



Contra Legem Judicial Reasoning in Marital Property Division: *Maqāṣid al-Shari‘ah* and Distributive Justice

Penalaran Yudisial *Contra Legem* dalam Pembagian Harta Perkawinan: *Maqāṣid al-Shari‘ah* dan Keadilan Distributif

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Abstract

The distribution of marital joint property after divorce in Indonesian Islamic family law is normatively governed by Article 97 of the Compilation of Islamic Law (KHI), which prescribes an equal division (50:50) between spouses. However, rigid adherence to this provision often fails to achieve substantive justice, as it overlooks actual contributions, unequal power relations within marriage, and structural gender inequalities. As a result, formal equality may perpetuate injustice, particularly against economically and socially disadvantaged spouses, especially women. This study examines the legitimacy of *contra legem* judicial decisions in marital property disputes and seeks to reconstruct a more just distribution model based on the perspective of *maqāṣid al-shari‘ah*. The research employs a normative legal method using statutory, conceptual, and case-based approaches. The data analysis method is qualitative and normative in nature. Its analytical framework integrates John Rawls' theory of distributive justice as the grand theory, Satjipto Rahardjo's progressive law as the middle theory, and Yasser Auda's *maqāṣid al-shari‘ah* as the applied theory. The findings reveal that a mechanical 50:50 division reflects formal equality rather than substantive justice and, in certain contexts, sustains inequality. The study further demonstrates that *contra legem* judicial rulings in joint property cases possess strong juridical, philosophical, and ethical justification when grounded in factual contributions and contextual realities. From a *maqāṣid* perspective, the distribution of marital property should prioritize justice (*al-‘adl*), protection of wealth (*hifz al-māl*), and public welfare (*maṣlaḥah*), rather than numerical equality alone. Accordingly, this research recommends a reinterpretation or reformulation of Article 97 KHI to provide judges with broader discretion to ensure proportional and context-sensitive outcomes that embody substantive justice.

Kata Kunci:

Harta bersama Perkawinan; Contra Legem; Keadilan Distributif;

Abstrak

Pembagian harta bersama setelah perceraian dalam hukum keluarga Islam di Indonesia secara normatif diatur dalam Pasal 97 Kompilasi Hukum Islam (KHI), yang menetapkan pembagian secara sama rata (50:50) antara suami dan istri. Namun, penerapan ketentuan ini secara kaku sering kali gagal mewujudkan keadilan substantif karena mengabaikan kontribusi nyata para pihak, ketimpangan relasi kuasa

Maqāṣid al-Shari‘ah; Hukum Progresif

dalam perkawinan, serta ketidaksetaraan gender yang bersifat struktural. Akibatnya, kesetaraan formal justru dapat melanggengkan ketidakadilan, terutama terhadap pasangan yang secara ekonomi dan sosial berada pada posisi kurang menguntungkan, khususnya perempuan. Penelitian ini mengkaji legitimasi putusan hakim yang bersifat *contra legem* dalam sengketa harta bersama serta berupaya merekonstruksi model pembagian yang lebih adil berdasarkan perspektif *maqāṣid al-shari‘ah*. Penelitian ini menggunakan metode penelitian hukum normatif dengan pendekatan perundang-undangan, konseptual, dan berbasis kasus. Metode analisis data bersifat kualitatif dan normatif. Kerangka analisis penelitian ini mengintegrasikan teori keadilan distributif John Rawls sebagai teori besar, hukum progresif Satjipto Rahardjo sebagai teori menengah, dan *maqāṣid al-shari‘ah* Yasser Auda sebagai teori terapan. Hasil penelitian menunjukkan bahwa pembagian harta bersama secara mekanis dengan rasio 50:50 lebih merepresentasikan kesetaraan formal daripada keadilan substantif dan, dalam konteks tertentu, justru mempertahankan ketimpangan. Penelitian ini juga menunjukkan bahwa putusan hakim yang bersifat *contra legem* dalam perkara harta bersama memiliki justifikasi yuridis, filosofis, dan etis yang kuat apabila didasarkan pada kontribusi faktual dan realitas kontekstual. Dari perspektif *maqāṣid*, pembagian harta bersama harus mengutamakan keadilan (*al-‘adl*), perlindungan harta (*hifz al-māl*), dan kemajuan umum (*maslahah*), bukan semata-mata kesetaraan numerik. Oleh karena itu, penelitian ini merekomendasikan reinterpretasi atau reformulasi Pasal 97 KHI guna memberikan diskresi yang lebih luas kepada hakim dalam mewujudkan putusan yang proporsional, kontekstual, dan mencerminkan keadilan substantif.

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INTRODUCTION

Background of the Problem

Marriage is a social and religious institution that has existed since the earliest stages of human civilization and has played a fundamental role in structuring human life (Ilahi, 2021). Universally, marriage is not merely a mechanism for biological reproduction, but also a foundational framework for social order, moral regulation, and the preservation of collective values (Salma Chalisha, 2023). Throughout history, the form, meaning, and objectives of marriage have continuously evolved in response to cultural, religious, and socio-economic transformations (Ginny Mega Maulidya Hasibuan, 2022). In pre-modern societies, marriage often functioned as a social or economic contract that regulated alliances between families and ensured social stability, rather than as a relationship grounded in mutual affection and ethical responsibility (Bunyamin et al., 2023).

In the Arabian Peninsula prior to the advent of Islam, marital practices reflected deeply patriarchal social structures that frequently marginalized women and reduced them to objects of exchange and exploitation (Windiarti & Besral, 2018). Various forms of marriage such as *nikāh mut‘ah*, *nikāh istibdā‘*, and *nikāh shighār* illustrated the absence of legal and moral safeguards for women’s dignity and rights. The Qur’anic discourse,

particularly in QS. *an-Nūr*: 33, documents this social reality and simultaneously articulates a strong moral condemnation of coercion, sexual exploitation, and the commodification of women (Mohammed, 2024). Against this backdrop, Islam introduced a transformative vision of marriage as a sacred covenant (*mithāqan ghalīzān*), grounded in justice, mutual consent, responsibility, and compassion, as affirmed in QS. *an-Nisā* : 21 and QS. *ar-Rūm*: 21.

