

Manchester Journal of Transnational Islamic Law & Practice

About

The Manchester Journal of Transnational Islamic Law & Practice (formerly the Journal of Islamic State Practices in International Law) was founded in 2005. The Journal is independent of any State, school of fiqh or institutional affiliation and has a diverse and global editorial board. It is indexed on Scopus and available both in electronic and printed forms.



Aims of the Journal

The principal objectives of the Manchester Journal of Transnational Islamic Law & Practice (MJTILP) are to provide a vehicle for the consideration of transnational forms of Islamic law and practice. Transnationalism in Islamic law is taken broadly as communications and interactions linking Islamic thoughts, ideas, people, practices and institutions across nation-States and around the globe. In recent times, research in Islamic law has shaped narratives based on nation-States, demographics, diasporic communities, and ethnic origins instead of developing around a central core. Contemporary issues of Islamic law are increasingly linked to geographical locations and ethnic or parochial forms of religious beliefs and practices. Expressions like American, European, British, Asian, and Arab Islam have widely gained acceptance.

Despite the growing importance of dialogue to develop shared understandings of issues facing Islamic law and proposing coordinated solutions, the contemporary research and scholarship has not developed harmoniously and remains piecemeal and sporadic. Researchers and practitioners of Islamic law are drawn from a wide variety of subjects and come from various regions of the world but have insufficient institutional support for sharing information and comparing experiences. Innovation in various strands and paradigms of Islamic law and practice is stifled because there are limited spaces where evolutionary, collaborative and interdisciplinary discourses can take place. This in turn hampers the ability to build on past research and record best practices, negatively impacting a consistent and orderly development of the field. There is a need to constitute a world community of Islamic law scholars based on interactions and aspirations moving across linguistic, ethnic, geographical and political borders.

The MJTILP is inspired by the need to fill these gaps. It provides a platform to legal and interdisciplinary scholars and researchers for critical and constructive commentaries, engagements, and interactions on Islamic law and practice that are built upon configurations in contemporary contexts. It welcomes contributions that look comparatively at Islamic law and practice that apprise and inspire knowledge across national boundaries whether enforced by a State or voluntarily practiced by worldwide Muslim communities. We are equally interested in scholarships on encapsulated cultural worlds, diaspora, identity and citizenship that are embedded and circumscribed by religious ties. As it has been the practice of the journal since its establishment in 2005, it also has a specific interest in issues relating to the practice of Muslim States in international law, international law issues that may concern Muslim countries, and all aspects of law and practice affecting Muslims globally.

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Contents

Articles:

- Covid-19 and the Demonisation of Muslims in India**
S. M. Aamir Ali, Darshi Sharma, Anuttama Ghose 1
- Discursive Discourse on the Breakdown Theory of Divorce and its Application in the Shari’ah-Compliant Maldives Family Act of 2000**
M. Z. M. Nomani, Faizan Mustafa, Mohammad Rauf 34
- Cultural Relativism and Women’s Rights in Islamic Personal Law in Saudi Arabia**
Beata Polok, Mariana Dussin, Dareen Abdulmohsen 51
- Approaches of the Religious Court Judges in Indonesia to Settle Joint Marital Property Disputes**
Sukiati, Nurasih, Milhan 71
- Legal Analysis of the Customary Practices in the Resolution of Family Disputes in Pakistan**
Zeeshan Ashraf Qureshi, Mohammad Azam Hussain, Ain Husna Mohammad Arshad 82
- Indonesian Muslim Women Ministers: Participation and Significance of the Muslim Women’s Movement in Indonesia since the Early Reformation to the Present**
Fajar Apriani, Thalita Rifda Khaerani 102
- Proving Murder by Qasamah (Oathtaking): A Historical Analytical Study**
Maher Haswa, Ibrahim Alqatawneh, Ahmed Fekry Moussa 115
- Streamlining Religiotainment: The Influence of Da’wah Content in Digital Space on the Life of the Samarinda Muslim Community in Indonesia**
Nurliah, Rina Juwita 128
- The Practice of Mohuyula (Mutual Cooperation) and Transformation of Local Culture Based on Islamic Law and Values in Gorontalo Coastal, Indonesia**
Zulkarnain Suleman, Zulfitri Zulkarnain Suleman 138

