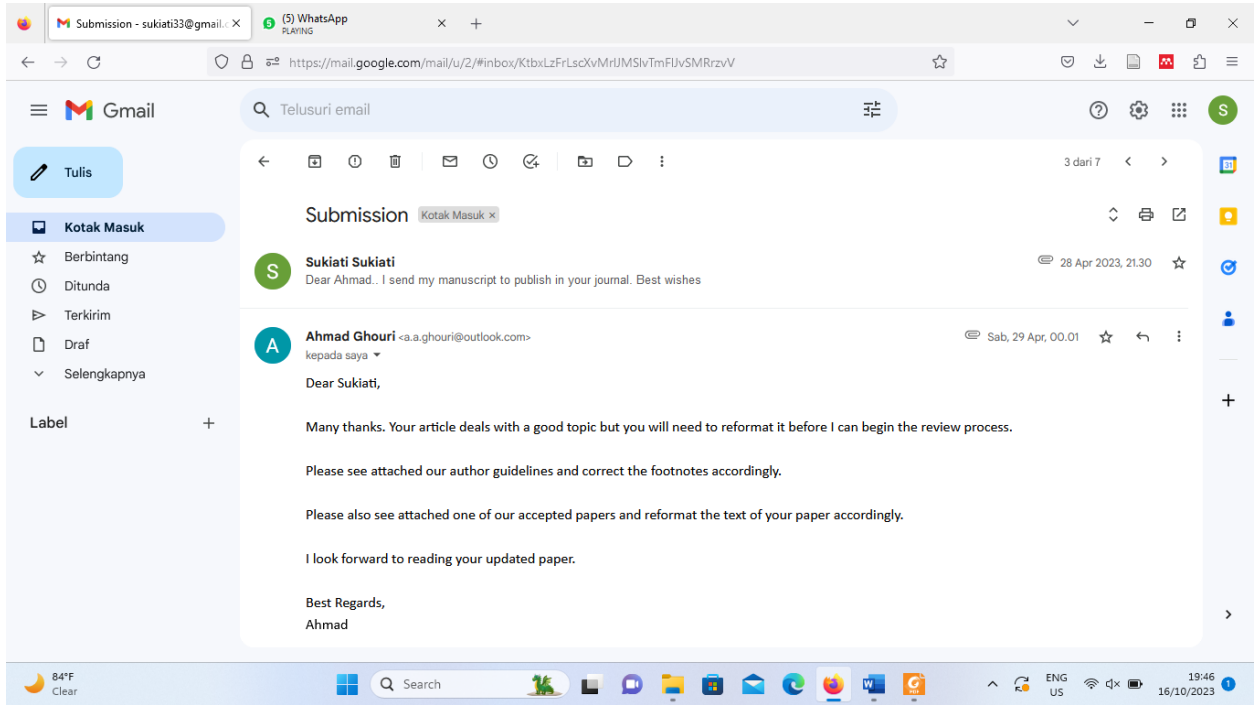


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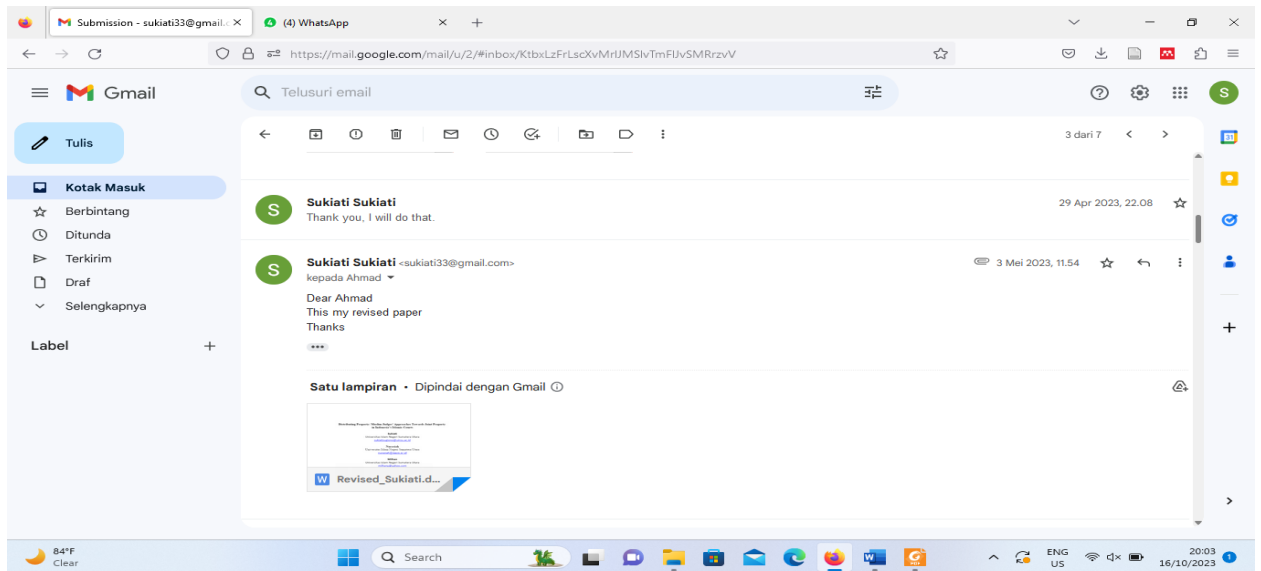
Approaches of the Religious Court Judges in Indonesia to Settle Joint Marital Property Disputes

Sukiati, Nurasih, Milhan

1. Submit Naskah (28 April 2023)



2. Revisi Naskah (3 Mei 2023)



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Subject: Re: Submission

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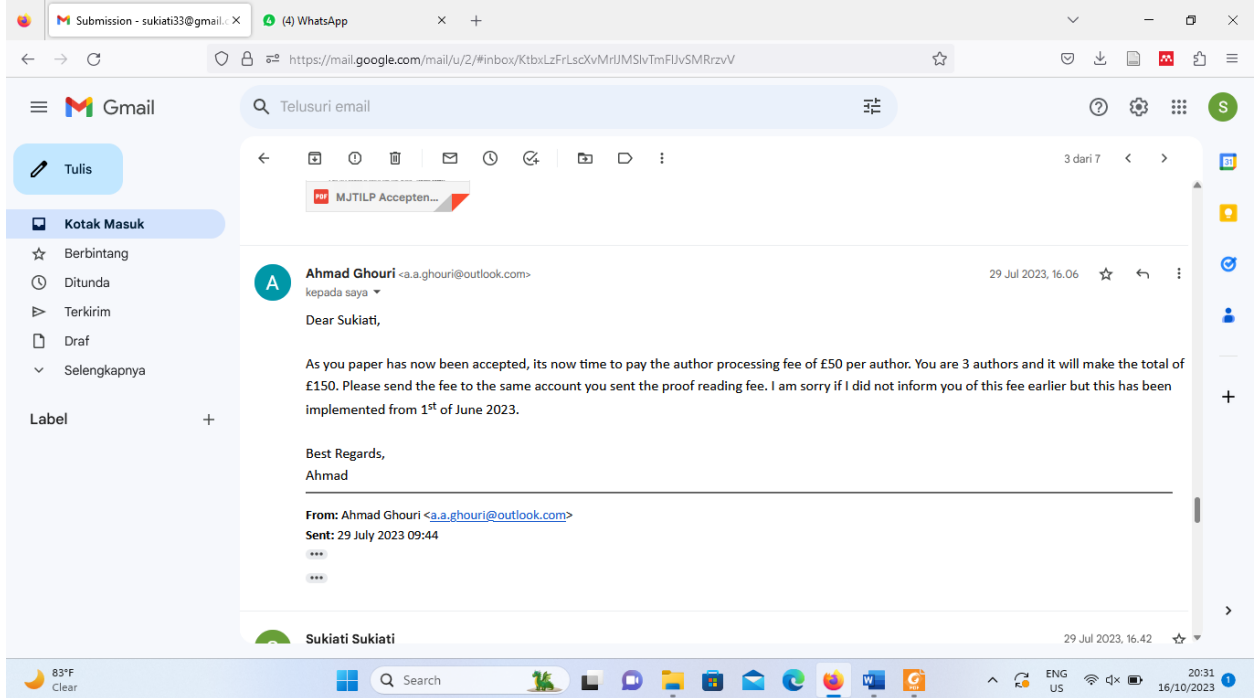
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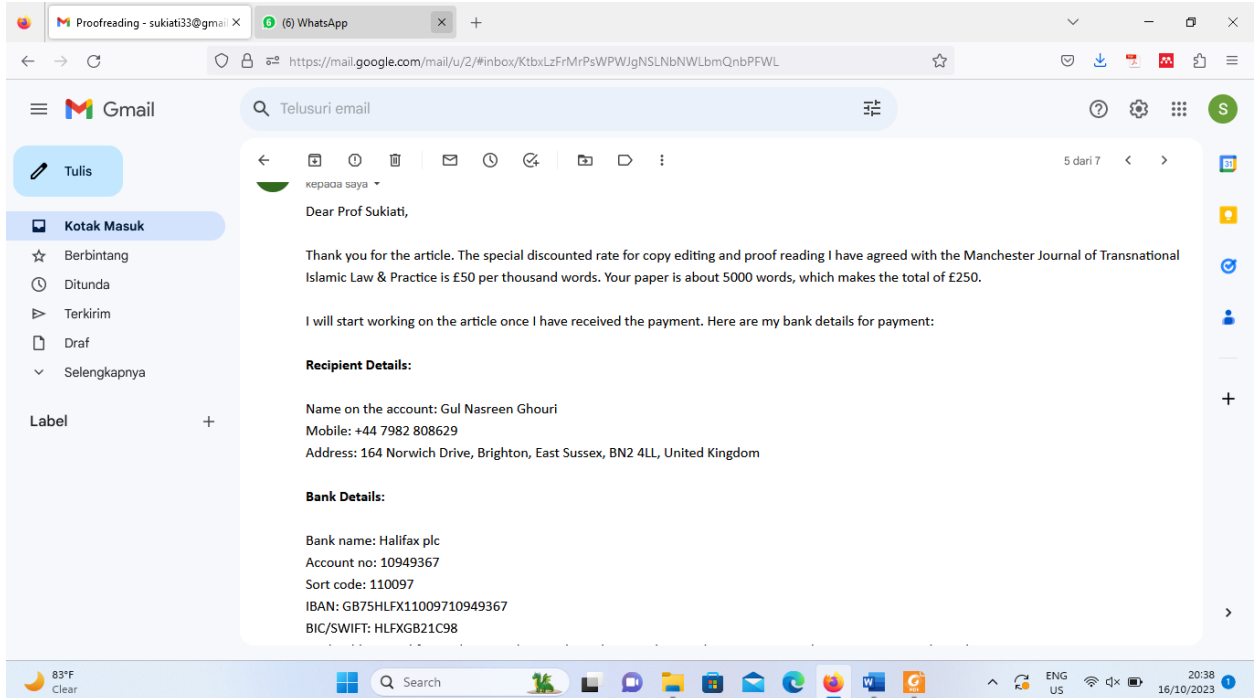