Within Islamic jurisprudence, marriage is conceptualized not only as a civil contract but also as an act of worship that integrates horizontal relations between spouses and vertical accountability before God (Few-Demo & Allen, 2020). This framework establishes a clear allocation of rights and obligations, particularly in relation to financial responsibility (*nafāqah*), which is principally borne by the husband, while the wife retains independent ownership over her property and income. Classical Islamic law does not recognize the concept of joint marital property (*harta bersama*) as an inherent legal category; instead, property ownership remains individual unless explicitly transformed through contractual arrangements such as *syirkah* (partnership) (Muhtadin et al., 2022).

In the Indonesian legal context, however, marriage is regulated through Law of the Republic of Indonesia Number 16 of 2019 on Amendments to Law Number 1 of 1974 concerning Marriage and further elaborated for Muslims through the Compilation of Islamic Law (Kompilasi Hukum Islam/KHI). These instruments adopt the concept of joint marital property, stipulating that assets acquired during marriage constitute *harta bersama* and, upon divorce, are to be divided equally between former spouses, as stated in Article 35 of the Marriage Law and Article 97 of the KHI. This normative construction reflects a legal compromise between Islamic principles and Indonesian customary law, rather than a direct derivation from Qur’anic or Prophetic sources (Lubis et al., 2025).

Previous studies on marital property in Indonesian Islamic family law have largely focused on doctrinal analysis of statutory provisions, the historical development of the KHI, or the compatibility of joint property with Islamic legal theory (Pelu & Dakhoir, 2021). Many works tend to accept the 50:50 distribution formula as a neutral and equitable solution, emphasizing legal certainty and formal equality (Siregar, 2024). Other studies have critiqued the concept of *harta bersama* from a classical *fiqh* perspective, highlighting its roots in adat law and its tension with individual property rights in Islam (Rahmi et al., 2025). However, much of this scholarship remains text-oriented and insufficiently engages with judicial practice and the lived realities of contemporary marital relations (Fauziah Lubis, 2024).

A significant gap emerges when normative legal provisions are confronted with empirical judicial developments. In practice, Indonesian religious courts particularly through Supreme Court decisions have increasingly departed from the rigid application of Article 97 KHI. A growing body of jurisprudence demonstrates judicial resistance to the automatic 50:50 division of marital property, especially in cases where factual evidence reveals stark inequalities in economic contribution, neglect of financial responsibility, or disproportionate domestic and productive labor. Decisions such as Supreme Court Ruling No. 266 K/AG/2010, No. 597 K/Ag/2016, and No. 78 K/Ag/2021 illustrate a consistent pattern of *contra legem* reasoning, whereby judges prioritize substantive justice over literal compliance with statutory norms.

Despite the significance of these developments, existing research has not sufficiently theorized the epistemological and normative foundations of such *contra legem* decisions. The question of why and how judicial deviation from Article 97 KHI can be justified within an Islamic legal framework remains underexplored. In particular, the potential of *maqāṣid al-syari‘ah* as a methodological lens to legitimize and systematize these judicial practices has not been comprehensively examined. This absence creates a theoretical vacuum in which progressive judicial reasoning operates without a robust scholarly

framework to support it (Rahman & Lubis, 2023).

The novelty of this article lies in its integrative approach. Rather than treating *contra legem* rulings as exceptional or problematic, this study positions them as manifestations of *maqāṣid*-oriented judicial *ijtihād*. By situating the division of joint marital property within the objectives of Islamic law especially *hifz al-māl* (protection of property), al-‘adālah (justice), and the prevention of harm this article reconceptualizes marital property disputes as a form of distributive justice analogous to *syirkah* in Islamic commercial law. Furthermore, it advances the argument that rigid adherence to formal equality may, in certain contexts, perpetuate structural injustice, particularly against women whose economic and domestic contributions are rendered invisible by arithmetical distribution.

Accordingly, the aim of this article is to critically examine the normative position of joint marital property within the Compilation of Islamic Law, to analyze the scope of judicial authority and *ex officio* competence in deviating from statutory provisions, and to articulate a *maqāṣid al-syari‘ah*-based framework for assessing *contra legem* decisions in Islamic family law adjudication. By bridging doctrinal analysis, jurisprudential practice, and *maqāṣid* theory, this study seeks to contribute to the reconstruction of a more just, contextual, and ethically grounded paradigm of marital property division in contemporary Islamic law in Indonesia.

Identification of the Problem

The normative regulation of joint marital property in Indonesian Islamic family law, particularly Article 97 of the Compilation of Islamic Law (KHI), mandates an equal 50:50 division upon divorce. However, this rigid formulation often fails to reflect substantive justice, as it ignores unequal economic contributions, domestic labor, power imbalances within marriage, and structural gender inequality. In judicial practice, religious court judges have increasingly departed from this provision through *contra legem* reasoning to achieve fairer outcomes. Nevertheless, the epistemological, juridical, and Islamic legal foundations of such judicial deviations remain insufficiently theorized, creating tension between statutory norms, judicial practice, and Islamic legal principles.

Research Questions

This research is guided by several interrelated questions concerning the division of marital joint property in Indonesian Islamic family law. First, it seeks to examine how joint marital property is normatively conceptualized and regulated within the Compilation of Islamic Law, particularly in relation to Article 97 KHI and its underlying legal assumptions. Second, the study questions the juridical, philosophical, and ethical foundations that allow judges to depart from statutory provisions through *contra legem* reasoning in marital property disputes. Third, it explores how *maqāṣid al-shari‘ah* can function as a methodological framework to legitimize, systematize, and guide such judicial deviations in order to achieve substantive justice. Finally, the research inquires into the extent to which *contra legem* judicial decisions contribute to the realization of distributive justice and the protection of disadvantaged spouses especially women within the contemporary adjudication of Islamic family law in Indonesia.

Research Objective and Benefits

This study aims to critically examine the normative construction of joint marital property under Indonesian Islamic family law and to analyze the scope of judicial authority in

departing from Article 97 KHI through *contra legem* reasoning. By employing a *maqāṣid al-shari‘ah* framework, the research seeks to formulate a more just, proportional, and context-sensitive model for the division of marital property. The findings are expected to contribute theoretically by strengthening the integration of *maqāṣid* theory, distributive justice, and progressive legal reasoning within Islamic family law. Practically, this research provides normative guidance for judges, legal practitioners, and policymakers in developing marital property adjudication that better reflects substantive justice, gender equity, and contemporary social realities in Indonesia.

