



Towards Substantive Justice: Reforming Islamic Family Law Regarding the Division of Marital Property in Indonesia

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Abstract

The division of marital property in marriage is a complex issue within Islamic family law in Indonesia. The Compilation of Islamic Law (KHI) stipulates that upon divorce, marital property is divided equally, with each party entitled to 50%. However, justice cannot be measured solely by numerical equality but must also consider each party's contributions and socio-economic conditions. This study aims to formulate an ideal legal framework for the regulation of marital property division that ensures substantive justice for all parties involved. Using Werner Menski's legal pluralism approach, which integrates normative and philosophical studies, and employing a qualitative method through literature review, this research relies on primary data sources from court rulings, academic journals, and relevant previous studies. The findings indicate that although KHI prescribes equal division, in practice flexibility is needed to adjust rulings to achieve fairness. The proposed model for marital property division emphasizes a socially responsive approach by recognizing the different economic and non-economic contributions, including domestic work; considering the economic conditions and needs of each party post-divorce; and allowing room for adaptive legal policies based on clear guidelines. This model is expected to make Islamic family law more relevant to social developments and to ensure substantive justice. Furthermore, the findings have the potential to contribute to reforms in Islamic family law in Indonesia, making it more adaptive, fair, and aligned with contemporary societal needs.

Keywords: Islamic Family Law, Legal Reform, Marital Property Division, Substantive Justice

Abstrak

Pembagian harta bersama dalam perkawinan merupakan persoalan kompleks dalam hukum keluarga Islam di Indonesia. Kompilasi Hukum Islam (KHI) mengatur bahwa saat perceraian, harta bersama dibagi rata 50% untuk masing-masing pihak. Namun, keadilan tidak dapat diukur hanya dari kesetaraan numerik, melainkan juga harus memperhatikan kontribusi dan kondisi sosial ekonomi masing-masing individu. Penelitian ini bertujuan merumuskan kerangka hukum ideal untuk pengaturan pembagian harta bersama yang mampu menjamin keadilan substantif bagi semua pihak. Dengan menggunakan pendekatan pluralisme hukum Werner Menski yang mengintegrasikan kajian normatif dan filosofis serta



metode kualitatif berupa studi pustaka, penelitian ini mengandalkan sumber data primer dari putusan pengadilan, jurnal ilmiah, dan hasil penelitian yang relevan. Temuan menunjukkan bahwa meskipun KHI mengatur pembagian harta secara sama, dalam praktik diperlukan fleksibilitas untuk menyesuaikan putusan demi keadilan. Model pembagian harta bersama yang diusulkan menekankan pendekatan yang responsif terhadap konteks sosial dengan mengakui perbedaan kontribusi ekonomi dan non-ekonomi, termasuk pekerjaan rumah tangga; mempertimbangkan kondisi dan kebutuhan ekonomi masing-masing pihak setelah perceraian; serta memberikan ruang bagi penerapan kebijakan hukum yang adaptif berdasarkan pedoman yang jelas. Model ini diharapkan dapat menjadikan hukum keluarga Islam lebih relevan dengan perkembangan sosial dan memastikan keadilan substantif. Selain itu, temuan ini berpotensi memberikan kontribusi pada reformasi hukum keluarga Islam di Indonesia agar lebih adaptif, adil, dan sesuai dengan kebutuhan masyarakat saat ini.

Kata Kunci: Hukum Keluarga Islam, Reformasi Hukum, Pembagian Harta Bersama, Keadilan Substantif

Introduction

The issue of joint property is a legal matter that has not been specifically addressed by classical Islamic jurists, as this concept only developed and gained significant attention in the modern era. In classical fiqh literature, discussions on property within marriage generally focused on maintenance (nafkah) and inheritance law, while provisions regarding joint ownership of assets acquired during marriage were not found. Traditional Islamic legal perspectives tended to place property acquired by the husband as belonging to the husband, while the wife's rights were limited to the maintenance provided to her. However, the Qur'an and Hadith do not explicitly state that such property belongs entirely to the husband or that the wife automatically has rights over it, thereby leaving room for interpretation in regulating joint property.¹

The legal issue of joint property examined by the researcher relates to the dynamics of Indonesian society and the facts revealed from various Religious Court decisions.² In general, the panel of judges decides the division of joint property in accordance with statutory regulations, namely, that it be divided equally, with half going to the husband and half to the wife. However, this provision often creates problems in practice, as it is deemed not always reflective of a sense of justice. In some cases, one party disadvantages the other by neglecting their obligations, or the wife does not contribute beyond her minimal duties over an extended period. There are even situations where all financial support comes from the husband, while the wife only serves the husband in a limited way according to traditional fiqh views, without managing the household due to the presence of domestic helpers,

¹ Muhammad Tigas Pradoto, "Aspek Yuridis Pembagian Harta Bersama Dalam Perkawinan (Tinjauan Hukum Islam Dan Hukum Perdata)," *Jurnal Jurisprudence* 4, no. 2 (2017): 85-91, <https://doi.org/10.23917/jurisprudence.v4i2.4208>.