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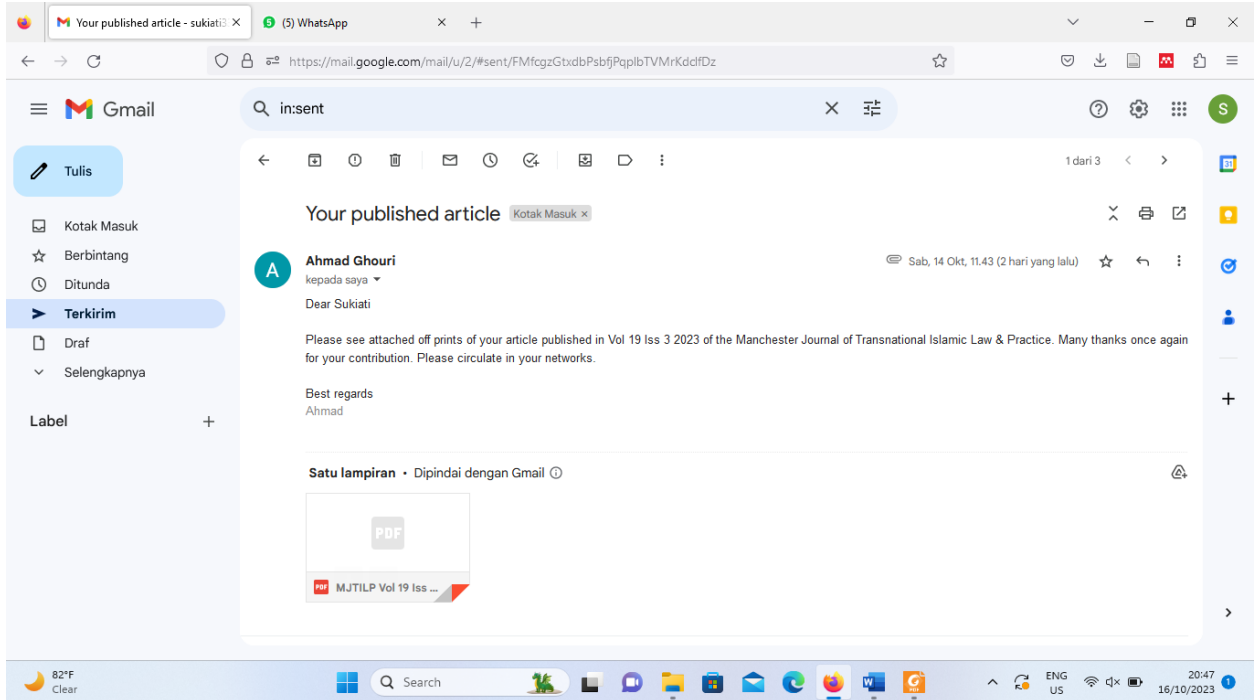
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Distributing Property: Muslim Judges' Approaches Towards Joint Property in Indonesia's Islamic Courts

Abstract

This paper examines the legal practice of sharing joint property in Indonesian Religious Courts. This paper examines the approaches and considerations of judges in resolving 'shared property' conflicts in several Religious Courts. This paper also aims to see the relationship between the types of roles played by spouses in creating joint property (*Harta Bersama*) with the legal knowledge of judges and the content of their dictum decisions. This paper argues that there are differences in approach and legal interpretation (legal interpretation) among judges in seeing the role played by spouses in creating joint property. Deploying a normative approach, this paper found that the provisions on joint property mandated by Indonesian Islamic family law regulations are only relevant in a context where women only work in the domestic sphere. In other words, the judges carry out broad and flexible interpretations in resolving conflicts of shared property involving spouses whose wives work outside the house. Therefore, this paper asserts that the division of joint property involving working women – whether the men work or not – is no longer based on the provisions of the legal norms of joint property but is based on the type of role played by women who directly contribute to the creation of joint property.

Keywords: distributing property, Harta Bersama, marital property, Indonesia Muslim judges, Indonesia's Islamic Courts

Introduction

Marital assets in the study of family law have faced inconsistencies and problems in their application in various countries of the world.¹ In addition, issues of gender inequality and studies on cases of shared property are increasingly widespread.² The choice of legal options governing the legal provisions of this joint property has become another issue to consider.³ In the Indonesian context, legal options for joint property also vary. Moreover, in Indonesia, joint property in Indonesia is regulated in at least three legal systems; Indonesian customary law, Islamic Law, and National Law.⁴

¹ Krista Jacobs & Aslihan Kes (2015) The Ambiguity of Joint Asset Ownership: Cautionary Tales From Uganda and South Africa, *Feminist Economics*, 21:3, 23-55, DOI: 10.1080/13545701.2014.926559. See Also, CMV Clarkson (2008), Matrimonial Property On Divorce: All Change In Europe, *Journal of Private International Law*, 4: 3, 421-442. Vol. 4 No. 3.

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

³ Rhona Schuz (2019) Choice of Law in Relation to Matrimonial Property in the 21st Century, *Journal of Private International Law*, 15:1, 1-49, DOI: 10.1080/17441048.2019.1599769

⁴ Mark E. Cammack and R. Michael Feener (2008), "Joint Marital Property in Indonesian Customary Law, Islamic Law and National Law," in Peri Bearman, et.al, eds, *The Law Applied: Contextualizing the Islamic Shariah*, New York, Tauris. 92-115.

Joint property is defined as property acquired after a wedding ceremony. When a married couple chooses to divorce, besides taking care of children, another issue that is often discussed in the Religious Courts is joint property.

However, after the formalization of joint property in the 1974 Marriage Law and the formalization of the Islamic legal code, the Compilation of Islamic Law (KHI) or Compilation of Islamic Law (Presidential Instruction No. 1 of 1991), the pattern of sharing joint property refers to the same amount which is 50:50. The birth of this law has increasingly protected and enhanced the rights of women on the property and financially within, during, and after marriage, especially the marital joined property.⁵

In reality, the distribution of joint property that has been determined by law is not implemented properly. This distribution pattern often creates conflict because it is associated with spouses who 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. Therefore, after the divorce, the distribution of joint property often creates conflict. The settlement of this joint property conflict will usually be submitted to the Court, in this case, the Religious Court.

Although cases of joint property are not the most frequent cases in the Religious Courts, cases of joint property are issues that are often brought up by women in court after a divorce. The joint property also attracts the attention of the judges in determining the division of ownership of this marital property. In the case of joint property, most Indonesian Muslim women have to struggle to influence the decisions of judges, by presenting evidence of their contribution as husband and wife to the family, both in terms of the economy and contribution in maintaining and running the family and household. This is supported by the view that women are assumed to have better access to fight for justice.⁶

In resolving conflicts over the distribution of joint property in the Religious Courts, two types of distribution of joint property in court will be considered. First, the settlement of joint property integrated into divorce and conflict resolution of the joint property separated due to divorce. The attitude of judges in settling joint property, after the 1974 law and the Compilation of Islamic Law tends to use the division that has been determined by law, but conflicts often require judges to act outside the provisions of the law for consideration and justice.⁷

There have been many studies on joint property conducted. There are at least two aspects of the review of joint property that have been carried out. The study of common property related to history, concepts, and principles of justice as what was carried out by Marck E. Cammack, who discussed Marital Property in California and Indonesia: Community Property and Common Property. Cammack compared joint property in Indonesia and California. The results of this comparison assume that the law is capable of making changes and adapting. In California, a fully egalitarian system of joint property did not emerge until the 1970s, more than 100 years after the civil law of joint property was formally adopted in the state constitution in 1849. In Indonesia, on the other hand, the customary concept of marital property faces relatively little attention from Islamic

⁵ Mark E. Cammack, Marital Property in California and Indonesia: Community Property and Harta Bersama, 64 Wash. & Lee L. Rev. 1417 (2007), <https://scholarlycommons.law.wlu.edu/wlulr/vol64/iss4/7>

⁶ Euis Nurlaelawati, The Legal Fate of Indonesian Muslim Women in Court Divorce and Child Custody, Religion, Law, Intolerance, 2016, hal. 2-16. see also Sumner, Cate and Lindsey, Tim 2010. *Courting Reform: Justice for the Poor*. Canberra: Lowy Institute. Salim, Arskal (ed.) 2009. *Demi Keadilan dan Kesetaraan: Dokumentasi Program Sensitivitas Gender Hakim Agama*. Jakarta: PUSKUMHAM.

⁷ Pasal 66 ayat (5) dan Pasal 86 ayat (1) Undang-Undang Peradilan Agama

authorities. Islamic jurists were able to embrace common property by reconstituting this doctrine as an Islamic institution.⁸

Michael Feener studies joint marital property with Mark E. Cammack, *Joint Marital Property in Customary, Islamic, and National Law*. Feer and Cammack examine the concept of joint property in customary law, the rationalization of joint property in Islamic law, and how joint property is included in Indonesian national law. They also discussed how joint property is in the religious court.⁹ Meanwhile, Ratno Lukito emphasized that the concept of joint property in customary law is inseparable. Even though customary law has now been legalized, joint property cannot be separated from the context of customary law, because it is rooted in culture and custom itself.¹⁰

The second study is related to the study of joint property; practically carried out by JM. Muslimin, "The Actualization of Justice in the Settlement of Joint property due to Divorce: Comparative Analysis of Decisions of the Religious Courts." Muslimin found that the decisions of the Religious Courts regarding the distribution of assets were not always following the provisions of the Compilation of Islamic Law.¹¹ Muhammad Siddiq and Irmawati Analysis of the Ruling of the Meureudu Syar'iyah Court on the Distribution of Joint property. This study found that judges in considering the share of the joint property of husband and wife also use various existing regulations, both statutory regulations, KHI, customary law (local wisdom), and books of fiqh. So that the share of the joint property of the husband and wife 1/2 (half), is not an absolute value of justice, but everything is returned to each case and the judge's consideration. The Panel of Judges of the Syar'iyah Court emphasized its considerations in seeing the existence of the disputed property, whether the property was joint property or not joint property.¹² Muhammad Kamran wrote *Post-Divorce Matrimonial Property Distribution: A Case Study Of Polygamy Marriage*. The results showed that the effectiveness of post-divorce distribution of marital assets in the case study of polygamous marriages at the Makassar Class 1A Religious Court can be seen based on five factors, including legal factors, law enforcement factors, facility factors, community factors, and cultural factors. This study also recommends that law enforcers take this seriously in carrying out their role, and it is hoped that all relevant stakeholders socialize the rules regarding the procedure for distributing marital assets after divorce.¹³ In addition to this study, there are also many types of research presented in the form of theses and dissertations, for example, Zahrowati who examines the value of fairness in joint property

⁸ Marck E. Cammack, menulis *Marital Property in California and Indonesia: Community Property and Harta Bersama*.

⁹ Mark E. Cammack, *Joint Marital Property in Customary, Islamic and National Law*

¹⁰ Ratno Lukito, *Pergumulan Antara Hukum Islam Adat Indonesia* (Jakarta: INIS, 1998), h. 84.

¹¹ J.M. Muslimin dan Yulia Fatma, *The Actualization of Justice in the Settlement of Joint property (Harta Bersama) Due to Divorce: Comparative Analysis of Decisions of the Religious Courts*, *De Jure: Jurnal Hukum dan Syar'iah*, Vol. 12, No. 2, 2020, h. 176-190.

¹² Muhammad Siddiq, Irmawati Analisis Putusan Mahkamah Syar'iyah Meureudu Terhadap Pembagian Harta Bersama, *Ahkamul Usrah: Jurnal Hukum Keluarga dan Peradilan Islam*, Vol. 1 No.1 Januari-Juni 2021.

¹³ Muhammad Kamran, *Post-Divorce Matrimonial Property Distribution: A Case Study Of Polygamy Marriage*, *Sovereign: International journal of Law*, Vol. 2, Issue 2 (2020): 013–026

decisions,¹⁴ Fitroh Nur'aini Laily,¹⁵ Nurnazli,¹⁶ Zakiya Salsabila,¹⁷ Rita Elviyanti.¹⁸ However, specifically, the study of the wife's contribution as the basis for sharing joint property has not received more serious attention, especially studies based on the types of distribution of joint property.

This paper aims to examine the relationship between judges' considerations and the role and contribution of wives in the family, whether the husband is working or not working in creating a joint property. This study uses a normative approach by examining the decisions of judges in several regions in Indonesia. This study was analyzed with the support of interview data. Interviews were carried out with judges and clerks of the Religious Courts in Medan, Aceh, and Surabaya, and the type of joint property case which is analyzed is the kind of cases that were resolved by a court decision or out of court using mediation.

Property in Marriage: Indonesia's Perspective

Wealth or property ownership in marriage in the Indonesian context can be seen from several perspectives; customary law perspective, Islamic law perspective, and positive law perspective. The joint property is based on customary law.¹⁹ It is attached to the law and institution of customary marriage. As stated by Ratno Lukito, the institution of joint property in the customary sense cannot be separated from the social institution of customary marriage.²⁰ Thus the doctrine of common property comes from traditional/ customary law.

B. Ter Haar noted that community property has been known for a long time among indigenous peoples under different names. In West Sumatra the joint 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* or also called *Atra* or *Laba Meucharikat*. However, then the most popular designation is *Harta Gono Gini* which refers to the term used by the Javanese tribe. Then, in Indonesia, it is better known as *Harta Bersama* (joint property, shared assets, or joint assets)²¹ although the *Harta Gono Gini* is still widely used.

When it is still in the form of local and customary rules, using its respective local term, this marital property denotes different meanings and is distributed in different ways,

¹⁴ Zahrowati, Nilai Keadilan Dalam Putusan Pembagian Harta Bersama Pada Peradilan Agama, *Disertasi*, Program Pascasarjana, Universitas Hasanuddin, Makasar, 2017.