THEORITICAL AND CONCEPTUAL FRAMEWORK

Theoretical Framework

Distributive Justice (John Rawls)

John Rawls' theory of justice as fairness, as articulated in *A Theory of Justice* (1971), represents a fundamental shift in modern legal and moral philosophy. Rawls rejects purely formal and positivistic notions of justice and instead proposes a distributive framework grounded in fairness, rationality, and ethical concern for structural inequality. His theory is built upon two core principles: (1) equal basic liberties for all individuals, and (2) the difference principle, which permits social and economic inequalities only insofar as they benefit the least advantaged members of society. Rawls' framework is highly relevant to the issue of joint marital property in Indonesian Islamic family law. The rigid application of Article 97 of the Compilation of Islamic Law (KHI), which mandates an automatic 50:50 division of joint property after divorce, reflects a model of numerical equality that often ignores actual contributions and social vulnerability (Pelu & Dakhoir, 2021). From a Rawlsian perspective, such formal equality fails to achieve substantive justice, particularly when one spouse often the wife has made greater material or non-material contributions but remains structurally disadvantaged (Hauzel & Patnaik, 2024).

The relevance of Rawls' theory is further reinforced by progressive judicial decisions in Indonesia that depart from strict equality in favor of proportional distribution based on contribution. These judicial practices resonate with Rawls' insistence that justice must be evaluated from the standpoint of those in the weakest position. Thus, Rawls' theory provides a strong philosophical foundation for critiquing rigid legal norms and prioritizing substantive distributive justice in marital property disputes.

Progressive Law (Satjipto Rahardjo)

Satjipto Rahardjo's theory of Progressive Law constitutes a critical response to legal positivism and formalism in Indonesian jurisprudence. Progressive law asserts that law is not an end in itself but a means to achieve justice and human dignity (Kurniawan & Suyatno, 2025). Rahardjo famously argued that "law exists for humans, not humans for law," emphasizing that rigid adherence to legal texts can legitimize injustice when detached from social realities. Within this framework, judges are not merely passive executors of statutory provisions but active agents of social justice (Setyawan, 2025). Progressive law legitimizes judicial creativity, including *contra legem* decisions, when statutory norms conflict with substantive justice (Lubis & Sinaga, 2023). In the context of joint property disputes, the automatic enforcement of a 50:50 division under Article 97 KHI exemplifies legal certainty that sacrifices fairness. Progressive law supports judicial courage to depart from such norms when factual circumstances such as unequal economic contribution or gender-based structural inequality demand a more equitable outcome. Indonesian Supreme Court decisions that allocate joint property

disproportionately in favor of the wife illustrate the practical application of this theory (Nurzannah et al., 2023). As a middle theory, progressive law bridges abstract justice ideals and concrete judicial practice, providing methodological justification for departing from rigid legal texts in pursuit of substantive justice (Wahyudi & Suntana, 2025).

Maqāṣid al-Sharī‘ah (Yasser Auda)

Yasser Auda's contemporary reformulation of *maqāṣid al-sharī‘ah* offers a dynamic, systemic, and context-sensitive approach to Islamic legal reasoning. In *Maqāṣid al-syari‘ah* Philosophy of Islamic Law: A Systems Approach (2008), Auda reconceptualizes *maqāṣid* not as static objectives but as an open, multidimensional ethical framework oriented toward justice, human dignity, and social transformation (Sulhadi, 2024). Auda's *maqāṣid* framework is particularly relevant to the critique of mechanistic application of Article 97 KHI. The principle of *hifz al-māl* (protection of wealth) is not limited to safeguarding ownership but extends to ensuring just acquisition, distribution, and recognition of both material and non-material contributions (Warisno et al., 2025). Domestic labor, emotional support, and caregiving often performed by women must therefore be recognized as legally and morally significant contributions. By prioritizing justice (*al-‘adl*) as a supreme objective, Auda's *maqāṣid* approach legitimizes reinterpretation or even rejection of legal norms that produce harm (*mafsadah*) (Wahyudi et al., 2025). In this sense, contra legem judicial decisions that distribute joint property proportionally rather than equally align with the higher objectives of Islamic law. Auda's theory also harmonizes well with Rawls' distributive justice and Rahardjo's progressive law, positioning *maqāṣid* as an ethical umbrella that integrates Islamic principles with contemporary justice theories (Anas Asy'ari Nashuha et al., 2025).

Conceptual Framework

This study employs an integrative conceptual framework that synthesizes John Rawls' theory of distributive justice, Satjipto Rahardjo's progressive law, and Yasser Auda's *maqāṣid al-sharī‘ah* to analyze *contra legem* judicial reasoning in the division of marital joint property. Rawls' distributive justice serves as the grand theoretical foundation, emphasizing fairness, the difference principle, and the moral priority of protecting the least advantaged spouse when legal equality produces substantive inequality (Taufik & Utami, 2025). This perspective provides a critical lens to evaluate the limitations of rigid numerical equality embodied in the 50:50 division mandated by Article 97 of the Compilation of Islamic Law.

Rahardjo's progressive law functions as the middle theory that operationalizes these justice ideals within judicial practice. It conceptualizes judges as active agents of social justice who are normatively justified in departing from statutory provisions when strict legal formalism conflicts with lived realities and ethical fairness. Progressive law thus legitimizes *contra legem* decisions as a method of correcting structural injustice in marital property disputes.

Auda's *maqāṣid al-sharī‘ah* constitutes the applied and normative framework that grounds judicial discretion within Islamic legal philosophy. By prioritizing justice (*al-‘adl*), protection of wealth (*hifz al-māl*), and the prevention of harm (*dar’ al-mafsadah*), *maqāṣid* provides ethical validation for proportional and context-sensitive distribution of joint property. Together, these three frameworks form a coherent analytical model that bridges philosophical justice, progressive adjudication, and Islamic legal objectives to support substantive justice in marital property division.