² Idri Idri, "RELIGIOUS COURT IN INDONESIA: History and Prospect," *JOURNAL OF INDONESIAN ISLAM* 3, no. 2 (2009): 297-313, <https://doi.org/10.15642/JIIS.2009.3.2.297-313>.

drivers, and nannies. Such conditions give rise to objections when, at the time of divorce, both parties still receive an equal share of the joint property.³

The core issue concerns the provision in the Compilation of Islamic Law (KHI) mandating an equal division (50:50) of joint property between former spouses upon divorce, irrespective of disparities in their respective contributions or socio-economic circumstances. This raises critical questions regarding the extent to which such a rule upholds the principle of substantive justice, particularly in cases where one party has contributed disproportionately or has failed to fulfill their marital obligations.⁴

Research conducted by Ermi Suhasti Syafei,⁵ Muhamad Subhi Apriantoro,⁶ Elimartati,⁷ and Khairina⁸ highlights various challenges in resolving post-divorce joint property disputes in Indonesia, whether through court mediation or out-of-court settlements. Data show that the success rate of mediation in Religious Courts is very low, including in the Tanjung Karang Religious Court, with inhibiting factors such as the absence of parties, the nature of the disputed assets, and third-party interference. Their study further compares the regulation of hibah (gifts) under the KHI and the Compilation of Sharia Economic Law (KHES), identifying technical differences such as the additional witness requirement in the KHI and the *qabd* (possession) condition in the KHES. Moreover, societal change has influenced the regulation of joint property, whereby personal assets may transform into joint property by virtue of marital status yet this transformation is not optimally regulated under current statutory law. The study also underscores a notable decision of the Payakumbuh Religious Court, which departed from the KHI's equal division rule by allocating joint property unequally, based on evidence of the respective contributions of each party. This reflects the application of a progressive legal approach, intended to adapt judicial decisions to factual realities and to uphold the community's sense of justice.

The research by Ibnu Elmi AS. Pelu⁹ emphasizes that the legal framework for dividing marital property is established by the Marriage Law (UUP) and the Compilation of Islamic Law (KHI), which apply nationwide. Under these laws, property acquired during marriage is jointly owned by both spouses. However, this joint ownership can be modified if

³ Dian Aries Mujiburohman et al., "Mixed Marriage in Indonesia: Joint Property and Foreign Land Ownership Restrictions," *The Lawyer Quarterly* 13, no. 4 (2023): 424–35.

⁴ Abd Rouf et al., "Joint Property Division in Indonesia: A Gender Equality Viewpoint," *De Jure: Jurnal Hukum Dan Syari'ah* 15, no. 2 (2023): 230–250.

⁵ Ermi Suhasti Syafei and Siti Djazimah, "Mediation In Settlement of Joint Marital Property Disputes: Study At Tanjung Karang Religious Court, Lampung," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 5, no. 2 (2021): 867–91, <https://doi.org/10.22373/sjhk.v5i2.9039>.

⁶ Muhamad Subhi Apriantoro et al., "Comparing KHI and KHES in Marital Property Grant Disputes: An Analysis of Judges' Views," *Al-Istinbath: Jurnal Hukum Islam* 8, no. 1 May (2023): 37–52, <https://doi.org/10.29240/jhi.v8i1.6464>.

⁷ Elimartati Elimartati and Elfia Elfia, "Kritik Terhadap Kompilasi Hukum Islam Tentang Ketentuan Harta Bersama Dalam Perkawinan," *JURIS (Jurnal Ilmiah Syariah)* 19, no. 2 (2020): 231–43, <https://doi.org/10.31958/juris.v19i2.2283>.

⁸ Khairina Khairina et al., "Reforming the Rules on the Division of Joint Property: A Progressive Legal Approach," *JURIS (Jurnal Ilmiah Syariah)* 23, no. 1 (2024): 193–204, <https://doi.org/10.31958/juris.v23i1.11565>.

⁹ Ibnu Elmi AS Pelu and Ahmad Dakhoir, "Marital Property within the Marriage Law: A Debate on Legal Position and Actual Applications," *Al-Jami'ah: Journal of Islamic Studies* 59, no. 2 (2021): 287–316, <https://doi.org/10.14421/ajis.2021.592.287-316>.

the couple includes specific provisions in their marriage agreement or if one spouse files a claim through litigation or alternative dispute resolution. In practice, decisions that consider the qualitative contributions of each spouse have been more influential in resolving marital property disputes in Indonesia. This study is also quite similar to the research by Wahyu Akbar,¹⁰ which emphasizes that marital property should provide economic security for the future of women and children through its distribution.

The focus of this research is to formulate an ideal legal framework for the division of joint property in Islamic family law in Indonesia, particularly as regulated in the Compilation of Islamic Law (KHI), in order to realize substantive justice for the parties involved. The research is directed towards analyzing the provisions set out in the KHI, evaluating their application in the Religious Courts with due consideration to the respective contributions of each party and their socio-economic circumstances, and proposing legal reforms that are more adaptive to societal dynamics. Employing a progressive legal approach and the framework of legal pluralism, this focus underscores the necessity of regulations that are grounded not merely in formal equality, but that also take into account the realities and proportionality of contributions in the acquisition of joint property.

The novelty of this research lies in its shift of focus from the concept of formal equality, as stipulated in the Compilation of Islamic Law (KHI), towards the application of the principle of substantive justice in the division of joint property, taking into account the actual contributions of each party, their socio-economic conditions, and their conduct during the marriage. This study employs Werner Menski's triangular concept of legal pluralism,¹¹ which integrates normative, empirical, and philosophical analyses, thereby producing a more comprehensive understanding of the practice of joint property division in Indonesia. Furthermore, the research proposes an ideal, adaptive, and progressive legal model, intended to respond to social dynamics and to provide guidance for Religious Court judges in exercising their *ex officio* authority to adjust rulings in pursuit of substantive justice—a perspective that has rarely been the focus of previous studies.

This research employs a normative legal research method¹² utilizing Werner Menski's *triangular concept of legal pluralism*, which integrates normative, philosophical, and sociological dimensions to obtain a comprehensive understanding of joint property division in marriage.¹³ The normative approach is used to examine the applicable laws and regulations, particularly the Compilation of Islamic Law (KHI) and related provisions, while the philosophical approach is applied to explore the principles and values of substantive justice within Islamic family law. The sources of data for this study comprise primary legal materials, such as legislation and court decisions; secondary legal materials, including literature, scholarly journals, and expert opinions; and tertiary legal materials, such as legal

¹⁰ Wahyu Akbar and Rahmad Kurniawan, "Marital Property in Indonesia:," *Jurnal Ilmu Hukum Tambun Bungai* 8, no. 1 (2023): 228–44, <https://doi.org/10.61394/jihtb.v8i1.250>.