¹⁵ Fitroh Nur'aini Laily, "Model Pembagian Harta Bersama Perspektif Hukum Progresif," *Tesis*, Program Studi Hukum Keluarga Pascasarjana Institut Agama Islam Negeri (IAIN) Ponorogo, Agustus 2017

¹⁶ Nurnazli, "Analisis Putusan Mahkamah Agung Tentang Pembagian Harta Bersama dan Implikasinya terhadap Pembaruan Hukum Keluarga di Indonesia," *Disertasi*, Program Doktor (S3) Hukum Keluarga Program Pascasarjana Universitas Islam Negeri Raden Intan Lampung, 2019.

¹⁷ Zakiya Salsabila, "Pembagian Harta Bersama Akibat Perceraian Di Indonesia dan Malaysia dalam Perspekti Gender," *Tesis* Program Studi Magister Hukum Keluarga Fakultas Syariah Dan Hukum Universitas Islam Negeri Syarif Hidayatullah, Jakarta, 2021.

¹⁸ Rita Elviyanti, "Sengketa Harta Bersama Istri Turut Mencari Nafkah," *Tesis*, Program Studi Hukum Islam Program Pasca Sarjana (S2) Universitas Islam Negeri Fatmawati Sukarno Bengkulu, 2022

¹⁹ Harta Bersama (joint property) is by nature derived from customary law. Many studies have shown that discussing joint 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. Ratno Lukito, *Pergumulan Antara Hukum Islam Adat Indonesia* (Jakarta: INIS, 1998)

²⁰ Ratno Lukito, *Pergumulan Antara Hukum Islam Adat Indonesia* (Jakarta: INIS, 1998), h. 84.

²¹ Mark E. Cammack and R. Michael Feener, "Joint marital property in Indonesian Customary, Islamic, and national law," in Peri Bearman, wolfhart Heinrichs & Bernard G. Weiss (eds), *The Law Applied: Contextualizing the Islamic Sharia* (London-New York: I.B Tauris, 2008), hal. 93-115

and has not fully manifested the balance position of husband-wife. For example, one society understands marital property as including all kinds of properties gained during the marriage. Other societies define it as the property produced by husbands only, since it is they who are responsible, and so are obligated to work, to fulfilling the need of the family. Likewise, the method of splitting the marital property is different. There is even a society that divides marital property by referring to the method of distributing inheritance, in which a man gets double portions compared to women. This practice is carried out in some parts of Java society known as *Sak Pikul Sak Gendong*.²² Men get one shoulder, which is like carrying things on the front and back, while women get a carrying bag, which is as much as they can carry. In other words, the man gets more shares from his wife. In Aceh, joint property is divided according to the legal portion of the inheritance, two male shares and one female share. In Bataknese culture, joint property is also divided according to a patrilineal pattern, men usually get more shares than women. Other societies divide marital property based on equity and fairness and are not necessarily equal. Still, other societies divide it according to community property states, with which both parties get the same amount of percentage.

In general, joint property in customary law has almost the same concept. They differ in naming the term. In the perspective of customary law, property owned by husband and wife can be divided into two general categories, (1) property acquired before the marriage; and (2) property acquired after or during the marriage engagement.²³ The first is usually termed innate property and the second is termed joint property. For this reason, it can be understood that the existence of marriage is the starting point for considering the existence of joint property. Therefore, the issue of the source of income for assets in the family whether the assets come from the husband or wife after the marriage bond is irrelevant to be disputed. Although there are differences in the names in each region, according to Ismuha's research, the concept is the same,²⁴

From the description above, it can be seen that the concept of ownership of property in marriage which is called joint property is a product of customary law derived from the philosophical premise of local values to establish a balance between husband and wife in married life. Therefore, in the division of the property, the husband who is still in a marriage bond is seen as two parties, each of whom has the same rights under the law. This is because both of them have always looked after the household, which has always been seen as a task that both parties must have equally.²⁵

Interestingly, Islamic law is not dogmatic law, or necessarily a social and apart from the context and meaning. One of the important Islamic jurisprudence principles mentions "*al-hukm yaduur ma'a illatihi wujudan wa 'adaman*" (a law circulates/takes place depending on its cause/reason, in its existence or non-existence).²⁶ Another theoretical principle is "*al-'Adah al-Muhakkamah*," the operationalization of which is known as the

²² Abdul Basith Junaidy, 'Harta Bersama dalam Hukum Islam di Indonesia.' *Jurnal al-Qanun*, Surabaya: Fakultas Syariah dan Hukum UIN Sunan Ampel, 2014, 357. See also Isamil Muhammad Syah, *Pencaharian Bersama Suami Istri di Indonesia* (Jakarta: Bulan Bintang, 1978), h. 45.

²³ Hilman Hadikusuma, *Hukum Waris Adat* (Bandung: Aluni, 1980), h. 70-71.

²⁴ Ismuha, *Pencaharian bersama suami Isteri* (cet. I; Jakarta: PT. Bulan Blnang, 1986), h. LII.

²⁵ Ratno Lukito, *Pergumulan Antara Hukum Islam Adat Indonesia* (Jakarta: INIS, 1998), h. 82.

²⁶ Syekh Muhammad Bin Muhammad Abu Hamid Al-Ghazali, *Kitab Al-Mustafa fi 'Ilmi Al-Usul*, pp. 281-283 and 309.

method of ‘*Uruf*’.²⁷ This means that Islamic law welcomes the selected good practices of local society to be adopted as religious law to fulfill the need for law and justice in society.²⁸

Even though Fiqh does not have rules regarding joint property, however, Islamic judges and jurists can accept the joint property as part of Islamic teachings by rearranging and analogizing it to *syirkah* or cooperation in the economic field.²⁹ It can be seen that the *syirkah* principle applied in determining the occurrence of joint property in a marriage bond is more purely business oriented, but it cannot be avoided that there are several principles such as the rights and obligations that exist in work transactions that are in line with the principles of joint property which formulated by customary law. However, as described by Ratna Lukito, there is a striking difference in the focus. Here *syirkah* cooperation is understood as business-economic, while the institution of joint property in the customary sense cannot be separated from the social institution of marriage. This is exactly what works in the enactment of Islamic marital property law in Indonesia.

Thanks to the development of the legalization of Islamic Law in Indonesia, the local traditions and practices are adopted by Islamic law and are united to become national law. As a basis of marital property in Indonesia National Law, as follows; Undang-Undang Marriage Chapter VII, Article 35-37 regarding property in marriage and Compilation of Islamic Law (KHI) Chapter XIII Article 85-97, regarding property in marriage.

This adoption of the local law of marital property is only an example of how Islamic law responded to the good interest of society, at that time, among others, the women's emancipation movement.³⁰ Thence, the legislation of Islamic law marriage in Indonesia unifies all those local different provisions and traditions and determines that the marital property must be split equally 50:50 (KHI art. 97) should the marriage be put to an end.³¹

The Practice of Sharing Joint Property in the Religious Courts: Conflicts and Types

This part is based on data gathered from bibliographical research and empirical investigations through interviews, and analysis. After the divorce, the distribution of joint property can also be done outside the court without mediation depending on the decision of both parties. The portion of joint property is carried out based on an agreement. Usually this happens based on existing customary law or local wisdom. The size of the portion is not a problem as long as the rights of each separated partner are fulfilled and fulfill a sense of justice.

The division of joint property that does not reach an agreement will eventually lead to conflict. Then, one of the parties will file a lawsuit to the Religious Court. From the study conducted, it can be considered two models of filing a lawsuit for the division of *joint property* that are submitted to the Religious Courts; filing a lawsuit because one of the parties

²⁷ Wahab Khalaf, *Mashadir al-Tashri' al-Islami fi Ma Laysa Nashsh Fih* (Kuwait: Dar al- Qalam, 1972 M/1392 H), 145. see also, Wahbah al-Zuhayli, *Ushul al-Fiqh al-Islami*, Vol. II (Beirut: Dar al-Fikr, tt), 828.

²⁸ Ratno Lukito, *Islamic Law and Adat Encounter: The Experience of Indonesia*, (Jakarta: Logos, 2001), 11.

²⁹ Mark E. Cammack and R. Michael Feener, “Joint marital property in Indonesian Customary, Islamic, and national law,”

³⁰ Mark E. Cammack and R. Michael Feener, “Joint marital property in Indonesian Customary, Islamic, and national law,”

³¹ See Indonesian Islamic Legal Compilation Chapter VIII, the whole verses on marital property is on verse 85 to 97. Beside the joint property, the compilation recognizes the separate assets which refers to those property which are acquired not through work for living and those that gained before marriage. These are inheritance, gift, individual assets, see verse 85-87.

does not get a joint property at all and the second model, that one of the parties gets a share but with a portion that is considered unfair.

1. *Conflicts over the distribution of joint property*
 - a. The first conflict is a conflict that arises because one of the parties, neither the husband nor the wife, does not get any share of the joint property at all because he is considered to have absolutely no contribution to the family, either an economic contribution or a contribution in managing the household. In this model, there are also cases where the joint property is not divided between the wife who is only a housewife. Wives who are unemployed and do not earn money for their families are also often seen as having no contribution to the family. The view of domestic work as work that has no economic value also places women who do not earn money as wives who do not have a job. Likewise, there is a conflict of the joint property where the husband does not get any share of the joint property because the husband does not work, while the wife plays the role of breadwinner.
 - b. The second joint property conflict is that each partner has received a share of the joint property but is considered unfair. One of the parties gets the distribution but with an unfair portion. The amount of division that is considered unfair is also a trigger for filing a joint property lawsuit to the Religious Court. The distribution that has been done by both parties may not reach an agreement and even if it is divided by the same portion according to the law. The 50:50 portion as mandated by law, according to some spouses, is still considered unfair for them because they have a sizeable economic contribution compared to their partner. Meanwhile, a wife who does not produce economically is considered to have no contribution to the family. Therefore, women often got fewer shares or even got no shares at all.

The verdict of the equal amount of 50:50 greatly influenced the elevation of Muslim women's status by considering the labor concept adopted in that era. The 50:50 division is to elevate the degree of women who in local provisions and traditions do not have power and control over the family economy because women do not work to earn money. Only men make money while wives are considered not to have to make money. Confronting this condition, the decree of Islamic legal compilation on the marital property which distributes to wives the equal proportion of 50:50 on spouse separation, be it on death or divorce, is a revolutionary legal achievement for the wives. Because the status of a wife working at home as a housewife is as important as the status of a husband working outside the household.³²

However, now when the wife works outside the home and earns money, the 50:50 split is felt to be unfair because women's contribution to the family is often considered to be greater than that of men. Women work and earn money for the family, but women also have to do housework, such as cooking, washing, ironing clothes, caring for children and cleaning the house and yard, and so on. While the husband does not participate in household chores. Even if the husband helps only modestly, it is not their main job because household work is considered a woman's main job. In other words, women have a double burden, at home as main workers and outside the home as money earners. Therefore, conflicts over the division

³² Salim, A., & Nurlaelawati, E. (2009). *Demi Keadilan & Kesetaraan, Sensitivitas Jender Hakim Agama di Indonesia*. Jakarta: PUSKUMHAM, 72.

of assets are often brought to the Religious Courts. It is proposed that the resolution of conflicts over the joint property can be resolved.

2. Type of Joint Asset Distribution Settlement

In Article 66 paragraph (5) and Article 86 paragraph (1) of the Law on Religious Courts it is said that filing a lawsuit regarding child control, child support, wife maintenance, and joint property of husband and wife can be filed together with a divorce lawsuit or after a divorce decision obtains permanent legal force. The details of the articles mentioned above are as follows: Article 66 paragraph (5) "Application for child care, child maintenance, wife maintenance and joint property of husband and wife can be submitted together with a divorce application for divorce or after a divorce pledge." Article 86 paragraph (1) Lawsuits regarding child custody, child maintenance, wife maintenance, and joint 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 the provisions outlined in Article 66 paragraph (5) and Article 86 paragraph (1) of the Law on the Religious Courts as mentioned above, it can be seen that the law provides for the possibility that filing a lawsuit over the joint property (*Harta Bersama*) can be carried out jointly the same or separate from applying for a divorce pledge permit or divorce suit. If a lawsuit for joint property is filed together with a divorce lawsuit or a divorce application, then this is not a problem. This is because the Religious Courts which adjudicate are the Religious Courts that administer the wife's residence, as long as the wife does not leave the joint residence without permission from the husband. Furthermore, it becomes a problem if a lawsuit for joint property is filed separately from filing a divorce application or a divorce lawsuit. It is not uncommon for a lawsuit for joint property to be filed separately from a divorce lawsuit, that is, the lawsuit is filed after the decision on the divorce lawsuit or the application for a divorce decree permit in question has a permanent legal force, or in other words, the husband or wife has become a former husband or wife. This becomes even more complicated, in the case of a former husband or wife who has moved to an unknown place of residence. Thus, there are three possible relative competencies of the Religious Courts which have the authority to adjudicate, namely: a. The Religious Courts which rendered divorce decisions or licenses to pledge divorce for the divorce case in question; b. The Religious Court administers the actual residence of the husband; or c. The Religious Court administers the actual residence of the wife. The existence of legal uncertainty in determining the relative competence of the Religious Courts as mentioned above often results in losses for the plaintiff. Errors in relative competence in filing a lawsuit over the joint property in the Religious Courts will result in the party filing the lawsuit experiencing losses in terms of effort, cost, and time because the process of filing a lawsuit must be repeated or started all over again. Based on the Law on Religious Courts, if a lawsuit is filed for *joint property* separately from a lawsuit for divorce or an application for a divorce pledge permit, the Religious Court that has the authority to adjudicate is the Religious Court that administers the place of residence of the defendant.