METHODOLOGY

This study employs a normative juridical research method, focusing on the analysis of legal norms, statutory regulations, and judicial decisions relevant to the issue of joint marital property (harta bersama) (Defri Maulana & Yandi, 2025). Normative juridical research is appropriate for this study because it examines law as a normative system, emphasizing legal principles, legal doctrines, statutory provisions, and jurisprudence as the primary objects of analysis (Lamada & Gumilang, 2020). The research is designed to critically assess the consistency, interpretation, and application of legal norms governing joint property, particularly within the framework of Indonesian positive law and Islamic legal reasoning. The nature of this research is descriptive-analytical. It does not merely describe existing legal norms and court decisions but also critically analyzes their substance, coherence, and implications. The analysis aims to identify normative tensions, interpretative patterns, and judicial reasoning especially in decisions that deviate from the formal provisions of the Compilation of Islamic Law (KHI) (Edi & Kumar, 2024).

The data used in this research are predominantly library-based (doctrinal research). The primary legal materials consist of court decisions obtained from the Directory of Decisions of the Supreme Court of the Republic of Indonesia, including Decision No. 139/PDT/2023/PT MDN, Decision No. 0396/Pdt.G/2023/PA.Klt, Decision No. 311/Pdt.G/2024/PN Tab, Decision No. 89/Pid.B/2024/PN Tab, Decision No. 206/Pdt.G/2025/PA.Bn, and Decision No. 192/Pdt.G/2025/PA.Rtu. These decisions serve as the main empirical basis for examining judicial reasoning in cases concerning joint marital property. Secondary legal materials are used to support and strengthen the primary data. These include statutes and regulations such as Law No. 1 of 1974 on Marriage, the Compilation of Islamic Law (KHI), relevant provisions of the Civil Code, as well as scholarly works in the form of textbooks, journal articles, dissertations, research reports, and legal commentaries that discuss Islamic family law, joint property, *maqāṣid al-syārī‘ah*, and judicial discretion. Tertiary legal materials, including legal dictionaries, the Indonesian Dictionary (KBBI), and Arabic legal terminology references, are utilized to clarify legal and conceptual terms relevant to the analysis.

This research adopts several complementary approaches. The statutory approach is used to examine and interpret legislation governing marriage and joint property, particularly the Marriage Law and the KHI, in order to assess their normative construction and internal coherence. The case approach is employed to analyze judicial decisions that have obtained permanent legal force, with particular attention to the judges' legal reasoning (*ratio decidendi*), considerations of fact, and the manner in which statutory provisions are applied, interpreted, or departed from. In addition, a conceptual approach is applied by drawing on legal doctrines, theories of justice, *maqāṣid al-syārī‘ah*, and Islamic jurisprudential concepts such as *syirkah*, in order to construct a normative and theoretical framework for evaluating *contra legem* decisions.

Data collection is conducted through systematic library research. Relevant legal materials are inventoried, reviewed, and examined in depth to ensure a comprehensive understanding of the legal issues under study. The analysis of legal materials is carried out qualitatively using descriptive and analytical techniques. Legal norms and judicial decisions are systematically compared to identify inconsistencies, normative conflicts, and patterns of judicial interpretation, particularly between Article 97 of the KHI and Supreme Court jurisprudence on joint marital property.

The data analysis method is qualitative and normative in nature. The collected legal materials are organized and interpreted to reveal strengths, weaknesses, and gaps within existing legal norms. Judicial decisions are analyzed on a case-by-case basis to assess how judges exercise discretion and apply *maqāṣid*-oriented reasoning in resolving

disputes over joint property. The results of the analysis are presented in a structured and coherent narrative, aiming to produce a descriptive-analytical account that contributes to the development of a more just and context-sensitive framework for the division of joint marital property in Indonesian Islamic family law.

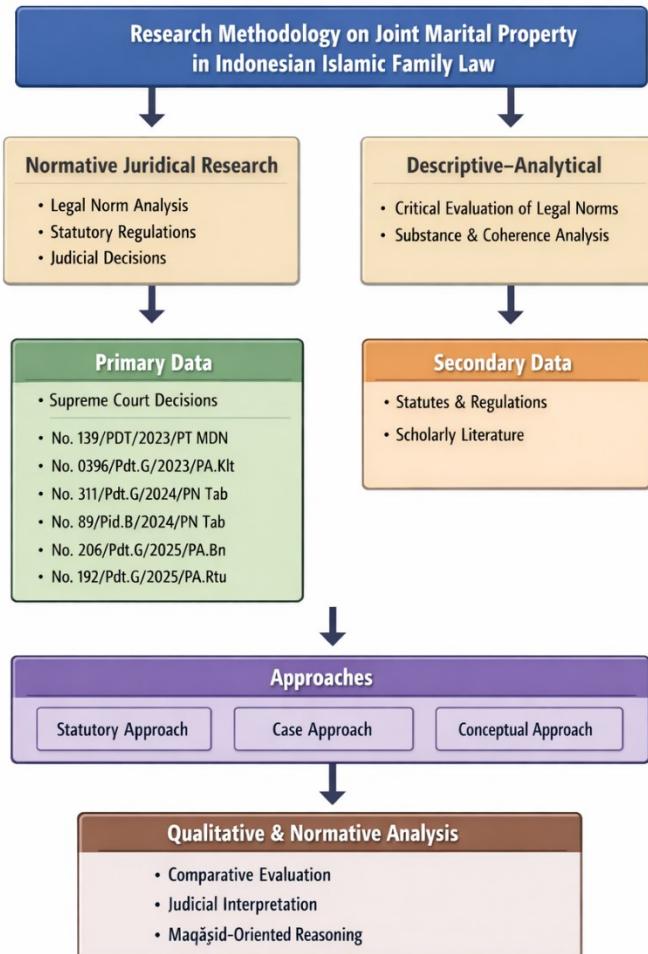


Figure 1. Research Methodology Flowchart

RESULT AND DISCUSSION

Result

The Normative Status of Marital Property in the Compilation of Islamic Law

The Concept of Marital Property from the Perspective of Islamic Law

Marital property refers to all assets acquired by a husband and wife during the course of a marital bond, whether obtained jointly or individually, regardless of in whose name the assets are registered. This concept is intended to ensure justice, balance, and the protection of the rights of both parties within the marital relationship, particularly in cases of divorce or death.

In Islamic law, there is no detailed regulation governing the division of marital property. Instead, general principles for its settlement are provided through *al-ṣulh* (amicable settlement), *'urf* (prevailing social customs), and, as a last resort, judicial adjudication (*qadā*). Resolution through mutual deliberation is strongly encouraged in order to

achieve mutual consent (*ridā*) between the parties. The moral values underlying the division of marital property include compassion, justice, and public benefit (*maṣlahah*), as reflected in the Qur'an and the Prophetic traditions.