Constitutional Amendments in Algeria: Getting Through the Bottleneck <i>Samia Abdellaoui</i>	152
Health Insurance Cover in the Light of Islamic Law <i>Manswab Mahsen Abdulrahman, Ahmad Abbas</i>	165
The Assessment of Indonesia’s Religious Courts in Resolving Shari’ah Banking Disputes According to the Principles of Justice <i>Weny Almoravid Dunga, Mohamad Hidayat Muhtar, Lucyane Djaafar</i>	179
Ending the Debate of Islamic Law Permissibility of Digital Wallet Through the Lens of Fiqh Adaptation <i>Fauzul Hanif Noor Athief, Lukmanul Hakim, Imron Rosyadi, Azidni Rofiqo</i>	194
Constructing Islamic Law and Islamic Business Ethics for a Sustainable Halal Industry Economy <i>Wazin, Tulus Suryanto</i>	212
Ihya al-Mawat: Islamic Law Perspectives on the Concept of Land Occupation in International Law <i>Agus Triyanta, Saufa Ata Taqiyya</i>	224
The Principle of Non-refoulement as ‘Urf in Muslim Societies <i>Malahayati Rahman, Laila M. Rasyid, Yulia Yulia</i>	233
Navigation Rights in Islamic Tradition and Modern International Law <i>Nehaluddin Ahmad, Norulaziemah Zulkiffle</i>	251
Recent Legal Developments:	
Saudi Arabia’s Vision 2030, Shariah, and Contemporary Legal Trends: The Transformative Power of Law in Guiding Reforms <i>Mohammad Bashayreh</i>	267
Ensuring Privacy of Personal Data: A Panoramic View of Legal Developments in Personal Data Protection Law in Saudi Arabia <i>Siddharth Kanojia</i>	270
The Consumer Protection Bill 2022: A Quantum Leap of Consumer Policy in Saudi Arabia <i>Shaya Abdullah Alshahrani</i>	277
New Saudi Personal Status Law Codifies Key Women’s Rights <i>Nadia Ahmad</i>	285
The Empowerment of Women in the Kingdom of Saudi Arabia’s Workforce <i>Beata Polok, Mariana Dussin</i>	292

Moral Damages in the New Saudi Civil Transactions Law: The End of a Controversy <i>Nawel Ben Sassi</i>	301
The Recognition of the One-Person Company in the Kingdom of Saudi Arabia <i>Bouthaina Ali Noureldeen Atwan</i>	308
Achieving Legal Certainty in Civil Dealings: An Overview of the Saudi Civil Transactions Regulation <i>Nisreen Mahasneh</i>	313
 Book Reviews:	
<i>Rediscovery and Revival in Islamic Environmental Law: Back to The Future of Nature's Trust</i> Samira Idllalène, Cambridge University Press, Cambridge, 2021, xxiv + 164 pp. ISBN 978-1-108-48878-5 <i>Muhammad Wajid Munir</i>	322
<i>Islamic State as a Legal Order to Have No Law but Islam, between Shari'a and Globalization</i> Federico Lorenzo Ramaioli, Routledge, Milton, Abingdon-On-Thames, 2022, v + 210 pp. ISBN: 978-1-032-20257-0 <i>Absar Aftab Absar</i>	327
<i>Islamic State as a Legal Order; To Have No law but Islam, between Sharī'a and Globalisation</i> Federico Lorenzo Ramaioli, Routledge, Oxfordshire, 2022, 212 pp. ISBN 9781003262916 <i>Faizan Akbar</i>	331

Approaches of the Religious Court Judges in Indonesia to Settle Joint Marital Property Disputes

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Abstract: This article examines the approaches and considerations of judges in resolving marital assets and joint marital property (commonly referred to as *harta bersama* in Indonesia) disputes between husband and wife in Indonesian Religious Courts. The analysis includes an investigation of the judges' approach to determining the roles played by spouses in creating joint marital property and the effect of such determination on the division of joint marital property. The article finds that judges have followed both textual and contextual approaches to the applicable law in determining the role played by spouses in creating joint marital property. The analysis in this article finds that the provisions on the joint marital property included in Indonesian law requiring a 50:50 division of joint family property are primarily aimed at protecting the rights of women where their role in marital life is limited to being homemakers. However, judges have taken broad and flexible approaches to apply this law and have not only included working women within the fold of this law but also given working women a preferable treatment as compared to working men. This article concludes that the division of joint marital property involving working women – whether the men work or not – is no longer based on the provisions included in the Indonesian Islamic family law, rather they are based on the type of role played by women who have contributed to the creation of joint marital property.

Keywords: *Harta Bersama*; Joint marital property; Marital Assets; Islamic Courts; Indonesia

I. INTRODUCTION

There are significant inconsistencies in the approach adopted in different countries to settle disputes over marital assets and joint marital property (hereinafter combinedly referred to as joint marital property) under Islamic family law.¹ In addition, studies highlighting issues of gender inequality in the cases of joint marital property are increasingly widespread.² The possibility to consider multiple factors, such as what role a husband or wife has played in the creation of joint marital property, further complicates this area of Islamic family law.³ In the

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¹ Krista Jacobs & Aslihan Kes, 'The Ambiguity of Joint Asset Ownership: Cautionary Tales From Uganda and South Africa' (2015) 21 (3) *Feminist Economics* 23-55; C. M. V. Clarkson, 'Matrimonial Property On Divorce: All Change In Europe' (2008) 4 (3) *Journal of Private International Law* 421, 449.

² Carmen Diana Deere and Cheryl R. Doss, 'The Gender Asset Gap: What Do We Know And Why Does It Matter?' (2006) 12 (1) *Feminist Economics* 25, 50.

³ Rhona Schuz, 'Choice of Law in Relation to Matrimonial Property in the 21st Century' (2019) 15 (1) *Journal of Private International Law* 31, 49.