Divorce Initiation: Female or Male?

We know that the 50:50 division is to elevate the dignity of the woman in her case to the marital property. As women are often ignored and considered not entitled to the property that has been sought by their husbands. However, in reality, the control over assets in marriage determines who will control the assets. So in reality, there are cases where men do not receive joint property even though they work to make a living. The fact that many men are filed for joint property shows that working women have control over marital assets.

Quantitative data about husbands or wives who filed for joint property in the last 4 years at the Aceh, Medan, and Surabaya Religious Courts are shown in the table.

Data on who file for joint property in Banda Aceh Syariah Court in 2019-2022³³

	2019	2020	2021	2022
Total Cases	10	13	6	6
Male	3	4	2	-
Female	2	7	4	5
The data is obfuscated	5	2	1	1

Data on who filed for joint property in Medan Religious Court for 2019-2022³⁴

	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 property in Surabaya Religious Court for 2019-2022³⁵

	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 of joint property claimants. This data was taken from the Case Tracing Information System or *Sistem Informasi Penelusuran Perkara* (SIPP) of the Banda Aceh Mahkamah Sharia Court, and the Medan and Surabaya Religious Courts. It appears that the tendency for joint property claimants to be women in recent years.

This is likely supported by the increasing number of working women. On the other hand, the Religious Courts also provide facilities and convenience for women in accessing the courts.

Even though in empirical data many women are reluctant to go to court for various reasons,³⁶ women are increasingly daring to file a lawsuit. Although the number of lawsuits for joint 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 the law on Peradilan Agama (Islamic Court) and KHI was legalized, many Indonesian Muslim women have dared to access the courts.³⁷

³³ https://www.sipp.ms-bandaaceh.go.id/list_perkara

³⁴ https://sipp.pa-medan.go.id/index.php/detil_perkara

³⁵ https://sipp.pa-surabaya.go.id/list_perkara

³⁶ E. Nurlaelawati / *Islamic Law and Society* 20 (2013), 250-251.

³⁷ Arskal Salim et al., *Demi Keadilan dan Kesetaraan: Dokumentasi Program Sensitivitas Jender Hakim Agama di Indonesia* (Jakarta: PUSKUMHAM, 2009).

The large number of women filing joint property lawsuits shows that women have control over marital assets. Control of assets is generally based on contributions to these assets. The phenomenon of women working in Indonesia shows that women have quite high control over marital assets. Conflicts over the division of joint property make the husband file a lawsuit in court.

Moslem Judge's Approach in Distributing Joint Property

Religious court judges in distributing joint property refer to two approaches. First, a normative textual approach, and a progressive contextual approach. The textual normative division is the distribution of joint property that is carried out normatively and refers to the law with a half: half (50:50) division, as mandated by law. The distribution with this pattern applies to families of married couples with three models.

From the cases above, whether the husband is suing or the wife is suing, the judge's approach shows that in any conflict resolution over the division of joint property, the first thing the judge does is refer to the applicable law, namely dividing the two joint property owned by married couples. If there is no appeal or objection from each party, this decision shall prevail. Let's look at two examples of judges' decisions regarding the following two kinds of lawsuits.

First Case: Wife as the Plaintiff

First, the case was decided by the judge at the Banda Aceh Religious Court 118/Pdt.G/2019/MS.Bna, where the wife is the plaintiff. The wife is suing for her rights to the joint property they own. The judge on behalf of the Religious Courts granted the plaintiff's claim in its entirety. The judge determines the assets that have been submitted as joint property. The judge then determines and distributes the respective rights and shares of the joint property to the Plaintiff (wife) ½ share and to the Defendant (husband) ½ share following legal provisions. Husband and wife both work, but the wife's income is greater than that of the husband.

Second Case: Husband as Plaintiff

In this case, it also happened that the plaintiff was the husband as stated in 1725/Pdt.G/2019/PA.Mdn. The judge granted the plaintiff's claim in its entirety. The judge declared the joint property filed as declared assets in the form of one parcel of land and a permanent house. One plot of land without a house, one kiosk unit, and one motorbike, and amount of money, profit from the sale of the house as joint property, the Plaintiff and the Defendant.

It is stipulated that the half (½) part is the right of the Plaintiff (husband) and the half (½) part is the right of the Defendant (wife) on the assets determined as joint property.

The Judge ordered the Defendant to hand over half (½) of the said joint 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 property lawsuits in the Religious Courts, whether the plaintiff is the wife as a woman or the plaintiff is a husband. Thus it can be concluded that there is no difference in the treatment of religious court judges toward male plaintiffs or female plaintiffs. All judges' decisions in handling cases of distribution of joint property always refer to the law.

Cases of Working Wives

Of these types of conflict, there are cases of joint property, in this section, the researcher will analyze cases of joint property in which the wife works with the husband and the wife works with the husband being unemployed/ not working outside as bread.

a. House Husbands Versus Working Wives

When sharing joint property where a husband works to earn a living and the wife does not work, only as a housewife based on the law of joint property is divided in half, half for the husband and half for the wife. However, many men who divorce their wives do not share the joint property, with the assumption that their wives do not produce they are supported. With this condition, the wife will come to court and sue the joint property. Islamic Law Compilation Rules which divides the two; 50:50 joint properties were initially to raise the rights of women who do not work on their marital property. However, in practice, the division of joint property that has been mandated by this law is often not implemented.

The interesting thing is when the husband is not working and the wife is working, is the husband entitled to half of the marital property that his wife produces? In the name of law, based on KHI rules, a husband who does not work has the right to 50% of his marital assets if he does not have a marriage agreement. However, if a lawsuit occurs in this context, the judge will usually decide based on the contribution made by the husband or wife who does not work for their family. Initially, the judges stick to the 50-50 section based on the rules that have been set. However, if the spouse who is not working does not play a good role in the family and does not contribute to the family, the judge will usually give a share of less than 50%.

This is following the law, in the event of a divorce, each husband and wife gets half of the marital property, which is a juridical aspect that must be followed. The nuances of the decision also imply one of the principles of marriage law regarding the need for a balance of position between husband and wife. Legal norms are on the line of logical justice, but still cannot be used to measure justice, the achievement of which is always casuistic. Therefore, the most important guideline, for a court decision to lead to the field of justice, must pay attention to the contribution of the husband and wife in upholding the household, and this element of the husband and wife's contribution should be used as a guideline in the context of the distribution of marital assets due to divorce.

b. Working Husbands Versus Working Wives

Case A, Decision Number 1372/Pdt.G/2011/PA.Ba stipulates that joint 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 role of each husband and wife is not as stipulated in Article 31 paragraph (3) of Law Number 1 of 1974 in the sense that the wife has a dual role besides being a housewife who manages and carries out household tasks as well as a career woman who plays a role large in collecting joint property, namely as a trader so that the provisions as in article 97 of the Compilation of Islamic Law cannot be applied to this case.

Case b, The legal arrangement stipulates that after the divorce the joint property is divided in half between husband and wife. However, this is not the decision in case No. Register 334/pdt.G/2017/PTA.Sby, which determines 1/3 of the share for the husband and the rest for the wife. The purpose of this study is to find out the legal arrangements regarding joint property exceptions in the distribution of joint property due to divorce, and to analyze the decision number 334/Pdt.G/2017/PTA.Sby. The research is normative legal research,

with data sources namely Islamic law data and secondary data. The data collection tool is a documentation study. Based on the results of the research, it is known that legal arrangements regarding the distribution of joint property due to divorce are contained in Article 128 paragraph (1) of the Civil Code, Article 37 of the Marriage Law, Article 97 KHI, and customary law. Exceptions to the distribution of joint property as a result of divorce are caused by, among other things, marriage agreements, husband and wife contributions during the marriage, both husband and wife working together, husbands working and wife working, and *nusyuz* conditions. The division of joint property cannot always be shared equally, in the existing decision (related to the thesis) that the contribution of the wife is more than that of the husband because the wife works and is the backbone of the family, if Article 97 KHI is applied, between the two parties it will cause injustice.

Case c, decision Number 618/Pdt.G/2012/PA.Bkt The Panel of Judges stipulates that the plaintiff (husband) has the right to own 1/3 (one-third) of the joint property as stated in the verdict and the defendant (wife) has the right to own 2/3 (two-thirds) part of the joint property. This decision was based on the condition of the marriage which had been previously considered by the judge. Where in reality as long as Plaintiff and Defendant are married, it is Defendant who is more dominant and plays an active role in meeting the needs of his household. This can be seen from the persistence of his wife in fulfilling his household life, while Plaintiff works on what Defendant has tried before.³⁸

From the cases above, the judge used an approach and *ijtihad* in resolving the conflict over this joint property dispute facing this conflict, the creativity of judges and their *ijtihad* must be used.

The approach taken by Muslim judges towards '*harta bersama*' at Indonesia's Islamic courts varies depending on several factors, including the specific circumstances of the case, the interpretation of Islamic law, and the judge's personal beliefs and experiences. However, some general principles are commonly applied.

- 1) One approach taken by Muslim judges is to apply the principles of '*fara'id*' or Islamic inheritance law. According to these principles, the distribution of property is based on a fixed set of rules that take into account the relationship of the heirs to the deceased, the number of heirs, and the type of property in question. In cases of '*harta bersama*' the court may divide the property equally among the heirs or distribute it following the principles of '*fara'id*'. This approach just happened in Aceh society.³⁹ This kind of case sometimes happens in Aceh.
- 2) Another approach taken by Muslim judges is to consider the specific circumstances of the case and the wishes of the deceased. In such cases, the court may take into account factors such as the contributions made by each spouse to the acquisition or maintenance of the property, and the financial needs of each spouse.⁴⁰
- 3) In addition to these approaches, Muslim judges may also consider the concept of '*maqasid al-shariah*' or the higher objectives of Islamic law. Under this approach, the court may prioritize the welfare of the spouse and the preservation of family

³⁸ Pembagian Harta Bersama Akibat Perceraian (Studi Putusan No. 618/Pdt.G/2012/Pa.Bkt

³⁹ W. Khairuddin, "Fara'id as the Principle of the Distribution of Joint Property in the Indonesian Islamic Court," *Al-Adalah: Journal of Islamic Law*, vol. 10, no. 1, pp. 117-140, 2018.

⁴⁰ W. Djuharie and S. N. R. Ayu, "The Legal Principles for Distribution of Harta Bersama in Islamic Inheritance Law," in 2nd International Conference on Law, Business and Governance (ICLBG 2018), 2019, pp. 1-6.

harmony over strict adherence to the principles of welfare. This approach is particularly relevant in cases where the distribution of property may lead to family disputes or other negative consequences.⁴¹

Overall, the approach taken by Muslim judges towards *'harta bersama'* at Indonesia's Islamic courts is multifaceted and may involve a combination of the above principles and considerations. Ultimately, the goal of the court is to ensure a fair and just distribution of property that is following Islamic law and that takes into account the specific circumstances of the case.