In Indonesian positive law, the regulation of marital property is governed by Law Number 1 of 1974 on Marriage, the Compilation of Islamic Law (KHI), and is further supported by the jurisprudence of the Supreme Court. In principle, assets acquired during the marriage constitute marital property, while premarital assets, gifts, and inheritance remain the personal property of each spouse. The division of marital property is generally carried out on an equal basis ($1/2 : 1/2$), unless otherwise determined by agreement or a marital contract. The KHI also regulates the forms of marital property, including both tangible and intangible assets such as shares, insurance policies, and securities. It further governs liability for debts, provisional seizure of marital property, and legal protection against actions that may cause harm to marital assets. In polygamous marriages, marital property with each wife is considered separate and independent, calculated from the commencement of each respective marriage.

The division of marital property takes place after the dissolution of the marriage due to divorce or death. Article 37 of the Marriage Law affirms that the distribution of marital property shall be carried out in accordance with the applicable law of the parties, namely religious law, customary law, or other relevant legal systems. Furthermore, Constitutional Court Decision Number 69/PUU-XIII/2015 expanded the meaning of marital agreements, allowing them to be made either before or during the marriage, as a preventive measure to minimize disputes over marital property following divorce. Overall, the regulation of marital property in both Islamic law and Indonesian positive law reflects a balanced position between husband and wife and demonstrates the efforts of both the state and religion to ensure justice, legal protection, and public welfare within family life.

Protection and Rights over Marital Property Based on the Compilation of Islamic Law

1. Marital Property from the Perspective of Islamic Law

From the perspective of Islamic law, the concept of marital property is not explicitly regulated in the Qur'an or the Hadith. Nevertheless, it may be justified through the application of 'urf (prevailing social customs), *maqāṣid al-shari‘ah*, and universal principles of Islamic law such as justice, public welfare (*maṣlahah*), balance, and compassion. Islamic law fundamentally regulates social relations in a general and normative manner, while the technical aspects of *mu‘āmalāt* are left to social dynamics and cultural contexts, provided that they do not contradict explicit *shari‘ah* texts (*nass shar‘i*).

The existence of marital property in Indonesia reflects an accommodation of customary practices that have long recognized joint ownership and collective efforts by spouses in acquiring property. In *uṣūl al-fiqh*, valid custom ('urf *ṣahīḥ*) may serve as a source of law, as encapsulated in the legal maxim al-‘ādah muḥakkamah (custom has legal authority). Accordingly, the practice of marital property may be accepted within Islamic law insofar as it aims to realize public benefit and does not give rise to harm.

Normatively, Islamic law affirms the principle of separation of property between husband and wife. Each spouse retains full ownership of property acquired both before and during the marriage. The husband bears the obligation to provide maintenance (*nafāqah*) for his wife and children, without any right to take or control the wife's property except with her consent. Classical fiqh literature does not

recognize the concept of marital property within the chapter on marriage; however, joint ownership may be analogized to shirkah (partnership) in fiqh al-mu'amalāt, particularly when the husband and wife demonstrably engage in joint economic efforts to acquire property.

The determination of the legal status of property acquired during marriage falls within the realm of ijtihādiyyah, allowing for differing interpretations in accordance with social needs and conditions. In judicial practice, the division of marital property is encouraged to be conducted through deliberation (al-ṣulh), guided by principles of justice and fairness, while taking into account both financial and non-financial contributions, as well as post-divorce conditions especially the protection of parties who are vulnerable to economic hardship.

From the perspective of maqāṣid al-sharī'ah, recognition of marital property serves the objective of safeguarding both life and property (ḥifẓ al-nafs and ḥifẓ al-māl), particularly in protecting divorced wives so that they may continue to meet their basic needs with dignity. Thus, although not textually regulated, the construction of marital property in Islamic law may be normatively and sociologically justified, as it aligns with the overarching objectives of sharī'ah: justice, public welfare, and balance within family life.

2. Marital Property from the Perspective of Hadith

In Islamic teachings, human beings do not possess absolute ownership over property; rather, they are entrusted with the responsibility to utilize and manage it during their lifetime in accordance with the commands of Allah SWT. Ownership of property is therefore relative and subject to the limitations imposed by *sharī'ah* principles. Islam encourages the pursuit of wealth as a means of fulfilling life's necessities and contributing to society, provided that it is acquired through lawful, ethical means and does not involve deception, exploitation, or environmental harm. This principle is affirmed in a hadith of the Prophet Muhammad SAW, which states that the best food is that earned through one's own labor (narrated by al-Bukhari).

This view is reinforced by Imam al-Kāsānī in *Badā'i' al-Sanā'i'*, who emphasizes that a husband has no right to take or control his wife's property without her consent. This position is grounded in the hadith of the Prophet SAW stating that the property of a Muslim is not lawful to be taken except with the owner's willing consent (narrated by Ahmad). In the Hanafi school, this hadith serves as a normative foundation affirming that property ownership within marriage remains individual in nature. Accordingly, Islamic law as understood by the Hanafi school does not recognize an automatic concept of marital property within the household, as each individual—husband or wife—retains full ownership over property acquired, even within the marital bond.

3. Marital Property from the Perspective of the Majority of Scholars (*Jumhūr al-'Ulamā'*)

Classical fiqh scholarship generally does not address the concept of marital property in marriage. Neither in the classical fiqh texts nor in the Qur'an and Hadith is there an explicit regulation concerning the legal construction of marital property or the mechanisms for its division, whether due to divorce or death. Consequently, the discourse on marital property falls within the domain of ijtihādiyyah, developing through interpretation and legal practice. This discussion therefore examines the views of various fiqh schools regarding spousal property ownership, both theoretically and in practical social application.

a. The Hanafi School

The Hanafi school firmly maintains that marriage does not alter the legal status of property ownership between husband and wife. Both are regarded as independent individuals with separate and autonomous property rights. This position is articulated in authoritative Hanafi works such as *Al-Hidāyah* by al-Marghinānī and *Radd al-Muhtār* by Ibn ‘Ābidīn, which affirm that a husband has no right to control his wife’s property, and vice versa. This principle is grounded in Qur’ān Surah al-*Nisā’* (4):32, which affirms that each individual—male or female—is entitled to the fruits of their own labor.