¹¹ Muhazir Muhazir and Azwir Azwir, "Divorce Bureaucracy in the Sharia Space: Examining Practices in Langsa City, Aceh," *At-Ta'fikir* 17, no. 1 (2024): 44–55.

¹² Hari Sutra Disemadi, "Lenses of Legal Research: A Descriptive Essay on Legal Research Methodologies," *Journal of Judicial Review* 24, no. 2 (2022): 289–304, <https://doi.org/10.37253/jjr.v24i2.7280>.

¹³ Dyah Ochterina Susanti and A'an Efendi, *Penelitian Hukum: Legal Research* (Sinar Grafika, 2022). 9-10

dictionaries.¹⁴ Data analysis is conducted through qualitative legal analysis using the *content analysis* method to connect positive legal norms with philosophical values,¹⁵ thereby enabling the formulation of an ideal, adaptive, and progressive legal model for regulating the division of joint property in Indonesia.

The Regulation of Marital Property in Indonesia

Article 35 of Law No. 1 of 1974 on Marriage regulates that all property acquired by spouses during their marriage is considered joint marital property.¹⁶ This provision establishes an automatic legal unity of property between husband and wife from the moment the marriage is legally recognized, regardless of which spouse contributes to the acquisition of assets. Such a framework positions marriage not only as a personal or social bond but also as an economic partnership, where all gains made during the marital period form part of the collective estate. This approach underscores the legal reality that the division of marital assets is an inherent consequence of the marital relationship, becoming particularly significant upon its dissolution through divorce or other legal means.¹⁷

Distinctively, joint marital property involves shared ownership rights, differing fundamentally from conventional co-ownership by virtue of matrimonial legal regulations. Both spouses hold equal rights over assets obtained throughout the marriage, spanning tangible goods like real estate and vehicles, as well as intangible assets such as investments and savings.¹⁸ Importantly, decisions regarding the management or disposition of these assets generally require mutual consent, barring specific legal exceptions. This legal construct reinforces the interdependence of property ownership and the marital union, emphasizing that the existence of joint property is inextricably linked to the continuity and legal status of the marriage.¹⁹

The statutory framework established by Article 35 of the Marriage Law harmonizes with the provisions of Article 119 of the Indonesian Civil Code (KUHPer), which mandates the establishment of a comprehensive community of property upon marriage unless otherwise modified by a prenuptial agreement. This community of property is inviolable by any subsequent marital agreements, thereby ensuring that all assets accumulated during marriage are presumptively shared between spouses. This alignment reflects a coherent legislative intent to uphold the principle of property unity within marriage, securing protection and legal certainty for both parties in the absence of a contrary agreement.²⁰

¹⁴ Tunggal Ansari Setia Negara, "Normative Legal Research in Indonesia: Its Originis and Approaches," *Audito Comparative Law Journal (ACLJ)* 4, no. 1 (2023): 1–9, <https://doi.org/10.22219/aclj.v4i1.24855>.

¹⁵ A. J. Kleinheksel et al., "Demystifying Content Analysis," *American Journal of Pharmaceutical Education* 84, no. 1 (2020): 7113, <https://doi.org/10.5688/ajpe7113>.

¹⁶ Jomana Mohamed Sabri Awiety and Abdul Kadir Riyadi, "History of Joint Marital Property in Indonesia and Its Legalization," *Malaysian Journal of Syariah and Law* 8 (2020): 94–110.

¹⁷ Abd Rouf, "Jurimetrics in the Reconstruction of the Joint Property Division Model for Wage-Earner Wives in Indonesia," *Al-Ahkam* 34, no. 1 (2024): 1–32.

¹⁸ Pelu and Dakhoir, "Marital Property within the Marriage Law."

¹⁹ Akbar and Kurniawan, "Marital Property in Indonesia."

²⁰ Isnawati Rais, "The Settlement of Joint Property in Religious Courts of Indonesia (A Case in the Religious Court of South Jakarta)," *Al-Adalah* 15, no. 2 (2018): 234–62, <https://doi.org/10.24042/adalah.v15i2.2484>.

Furthermore, Article 122 of the Civil Code articulates that all profits, income, debts, and losses incurred during the marriage are jointly borne by the spouses. This legal mandate conveys that marital partnership extends beyond the mere sharing of gains to encompass shared responsibilities and risks. Such a principle aligns with a vision of marriage as a holistic economic and social partnership, where the equitable division of assets at the marriage's end must account not only for accumulated wealth but also for shared liabilities. This comprehensive approach is fundamental in fostering substantive justice and balancing the interests of both parties, especially in the context of Indonesia's evolving socio-economic landscape.²¹

The provisions regarding joint property in Indonesia stipulate that joint property is absolute and cannot be abolished or disregarded by either party. The scope of joint property includes all assets that can be proven to have been acquired during the marriage, even if such assets are registered in the name of one party. Thus, these assets are considered jointly owned.

If the assets are managed or transferred to a third party's name, such as the husband's sibling, and it is proven that they originated from efforts during the marriage, the assets remain regarded as joint property of the husband and wife. The existence of joint property does not require the wife to be actively involved at all times, unless the husband can prove that the wife has failed in her duties as a homemaker—for example, by leaving the home without valid and reasonable cause. Moreover, assets or properties purchased or constructed after divorce may also be considered joint property if the purchase or construction costs come from joint efforts during the marriage.