The approach taken by Muslim judges towards *'harta bersama'* at Indonesia's Islamic courts varies depending on several factors, including the specific circumstances of the case, the interpretation of Islamic law, and the judge's personal beliefs and experiences. However, some general principles are commonly applied.⁴²

This progressive legal idea is following the character of joint property conflicts that often arise in Indonesian society.⁴³ First, the law is for humans, not humans for law. Humans do the rotation of the law. Laws exist for humans, not humans for laws. Second, progressive law refuses to maintain the status quo in law. Maintaining the status quo has the same effect as when people argue that the law is the measure of all things, and people are for the law. Such a way of law is in line with positivistic, normative, and legalistic ways. Once the law says or formulates it like that, we can't do much, unless the law is amended first. Third, if it is recognized that legal civilization will bring up all the consequences and risks that arise, then the way we judge should also anticipate how to overcome obstacles in using written law. Fourth, progressive law pays great attention to the role of human behavior in law. The role of humans here is a consequence of the recognition that we should not adhere absolutely to the formal text of a rule. Therefore, in resolving conflicts faced by them, they must be able to resolve them objectively based on applicable law, so in the decision-making process, judges must be independent and free from the influence of any party, including the executive.⁴⁴

Thus, it is clear that the judges have great power over the parties to the dispute regarding the problem or conflict that is before the judges. However, this also means that in carrying out their duties fully they bear a great responsibility and must be aware of this responsibility because a judge's decision can have far-reaching consequences on the lives of other people affected by the scope of the decision. An unfair judge's decision can even leave an imprint on the minds of the *yastisinbels* concerned throughout their life's journey.⁴⁵

It is this contextual progressive foundation that characterizes the distribution of joint property. Because justice is the main principle, judges must have the courage to reject the status quo in interpreting the law according to reality. Rejecting the status quo means that judges no longer rely on the paradigm of legal positivism in interpreting the Constitution. In legal positivism, the position of the text is autonomous and independent of the interpreter. When someone interprets a legal text, that person is not allowed to go beyond the autonomy

⁴¹ R. Hidayatullah and A. A. Fakhruddin, "The Application of Maqasid Al-Shariah in Islamic Inheritance Law in Indonesia," *Journal of Islamic Law Research*, vol. 3, no. 1, pp. 25-42, 2017. See also W. Djuharie and S. N. R. Ayu, "The Legal Principles for Distribution of Harta Bersama in Islamic Inheritance Law," in 2nd International Conference on Law, Business and Governance (ICLBG 2018), 2019, pp. 1-6.

⁴² Satjipto Rahardjo, *Membedah Hukum Progresif*, (Jakarta: Kompas, 2006), h. ix

⁴³ Satjipto Rahardjo, *Biarkan Hukum Mengalir*, (Jakarta: Jakarta, 2007), h. 139- 147.

⁴⁴ Firman Floranta Adonara, "Prinsip Kebebasan Hakim dalam Memutus Perkara Sebagai Amanat Konstitusi *Principles of Freedom of Justice in Decidene The Case as a Constitutional Mandate* ," *Jurnal Konstitusi*, Volume 12, Nomor 2, Juni 2015, h. 218.

⁴⁵ Suhrawardi K. Lubis, *Etika Profesi Hakim*, (Jakarta: Sinar Grafika, 2002), h. 29.

and independence of the text being interpreted. This is intended so that the interpretation at trial is objective and free from the subjectivity of the interpreter, as well as its relation to values, culture, politics, and the economy. As a result, whether or not an interpretation is correct is seen from its suitability with the known meaning of the text.

The form of progressive law in the enforcement of Islamic positive law in the Religious Courts to realize justice in the distribution of joint property in the Islamic Law Compilation (KHI) is by *ijtihad tatbii* carried out by judges, namely *ijtihad* in the application of the law by looking at case law or 'casuistic law' by looking at the facts or events underlying the dispute or case, then the judge after considering all the interrelationships, the next step is to find the right law for the case.⁴⁶

Empowerment of Women through Re-reading Based-local Values of Harta Bersama

As mentioned above, the concept of *Harta Bersama* is deeply rooted in Indonesian culture and values. It recognizes that property is not just about material possessions but also encompasses relationships, social bonds, and other non-material forms of wealth. Women empowerment can be achieved through re-reading and emphasizing the local values of *Harta Bersama*

One way to empower women through the concept of *Harta Bersama* is to promote gender equality in the distribution of wealth. This means giving women equal access to economic resources and opportunities, as well as recognizing and valuing their contributions to the family and community. This can be achieved by providing women with financial education and training, as well as by creating policies that promote gender equality in the workplace and the distribution of land and property.

Another way to empower women through *Harta Bersama* is to 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. Women should be allowed to participate in community meetings, serve on committees and boards, and hold leadership positions.⁴⁷

In addition to promoting gender equality and women's participation in decision-making processes, the concept of *Harta Bersama* can also be used to emphasize the importance of social bonds and relationships in promoting women's empowerment. This means recognizing the value of women's contributions to the family and community and supporting them in their roles as caretakers, nurturers, and community builders.⁴⁸

Overall, the empowerment of women through the re-reading of the local values of *Harta Bersama* involves creating a society that values women and recognizes their contributions to the family and community. This requires not only changes in policies and laws, but also changes in attitudes and behaviors, and a greater appreciation of the non-material forms of wealth that are central to Indonesian culture and values.

Another important aspect of empowering women through *Harta Bersama* is by promoting women's education and skills development. Education is a key tool for empowering women and providing them with the skills and knowledge they need to participate fully in society. By investing in education and skills development programs for

⁴⁶ Akhmad Khisni, "Ijtihad Progresif dalam Penegakan Hukum Positif Islam di Pengadilan Agama tentang Pembagian Harta Bersama," *Jurnal Hukum Ius Quia iustum*, No. 3 Vol.19 Juli 2012: 455-470.

⁴⁷ Karolina Hutkova, "Gender and the Local Value of Harta Bersama (Shared Wealth) in Rural Indonesia" the *Journal of International Development*, Volume 31, Issue 2, 2019.

⁴⁸ Anis Hidayah and Rachel Sharples, "Women's Empowerment and Gender Equality in Indonesia: The Role of Civil Society" the *Journal of International Development*, Volume 31, Issue 2, 2019.

women, we can help them to break out of poverty and achieve greater economic independence.

The empowerment of women through the re-reading of local values of *Harta Bersama* involves promoting gender equality, encouraging women's participation in decision-making processes, recognizing the value of women's contributions to the family and community, and investing in women's education and skills development. By working towards these goals, we can help to create a more just, equitable, and inclusive society, where all women can thrive and reach their full potential.⁴⁹

In practice, justice efforts carried out through judges' *ijtihad* are also carried out to affirm women's rights. Although the rules related to these rights have not been properly implemented, there have been significant efforts by judges to protect women's rights to the property after divorce.⁵⁰

Conclusion

In general, this study demonstrates that Moslem Judges use two approaches in distributing *harta bersama* in the Religious Courts. First, the textual normative approach, and second, the contextual progressive approach. The normative textual approach refers to laws and regulations that have established formal provisions for the division of joint property), namely 50;50. while the contextual progressive approach refers to three patterns of distribution of joint property; *faraid* patterns or Islamic heritage; spousal contribution-based patterns and sharia *maqasih* patterns.

In addition, the results of this study indicate that the distribution of joint property (*Harta Bersama*) needs to take into account the legal facts that exist for both parties (husband and wife) and the distribution must prioritize benefit and a sense of justice. The distribution does not always have to be guided by existing rules, but rather a distribution that is felt to fulfill justice for both parties.

In this case, women need to get more attention because women often get unfair treatment. On the other hand, women are reluctant to report the conflicts they experience to the court. However, recent studies have shown that women have shown more courage in accessing religious courts than before.

To implement these goals, it is important to involve a range of stakeholders, including government agencies, civil society organizations, and the private sector. The government can play a key role in creating policies and laws that promote gender equality and women's empowerment, as well as providing funding for programs and initiatives that support these goals. Civil society organizations can work with communities to raise awareness and advocate for women's rights, as well as provide services and support to women who have experienced gender-based violence or discrimination.

References

Adonara, Firman Floranta. "Prinsip Kebebasan Hakim dalam Memutus Perkara Sebagai Amanat Konstitusi *Principles of Freedom of Justice in Decidene The Case as a Constitutional Mandate*," *Jurnal Konstitusi*, Volume 12, Nomor 2, Juni 2015.

⁴⁹ Kiki Verico and Theresia Widiyanti "Promoting Women's Empowerment in Indonesia: Challenges and Opportunities" *the Journal of Southeast Asian Economies*, Volume 36, Issue 1, 2019.

⁵⁰ Nurlaelawati, Euis (2014) *Islamic Justice in Indonesia: Family Law Reform and Legal Practice in the Religious Courts*. Center for Asia Pacific Studies Nanzan, Vol. 5 (No. 1). pp. 1-25.

- Al-Ghazali, Syekh Muhammad Bin Muhammad Abu Hamid. *Kitab Al-Mustafa fi 'Ilmi Al-Usul*.
- Al-Zuhayli, Wahbah. *Ushul al-Fiqh al-Islami*. Vol. II. Beirut: Dar al-Fikr, tt.
- Cammack, Mark E. and R. Michael Feener (2008), "Joint Marital Property in Indonesian Customary Law, Islamic Law and National Law," in Peri Bearman, et.al, eds, *The Law Applied: Contextualizing the Islamic Shariah*, New York, Tauris. 92-115.
- Cammack, Mark E. Marital Property in California and Indonesia: Community Property and Harta Bersama, 64 Wash. & Lee L. Rev. 1417 (2007), <https://scholarlycommons.law.wlu.edu/wlulr/vol64/iss4/7>
- Clarkson, CMV (2008), Matrimonial Property On Divorce: All Change In Europe, *Journal of Private International Law*, 4: 3, 421-442. Vol. 4.
- Deere, Carmen Diana and Cheryl R. Doss, The Gender Asset Gap: What Do We Know And Why Does It Matter?, *Feminist Economics* 12 (1-2), January/April 2006.
- Djuharie, W. and S. N. R. Ayu, "The Legal Principles for Distribution of Harta Bersama in Islamic Inheritance Law," in *2nd International Conference on Law, Business and Governance (ICLBG 2018)*, 2019, pp. 1-6.
- Elviyanti, Rita. "Sengketa Harta Bersama Istri Turut Mencari Nafkah," *Tesis*, Program Studi Hukum Islam Program Pasca Sarjana (S2) Universitas Islam Negeri Fatmawati Sukarno Bengkulu, 2022
- Hadikusuma, Hilman. *Hukum Waris Adat*. Bandung: Aluni, 1980.
- Hidayah, Anis and Rachel Sharples, "Women's Empowerment and Gender Equality in Indonesia: The Role of Civil Society" the *Journal of International Development*, Volume 31, Issue 2, 2019.
- Hidayatullah, R. and A. A. Fakhruddin, "The Application of Maqasid Al-Shariah in Islamic Inheritance Law in Indonesia," *Journal of Islamic Law Research*, vol. 3, no. 1, pp. 25-42, 2017.
- https://sipp.pa-medan.go.id/index.php/detil_perkara
- https://sipp.pa-surabaya.go.id/list_perkara
- https://www.sipp.ms-bandaaceh.go.id/list_perkara
- Hutkova, Karolina. "Gender and the Local Value of Harta Bersama (Shared Wealth) in Rural Indonesia" the *Journal of International Development*, Volume 31, Issue 2, 2019.
- Indonesian Islamic Legal Compilation
- Ismuha. *Pencaharian bersama suami Isteri*. Cet. I; Jakarta: Bulan Bintang, 1986.
- Jacobs, Krista & Aslihan Kes (2015) The Ambiguity of Joint Asset Ownership: Cautionary Tales From Uganda and South Africa, *Feminist Economics*, 21:3, 23-55, DOI: 10.1080/13545701.2014.926559.
- Junaidy, Abdul Basith. 'Harta Bersama dalam Hukum Islam di Indonesia.' *Jurnal al-Qanun*, Surabaya: Fakultas Syariah dan Hukum UIN Sunan Ampel, 2014, 357.
- Kamran, Muhammad. "Post-Divorce Matrimonial Property Distribution: A Case Study Of Polygamy Marriage, *Sovereign: International Journal of Law*, Vol. 2, Issue 2, 2020.
- Khairuddin, W (2018), "Fara'id as the Principle of the Distribution of Joint Property in the Indonesian Islamic Court," *Al-Adalah: Journal of Islamic Law*, vol. 10, no. 1, pp. 117-140.
- Khalaf, Abdu al-Wahab. *Mashadir al-Tashri' al-Islami fi Ma Laysa Nashsh Fih*. Kuwait: Dar al-Qalam, 1972 M/1392 H.
- Khisni, Akhmad. "Ijtihad Progresif dalam Penegakan Hukum Positif Islam di Pengadilan Agama tentang Pembagian Harta Bersama," *Jurnal Hukum Ius Quia iustum*, No. 3, Vol.19 Juli 2012: 455-470.