Indonesian context, legal considerations for joint marital property also vary.⁴ Moreover, in Indonesia, joint marital property is regulated by at least three legal systems: Indonesian customary law, Islamic Law, and National Law.⁵ Joint marital property is commonly referred to as *Harta Bersama* in Indonesia and is defined as property acquired after a wedding ceremony.⁶ When a married couple chooses to divorce, another issue besides taking care of children, which is often discussed in the Religious Courts, is related to joint marital property.

However, after the formalisation of joint marital property in the Marriage Law in 1974 and the formalisation of the Islamic legal code, i.e., the Compilation of Islamic Law (KHI) or Compilation of Islamic Law (Presidential Instruction No. 1 of 1991), the primary rule for sharing the joint marital property is on a 50:50 basis. This law aimed to ensure the protection of women's rights on the joint marital property within, during, and after marriage, especially at the time when the marriage proves to be unsuccessful.⁷ In reality, however, the distribution of joint marital property on a 50:50 basis as determined by the law is not implemented by the Religious Courts. The distribution approach followed by the Religious Courts is associated with considering whether spouses work for a living or do not work for a living, or both of them earn a living, but the amount of income is not balanced. Due to the apparent complications of this approach, the distribution of joint marital property after the divorce often creates serious issues to be decided by the Religious Courts.⁸

Although cases of joint marital property are not the most frequent in Religious Courts, they are often brought up by women after their divorce, where the judges often have to determine the division of ownership of joint marital property.⁹ In such cases, Indonesian Muslim women have to face the burden of proof by presenting evidence of their contribution to the family, both in terms of financial contribution and contribution to maintaining and running the household. Those who argue that this is a fair burden (of proof) on women justify their views based on the assumption that women have better access to fight for justice.¹⁰ The approach of judges in settling joint marital property disputes after the 1974 law and the Compilation of Islamic Law should follow the 50:50 division that has been determined by the law, but conflicts often require judges to act outside of this provision of the law for consideration of fairness and justice.¹¹

Studies conducted addressing the issues of joint marital property in the context of Indonesia suggest at least two possible approaches to the applicable law on joint marital property. Marck

⁴ Meida Anggi Fahira and Syawaludin Nur A Fahmi, 'Professional Ethics of Judges in Court' (2022) 1 (2) MILRev : Metro Islamic Law Review 176, 180.

⁵ Mark E. Cammack and R. Michael Feener, 'Joint Marital Property in Indonesian Customary Law' (2008) 2 (1) Islamic Law and National Law 92, 115.

⁶ Amelia Rahmaniah, 'Harta Bersama Dalam Perkawinan Di Indonesia Menurut Perspektif Hukum Islam' (in Indonesian) [Joint Assets in Marriage in Indonesia According to the Perspective of Islamic Law] (2015) 15 (1) Syariah: Jurnal Hukum dan Pemikiran 69, 72.

⁷ Mark E. Cammack, 'Marital Property in California and Indonesia: Community Property and Harta Bersama' (2007) 64 (4) Law 86, 97.

⁸ Santy Fitnawati, Muhamad Romdoni and Rizki Nurdiansyah, 'Harta Bersama: Sebuah Penyelesaian Objek Sengketa Yang Berstatus Agunan Di Pengadilan Agama Serang' (in Indonesian) ['Joint marital property: A Dispute Object Resolution with Collateral Status in the Serang Religious Court'] (2023) 9 (1) Yustitiabelen 1, 5.

⁹ Putri Widi Astuti and Tri Prastio, 'Post-Divorce Rights of Women and Children' (2022) 1 (2) MILRev : Metro Islamic Law Review 203, 207.

¹⁰ Euis Nurlaelawati, 'The Legal Fate of Indonesian Muslim Women in Court Divorce and Child Custody' (2016) 2 (2) Religion, Law, Intolerance 2, 16.

¹¹ Mahmudah and Ramdani Wahyu Sururie, 'Bentuk Dan Pola Penyelesaian Sengketa Harta Bersama Di Indonesia' (in Indonesian) ['Forms and Patterns of Dispute Resolution of Joint marital property in Indonesia'] (2023) 9 (1) Asy-Syari'ah: Jurnal Hukum Islam 53, 60.

E. Cammack, who studied and compared joint marital property dispute resolution in Indonesia and California from historical, conceptual, and principles of justice standpoints, reports that in California, a fully egalitarian system of joint marital property did not emerge until the 1970s, more than 100 years after the civil law of joint marital property was formally adopted in the State Constitution in 1849. In Indonesia, on the other hand, the customary concept of joint marital property attracted relatively little attention from Islamic law scholars earlier on, who eventually embraced the concept of joint marital property by reconstituting this doctrine through Islamic principles.¹² Importantly, Cammack assumes that the law in both jurisdictions is capable of making changes and adapting to appropriate situations in their time and place.¹³ Another study by Michael Feener and Mark E. Cammack examines the concept of joint marital property in customary law, the rationalisation of joint marital property in Islamic law, and how joint marital property is included in Indonesian national law.¹⁴ This also discussed how joint marital property disputes are resolved in the Indonesian Religious Courts through a combination of family law, Islamic law, and considerations of fairness and justice.¹⁵ Meanwhile, Ratno Lukito has emphasised that the concept of joint marital property in customary law is inseparable from the formal law, and even though customary law has now been formalised, the determination of joint marital property under formal law cannot be fully independent of customary law because it is rooted in culture and custom itself.¹⁶

This article examines the considerations of the Religious Court judges' regarding the role and contribution of wives in the creation of joint marital property, whether the husband is working or not working to contribute financially to the family.¹⁷ The article argues that the customary concepts of joint marital property in Indonesia have a strong presence in Indonesian society and are not only consistent with Islamic law but also provide a just solution to the resolution of joint marital property disputes and a means for women's empowerment in Indonesia.