Property purchased by one spouse at a location distant from the marital residence during the marriage is also included in the category of joint property. Types of assets classified as joint property include not only tangible objects such as houses, land, and vehicles, but also all income earned during the marriage, whether derived from personal property or from the joint property itself. However, profits originating from personal property do not automatically become part of the joint property unless there is a written agreement explicitly governing this.²²

Special provisions apply to husbands practicing polygamy with two or three wives. In this case, assets existing before marriage to the second wife remain the joint property of the husband and the first wife, so the second wife has no rights to those assets. Assets acquired during the marriage to the second wife are considered joint property between them. If the two families live separately, the assets acquired by each spouse during their respective marriages remain separate joint properties between the husband and each wife. The same principle applies if the husband passes away and the wife remarries; the assets remain separated according to the status of each marriage.²³

²¹ Rosalina Limbong, "A Legal Perspective on Inheritance of Joint Property: A Comparative Analysis of Various Legal Systems," *Legal Frontier* 1, no. 1 (2025): 11–18.

²² Sukiati et al., "Approaches of the Religious Court Judges in Indonesia to Settle Joint Marital Property Disputes," *Journal of International Law and Islamic Law* 19, no. 3 (2023): 71.

²³ Mahdianur et al., "Settlement of Joint Property Disputes Resulting from Divorce in the Religious Courts," *Journal of Law, Policy and Globalization* 141 (2024): 1.

Marital Property in Indonesia: Islamic, State, and Customary Perspectives

The division of joint property in marriage is an important issue that affects family life in Indonesia. As a country with cultural diversity and multiple legal systems, Indonesia has various approaches to regulating marital property, including Islamic law, state law, and customary law. These three systems offer different yet complementary perspectives in resolving joint property issues that arise during or after the dissolution of the marital bond.

The Government of Indonesia stipulates in Article 119 of the Civil Code (KUH Perdata) that from the moment a marriage is solemnized, a complete union of assets between husband and wife legally applies, unless a prenuptial agreement specifies otherwise. This unity of assets remains effective throughout the marriage and cannot be revoked or altered by mutual consent between husband and wife. Should there be any intention to deviate from this provision, the husband and wife must formalize it through a prenuptial agreement as regulated in Articles 139 to 154 of the Civil Code.²⁴

Furthermore, Articles 128 to 129 of the Civil Code state that upon the dissolution of the marital bond, the joint assets are to be divided equally between husband and wife, regardless of the origin of such assets. Prenuptial agreements are permitted as long as they do not violate public morals and applicable laws and regulations. Assets acquired during the marriage automatically become joint property, whereas assets obtained individually by each party, such as gifts or inheritances, remain under their respective control unless otherwise agreed.²⁵

Regarding the management of joint assets, any legal actions related to such assets must be carried out with the mutual consent of both husband and wife. If the marriage ends in divorce, the management and division of joint property are governed by applicable laws, providing legal certainty and protection of each party's rights over the joint assets.

Article 36 paragraph (2) of Law Number 1 of 1974 on Marriage, in conjunction with Article 87 paragraph (2) of the Compilation of Islamic Law, affirms that the wife has full rights to conduct legal acts concerning her personal property without interference from the husband. The wife is authorized to sell, gift, or mortgage her personal property independently. Likewise, there is no legal disparity between husband and wife in managing their respective personal assets. This provision aligns with Article 86 of the Compilation of Islamic Law, which confirms that the personal property of both husband and wife remains their exclusive right and is not commingled with joint assets.²⁶

Regarding personal property, in accordance with Article 35 paragraph (2) of the Marriage Law, this applies unless otherwise stipulated in a prenuptial agreement made

²⁴ Kholil Nawawi, "Harta Bersama Menurut Hukum Islam dan Perundang-undangan di Indonesia," *Mizan: Journal of Islamic Law* 1, no. 1 (2018), <https://doi.org/10.32507/mizan.v1i1.104>.

²⁵ Dwi Anindya Harimurti, "Perbandingan Pembagian Harta Bersama Menurut Hukum Positif Dan Hukum Islam," *Jurnal Gagasan Hukum* 3, no. 02 (2021): 149-71, <https://doi.org/10.31849/jgh.v3i02.8908>.

²⁶ Linda Firdawaty, "Filosofi Pembagian Harta Bersama," *ASAS* 8, no. 1 (2016): 88-90, <https://doi.org/10.24042/asas.v8i1.1227>.

before the marriage ceremony. Personal property includes assets owned before marriage and assets acquired individually during the marriage according to applicable provisions.²⁷

Acquisitions in the form of gifts, grants, and inheritance are exceptions to the general provisions regarding marital property. Apart from these types, all assets acquired during the marriage automatically become joint property. Whether the assets are obtained individually or jointly during the marriage, they are all considered marital property. Likewise, any property purchased during the marriage is regarded as joint property, regardless of who made the purchase, whether the husband or the wife, or whether either party was aware of the purchase. Furthermore, the name under which the property is registered does not affect its status as joint property.²⁸

In Islamic law, the issue of joint property or marital property is a legal matter that was previously not extensively considered or discussed by classical fiqh scholars, as the concept of joint property has only emerged and become widely discussed in the modern era. Indeed, the concept of marital property along with its provisions is not explicitly found in classical fiqh studies. Instead, classical Islamic jurisprudence primarily focuses on matters related to the regulation of maintenance (nafkah) and inheritance law, which are the main concerns in the discussion of property within marriage.²⁹

From the perspective of Islamic law, the concept of joint property as known in civil law is not recognized. Islamic law views a clear separation between the property of the husband and the wife. In fiqh texts, marital property is understood as assets acquired by the husband and wife during their marital bond, which can be described as a form of partnership (syirkah) between the spouses, resulting in the mixing of property that can no longer be distinguished.³⁰

However, despite the concept of partnership in generating property during marriage, Islamic law emphasizes the separation of ownership rights over the property of the husband and wife individually. The legal basis for this can be found in the Qur'an, Surah An-Nisa, verse 32, which provides guidance regarding the division and rights over property within the context of husband and wife relationships.