- Laily, Fitroh Nur'aini "Model Pembagian Harta Bersama Perspektif Hukum Progresif, *Tesis*, Program Studi Hukum Keluarga Pascasarjana Institut Agama Islam Negeri (IAIN) Ponorogo, Agustus, 2017.
- Lubis, Suhrawardi K. *Etika Profesi Hakim*. Jakarta: Sinar Grafika, 2002.
- Lukito, Ratno. *Islamic Law and Adat Encounter: The Experience of Indonesia*. Jakarta: Logos, 2001.
- Lukito, Ratno. *Pergumulan Antara Hukum Islam Adat Indonesia*. Jakarta: INIS, 1998.
- Muslimin, J.M. dan Yulia Fatma, The Actualization of Justice in the Settlement of *Joint property (Harta Bersama)* Due to Divorce: Comparative Analysis of Decisions of the Religious Courts, *De Jure: Jurnal Hukum dan Syar'iah*, Vol. 12, No. 2, 2020.
- Nurlaelawati, Euis (2014) *Islamic Justice in Indonesia: Family Law Reform and Legal Practice in the Religious Courts*. Center for Asia Pacific Studies Nanzan, Vol. 5 (No. 1).
- Nurlaelawati, Euis. *Islamic Law and Society* 20 (2013), 250-251.
- Nurlaelawati, Euis. *The Legal Fate of Indonesian Muslim Women in Court Divorce and Child Custody, Religion, Law, Intolerance*, 2016, hal. 2-16.
- Nurnazli. "Analisis Putusan Mahkamah Agung Tentang Pembagian Harta Bersama dan Implikasinya terhadap Pembaruan Hukum Keluarga di Indonesia," *Disertasi*, Program Doktor (S3) Hukum Keluarga Program Pascasarjana Universitas Islam Negeri Raden Intan Lampung, 2019.
- Putusan No. 618/Pdt.G/2012/Pa.Bkt
- Rahardjo, Satjipto. *Biarkan Hukum Mengalir*. Jakarta: Jakarta, 2007.
- Rahardjo, Satjipto. *Membedah Hukum Progresif*. Jakarta: Kompas, 2006.
- Salim, A., & Nurlaelawati, E. (2009). *Demi Keadilan & Kesetaraan, Sensitivitas Jender Hakim Agama di Indonesia*. Jakarta: PUSKUMHAM, 72.
- Salim, Arskal (ed.) 2009. *Demi Keadilan dan Kesetaraan: Dokumentasi Program Sensitivitas Gender Hakim Agama*. Jakarta: PUSKUMHAM.
- Salim, Arskal. et al., *Demi Keadilan dan Kesetaraan: Dokumentasi Program Sensitivitas Jender Hakim Agama di Indonesia*. Jakarta: PUSKUMHAM, 2009.
- Salsabila, Zakiya. "Pembagian Harta Bersama Akibat Perceraian Di Indonesia dan Malaysia dalam Perspekti Gender," *Tesis* Program Studi Magister Hukum Keluarga Fakultas Syariah Dan Hukum Universitas Islam Negeri Syarif Hidayatullah, Jakarta, 2021.
- Schuz, Rhona (2019) Choice of Law in Relation to Matrimonial Property in the 21st Century, *Journal of Private International Law*, 15:1, 1-49, DOI: 10.1080/17441048.2019.1599769
- Siddiq, Muhammad and Irmawati, "Analisis Putusan Mahkamah Syar'iyah Meureudu Terhadap Pembagian Harta Bersama," *Ahkamul Usrah: Jurnal Hukum Keluarga dan Peradilan Islam*, Vol. 1 No.1 Januari-Juni 2021.
- Sumner, Cate and Lindsey, Tim (2010), *Courting Reform: Justice for the Poor*. Canberra: Lowy Institute.
- Syah, Ismail Muhammad. *Pencaharian Bersama Suami Istri di Indonesia*. Jakarta: Bulan Bintang, 1978.
- Ter Haar, B. *Adat law in Indonesia*, trans. A. Arthur Schiller and E. Adamson Hoebel. Jakarta: Bhratara, 1962.
- Undang-Undang Peradilan Agama
- Verico, Kiki and Theresia Widiyanti "Promoting Women's Empowerment in Indonesia: Challenges and Opportunities" *the Journal of Southeast Asian Economies*, Volume 36, Issue 1, 2019.

Wulandari, Ratih Ayu. "Harta Bersama: Re-reading Women's Empowerment through the Local Value of Shared Wealth in Indonesia" *the Journal of International Women's Studies*, Volume 21, Issue 2, 2020.

Zahrowati. Nilai Keadilan Dalam Putusan Pembagian Harta Bersama Pada Peradilan Agama, *Disertasi*, Program Pascasarjana, Universitas Hasanuddin , Makasar, 2017.

Approaches of the Religious Court Muslim Judges: Approaches to Settling Joint Marital Assets and Joint Property Disputes between Spouses in Indonesia's Islamic Courts

Abstract: This paper examines the legal practice of sharing joint property in Indonesian Religious Courts. This paper article examines the approaches and considerations of judges in resolving marital assets and 'shared joint property/joint marital property' (commonly referred to as *harta bersama/Bersama* in Indonesia) conflicts-disputes between husband and wife in several Indonesian Religious Courts. Theft also aims to see analysis also includes investigation of the judges' approach to determining the relationship between the types of roles played by spouses in creating joint property/joint marital property and the effect of such determination on the dispute settlement/division of joint marital property (*Harta Bersama*) through the legal knowledge of approach adopted by judges and the analysis of their content of their dictum decisions. The paper article thus, argues finds that judges have followed both textual and contextual there are significant differences in the approaches to the applicable law and legal interpretation (legal interpretation) among of judges in seeing determining the role played by spouses in creating joint property/joint marital property, which produces inconsistent outcomes in similar cases. Deploying a normative approach, this The analysis in this article paper found finds that the provisions on joint property/joint marital property mandated-included by-in Indonesian Islamic family-law requiring a 50:50 division of joint family property regulations are only-primarily aimed at protecting the rights of women relevant in a context where their women role in the marital life is limited to being house wives, only work in the domestic sphere. In other words However, the judges have taken early out broad and flexible interpretations views approaches in resolving conflicts of shared joint property involving spouses of the to apply this law provisions is law but also only included working whose wives women within the fold of these provisions is law but also given working women a more preferable treatment as compared to working men work outside the house. Therefore, this paper article asserts asserts concludes that the division of joint property/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 of the legal norms of joint property, rather they are based on the type of role played by women who have directly contributed to the creation of joint property/joint marital property.

Keywords: Distribution; Harta Bersama; Joint marital property; Marital Property Assets; Indonesia Muslim Judges; 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 the study of family law have faced inconsistencies and problems in their application in various countries of the world.¹ In addition, studies highlighting issues of gender inequality and studies on the cases of shared joint

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; See also C. M. V. Clarkson, 'Matrimonial Property On Divorce: All Change In Europe' (2008) 4 (3) *Journal of Private International Law* 421, 449.

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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. Choice of legal options governing the legal provisions of their joint property has become another issue to consider.³ In the Indonesian context, legal options considerations for joint marital property also varies. Moreover, in Indonesia, joint marital property is regulated by at least three legal systems; Indonesian customary law, Islamic Law, and National Law.⁴ Joint marital property is commonly referred to as *Harta Bersama* in Indonesia and defined as property acquired after a wedding ceremony.⁵ When a married couple chooses to divorce, besides taking care of children, another issue besides taking care of children which that is often discussed in the Religious Courts is related to joint marital property.

However, after the formalization of joint marital property in the 1974 Marriage Law in 1974 and the formalization 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 pattern of sharing the joint marital property refers to the same amount which is on a 50:50 basis. The birth of this law has aimed to increasingly ensured the protection of women rights protected and enhanced the rights of women on the joint marital property and finance within, during, and after marriage, especially- at the time when the marriage proves to be unsuccessful the marital joined property.⁶

In reality, however, the distribution of joint marital property on a 50:50 basis as determined by the law that has been determined by law is not implemented by the Religious Courts properly. This distribution pattern approach often creates conflict because it is followed by the Religious Courts is associated with considering whether with spouses who 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, therefore, after the divorce, the distribution of joint marital property after the divorce often creates serious conflict issues to be decided by. The settlement of this joint property conflict will usually be submitted to the Court, in this case, the Religious Courts.⁷

Although cases of joint marital property are not the most frequent cases in the Religious Courts, however they are issues that are often brought up by women in court after their a divorce, where the. The joint property also attracts the attention of the judges often have to determine the in determining the division of ownership of this marital property. In this such cases, most Indonesian Muslim women have to

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.

⁴ Mark E. Cammack and R. Michael Feener, 'Joint Marital Property in Indonesian Customary Law' (2008) 2 (1) Islamic Law and National Law 92, 115.

⁵ Mark E. Cammack, 'Marital Property in California and Indonesia: Community Property and Harta Bersama' (2007) 64 (4) Law 86, 97.

⁷ Santy Fitnawati, Muhamad Romdoni and Rizki Nurdiansyah, 'Harta Bersama: Sebuah Penyelesaian Objek Sengketa Yang Berstatus Agunan Di Pengadilan Agama Serang' (In Indonesian) [Joint Property Joint marital property: A Dispute Object Resolution with Collateral Status in the Serang Religious Court] (2023) 9 (1) Yustitiabelen 1, 5.

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face the burden of proof struggle to influence the decisions of judges, by presenting evidences of their contribution as husband and wife to the family, both in terms of financial contribution the economy and contribution contribution in maintaining and running the family and the household. Those who argue that this is a fair burden (of proof) on women is supported justify their views by the view that women are based on the assumption assumed to have that women have better access to fight for justice.⁸

In resolving conflicts over the distribution of joint property in the Religious Courts, two types of distribution of joint property in courts are will be considered. First, the settlement of joint property integrated into divorce and conflict resolution of the joint property separated due to divorce. The attitude approach of judges in settling joint property joint marital property disputes, after the 1974 law and the Compilation of Islamic Law tends to should use follow the 50:50 division that has been determined by the law, but conflicts often require judges to act outside of these provisions of the law for consideration of fairness and justice.⁹

In studies conducted addressing the issues of joint marital property in the context of Indonesia There have been many studies on joint property conducted, suggest There are at least two possible approaches to the applicable law on joint marital property aspects of the review that was carried out. Marck E. Cammack, who The studied and compared of common property joint marital property dispute resolution in Indonesia and California related to historical, conceptual, and principles of justice standpoints, reports that in California, a fully egalitarian system of joint property joint marital property did not emerge until the 1970s, more than 100 years after the civil law of joint property joint marital property was formally adopted in the State Constitution in 1849. In Indonesia, on the other hand, the customary concept of marital property joint marital property attracted relatively little attention from Islamic law authorities scholars earlier on, who Islamic jurists eventually were able to embrace the concept of common joint marital property by reconstituting this doctrine as an Islamic institution through the Islamic principles, that was conducted by Marek E. Cammack. He discussed 'Marital Property in California and Indonesia: Community Property and Common Property'. Cammack compared joint property in Indonesia and California. The results of this comparison assume that the law is capable of making changes and adapting. In California, a fully egalitarian system of joint property did not emerge until the 1970s, more than 100 years after the civil law of joint property was formally adopted in the state constitution in 1849. In Indonesia, on the other hand, the customary concept of marital property faces relatively little attention from Islamic authorities. Islamic jurists were able to embrace common property by reconstituting this doctrine as an Islamic institution.¹⁰ Importantly, Cammack assumes that the law in both jurisdictions is capable of making changes and adapting to appropriate situations in their time and place.¹¹ In California, a fully egalitarian system of joint property did not emerge until the 1970s, more than 100 years after the civil law of joint property was formally adopted in the state constitution in 1849. In Indonesia, on the other hand, the customary concept of marital property faces relatively little

⁸ Euis Nurlaelawati, 'The Legal Fate of Indonesian Muslim Women in Court Divorce and Child Custody' (2016) 2 (2) Religion, Law, Intolerance 2, 16.

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

¹⁰ Cammack (n 6). Mark E. Cammack and R. Michael Feener, 'Joint Marital Property in Indonesian Customary Law' (2008) 2 (1) Islamic Law and National Law 94, 115.

¹¹ ibid.

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attention from Islamic authorities. Islamic jurists were able to embrace common property by reconstituting this doctrine as an Islamic institution.