This research has primarily used a normative approach by examining the decisions of judges in several regions in Indonesia. The analysis is supported by data collected through interviews carried out with judges and clerks of the Religious Courts in Medan, Aceh, and Surabaya. Both types of joint marital property cases, i.e. resolved by a court decision or settled outside of the court using mediation, are analysed. Part II of the article provides the Indonesian perspectives on joint marital property. Part III and IV examine, respectively, the different approaches adopted by Religious Court judges towards the 'sharing' and 'distribution' of joint marital property in Indonesia. Part V discusses the role of traditional practices on joint marital property in women's empowerment, and Part VI concludes that the Religious Court judges use two types of approaches in determining the issues of joint marital properties, namely, the textual normative approach and the contextual progressive approach. However, the judges need to adopt a more proactive approach by considering the customary rules of joint marital property and ensuring that justice is achieved for all parties to the dispute.

¹² Cammack (n 6).

¹³ *ibid.*

¹⁴ Cammack and Feener (n 4) 115.

¹⁵ *ibid.*

¹⁶ Ratno Lukito, *Pergumulan Antara Hukum Islam Adat Indonesia* (in Indonesian) [*Struggle Between Indonesian Customary Islamic Law*] (Jakarta: INIS 1998) 84, 150.

¹⁷ Dian Apriana and Nanda Silvia, 'Imbalance of Rights and Obligations of Husband and Wife in the Family' (2022) 1 (2) MILRev : Metro Islamic Law Review 214, 227.

II. JOINT MARITAL PROPERTY: THE INDONESIAN PERSPECTIVES

Wealth or property ownership in marriage in the Indonesian context can be seen from several perspectives of customary law, Islamic law, and positive law. However, the most prevalent concept of joint marital property is primarily based on customary law.¹⁸ Customs are attached to the law and institution of marriage. As stated by Ratno Lukito, the concept of joint marital property in the customary sense cannot be separated from the social institution of marriage as a custom.¹⁹ Thus the doctrine of common property comes from traditional customary law.

The joint marital property has been known for a long time among indigenous peoples under different names. In West Sumatra, the joint marital property is called *Harta Suarang*, in Kalimantan, it is called *Barang Perpantangan*, in South Sulawesi, it is called *Chakkara*, in Bali, it is called *Druwe Gabro*, in the Sundanese tribe of West Java it is called *Guna Kaya* and in Madura, it is called *Ghuna Ghana*. This concept is also known in Aceh as *Hareuta*, *Atra*, or *Laba Sihareukat* and also called *Atra* or *Laba Meucharikat*. However, the most popular designation is *Harta Gono Gini*, which refers to the expression used by the Javanese tribe. Then, all over Indonesia, it is better known as *Harta Bersama*, which is translated into English as joint marital property,²⁰ although the *Harta Gono Gini* is still widely used.

Interestingly, Islamic law is not dogmatic law, or necessarily asocial and apart from the social contexts. One of the important principles of Islamic law is “*al-hukmu yaduru ma’al illati wujudan wa ‘adaman*” (a law evolves depending on the existence or non-existence of underlying reason).²¹ This effectively means that when underlying reasons in two different cases are identical, the law for one case can be extended to the other, albeit a new case. Another theoretical principle of Islamic law is “*al-’adah al-muhakkamah*” (custom can be the basis of judgment), the operationalisation of which is known as the method of ‘*urf*’ (customary law).²² This means that Islamic law welcomes the selected good practices of local society to be adopted as religious law to fulfil the needs for law and justice in society.²³ It is true that in classical Islamic jurisprudence, there is no known concept of joint marital property, and when there is a divorce, it must be seen who legally owns the property at the time of divorce. It is irrelevant as to whether the husband or wife has directly or indirectly contributed to the acquisition of that property.

This is different from the jurisprudence prevailing in Indonesia, which has resulted from the *ijtihad* (legal reasoning) of the Indonesian nation, namely Law Number 1 of 1974 concerning Marriage and its amendments and the Annex to Presidential Instruction Number 1 of 1991 concerning the Dissemination of the Compilation of Islamic Law (“KHI”). These two laws and regulations can be called evolved jurisprudence resulting from the *ijtihad* by earnestly producing a legal formulation. Both these laws are the result of the legal reasonings of

¹⁸ Harta Bersama (joint marital property) is by nature derived from customary law. Many studies have shown that discussion of joint marital property means discussing property laws within the scope of customary territories. See, for example, Ratno Lukito, mentioning that common property is derived from the living values of the wisdom of local customary law. Lukito (n 13) 82, 256.