In the Hanafi school, maintenance (nafāqah) provided by the husband constitutes a shari‘ah obligation rather than part of marital property. The principle of individual ownership is further reflected in Islamic inheritance law, wherein spouses receive only their designated shares of the deceased spouse’s estate in accordance with shari‘ah provisions, thereby underscoring the absence of automatic collective ownership within marriage. Property may only be considered jointly owned if there is a specific contract or agreement, such as a marital agreement or a grant (hibah).

A similar view is upheld by the Shāfi‘ī school, which likewise does not recognize the commingling of spousal property in marriage. A wife’s income remains her own property, and a husband’s earnings remain his, unless a shirkah contract or specific agreement exists. This perspective is influenced by the socio-cultural background of classical jurists who lived in Arab societies characterized by patrilineal kinship systems that did not recognize the concept of marital property.

Although Islamic law does not textually regulate marital property, its application is made possible through valid ‘urf that has developed and become entrenched in Indonesian society. In this context, marital property is understood as the result of a cooperative partnership (shirkah) between husband and wife in building the household economy according to their respective capacities. Islam also allows spouses to enter into marital agreements as legal instruments to regulate property separation or commingling and to facilitate peaceful dispute resolution. Thus, although not explicitly regulated in the scriptural texts, the recognition of marital property may be justified insofar as it aligns with the principles of public welfare, justice, and the objectives of Islamic law (maqāṣid al-shari‘ah).

b. The Maliki School

The Maliki school generally shares a similar view with the Hanafi school regarding property ownership in marriage, namely that husband and wife remain individuals with separate property rights. Marriage does not automatically result in the commingling or merging of assets. This principle is affirmed by Imam Mālik ibn Anas in *Al-Muwaṭṭa’* and is based on the hadith stating that a Muslim’s property is not lawful to be taken without the owner’s consent (narrated by Ahmad), as well as Qur’ān Surah aN-*Nisā’* (4):32, which affirms individual rights over earned property.

Nevertheless, the Maliki school allows greater flexibility in the management of marital property through contractual stipulations (shurūt al-‘aqd). If husband and wife knowingly and lawfully agree that property acquired during marriage will be jointly managed or owned, such an agreement may serve as a binding legal basis. This view is elaborated by Ibn Rushd in *Bidāyat al-Mujtahid*, who notes the existence of marital property-sharing practices in certain Muslim regions influenced by local customs, provided that such practices do not

contravene fundamental shari‘ah principles. In the event of divorce, the Maliki school holds that property division follows the original rule of individual ownership in the absence of a prior agreement. Conversely, where a valid agreement exists, property must be divided in accordance with that agreement. The principle of individual ownership also remains operative in inheritance law, where spouses receive shares determined by shari‘ah rather than based on the concept of marital property.

The Maliki approach reflects a fiqh tradition that is adaptive to social realities and customary practices ('urf), so long as they do not contradict Islamic principles. Accordingly, although Islam does not recognize an automatic concept of marital property, the Maliki school opens space for *ijtihād* to accommodate joint property arrangements through lawful agreements an approach that is particularly relevant for critical examination in the context of marital property regulation under the Compilation of Islamic Law in Indonesia.

Judicial Authority/Ex Officio Competence of Judges in The Sharia Court

Judges as Agents in the Realization of Justice

Judges do not merely function as applicers of law but also as finders of law (*rechtsvinding*), who are obliged to explore and internalize the living legal values within society in order to realize substantive justice. This role is explicitly affirmed in Law Number 48 of 2009 on Judicial Power, which mandates courts to adjudicate cases without discrimination, to assist justice seekers, and to administer justice that is simple, expeditious, and cost-efficient. Courts are further prohibited from refusing to examine, hear, and decide cases brought before them.

Within modern judicial systems, courts play a central role not only in rendering judgments but also in ensuring that judicial processes adhere to principles of openness, transparency, and accountability. In line with the views of Sudikno Mertokusumo, judges are required to actively engage in *rechtsvinding* based on their official authority in order to ensure substantive justice. This mandate is consistent with the principle of the rule of law as enshrined in Article 1 paragraph (3) of the 1945 Constitution, as well as the constitutional guarantee of legal certainty and equality before the law under Article 28D paragraph (1). Accordingly, judges are expected to act wisely and progressively in resolving disputes, so that the judiciary truly functions as a mechanism for achieving genuine justice.

Juridical Basis of Judicial Panels in Deciding Marital Property Cases Ex Officio

Ex officio authority refers to powers inherently attached to a judge by virtue of office, enabling judicial action without awaiting a formal request from the parties. This authority constitutes not merely a judicial prerogative but also a judicial obligation aimed at ensuring legal certainty, justice, and utility. Its normative foundation is found, *inter alia*, in Article 5 paragraph (1) of Law Number 48 of 2009 on Judicial Power, which obliges judges to explore legal values and societal notions of justice.

In judicial practice, ex officio authority is exercised in a limited and responsible manner, including rejecting unlawful evidence, protecting weaker parties, and imposing certain obligations in pursuit of substantive justice. In divorce proceedings within the Religious Court system, ex officio authority serves as a crucial instrument for protecting the rights of wives and children. This is reflected in Law Number 1 of 1974 on Marriage and the Compilation of Islamic Law (KHI), particularly Article 41 of the Marriage Law and Article

149 of the KHI, which provide a legal basis for judges to determine *mut‘ah*, *iddah* maintenance, child support, and other obligations even when such claims are not explicitly requested (Al-Umam Sitepu & Lubis, 2024). The application of this authority must consider the husband's financial capacity, the principle of proportionality, and the protection of structurally vulnerable parties. Conversely, disputes concerning marital property constitute matters of *mu‘āmalāt* that are not explicitly regulated in classical Islamic jurisprudence. Scholars across various schools Hanafi, Maliki, Shafi‘i, Hanbali, and Zahiri generally agree that property ownership in Islam is individual in nature. Marriage does not automatically result in the commingling of property between spouses unless established through a specific contract or agreement. This principle is affirmed in the Qur‘an, particularly Surah aN-*Nisā’* (4):32, which recognizes individual ownership based on personal effort.