"And do not envy one another for what Allah has bestowed upon you of His bounty. For men is a share of what they have earned, and for women is a share of what they have earned. And ask Allah of His bounty. Indeed, Allah is ever, of all things, Knowing." [QS. An-Nisa (4:32)]

Therefore, although the concept of joint property has not been deeply examined in classical fiqh, the management and distribution of property within marriage remains an

²⁷ Safira Maharani Putri Utami and Siti Nurul Intan Sari Dalimunthe, "Penerapan Teori Keadilan Terhadap Pembagian Harta Bersama Pasca Perceraian," *JURNAL USM LAW REVIEW* 6, no. 1 (2023): 433–47, <https://doi.org/10.26623/julr.v6i1.6899>.

²⁸ Heppy Hyma Puspytasari, "Harta Bersama Dalam Perkawinan Menurut Hukum Islam Dan Hukum Positif," *JATISWARA* 35, no. 2 (2020), <https://doi.org/10.29303/jtsw.v35i2.252>.

²⁹ Radi Yusuf, "Pembagian Harta Bersama Akibat Perceraian Berbasis Nilai Keadilan," *Jurnal Pembaharuan Hukum* 1, no. 1 (2014): 73–82, <https://doi.org/10.26532/jph.v1i1.1475>.

³⁰ Eko Rial Nugroho et al., "Granting of Property During Marriage as an Inherited Property in Indonesia," *El-Ushrah: Jurnal Hukum Keluarga* 7, no. 1 (2024): 310–25, <https://doi.org/10.22373/ujhk.v7i1.22875>.

important issue in Islamic law, especially through rules related to maintenance, inheritance, and the individual ownership rights of each spouse.

Every man has a right to a portion of the earnings from his efforts, and every woman likewise has a right to a portion of the earnings from her efforts. This verse emphasizes the equality between men and women in earning a livelihood. In Islamic law, women are also encouraged to seek sustenance just as men do. Both are guided to attain blessings and goodness in the form of wealth through their efforts and charitable deeds without harboring envy. The division of marital property depends greatly on the agreement between husband and wife. In the Qur'an, this agreement is referred to as "*ash-shulhu*" which means a peace agreement between both parties (husband and wife) following a dispute.

Islamic law holds the view that property acquired by the husband during the marriage belongs to the husband, while the wife is entitled only to the maintenance provided by her husband. However, the Qur'an and Hadith do not explicitly state that all property obtained by the husband during the marriage solely belongs to him, nor do they clearly declare that the wife automatically has rights over the husband's property acquired during the marriage.³¹

Some Islamic legal scholars argue that Islam does not regulate the concept of joint marital property in the Qur'an. This view was expressed by figures such as Hazairin, Anwar Harjono, and Andoerraoef, and was followed by their students. However, other scholars contend that it is unlikely Islam does not address joint marital property, given that many minor issues are regulated in detail along with their legal rulings. If such provisions are not found in the Qur'an, then they are governed by the Hadith, which is also a source of Islamic law.³²

The Islamic legal perspective on joint marital property aligns with Muhammad Syah's statement that the shared earnings of husband and wife should fall under the category of *rubu' 'amalah* (jointly earned property), yet this matter is not discussed in detail. This might be due to the fact that most classical fiqh scholars did not recognize the concept of shared income between husband and wife, but rather only understood partnership or joint ownership (*syirkah*). Therefore, the concept of joint property within marriage is not explicitly or thoroughly discussed in Islamic law, possibly due to the social and cultural context of classical times that differs from the modern era. Nevertheless, the important role of managing property and economic responsibilities within the household remains a significant focus in Islamic teachings.³³

Islamic law grants each spouse—both husband and wife—the right to individually own property that cannot be interfered with by the other party. A husband who receives gifts, inheritance, or other assets has full control over those possessions without intervention from his wife. The same principle applies to the wife. Therefore, the assets each spouse

³¹ Bani Syarif Maula et al., "Marital Property in Marriages of Different Nationalities in Indonesia According to National Law and Islamic Law," *El-Aqwal: Journal of Sharia and Comparative Law*, 2024, 1-16, <https://doi.org/10.24090/el-aqwal.v3i1.10508>.

³² Latif Jamil, *Aneka Hukum Perceraian Indonesia* (Ghia Indonesia, 1982).82

³³ Nadia Nadia and Noval Noval, "Musyarakah Pada Harta Bersama," *Bilancia: Jurnal Studi Ilmu Syariah Dan Hukum* 14, no. 2 (2020): 341-62, <https://doi.org/10.24239/blc.v14i2.601>.

brings into the marriage before it takes place remain the separate property of the respective husband or wife.³⁴

Given Indonesia's vast geographical expanse, the terminology for marital property varies across regions, shaped by local languages and dialects.³⁵ In Java, it is known as *gono-gini*; in Aceh, as *hareuta seuhareukat*; in Bali, as *druwe gubré*; in Minangkabau, as *saurang*;³⁶ in Madura, as *ghuma-ghuma*; and in Sulawesi, as *cakkrar*. Across Indonesia, customary law on *gono-gini* is broadly similar, particularly in limiting the types of assets that qualify as marital property (*harta persatuan*). Differences arise, however, in how this property is treated thereafter. In Java, dividing assets into separate property and *gono-gini* property is of great importance in divorce but carries less weight when a spouse dies. In Aceh, by contrast, the division into separate property and "*hareuta sauhareukat*" is considered equally important in both divorce and inheritance cases.³⁷