¹⁹ Lukito (n 14) 84, 256.

²⁰ Peri Bearman, Wolfhart Heinrichs, and Bernard G. Weiss (eds), *The Law Applied: Contextualizing the Islamic Sharia* (London-New York: I. B. Tauris 2008) 93, 115.

²¹ Abdul Muthalib, ‘Perubahan Hukum Dengan Sebab Berubahnya Masa, Tempat Dan Keadaan’ (in Indonesian) [Changes in Law Due to Changes in Time, Place and Circumstances] (2018) 15 (1) Hikmah 72, 74.

²² Abdul Wahab Khalaf, *Mashadir Al-Tashri’ Al-Islami Fi Ma Laysa Nashsh Fih* (in Arabic) [Legal Sources That are not from Texts] (Kuwait: Dar al-Qalam 1972) 145, 376.

²³ Ratno Lukito, *Islamic Law and Adat Encounter: The Experience of Indonesia* (Jakarta: Logos 2001) 11, 154.

contemporary scholars of Islamic law; hence they can be called “Indonesian Islamic jurisprudence”. Coming from these two laws and regulations in force in Indonesia, the concept of joint marital property has evolved. Article 35 of the Marriage Law provides for the joint marital property, which divides the household property into:

- A. Property acquired during marriage that becomes “joint marital property”; and
- B. The property of each husband and wife, whether it was acquired before marriage or in marriage acquired by each as personal property, for example, gifts or inheritances. Personal property is entirely under the control of each as long as the parties do not specify otherwise.

Likewise, in Articles 85 to 97 of the KHI, it is stated that marital property can be divided into:

1. The husband’s property, which is the property brought by the husband since before marriage;
2. The wife’s property, that is, the property she has carried since before marriage;
3. Marital joint property, i.e. property acquired during marriage that becomes joint property of husband and wife;
4. Property resulting from the husband’s gifts, grants, inheritances, and *sadaqah*, i.e. property obtained by him as gifts or inheritances;
5. Property resulting from gifts, grants, inheritances, and *sadaqah* of the wife, that is, property obtained by her as gifts or inheritances.

The recognition of joint marital property in Indonesia is based on the recognition and validation of the custom of *Harta Bersama* in Islamic law through *ijtihad*. Because marriage is considered a form of *sharikah* (partnership), which is a union of husband and wife to form a household, the property acquired during marriage is recognised as joint property of husband and wife regardless of if one or both of them have made financial contributions in the acquisition of such property. In the opinion of T. M. Hasbi Ash Shiddiqie,²⁴ marriage makes the wife *syirkatur rojuli filhayati* (sharing an ally of a husband in serving the ark of life), which creates *sharikah abadan* (unlimited partnership) between husband and wife. When a Muslim divorces in Indonesia, the Religious Court, when deciding the questions of property acquired during the marriage, is required to consider joint marital property as a separate unit of assets stipulated in Article 35 of the Marriage Law and Articles 85 to 97 of the KHI.

The 50:50 division of joint marital property rule is based on the labour concept that housework is equal to economic contribution in the context of a family’s household. Indeed, the provision by KHI on joint marital property requiring an equal proportion of 50:50 in joint marital property on spouse separation, be it on death or divorce, is a revolutionary legal achievement for the wives and greatly contributed to the elevation of Muslim women’s legal status. The 50:50 division aimed to elevate the legal status of women who, according to local customs and traditions, could not contribute financially to the family as they cannot work due to being housewives and did not have the direct legal right over the family’s assets.²⁵

²⁴ T. M. Hasbi Ash Shiddiqie, *Pedoman Rumah Tangga* (in Indonesian) [*Household Guidelines*] (Medan: Pustaka Maju 1971) 9.

²⁵ Ahmad Salim and Nurlaelawati, *Demi Keadilan & Kesetaraan, Sensitivitas Jender Hakim Agama di Indonesia* (in Indonesian) [*Gender Sensitivity of Religious Judges in Indonesia*] (Jakarta: Puskomham 2009) 72, 104.

III. DISPUTES OVER THE DISTRIBUTION OF JOINT MARITAL PROPERTY

This part is based on the data gathered from bibliographical research and empirical investigations through interviews and analysis. After the divorce, the distribution of joint marital property can also be resolved in court, through mediation outside of the court, or without mediation, depending on the decision of both parties. The portions of joint marital property to be allocated to each party are determined based on an agreement, which is usually achieved based on existing customary law and local wisdom. The size of each portion is not a problem as long both parties are satisfied and fulfilled a sense of justice.

A. Conflicts over the Distribution of Joint Marital Property

If the division of joint marital property does not reach an agreement prior to the parties reaching the court, it will eventually lead to conflict and a lawsuit to the Religious Court. Our research suggests two types of disputes leading to the filing of a lawsuit for the division of joint marital property in the Religious Courts: 1) where one of the parties did not get a portion of the joint marital property at all and 2) where both of the parties get a share in the joint marital property but with a portion that is considered unfair.