Another study by Michael Feener studied joint marital property with and Mark E. Cammack, Joint Marital Property in Customary, Islamic, and National Law. Feer and Cammack examines the concept of joint property joint marital property in customary law, the rationalization of joint property joint marital property in Islamic law, and how joint property joint marital property is included in Indonesian national law. They also discussed how joint property is in the religious court.¹² 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.¹³ Meanwhile, Ratno Lukito has emphasized that the concept of joint property joint marital property in customary law is inseparable from the formal law, and. eEven though customary law has now been legalized formalised, determination of joint property joint marital property under formal law cannot be fully separated from the context independent of customary law, because it is rooted in culture and custom itself.¹⁴

This article examines the considerations relationship between of the Religious Court judges' considerations of the role and contribution of wives in the family creation of joint marital property, whether the husband is working or not working in creating a joint property joint marital property. The article argues that the customary concepts of joint marital property in Indonesia have a strong presence in the 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 empowerment in Indonesia.

This study research has primarily used a normative approach by examining the decisions of judges in several regions in Indonesia. The study was analyzed with the analysis is supported of by data collected through interviews data. Interviews were carried out with judges and clerks of the Religious Courts in Medan, Aceh, and Surabaya. Both and the types of joint property joint marital property cases, i.e. resolved which is analyzed is the kind of cases that were resolved by a court decision or settled outside of the court using mediation, are analyzed. Part II of the article provides the Indonesian perspectives on the joint marital property. Part III and IV examine respectively the different approaches adopted by Religious Court judges towards the 'sharing' and 'distibution' of joint marital property in Indonesia. Part V discusses the role of traditional practices on joint marital property in women empowerment and Part VI concludes that the Religious Court judges use two types of approaches in detmining 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 ensure that justice is achieved for all parties to the dispute.

This study is field research based on legal research on the facts of the relationship between judges' considerations of the role and contribution of wives in the family, whether the husband is working or not in creating a joint property joint marital property. This research is

¹² Mark E. Cammack and R. Michael Feener (n 4), 'Joint Marital Property in Indonesian Customary Law' (2008) 2 (1) Islamic Law and National Law 98, 115.

¹³ *ibid*,

¹⁴ Ratno Lukito, *Pergumulan Antara Hukum Islam Adat Indonesia* (in Indonesian) [*Struggle Between Indonesian Customary Islamic Law*] (Jakarta: INIS, 1998), 84, 150.

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~~explanatory (explaining the law), hermeneutical (interpretation, argumentation), and evaluative (analyzing the relationship between judges' considerations of the role and contribution of wives in the family, whether the husband is working or not working in creating a joint property/joint marital property). The approach used in this study is a socio-legal approach because it is a legal study that looks at social reality. Socio-legal approach is used to discover and describe facts related to the relationship between judges' considerations of the role and contribution of wives in the family; whether the husband is working or not in creating a joint property/joint marital property. Data analysis techniques are carried out in stages: data reduction, data presentation, and conclusion. The data validity technique used in this study is source triangulation.~~

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Introduction does not clearly reflect the aims of the paper.

II. ~~MARITAL~~ JOINT MARITAL ~~PROPERTY IN MARRIAGE: THE~~ INDONESIAN PERSPECTIVES

Wealth or property ownership in marriage in the Indonesian context can be seen from several perspectives ~~of~~ customary law perspective, Islamic law perspective, and positive law perspective. ~~However, t~~ The most prevalent concept of joint property/joint marital property is primarily based on customary law.¹⁵ ~~Customs are~~ It is attached to the law and institution of customary marriage. As stated by Ratno Lukito, the institution concept of joint property/joint marital property in the customary sense cannot be separated from the social institution of customary marriage as a custom.¹⁶ ~~Thus the doctrine of common property comes from traditional/~~ customary law.

B. Ter Haar noted that the community joint marital property has been known for a long time among indigenous peoples under different names. In West Sumatra the joint property/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* or also called *Atra* or *Laba Meucharikat*. However, ~~then~~ the most popular designation is Harta Gono Gini which refers to the term-expression used by the Javanese tribe. Then, in all over Indonesia, it is better known as Harta Bersama, which is translated into English as (joint property/joint marital property, shared joint assets, or joint assets)¹⁷ although the *Harta Gono Gini* is still widely used.

Interestingly, Islamic law is not dogmatic law, or necessarily a-social and apart from the social contexts and meaning. One of the important principle of Islamic jurisprudence principles law mentions is "al hukmu yaduru ma'al illati wujudan wa 'adaman al hukmy aduurma'a 'illati hi wujudan wa 'adaman" (a law circulates/takes place/evolves depending on the existence or non-existence its of underlying cause/reason, in its existence

¹⁵ Harta Bersama (joint property/joint marital property) is by nature derived from customary law. Many studies have shown that discussion of joint property/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. Ratno Lukito (n 13), Pergumulan Antara Hukum Islam Adat Indonesia (in Indonesian)[Struggle Between Indonesian Customary Islamic Law] (Jakarta: INIS, 1998) 82, 256.

¹⁶ Ratno Lukito (n 14), Pergumulan Antara Hukum Islam Adat Indonesia (in Indonesian)[Struggle Between Indonesian Customary Islamic Law] (Jakarta: INIS, 1998) 84, 256.

¹⁷ Peri Bearman, wolhart Heinrichs, and Bernard G. Weiss (eds), The Law Applied: Contextualizing the Islamic Sharia (London-New York: I. B. Tauris, 2008) 93, 115.

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or non-existence).¹⁸ 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-m‘Auhakkamah*,” (custom can be the basis of judgment) the operationalization of which is known as the method of ‘*u‘Uruf*’ (customary law).¹⁹ This means that Islamic law welcomes the selected good practices of local society to be adopted as religious law to fulfill the needs for law and justice in society.²⁰ 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 have 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 contemporary scholars of Islamic law, hence they can be called “Indonesian Islamic jurisprudence”. Coming from these two laws and regulations in force in Indonesia, 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:

1. Property acquired during marriage that becomes “joint marital property”; and
2. 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 Article 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 *sadaqahs*, 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 custom of *Harta Bersama* in Islamic law through *ijtihad*. Because marriage is considered a form of *shirkah* (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

¹⁸ 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.
¹⁹ Ratno Lukito, *Islamic Law and Adat Encounter: The Experience of Indonesia* (Jakarta: Logos 2001) 11, 154.

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and wife regardless of one or both of them have made financial contributions in the acquisition of such property. In the opinion of T. M. Hasbi Ash Shiddiqie,²¹ with marriage, makes the wife *syirkatur rojuli filhayati* (sharing an ally of a husband in serving the ark of life), then between husband and wife there can be which creates *sharikah abadan* (unlimited partnership) between husband and wife.

That is why when a Muslim divorces in Indonesia, in the Religious Court when a Muslim divorces and when deciding the questions of property acquired during the marriage, it will be required to be considered joint marital property in marriage as a separate unit of assets stipulated in Article 35 of the Marriage Law and Article 85 – Article 97 of the KHI.

The 50:50 division of joint marital property rule is based on the labour concept that house work is equal to economic contribution in the context of a family's household. Indeed, the provision by KHI on the joint marital property requiring 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 the verdict of the equal amount of 50:50 greatly influenced contributed to the elevation of Muslim women's legal status, by considering the labor concept adopted in that era. The 50:50 division is aimed to elevate the legal degree status of women who, according to local provisions customs and traditions, did not have the possibility to work to earn money and did not have the direct power and control legal right over the family's asset economy because women do not work to earn money. Only men make money while wives are considered not to have. Confronting this condition, the decree of Islamic legal compilation on the marital property which distributes to wives the equal proportion of 50:50 on spouse separation, be it on death or divorce, is a revolutionary legal achievement for the wives. Because the status of a wife working at home as a housewife is as important as the status of a husband working outside the household.²²

Thus, according to Indonesian Islamic jurisprudence, marriage gives rise to the existence of joint property in marriage.

III. THE PRACTICE OF SHARING JOINT PROPERTY IN THE RELIGIOUS COURTS JUDICIAL APPROACHES TOWARDS DISPUTES OVER DISTRIBUTION SHARING OF JOINT PROPERTY 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 property joint marital property can also be resolved done 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 carried out determined based on an agreement, which is usually this happens achieved based on existing customary law under local wisdom. The size of the each portion is not a problem as long as the rights of each separated partners both parties are satisfied and fulfilled a sense of justice.

²¹ T. M. Hasbi Ash Shiddiqie, *Pedoman Rumah Tangga (in Indonesian) [Household Guidelines]* (Medan: Pustaka Maju 1971) 9.

²² Ahmad Salim and Nurlaelawati, *Demi Keadilan & Kesetaraan, Sensitivitas Jender Hakim Agama di Indonesia (in Indonesian) [Gender Sensitivity of Religious Judges in Indonesia]* (Jakarta: Puskuham 2009) 72, 104.

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The division of joint property joint marital property that does not reach an agreement will eventually lead to conflict. Then, one of the parties will file a lawsuit to the Religious Court. From the study conducted, it can be considered two models of filing a lawsuit for the division of joint property joint marital property that are submitted to the Religious Courts: 1) one of the parties does not get a joint property joint marital property at all; and 2) that one of the parties gets a share but with a portion that is considered unfair.

D.A. Conflicts over the Distribution of Joint Property 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 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 from 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.

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

2. The second type of joint property joint marital property conflict-dispute is that where each partner has received a share of the joint property 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 amount of division that is considered unfair also triggers for filing a joint property joint marital property lawsuit to in the Religious Court. The distribution division in such cases may have been done that has been done by both parties may not reach an agreement and even if it is divided by the same portion according to the law, i.e., on. (The 50:50 portion basis as mandated by law, according to some spouses, is a husband or wife may still considered it unfair for them because they have a sizeable economic contribution in the acquisition of joint marital property is significantly more as compared to their partner. Meanwhile It is also often the case that, the wife who does not produce-contribute economically is considered to have no contribution to the family. Therefore, women often get fewer-lower shares or even got no shares at all in the joint marital property.

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~~The verdict of the equal amount of 50:50 greatly influenced the elevation of Muslim women's status by considering the labor concept adopted in that era. The 50:50 division is to elevate the degree of women who in local provisions and traditions do not have power and control over the family economy because women do not work to earn money. Only men make money while wives are considered not to have. Confronting this condition, the decree of Islamic legal compilation on the marital property which distributes to wives the equal proportion of 50:50 on spouse separation, be it on death or divorce, is a revolutionary legal achievement for the wives. Because the status of a wife working at home as a housewife is as important as the status of a husband working outside the household.²³~~

E.B. _____ Types of Joint Asset Distribution Settlement

~~In Article 66 paragraph (5) and Article 86 paragraph (1) of the Law on Religious Court s it is said that, says that the filing a lawsuit regarding child control, child support, wife maintenance of wife, and joint property~~joint marital property~~ of husband and wife can be filed together with a divorce lawsuit or after a divorce decision attains~~obtains~~ permanent legal force. The details of the articles mentioned above are as follows: Article 66 paragraph (5) says:"~~

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

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Likewise, Article 86 paragraph (1) says:

"Lawsuits regarding child custody, child maintenance, wife maintenance, and joint property~~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.""

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~~-Based on these provisions outlined in Article 66 paragraph (5) and Article 86 paragraph (1) of the Law on the Religious Courts as mentioned above, it can be seen that the law provides for the possibility that filing a lawsuit over the joint property~~joint marital property~~ (Harta Bersama) 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 property~~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 which adjudicates on all of the matters mentioned in Articles 66 and 86 are the Religious Courts thatincluding administration of the wife's residence, as long as the wife does not leave the joint residence without permission from the husband.²⁴~~

Furthermore, it becomes a problem if a lawsuit for joint property~~joint marital property~~ is filed separately from filing a divorce application or a divorce lawsuit. It is not uncommon for a lawsuit for joint property~~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~~permit in question has a permanent legal force.~~; for in other words, the husband and~~or~~ wife has~~ve~~s

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²³ Ahmad Salim & Nurlaelawati, *Demi Keadilan & Kesetaraan, Sensitivitas Jender Hakim Agama di Indonesia* (in Indonesian) [*Gender Sensitivity of Religious Judges in Indonesia*] (Jakarta: Puskumham, 2009) 72, 104.

²⁴ Suryaningsih, 'Impact of Gadget Addicts on Family Harmony Perspective of Islamic Law' (2022) 1 (1) Nusanantara: Journal of Law Studies 50, 53.

become a former husband and/or wife. In this situation, the question of joint marital property becomes complicated, in the case of where a former husband and/or wife who have separated and residing in different places has moved to an unknown place of residence. Control over assets in marriage often determines who will have those assets.