While the division of *gono-gini* property is generally similar across regions, variations exist due to local cultural contexts. In Lombok, West Nusa Tenggara, for example, customary law tends not to recognize the *gono-gini* concept. Under Lombok customary law, a divorced woman returns to her parents' home with only her children and personal belongings, without any entitlement to *gono-gini* or other marital property. Historically, the recognition of marital property in customary law developed on the basis that the wife must have actively participated in the husband's work. If the wife did not contribute physically to the acquisition of property, traditional customary law held that no marital property was formed during the marriage. This view has faced strong criticism from legal scholars, in line with the growing recognition of women's emancipation and the influence of globalization in various spheres.³⁸

Spousal Rights and Obligations in the Management of Marital Property

When both husband and wife fulfill their respective responsibilities, harmony and peace of mind are achieved, thereby perfecting the happiness of marital life. The provisions on marital property, as stipulated in Articles 35 to 37 of Law No. 1 of 1974 and Articles 85 to

³⁴ Abdul Basith Junaidy, "Harta bersama dalam hukum Islam di Indonesia: perspektif sosiologis," *Al-Qanun: Jurnal Pemikiran dan Pembaharuan Hukum Islam* 17, no. 2 (2014): 345–68.

³⁵ Muthmainnah Muthmainnah and Fattah Setiawan Santoso, "Akibat Hukum Harta Bersama Perkawinan Dalam Pewarisan Di Indonesia Analisis Komparatif Hukum Islam Dan Hukum Adat," *Ulumuddin: Jurnal Ilmu-Ilmu Keislaman* 9, no. 1 (2019): 81–96, <https://doi.org/10.47200/ulumuddin.v9i1.286>.

³⁶ Anak Agung Alit Raka Ramayudha, "Kedudukan Harta Bersama Dalam Perkawinan Campuran Di Indonesia," *Jurnal Analisis Hukum* 6, no. 2 (2023): 278–90, <https://doi.org/10.38043/jah.v6i2.4799>.

³⁷ Hafizha Harts, "Perspektif Ulama Kota Langsa Terhadap Pembagian Harta Bersama Bagi Istri Yang Tidak Bekerja," *El-Ussrah: Jurnal Hukum Keluarga* 5, no. 2 (2022): 374–87, <https://doi.org/10.22373/ujhk.v5i2.11929>; Muhammad Ridwan et al., "Harta Bersama Suami Istri Ditinjau Dari Hukum Islam Dan Hukum Adat," *Yurisprudencia: Jurnal Hukum Ekonomi* 7, no. 2 (2021): 201–21, <https://doi.org/10.24952/yurisprudencia.v7i2.4689>; Zaiyad Zubaidi, "Tanggapan Ulama Dayah Terhadap Pembagian Harta Bersama Menurut Pasal 97 KHI," *Media Syari'ah: Wahana Kajian Hukum Islam dan Pranata Sosial* 22, no. 1 (2020): 30–47, <https://doi.org/10.22373/jms.v22i1.6615>.

³⁸ Sri Hariati & Musakir Salat, "The Injustice Of Distributing Marital Property (Harga Gini Gono) in Divorce Cases," *Jurnal IUS Kajian Hukum Dan Keadilan* 1, no. 3 (2013): 448–50, <https://doi.org/10.12345/ius.v1i3.249>.

97 of the Compilation of Islamic Law (KHI), essentially concern the obligations of each party, both between spouses themselves and toward third parties.³⁹

Within the internal relationship between husband and wife, responsibilities include the maintenance of marital property. The KHI stipulates that the husband is responsible for both the marital property and his personal property. From this provision, it is understood that both spouses share responsibility for maintaining marital property, as a means of fostering a prosperous and harmonious family life.⁴⁰

Responsibilities toward third parties relate to the use of marital assets, which may involve debts, whether joint debts or personal debts. In terms of liability, a spouse's personal debts are charged to his or her own assets. Joint debts incurred for the benefit of the family are charged to the marital property; however, if the husband's assets are sufficient, the liability falls on him. If the husband's assets are insufficient or unavailable, the liability may be charged to the wife's assets.

The key issue that often arises is determining liability for such debts. To clarify this matter, it is necessary to distinguish between personal debts and joint debts within marriage. Joint debts include all debts or expenditures made by either spouse, or by both together, for the needs of the household, including daily expenses. Personal debts, on the other hand, are those incurred by either spouse for individual purposes that do not constitute daily expenses or expenditures related to their respective personal property.

Based on these provisions, the debt obligations of each spouse may arise, among others, from debts incurred prior to marriage, debts contracted by either spouse for personal purposes, and debts arising after the dissolution of marriage. Such personal debts of the husband or wife are to be settled from their respective personal assets. This is affirmed in Article 93(1) of the Compilation of Islamic Law (KHI), which states that 'liability for the debts of the husband or wife shall be charged to their respective assets.'⁴¹

With regard to marital property – assets acquired during the course of the marriage – both spouses share joint responsibility for debts incurred to meet family expenses. These shared expenses include daily household needs, medical and healthcare costs, and the education of children. Accordingly, marital property is the primary source for the repayment of joint debts. The KHI further provides that if marital property is insufficient to cover such debts, repayment shall be taken from the husband's personal assets; if the husband's personal assets are insufficient or unavailable, the debt shall then be charged to the wife's personal assets.

The obligation of the husband to use his personal assets to settle joint debts before resorting to the wife's personal assets, in cases where marital property is insufficient or unavailable, is, in the author's view, linked to the husband's position as the head of the family. In this capacity, the husband is obliged to protect his wife and provide for the

³⁹ Etty Rochaeti, "Analisis Yuridis Tentang Harta Bersama (Gono Gini) Dalam Perkawinan Menurut Pandangan Hukum Islam Dan Hukum Positif," *Jurnal Wawasan Yuridika* 28, no. 1 (2013): 650–61, <https://doi.org/10.25072/jwy.v28i1.61>.