The first type of dispute is a conflict that arises because one of the parties, either the husband or the wife, does not get any share of the joint marital property at all because he or she is considered to have made absolutely no contribution to the family, either in the form of an economic contribution or a contribution in managing the household. In this type of dispute, there are cases where the wife is not given a share in the joint marital property because she was only a housewife. Wives who are unemployed and do not earn money for their families are often seen as having no contribution to the family. The view that domestic work has no economic value places women at a disadvantage in such cases. Likewise, such conflicts also arise where the husband does not get any share of the joint marital property because the husband does not work, while the wife plays the role of breadwinner.

The second type of joint marital property dispute is where each partner has received a share of the joint marital property but is considered unfair. One of the parties gets the share in the distribution of joint marital property but with an allegedly unfair portion. The division that is considered unfair also triggers the filing of a joint marital property lawsuit in the Religious Court. The division in such cases may have been done according to the law, i.e., on a 50:50 basis, a husband or wife may still consider it unfair for them because their economic contribution in the acquisition of joint marital property is significantly more as compared to their partner. It is also often the case that the wife who does not contribute economically is considered to have no contribution to the family. Therefore, women often get lower shares or even no share at all in the joint marital property.

B. Types of Joint Asset Distribution Settlement

Article 66 paragraph (5) and Article 86 paragraph (1) of the Law on Religious Court says that the filing a lawsuit regarding child control, child support, maintenance of wife, and joint marital property of husband and wife can be filed together with a divorce lawsuit or after a divorce decision attains permanent legal force. Article 66, paragraph (5) says:

“Application for child care, child maintenance, wife maintenance and joint marital property of husband and wife can be submitted together with a divorce application or after a divorce pledge.”

Likewise, Article 86, paragraph (1) says:

“Lawsuits regarding child custody, child maintenance, wife maintenance, and joint marital property of husband and wife can be filed together with a divorce lawsuit or after the divorce decision has obtained permanent legal force.”

Based on these provisions, it can be seen that the law provides for the possibility that filing a lawsuit over the joint marital property can be carried out jointly by the same or separated from applying for a divorce pledge permit or divorce suit. If a lawsuit for joint marital property is filed together with a divorce lawsuit or a divorce application, then this is not a problem. This is because the Religious Courts adjudicate on all of the matters mentioned in Articles 66 and 86, including administration of the wife’s residence, as long as the wife does not leave the joint residence without permission from the husband.²⁶

Furthermore, it becomes a problem if a lawsuit for joint marital property is filed separately from filing a divorce application or a divorce lawsuit. It is not uncommon for a lawsuit for joint marital property to be filed separately from a divorce lawsuit; that is, the lawsuit is filed after the decision on the divorce lawsuit or the court has granted the application for a divorce decree and it has obtained permanent legal force. In other words, the husband and wife have become former husband and wife. In this situation, the question of joint marital property becomes complicated when a former husband and wife have separated and reside in different places. Control over assets in marriage often determines who will have those assets.

C. Initiation of Lawsuit: Female or Male?

The 50:50 division is meant to elevate the dignity of the woman in her claim to the joint marital property. It is assumed that women are often considered not entitled to the property acquired by their husbands during marriage, although they might have contributed to the household otherwise than making the financial contribution. However, in reality, the control over an asset often determines who will get that asset of joint marital property. So, in reality, there are cases where men do not receive joint marital property even though they have worked to make a living and provide for their families. The fact that many men have filed lawsuits for joint marital property shows that when working women have control over marital assets, men may not get a 50 per cent share in that asset. Quantitative data about husbands or wives who filed for joint marital property in the last 4 years at the Aceh, Medan, and Surabaya Religious Courts are shown in the table below.²⁷

Data on who filed for joint marital property in Banda Aceh Syariah Court in 2019-2022

	2019	2020	2021	2022
Total Cases	10	13	6	6
Male	3	4	2	-

²⁶ Suryaningsih, ‘Impact of Gadget Addicts on Family Harmony Perspective of Islamic Law’ (2022) 1 (1) Nusantara: Journal of Law Studies 50, 53.

²⁷ This data was taken from the Case Tracing Information System (Sistem Informasi Penelusuran Perkara (SIPP)) of the Banda Aceh Mahkamah Sharia Court, and the Medan and Surabaya Religious Courts.