The concept of marital property as recognized in Indonesian marriage law is not derived from classical *fiqh* but rather represents an assimilation of Islamic law and customary law deeply rooted in Indonesian society. This is reflected in Article 85 of the KHI, which stipulates that property acquired during marriage constitutes marital property unless otherwise determined by a prenuptial agreement. Several Indonesian Islamic legal scholars view this regulation as an effort to protect women's rights, although it has also been criticized for potentially deviating from the *fiqh* principle of individual ownership. Accordingly, the concept of marital property in Indonesian Islamic law constitutes a contextual legal construction that seeks to reconcile Islamic jurisprudential principles with social realities and demands for justice. Future reconstruction of the KHI must therefore be undertaken critically to ensure continued alignment with foundational principles of Islamic jurisprudence while providing fair and proportional legal protection for spouses and children in contemporary marital practice.

Spousal Property Ownership in Islam from the Shafi‘i School Perspective

Property ownership within marriage under Islamic jurisprudence is fundamentally grounded in the principle of individual ownership. Husband and wife are regarded as separate legal subjects, each possessing full rights over property acquired both before and during marriage. Marriage in Islam is not a contract that merges assets but rather one that regulates rights and obligations, particularly concerning maintenance and family responsibilities. Consequently, classical Islamic jurisprudence does not recognize an automatic concept of marital property. This position is consistently upheld by the four major Sunni schools Hanafi, Maliki, Shafi‘i, and Hanbali which affirm that spousal property remains separate unless governed by a specific contract such as *hibah*, *shirkah*, or a voluntarily agreed arrangement. Qur‘anic evidence, particularly Surah al-*Nisā’* (4):32, as well as Islamic inheritance law, further underscores the individual not collective nature of property ownership in Islam.

The concept of marital property in Indonesian marriage law does not originate from classical Islamic jurisprudence but rather represents an assimilation of Islamic law, customary law, and Western colonial legal influences. Indigenous kinship systems matrilineal, patrilineal, and bilateral—have shaped collective perspectives on marital property ownership, which were subsequently institutionalized in national law through Law Number 1 of 1974 and the Compilation of Islamic Law. Although textually inconsistent with classical *fiqh* principles, the recognition of marital property in Indonesian Islamic law carries sociological justification and considerations of public welfare, particularly as a legal protection mechanism for women and children following divorce. In Indonesian social realities, women frequently perform not only domestic roles but also substantial economic contributions to the household. Without legal recognition of such contributions, women are vulnerable to structural injustice.

Nevertheless, the automatic application of marital property in the KHI presents normative problems, as it conflicts with Islamic principles of individual ownership and risks inconsistency with Islamic inheritance law. Consequently, a more critical and contextual reconstruction of Islamic legal thought is required. Such reconstruction may be pursued through *maqāsid al-shari‘ah*, social *fiqh*, and Islamic law within the framework of the modern state. One proposed alternative is to conceptualize marital property as arising from agreement whether through *shirkah* or prenuptial contracts rather than as an automatic legal norm. This approach preserves the Islamic principle of individual ownership while ensuring equitable legal protection for women in accordance with contemporary social realities. Through this approach, Islamic law in Indonesia is expected to remain normatively authentic, socially adaptive, and substantively just in regulating property ownership within marriage.

Discussion

Legal Positivism

Norms governing marital property within Indonesian marriage law reveal serious structural problems at philosophical, constitutional, and sociological levels. Provisions contained in the Civil Code, Law Number 1 of 1974, and the Compilation of Islamic Law reproduce colonial legal logic that is legalistic, patriarchal, and anti-discretionary, thereby failing to respond to power relations and real inequalities within modern households. Although normatively promoting equality and asset unification, these norms instead create an illusion of justice that conceals economic and administrative domination by the stronger party—predominantly the husband. The automatic unification of assets disregards the reality that families are not homogeneous economic entities. Contributions within marriage are diverse and cannot always be measured materially or administratively. Yet positive law recognizes only formal ownership and written evidence, excluding non-material contributions such as domestic labor, childcare, and career sacrifice. Consequently, upon divorce, structurally weaker parties often lose access to marital assets despite having made substantial moral and social contributions.

The absence of mechanisms for asset registration, oversight, and transparency further exacerbates injustice. The state fails to provide preventive instruments to protect collective ownership during marriage, rendering the law reactive rather than protective and imposing burdensome evidentiary standards on victims. The mechanistic 50:50 division norm likewise lacks contextual sensitivity and frequently reinforces the dominance of parties who already control assets. From a constitutional perspective, this normative construction contradicts principles of equal treatment and substantive justice as guaranteed by the 1945 Constitution. Within *maqāsid al-shari‘ah*, marital property norms likewise fail to fulfill the objective of protecting wealth (*hifz al-māl*), as they do not ensure fair access, control, and distribution particularly for women. Islamic law, inherently adaptive and welfare-oriented, is thus reduced to rigid administrative formulations.

Although some progressive judicial practices attempt to account for qualitative contributions and relational contexts, such efforts remain sporadic and unsupported by normative reform. Comprehensive reconstruction of marital property norms is therefore imperative, encompassing recognition of material and non-material contributions, establishment of preventive protection systems, and expansion of judicial discretion grounded in substantive justice.

*Justice in Marital Property Division from the Perspective of *Maqāṣid al-Shari‘ah**

Marital property norms in Indonesian law demonstrate serious inconsistencies with constitutional principles of justice, equality, and human rights protection. Although the Constitution guarantees equality before the law and protection from discrimination, marital property provisions in the Civil Code, the Marriage Law, and the KHI continue to replicate patriarchal, rigid, and legalistic colonial logic. These norms create false equality by assuming equal positions between spouses without accounting for power relations, structural inequalities, and non-material contributions. The automatic unification and mechanistic 50:50 division of assets ignore the reality that marital contributions are not purely material. Domestic labor, childcare, career sacrifice, and emotional support—predominantly undertaken by women—are excluded from legal recognition. As a result, women are frequently disadvantaged in divorce proceedings due to lack of asset registration and formal evidence, while law maintains evidentiary standards biased toward structurally stronger parties.

This injustice is intensified by the absence of implementing regulations and administrative systems ensuring asset registration, transparency, oversight, and preventive protection. The state limits itself to declarative norms without providing operational instruments, rendering marital property law ineffective and discriminatory. From constitutional and human rights perspectives—including state obligations under CEDAW—this situation reflects a failure of state responsibility in ensuring justice distribution. Marital property norms thus violate equality before the law and substantive justice. Radical reformulation through constitutional and interdisciplinary approaches is therefore required.