⁴⁰ Siah Khosy'ah, "Keadilan Distributif Atas Pembagian Harta Bersama Dalam Perkawinan Bagi Keluarga Muslim Di Indonesia," *Al-Manahij: Jurnal Kajian Hukum Islam* 11, no. 1 (2017): 35–48, <https://doi.org/10.24090/mnh.v11i1.1266>.

⁴¹ Widya Sari and Muhammad Arif, "Rekonstruksi Hukum Harta Bersama dalam Perkawinan," *UNES Law Review* 6, no. 1 (2023): 593–601, <https://doi.org/10.31933/unesrev.v6i1.745>.

household in accordance with his means. This includes the duty to provide maintenance, housing for the wife, medical care and treatment for the wife and children, household expenses, and the cost of the children's education. Accordingly, it is reasonable that the Compilation of Islamic Law (KHI) stipulates that if the repayment of joint debts cannot be met from marital property, such repayment shall first be taken from the husband's personal assets. In other words, the primary priority in repaying joint debts, after exhausting marital property, is to use the husband's personal assets.⁴² Nevertheless, given that marital property is essentially acquired during the marriage and that the legal standing of husband and wife is equal in both rights and responsibilities, both spouses have an equal share in marital property. This principle is intended to strengthen the stability of the household.

Reforming Islamic Family Law in Indonesia: Analysis of Marital Property

In principle, disputes over marital property are not inherently complex if resolved through deliberation and in a spirit of kinship. However, such disputes may become difficult to settle when one party feels disadvantaged and the other is unwilling to reach an amicable resolution. Marital property cases may be brought before the Religious Court, or before the District Court for non-Muslims, by filing a lawsuit either separately or cumulatively with divorce, maintenance, or *hadhanah* cases. In adjudicating marital property disputes or other related matters, judges are obliged to act impartially and ensure that no party is unjustly harmed.⁴³

In cases involving marital property, there are several court decisions that provide important considerations for the reform of family law, particularly with regard to marital property. In Decision No. 642/Pdt.G/2020/PA.Bn, the Religious Court of Bengkulu did not reinterpret Article 97 of the Compilation of Islamic Law (KHI). The judge merely adhered to the provision without exploring legal interpretations that might better reflect substantive justice. This contrasts with the decision of the Bukittinggi Religious Court in Case No. 618/Pdt.G/2012/PA.Bkt concerning the division of marital property, where the judge determined an unequal division—two-thirds to the wife and one-third to the husband—based on the consideration that the wife was the one who worked and contributed more significantly to the acquisition of the property.

In Case No. 0031/Pdt.G/2017/PTA.Pdg concerning marital property, the Plaintiff was dissatisfied with the judgment rendered by the court. On June 8, 2017, the Plaintiff, as the Appellant, filed an appeal to the Padang High Religious Court. The panel of judges carefully reviewed and examined the appeal documents as stated in the decision of the Padang Religious Court. Regarding the determination of the disputed marital property—which included the quantity of assets, the size of the land and buildings, as well as the certification of the buildings—no further objections were raised by the Appellant. However, the main objection of the Plaintiff/Appellant concerned the operative part of the Padang Religious Court's decision, which allocated one-third of the marital property to the

⁴² Elfirda Ade Putri and Windy Sri Wahyuni, "Penyelesaian Sengketa Harta Bersama Setelah Perceraian Dalam Hukum Positif Di Indonesia," *JURNAL MERCATORIA* 14, no. 2 (2021): 94–106, <https://doi.org/10.31289/mercatoria.v14i2.5692>.

⁴³ Andi Intan Cahyani, "Peradilan Agama Sebagai Penegak Hukum Islam Di Indonesia," *Jurnal Al-Qadau: Peradilan Dan Hukum Keluarga Islam* 6, no. 1 (2019): 119–32, <https://doi.org/10.24252/al-qadau.v6i1.9483>.

Plaintiff/Appellant and two-thirds to the Defendant/Appellee, based on the legal reasoning and considerations adopted by the Padang Religious Court.

Table 1. Marital Property Division in Court Decisions

Case Number	Division of Marital Property	Summary of Legal Facts
0031/Pdt.G/2017/PTA.Pdg	1/3 to Plaintiff (former wife), 2/3 to Defendant (former husband)	The Plaintiff did not dispute the marital property assets themselves but objected to the larger share awarded to the former husband.
618/Pdt.G/2012/PA.Bkt	2/3 to wife, 1/3 to husband	The wife was proven to have worked and contributed significantly to the acquisition of property; the husband's contribution to household income was minimal.

By considering the principle of justice in adjudicating cases in accordance with the prevailing social dynamics at the time, the panel of judges concluded that awarding a greater portion of the marital property to the former wife was the most equitable decision. This consideration was based on the former husband's neglect in fulfilling his obligations and responsibilities as the head of the household. Although the wife also worked outside the home, the husband remained obligated to provide financial support and ensure the continuity of the household. In this case, however, the husband failed to fulfill those obligations and even committed adultery by engaging in an extramarital relationship and marrying another woman, thereby abandoning his legal responsibilities toward his lawful wife.

An ideal legal system is one that can adapt to the facts of each case without deviating from established norms. In this context, judges have *ex officio* authority—the freedom to make decisions without interference from other parties—allowing them to remain independent in carrying out their duties. In marital property division cases at the Religious Court, this authority has been exercised by, among other things, adding a ruling that obliges both parties to divide the joint property as determined by the court, even if it was not explicitly requested in the plaintiff's *petitum*. Judges have also applied the *ius contra legem* principle to depart from Article 97 of the Compilation of Islamic Law, which prescribes equal division of joint property, in order to achieve substantive justice.

Based on Article 2 paragraph (1) of Law No. 48 of 2009 on Judicial Power, which states that "The judiciary is conducted for the sake of justice based on the belief in the One Almighty God," judges act to balance the rights of both parties, who are legally equal. Theoretically, adding a ruling outside the *petitum* could be considered *ultra petita*; however, its use under *ex officio* should be understood as a measure to ensure more effective enforcement of the law and to safeguard substantive justice, rather than as a deviation.