Female	2	7	4	5
The data is obfuscated	5	2	1	1

Data on who filed for joint marital property in Medan Religious Court for 2019-2022

	2019	2020	2021	2022
Total cases	19	25	12	24
Male	8	10	3	10
Female	11	10	7	12
The data is obfuscated	-	5	2	2

Data on who filed for joint marital property in Surabaya Religious Court for 2019-2022

	2019	2020	2021	2022
Total cases	26	31	30	31
Male	5	11	11	12
Female	21	18	18	19
The data is obfuscated	-	2	1	-

The table above shows the trend that men are claimants in most cases of joint marital property. It appears that the tendency for joint marital property claimants to be women in recent years. This is likely due to the increasing number of working women. This trend is despite the fact that the Religious Courts are supposed to provide special facilities and convenience for women in accessing the courts.²⁸ Although studies show that many women are reluctant to go to court for various reasons,²⁹ women are increasingly daring to file a lawsuit. The number of lawsuits for joint marital property is not as large as the number of lawsuits for divorce; the opportunity for women to voice their rights over their marital assets is very open. Moreover, since Peradilan Agama (Religious Court) and KHI laws were promulgated, Indonesian Muslim women have freely and frequently accessed the Religious Courts.³⁰

IV. JUDICIAL APPROACHES TOWARDS DISTRIBUTION OF JOINT MARITAL PROPERTY

Religious court judges in distributing joint marital property prefer two approaches, namely, the normative textual approach and the progressive contextual approach.³¹ The normative textual approach for the distribution of joint marital property is carried out based on the literal approach to 50:50 division, as stated in the law. From the cases above, whether the husband or the wife is suing, the judges' approach shows that in any conflict resolution over the division of joint

²⁸ Musda Asmara and Lilis Sahara, 'Problems with Choosing a Mate in Islam for People Who Choose a Mate through Social Media' (2022) 1 (1) Nusantra: Journal of Law Studies 40, 43.

²⁹ Kamarusdiana Kamarusdiana and Sri Hidayati, 'Perempuan Dalam Penegakan Hukum di Indonesia (Studi Peran Perempuan di Pengadilan Agama DKI Jakarta)' (in Indonesian) [Women in Law Enforcement in Indonesia (Study of the Role of Women in Jakarta Religious Court)] (2017) 4 (1) SALAM: Jurnal Sosial dan Budaya Syar-i 27, 30.

³⁰ Arskal Salim et al, *Demi Keadilan dan Kesetaraan: Dokumentasi Program Sensitivitas Jender Hakim Agama di Indonesia* (in Indonesian) [Gender Sensitivity of Religious Judges in Indonesia] (Jakarta: Puskumham 2009) 72, 152.

³¹ Dwi Astuti Wahyu Nurhayati and Novi Tri Oktavia, 'Relevance of Al Mawardi's Reflection In The Development of Islamic Economic Activities' (2022) 1 (1) Journal of Nusantara Economy 48, 53.

marital property, the judges first refer to the applicable law, which requires the division of joint marital property on a 50:50 basis. If there is no objection from either party, judges make decisions accordingly. The following two examples of judges' decisions reflect this approach.

A. First Case: Wife as the Plaintiff

The case 118/Pdt.G/2019/MS.Bna was decided by the judge at the Banda Aceh Religious Court, where the wife was the plaintiff. The wife sued for her rights to the joint marital property, and the judge granted the plaintiff's claim in its entirety. The judge determined the assets that have been submitted as joint marital property. The judge then determined and distributed the respective rights and shares of the joint marital property to the plaintiff (wife) ½ share and to the defendant (husband) ½ share strictly following the positive law provision. The husband and wife both worked, but the wife's income was greater than that of the husband.

B. Second Case: Husband as Plaintiff

In the case 1725/Pdt.G/2019/PA.Mdn, the plaintiff, was the husband. The judge granted the plaintiff's claim in its entirety. The judge determined the joint marital property as claimed by the husband in the form of one parcel of land and a house, one plot of land without a house, one kiosk unit, one motorbike, and the amount of money and profit from the sale of a house. Then the court decided that the half (½) of the joint marital property is the right of the plaintiff (husband) and half (½) is the right of the defendant (wife). The Judge ordered the defendant to hand over half (½) of the said joint marital property in good condition without any burden whatsoever to the plaintiff. In this case, the husband works while the wife is a housewife.

Decisions like this occur in all cases of joint marital property lawsuits in the Religious Courts, whether the plaintiff is the wife or the husband. Thus it can be concluded that there is no difference in the treatment of religious court judges toward male plaintiffs or female plaintiffs. The judges in handling cases of distribution of joint marital property first refer to the law and apply it positively.

C. Case of Working Wives

There are cases of joint marital property where the wife works and the husband is either employed or is not a breadwinner for the family.

1. Working Husbands Versus Working Wives

The case 1372/Pdt.G/2011/PA.Ba stipulates that joint marital property between husband and wife is divided 2/5 (two-fifths) for the plaintiff (husband) and 3/5 (three-fifths) for the defendant (wife). The decision was made on the basis of the unequal role of husband and wife in the acquisition of joint family property. The judge decided held that Article 31 paragraph (3) of Law Number 1 of 1974 is not stipulated in a sense to discredit the wife who has a dual role, i.e., besides being a housewife who manages and carries out household tasks she is also a career woman working as a trader who played a greater role in acquiring the joint marital property. Although the husband was working, he did not make sufficient contributions to the household and in the acquisition of the joint marital property. In the view of the court, the provisions of Article 97 of the Compilation of Islamic Law were not applicable to this case. This reflects the progressive contextual approach adopted by the Religious Court judge.