*Reconstruction of Marital Property Division from the Perspective of *Maqāṣid al-Shari‘ah**

The post-divorce division of marital property based on the formal 50:50 equality principle under Article 97 of the KHI constitutes an illusion of justice that obscures structural inequalities within marital relations. Numerical equality fails to reflect substantive justice because it disregards actual contributions—both economic and non-material—that sustain household life. This mechanistic approach reflects the positivistic and textualistic nature of Indonesian family law, privileging formal certainty over contextual justice. Article 97 of the KHI restricts judicial discretion, reducing judges to “numerical distribution machines” and inhibiting their substantive justice function. Given that the KHI is an administrative compilation rather than formal legislation, it should remain open to progressive reinterpretation.

From the perspective of *maqāṣid al-shari‘ah*, rigid 50:50 division contradicts the principles of justice (*al-‘adl*), wealth protection (*hifz al-māl*), and human dignity. *Maqāṣid* emphasizes equitable distribution based on contribution and welfare rather than uniformity. Domestic labor and non-material contributions must therefore be recognized as legally valuable. This argument is reinforced by John Rawls’ theory of distributive justice and Satjipto Rahardjo’s progressive law, both emphasizing protection of the most disadvantaged and affirming that law exists for humanity. Norms sacrificing justice for textual certainty contradict Article 28D paragraph (1) of the Constitution, which requires fair legal certainty. Accordingly, Article 97 of the KHI must be reinterpreted or reformulated through a *maqāṣid*-oriented approach to prevent continued legitimization of gender inequality. Such reinterpretation constitutes not defiance of law, but a rescue of law from moral and social stagnation. Marital property division must shift from numerical equality to justice based on real contributions, thereby realizing a humane, constitutional, and *shari‘ah*-aligned family law system.

Limitation

This study is limited to normative legal analysis and does not incorporate empirical field research involving litigants, judges, or court administrators. The discussion relies on statutory provisions, constitutional principles, judicial decisions, and doctrinal analysis rather than quantitative or sociological data on post-divorce economic outcomes. In addition, the analysis focuses primarily on Indonesian Islamic family law and selected Supreme Court jurisprudence, and therefore does not provide a comparative examination with other Muslim jurisdictions. As a result, while the study offers a strong normative and theoretical critique, its findings are not intended to represent empirical generalizations of all marital property practices in Indonesia.

Novelty/Contribution

The novelty of this study lies in its integrative and critical reconstruction of marital property division through a *maqāṣid al-shari‘ah*-oriented framework that legitimizes *contra legem* judicial reasoning. Unlike previous studies that treat the 50:50 distribution under Article 97 KHI as normatively fixed or merely doctrinal, this research reconceptualizes marital property disputes as issues of distributive justice grounded in real contributions, power relations, and structural inequality. By systematically integrating John Rawls' theory of distributive justice, Satjipto Rahardjo's progressive law, and Yasser Auda's *maqāṣid* theory, the study provides a coherent theoretical foundation for proportional and context-sensitive adjudication. This contribution advances Islamic family law scholarship by offering a normative justification for expanding judicial discretion, recognizing non-material domestic contributions, and aligning Indonesian marital property law with constitutional principles, gender justice, and the ethical objectives of Islamic law.

CONCLUSION AND SUGGESTION

Conclusion

This study concludes that the application of *contra legem* reasoning in disputes over joint marital property can be normatively justified within the framework of *maqāṣid al-syari‘ah*. The objectives of Islamic law emphasize justice (al-‘adālah), proportionality, and the realization of public and individual welfare (*maṣlahah*), rather than rigid adherence to textual norms that may generate injustice in concrete cases. Accordingly, judicial decisions that appear to deviate from the literal provisions of positive law—particularly Article 97 of the Compilation of Islamic Law—remain consistent with the spirit of Islamic law when they substantively prevent harm, protect the rights of vulnerable parties, and ensure equitable distribution based on actual contributions. From a *maqāṣid* perspective, such decisions do not constitute legal deviation, but rather represent a legitimate effort to uphold the higher objectives of the *Shari‘ah*. Furthermore, *maqāṣid al-syari‘ah* functions as an ethical and philosophical foundation for assessing the validity of judicial decisions that transcend formal statutory boundaries. Within the context of the Religious Courts (Mahkamah Syariah), the exercise of *ex officio* authority is an inherent and legitimate judicial competence attached to the office of the judge.

This authority enables judges to render decisions beyond the explicit demands of the parties when necessary to achieve substantive justice, to remedy deficiencies in legal claims, and to protect structurally weaker parties most notably women and children. The study affirms that *ex officio* judicial action, when grounded in legal reasoning, justice, and *maṣlahah*, constitutes an integral mechanism for realizing the objectives of Islamic

family law. Finally, this research establishes that contra legem decisions in the Religious Courts emerge primarily in situations where positive legal norms are rigid, incomplete, or incapable of responding to the complexities of contemporary marital relations. In such circumstances, *maqāṣid al-syārī‘ah* provides a coherent methodological framework that legitimizes judicial discretion and guides judges toward outcomes that reflect distributive justice rather than mere formal equality. Thus, contra legem reasoning should be understood not as a violation of law, but as a form of purposive interpretation aimed at preserving the moral and social objectives of Islamic law within a modern legal system.

Suggestion

This study suggests the need for a paradigm shift in the understanding and application of joint marital property law in Indonesia. Legal reasoning in family law adjudication should not be confined to legal positivism alone, but must also incorporate living values of justice and social reality as reflected in judicial practice. Future research is encouraged to further explore the integration of *maqāṣid al-syārī‘ah* into statutory interpretation and judicial decision-making, particularly in cases involving economic inequality and gendered power relations within marriage. Additionally, further studies may focus on normative reconstruction of Article 97 of the Compilation of Islamic Law, either through doctrinal reform or jurisprudential development, in order to align positive law with evolving judicial practices and substantive justice. Comparative research examining how other Muslim-majority jurisdictions address the division of marital property through *maqāṣid*-based reasoning would also provide valuable insights. Finally, empirical research involving judges, litigants, and court institutions could enrich the understanding of how contra legem decisions are perceived, implemented, and institutionalized in practice. Such studies would contribute not only to academic discourse but also to the development of a more responsive, equitable, and context-sensitive framework for Islamic family law in Indonesia.

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