From the perspective of Islamic legal reform, Islamic law is dynamic and can evolve to meet the needs of society. Ibn Qayyim al-Jauziyah emphasized that the purpose of Islamic law is to achieve *maslahah* (public benefit) and avoid harm; thus, if a provision results in

injustice, it should be revised accordingly. Therefore, the use of *ex officio* by judges in joint property rulings can be seen as a form of *ijtihad* aimed at achieving more substantive justice.

In line with the progressive legal theory developed by Satjipto Rahardjo,⁴⁴ the law should not be viewed as a rigid set of rules, but rather as a responsive system that reflects social realities. In this regard, judges are not merely the mouthpiece of the law, but active agents in shaping a more just and human-oriented legal order. The application of *ex officio* and the *ius contra legem* principle in joint property division cases reflects the principles of progressive law, in which the law functions as a tool to achieve social welfare and justice.

The application of *ex officio* in judicial practice must meet several criteria to avoid being categorized as *ultra petita*. *First*, it must be based on a clear legal foundation, allowing judges the authority to independently and autonomously discover the law. *Second*, judges must not interfere with civil rights that are not demanded in the *petitum*. In cases of joint property division, judges do not add decisions regarding the disputed objects but focus on ensuring the execution of the ruling. *Third*, the decision must relate to the rights and obligations of the parties beyond the *petitum*, ensuring that these obligations are fulfilled fairly. *Fourth*, judges must not change the legal status of the parties or decide on legal relationships not requested by the litigants. *Fifth*, the ruling must remain consistent with the applicable legal system and existing legal norms. *Sixth*, the ruling's purpose is to resolve the case and avoid legal uncertainty. *Seventh*, the ruling must uphold values of justice and truth, with judges acting based on greater legal interests rather than merely formal legal aspects.

From a progressive legal perspective, the use of the *ius contra legem* principle in interpreting Article 97 of the Compilation of Islamic Law (KHI) indicates that the law must be flexible and able to adapt to the needs of substantive justice. Therefore, to ensure more inclusive justice, it is highly recommended that Article 97 of the KHI be amended with the provision:

"Joint property between former husband and wife may be divided equally (50:50) or based on each party's contribution in acquiring it."

This amendment aligns with *intuitive legal reasoning*, where the law is not solely based on deductive logic or textual norms but also incorporates moral intuition, justice values, and social wisdom prevailing in society. Such reasoning allows a *mujtahid* or judge to grasp the underlying values behind established social practices like joint property division and to adjust the law contextually, transformatively, and integratively.

Thus, Islamic law is not rigid but dynamic and adaptive to social changes without compromising the essence of upholding justice and humanity. The law becomes more responsive to social realities and avoids normative rigidity. This reform also provides a stronger legal basis for judges to apply the *ius contra legem* principle proportionally and responsibly. Ultimately, the application of *ex officio* and *ius contra legem* in dividing joint property is a manifestation of progressive law oriented towards substantive justice and social welfare.

In the context of legal pluralism, provisions regarding marital property should also take into account the living legal conditions within society. Contextual legal considerations

⁴⁴ M. Zulfa Aulia, "Hukum Progresif Dari Satjipto Rahardjo: Riwayat, Urgensi, Dan Relevansi," *Undang: Jurnal Hukum* 1, no. 1 (2018): 159–85, <https://doi.org/10.22437/ujh.1.1.159-185>.

are crucial in legal reforms to ensure that regulations are not only normative but also relevant and effective in social practice. Werner Menski's legal pluralism approach, which highlights the interaction among various legal systems—normative, customary, and state law—provides an important foundation for understanding the complexity of marital property regulations within Islamic family law in Indonesia.

In the study of marital property division, substantive justice is the primary goal, requiring adjustments in division based on both economic and non-economic contributions as well as the socio-economic conditions of each party. By accommodating the coexistence of multiple legal norms, including customary law and societal practices, legal reforms on marital property division can be more responsive to the real needs of society and better realize true substantive justice for all parties involved.

Conclusion

Islamic family law, especially regarding the division of joint marital property, must be dynamic and responsive to social developments and the need for substantive justice. The application of *ex officio* authority by judges in joint property division cases provides flexibility in upholding justice, provided it meets certain criteria to avoid violating the *ultra petita* principle. Judges can use the *ius contra legem* principle to interpret legal provisions progressively, ensuring that the law is not rigid and can adapt to evolving social contexts and moral values. Therefore, reforming Islamic family law to accommodate fair division of joint property—whether proportionally based on contribution or equal sharing—is essential to guarantee welfare and social justice in family life. This approach makes Islamic law more adaptive, transformative, and upholds human values and justice.

The ideal legal formulation in regulating joint property in Indonesia should be based on the principle of substantive justice, not merely emphasizing formal equality as stipulated in Article 97 of the Compilation of Islamic Law (KHI). Regulations need to be updated by incorporating the element of each party's contribution in acquiring joint property, so that the division becomes more proportional and not just 50:50. Furthermore, flexibility is required for judges through their *ex officio* authority to adjust decisions based on socio-economic conditions and to provide legal protection for the weaker party. With a progressive legal approach, this legal formulation will be more responsive to societal realities, ensuring justice that is not only legalistic but also meaningful for all parties involved.

This study recommends that policymakers revise existing regulations, especially Article 97 of the Compilation of Islamic Law (KHI), to explicitly recognize contribution-based property division and provide clear guidelines for judges to exercise fair discretion. Additionally, further empirical research is needed to examine the influence of socio-economic factors on judicial decisions and how customary law practices can be integrated into the national legal system to strengthen the pluralistic legal approach. These efforts are expected to make marital property regulations more relevant and responsive to societal conditions.

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