2. *House Husbands Versus Working Wives*

When dividing joint marital property where a husband works to earn a living and the wife does not work and serves mainly as a housewife, the property is divided on a 50:50 basis based on the law of joint marital property. When the husband is not working, and only the wife is working, is the husband entitled to half of the joint marital property that his wife has acquired? Based on the KHI rules, the husband who does not work has the right to 50% of the joint marital property unless the marriage agreement states otherwise. However, considering the decision in 1372/Pdt.G/2011/PA.Ba, if a lawsuit occurs in this context, the judge is likely to decide based on the contribution made by the husband both in the household and in financial terms.

From the cases above, it is clear that the judge has used both textual and contextual approaches in resolving the disputes over joint marital property. Through the creativity of judges and their *ijtihad*, they have followed these two approaches, taken into account both the formalised form of *harta bersama* in the light of Islamic law and the need for justice and fair outcome of the disputes for parties. The application of textual or contextual approach depends on factors including the specific circumstances of the case, the interpretation of *harta bersama* and Islamic law, and the judge's personal finding on the respective role played by the husband and the wife, both in financial and non-financial terms, to the household.³²

V. WOMEN EMPOWERMENT THROUGH HARTA BERSAMA

The concept of *harta bersama* is deeply rooted in Indonesian culture and values. It recognises that property is not just about who contributed to the creation of material possessions but also encompasses the role of relationships, social bonds, and other non-material forms of contributions to the wealth of a household. The formalisation of the local values of *harta bersama* under the umbrella of Islamic law has contributed to women's empowerment in Indonesia.

The role of *harta bersama* in women's empowerment is surely not limited to its adaptation into Muslim family law in Indonesia. The *harta bersama* values also encourage women's participation in decision-making processes at all levels. This means ensuring that women's voices are heard, and their opinions are taken into account in matters that affect their lives and those of their families and communities. Based on the same principles of Islamic law that led to the *harta bersama's* legitimisation in Islamic law, women should also be encouraged to effectively participate in community meetings, serve on committees and boards, and hold leadership positions.³³

In addition to promoting gender equality and women's participation in decision-making processes, the concept of *harta bersama* can also be used to emphasise the importance of social bonds and relationships in promoting women's empowerment. This means recognising the value of women's contributions to the family and community and supporting them in their roles as caretakers, nurturers, and community builders.³⁴

³² Satjipto Rahardjo, *Membedah Hukum Progresif* (in Indonesian) [*Dissecting Progressive Law*] (Jakarta: Kompas 2006) 87, 275.

³³ Karolina Hutkova, 'Gender and the Local Value of Harta Bersama (Shared Wealth) in Rural Indonesia' (2019) 31 (2) *The Journal of International Development* 23, 46.

³⁴ Anis Hidayah and Rachel Sharples, 'Women's Empowerment and Gender Equality in Indonesia: The Role of Civil Society' (2019) 31 (2) *The Journal of International Development* 58, 78.

VI. CONCLUSION

The recognition of joint marital property in Indonesia is based on the recognition and validation of the custom of *Harta Bersama* in Islamic law through *ijtihad*. Because marriage is considered a form of *sharikah* (partnership), which is a union of husband and wife to form a household, the property acquired during marriage is recognised as joint property of husband and wife regardless of whether one or both of them have made financial contributions in the acquisition of such property. Marriage makes the wife *syirkatur rojuli filhayati* (sharing an ally of a husband in serving the ark of life), which creates *sharikah abadan* (unlimited partnership) between husband and wife. When a Muslim divorces in Indonesia, the Religious Court when deciding the questions of property acquired during the marriage, is required to consider joint marital property as a separate unit of assets stipulated in Article 35 of the Marriage Law and Articles 85 to 97 of the KHI.

The 50:50 division of joint marital property rule provided in the Indonesian law is based on the labour concept that housework is equal to economic contribution in the context of a family's household. Indeed, this provision by KHI on the joint marital property requiring an equal proportion of 50:50 in the joint marital property on spouse separation, be it on death or divorce, is a revolutionary legal achievement for the wives and greatly contributed to the elevation of Muslim women's legal status. The 50:50 division aimed to elevate the legal status of women who, according to local customs and traditions, did not have the possibility to work to earn money and did not have the direct legal right over the family's assets.

In general, the analysis in this article demonstrates that the Religious Court judges use two approaches when deciding disputes over joint marital property under the KHI law, namely, the textual normative approach and the contextual progressive approach. The normative textual approach is adopted to implement the laws and regulations that have established formal provisions for the division of joint marital property on a 50:50 basis between the husband and the wife. The judges apply the contextual progressive approach to uphold the true spirit of *Harta Bersama* in the light of the purposes of Islamic law and in the interest of justice and fairness. This approach has resulted in the division of joint marital property involving working women – whether the men work or not – not strictly based on the provisions included in the Indonesian Islamic family law but based on the contextual judgement of the type of role played by women who have contributed to the creation of joint marital property.

This indicates that the judges, when dividing joint marital property, take into consideration facts that exist for both parties (husband and wife) and prioritise women for their empowerment. The division does not always have to be guided by the applicable law in its literal form but rather should be felt to have fulfilled justice for both parties. In this case, women need to get more attention and because they often get unfair treatment.