Thus, there are three possible relative competencies of the Religious Courts which have the authority to adjudicate, namely:

F.C. Divorce Initiation of Lawsuit: Female or Male?

The 50:50 division is meant to elevate the dignity of the woman in her ease claim to the joint marital property. It is assumed that women are often ignored and considered not entitled to the property sought-acquired by their husbands during marriage although they might have contruted in the household otherwise than making the financial contribution. However, in reality, the control over an assets in marriage-often determines who will control the assets who will get that asset of joint marital property. So in reality, there are cases where men do not receive joint property joint marital property even though they have worked to make a living and provide for their family. The fact that many men are have filed lawsuits for joint property joint marital property shows that when working women have control over marital assets, men ma not get the 50 percent share in that asset. Quantitative data about husbands or wives who filed for joint property joint marital property in the last 4 years at the Aceh, Medan, and Surabaya Religious Courts are shown in the table below.²⁵

Data on who file for joint property 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	-
Female	2	7	4	5
The data is obfuscated	5	2	1	1

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

²⁵ 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.

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	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 of men are joint property joint marital property claimants in most cases of joint marital property.~~ This data was taken from the Case Tracing Information System or Sistem Informasi Penelusuran Perkara (SIPP) of the Banda Aceh Mahkamah Sharia Court, and the Medan and Surabaya Religious Courts. It appears that the tendency for ~~joint property joint marital property~~ claimants to be women in recent years.

This is likely ~~supported by due to~~ the increasing number of working women. ~~On the other hand~~ This trend is despite the fact that, the Religious Courts ~~are supposed to also~~ provide special facilities and convenience for women in accessing the courts.²⁶

~~Even~~ Although in empirical data studies show that many women are reluctant to go to court for various reasons,²⁷ women are increasingly daring to file a lawsuit. ~~Although~~ The number of lawsuits for ~~joint property 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 ~~the law on~~ Peradilan Agama (Islamic Religious Court) and KHI laws ~~was were legalized promulgated,~~ many Indonesian Muslim women have freely and frequently ~~dared to~~ accessed the Religious Courts.²⁸

IV. JUDICIALGES APPROACHES TOWARDS DISTRIBUTION OFNG JOINT PROPERTY JOINT MARITAL PROPERTY

Religious court judges in distributing ~~joint property joint marital property~~ prefer to two approaches, namely, ~~First, a n~~ normative textual approach, and ~~a~~ progressive contextual approach.²⁹ The ~~textual normative~~ textual division approach is for the distribution of ~~joint property joint marital property~~ that is carried out ~~normatively and~~ based on the literal approach to refers to the law with a half: half (50:50) division, ~~as mandated stated in the by~~ law. ~~The distribution with this pattern applies to families of married couples with three models.~~

From the cases above, whether the husband or the wife is suing, the judge's' approach shows that in any conflict resolution over the division of ~~joint property joint marital property~~, the ~~first thing the judges does is first~~ refer to the applicable law which requires division of joint marital property on, ~~namely a 50:50 dividing the two joint property joint marital property~~ basis owned by married couples. If there is no ~~appeal or~~ objection from ~~each either~~ party,

²⁶ Musda Asmara and Lilis Sahara, 'Problems with Choosing a Mate in Islam for People Who Choose a Mate through Social Media' (2022) 1 (1) Nusantara: Journal of Law Studies 40, 43.

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²⁸ 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.

²⁹ 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.

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~~judges make this decision shall prevail accordingly. Let's look at The following two examples of judges' decisions regarding the following two kinds of lawsuits reflect this approach.~~

A. First Case: Wife as the Plaintiff

~~First, the~~The case 118/Pdt.G/2019/MS.Bna was decided by the judge at the Banda Aceh Religious Court 118/Pdt.G/2019/MS.Bna, where the wife was the plaintiff. The ~~wife is suing~~ wife is suing for her rights to the ~~joint property~~joint marital property they own and. ~~The judge on behalf of the Religious Court judges~~ granted the plaintiff's claim in its entirety. The judge determined ~~s~~ the assets that have been submitted as ~~joint property~~joint marital property. The judge then determined ~~s~~ and distributed ~~s~~ the respective rights and shares of the ~~joint property~~joint marital property to the ~~p~~Plaintiff (wife) ½ share and to the ~~d~~Defendant (husband) ½ share strictly following the positive legal-law provisions. Husband and wife both worked d, but the wife's income was greater than that of the husband.

B. Second Case: Husband as Plaintiff

~~In this the case 1725/Pdt.G/2019/PA.Mdn, it also happened that~~ the plaintiff was the husband ~~as stated in 1725/Pdt.G/2019/PA.Mdn~~. The judge granted the plaintiff's claim in its entirety. The judge ~~declared determined~~ the ~~joint property~~joint marital property as filed as declared claimed assets by the husband in the form of one parcel of land and a permanent house. ~~One plot of land without a house, one kiosk unit, and one motorbike, and amount of money, and profit from the sale of the a houses as joint property~~joint marital property; the Plaintiff and the Defendant.

~~It is stipulated~~Then the court decided that the half (½) ~~part of the joint marital property is~~ the right of the ~~p~~Plaintiff (husband) and the half (½) ~~part~~ is the right of the ~~d~~Defendant (wife) ~~on the assets determined as joint property~~joint marital property.

~~The Judge ordered the d~~Defendant to hand over half (½) of the said ~~joint property~~joint marital property in good condition without any burden whatsoever to the ~~p~~Plaintiff. In this case, the husband works while the wife is a housewife.

Decisions like this occur in all cases of ~~joint property~~joint marital property lawsuits in the Religious Courts, whether the plaintiff is the wife or the ~~plaintiff is a~~ 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 All judges' decisions~~ in handling cases of distribution of ~~joint property~~joint marital property ~~always first~~ refer to the law and apply it positively.

C. Cases of Working Wives

~~Of these types of conflict, t~~There are cases of ~~joint property~~joint marital property where, in this section, the researcher will analyze cases of joint propertyjoint marital property in which the wife works with and the husband is either as employed or is not a bread winner for the family.

1. House Husbands Versus Working Wives

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~~When sharing joint property joint marital property where a husband works to earn a living and the wife does not work, only as a housewife based on the law of joint property joint marital property is divided in half, half for the husband and half for the wife. However, many men who divorce their wives do not share the joint property joint marital property, with the assumption that their wives do not produce. With this condition, the wife will come to court and sue the joint property joint marital property. Islamic Law Compilation Rules which divides the two; 50:50 joint properties were initially to raise the rights of women who do not work on their marital property. However, in practice, the division of joint property joint marital property that has been mandated by this law is often not implemented.~~

~~It is The interesting thing is when the husband is not working and the wife is working, is the husband entitled to half of the marital property that his wife~~

~~produces? In the name of law, based on KHI rules, a husband who does not work has the right to 50% of his marital assets if he does not have a marriage agreement. However, if a lawsuit occurs in this context, the judge will usually decide based on the contribution made by the husband or wife who does not work for their family. Initially, the judges stick to the 50-50 section based on the rules that have been set. However, if the spouse who is not working does not play a good role in the family and does not contribute to the family, the judge will usually give a share of less than 50%.~~

7.1. Working Husbands Versus Working Wives

~~The cCase :- Decision Number-1372/Pdt.G/2011/PA.Ba stipulates that joint property joint marital property between husband and wife is divided 2/5 (two-fifths) for the pPlaintiff (husband) and 3/5 (three-fifths) for the dDefendant (wife). The decision was made on the bases of unequal role of each husband and wife in the acquisition of joint family property. The judge decided held that is not as stipulated in Article 31 paragraph (3) of Law Number 1 of 1974 is not stipulated i-In the sense thatto discredit, the wife who has a dual role, i.e. besides being a housewife who manages and carries out household tasks, she is as well also a career woman woring as a trader who playeds a greater role in large in collecting 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, Namely, as a trader so that the provisions as in of Aarticle 97 of the Compilation of Islamic Law cannot be applied were not applicable to this case. This relects the progressive contextual approach adopted by the Religious Court judge.~~

2. House Husbands Versus Working Wives

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When dividing joint marital property where a husband works to earn a living and the wife does not work and serves mainly a house wife, 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 the 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 have used both textual and contextual approaches an approach and *ijtihad* in resolving the conflict-disputes over this joint property joint marital property dispute. Through the creativity of judges and their *ijtihad*, must be used. They have followed these two approaches taken into account both the fomalised form of by Muslim judges towards '*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 at Indonesia's Islamic courts varies depending depends on several factors; including the specific circumstances of the case, the interpretation of *harta bersama* and Islamic law, and the judge's personal beliefs and experiences finding on the respective role played by the husband and the wife, both in financial and non-financial terms, to the household. However, some general principles are commonly applied.³⁰

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V. WOMEN EMPOWERMENT THROUGH HARTA BERSAMA

As mentioned above, the concept of *harta bersama* is deeply rooted in Indonesian culture and values. It recognizes 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 Women empowerment can be achieved through re-reading formalisation of the local values of *harta bersama* under the umbrella of Islamic law has contributed to women empowerment in Indonesia. and emphasizing the local values of *Harta Bersama*

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Another way to empower women through The role of *harta bersama* in the women empowerment is surely not limited to its adaptation into Muslim family law in Indonesia. The *harta bersama* values also to 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, wWomen should also be allowed-encouraged to effectively participate in community meetings, serve on committees and boards, and hold leadership positions.³¹

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In addition to promoting gender equality and women's participation in decision-making processes, the concept of *harta bersama* can also be used to emphasize the importance of social bonds and relationships in promoting women's empowerment. This means

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³⁰ Satjipto Rahardjo, *Membedah Hukum Progresif* (in Indonesian) [*Dissecting Progressive Law*] (Jakarta: Kompas, 2006) 87, 275.

³¹ 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.

recognizing the value of women's contributions to the family and community and supporting them in their roles as caretakers, nurturers, and community builders.³²

VI. CONCLUSION

The recognition of joint marital property in Indonesia is based on the recognition and validation of custom of *Harta Bersama* in Islamic law through *ijtihad*. Because marriage is considered a form of *shirkah* (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 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 Article 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 house work is equal to economic contribution in the context of a family's household. Indeed, this provision by KHI on the joint marital property requiring 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 is study demonstrates that the Religious Court Muslim judges use two approaches when deciding dispute over joint marital property under the KHI law in distributing *harta bersama* *Bersama* in the Religious Courts. First, namely, the textual normative approach; and second, the contextual progressive approach. The normative textual approach refers is adopted to implement the laws and regulations that have established formal provisions for the division of joint property joint marital property on a, namely 50:50 basis between the husband and the wife. While 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 contextual judgement of the type of role played by women who have contributed to the creation of joint marital property.

refers to three patterns of distribution of joint property joint marital property: *faraid* patterns or Islamic heritage; spousal contribution based patterns and sharia *maqasid* patterns.

In addition, this e results of this study indicates that the judges when dividing joint marital property take into consideration distribution of joint property joint marital property (*Harta Bersama*) needs to take into account the legal facts that exist for both parties (husband and wife) and the distribution must prioritize benefit and a women for their empowerment sense

³² 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.

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of justice. The ~~distribution-division~~ does not always have to be guided by the existing rules applicable law in its literal form, but rather ~~a distribution that is~~ should be felt to have fulfilled justice for both parties.

In this case, women need to get more attention and because ~~women they~~ often get unfair treatment. ~~On the other hand, women are reluctant to report the conflicts they experience to the court. However, recent studies have shown that women have shown more courage in accessing religious courts than before.~~

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29 July 2023

Re: Your Article in the MJTILP

Dear Sukiati, Nurasiah, and Milhan,

I am very pleased to inform that your article “Muslim Judges’ Approaches Towards Joint Property in Indonesia’s Islamic Courts” has been accepted for publication in the Manchester Journal of Transnational Islamic Law & Practice (MJTILP). This acceptance is subject to your satisfactory revisions of the article as required by the editor and reviewers before publication.

On behalf of the Editorial Board, I would like to thank you for this very timely and important contribution.

Sincerely,

Dr Ahmad Ghouri

Ahmad Ali Ghouri

Editor-in-Chief

Manchester Journal of Transnational Islamic Law & Practice

Email: a.a.ghouri@outlook.com

Website: [Manchester Journal of Transnational Islamic Law & Practice ISSN 2633-6626 | ElectronicPublications](#)





Manchester Journal of Transnational Islamic Law & Practice

About the Journal

The MJTILP 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 publish four times a year.



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

Sukiati*

Nurasiah**

Milhan***

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.