussion process.

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