

MARITAL PROPERTY WITHIN THE MARRIAGE LAW

A Debate on Legal Position and Actual Applications

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Abstract

This paper presents a debate on the legal position of marital property and its application. It begins with examining the legal position of marital property and the application of the UUP and KHI for Muslims. It also pays attention to a discussion of whether the position of marital property needs to be declared in a marriage agreement or comes into effect automatically in every marriage. It ends with examining various actual applications in resolving a legal dispute over the marital property in the Indonesian Religious Courts. As qualitative research, this study adopts a socio-historical approach. Data were taken from such regulations on the marital property as the UUP and KHI, official documents released by the Supreme Court of the Republic of Indonesia. The data were also collected from books and reputable journals. Based on the socio-historical analysis, it could be concluded that the legal position of marital property distribution has been regulated in the UUP and KHI coming into force nationally. Under this legal framework, the property acquired during a marriage belongs to both spouses. In practice, however, the spousal rights to share the property ownership becomes broken in two situations, i.e., when the husband and wife agree to include the formulation of the distribution of marital property in their marriage agreement, and when one of them files a lawsuit for the marital property by either litigation or non-litigation. Decisions based on the qualitative contributions have turned out to be more dominant in the history of settling disputes over marital property in Indonesia.

[Artikel ini membahas perdebatan posisi hukum dari harta bersama beserta penerapannya. Pembahasan diawali dari posisi hukum harta bersama dan penerapannya didalam UU Perkawinan dan Kompilasi Hukum Islam (KHI). Hal ini juga dibahas apakah perlu dicantumkan dalam perjanjian nikah atau otomatis menjadi bagian dari setiap pernikahan. Selain itu artikel ini juga membahas beberapa penerapan dalam penyelesaian kasus hukum harta bersama di Peradilan Agama. Artikel ini menggunakan pendekatan sosio-historis dan tidak hanya menggunakan rujukan dari buku serta jurnal ilmiah, tetapi juga dari dokumen resmi peraturan perundangan dalam UU Perkawinan, KHI serta Mahkamah Agung. Dalam tulisan ini disimpulkan bahwa harta bersama sudah mempunyai posisi legal dalam UU Perkawinan dan KHI serta diterapkan secara nasional. Dalam logika hukum ini, harta yang didapatkan selama pernikahan menjadi milik bersama. Dalam praktiknya, hak keduanya akan terbagi jika berada di dua kondisi, pertama ketika suami dan istri memasukkan formasi pembagian sendiri dalam perjanjian pernikahan dan kedua ketika salah satu dari pasangan tersebut mengajukan gugatan harta kekayaan baik lewat pengadilan atau tidak. Keputusan yang berdasarkan kontribusi kualitatif ternyata lebih dominan dalam sejarah penyelesaian perselisihan harta bersama di Indonesia.]

Keywords: *Marital Property, Marriage Law, Legal Position, Actual Applications*

A. Introduction

In the era of industrial revolution, property is a prioritized need in supporting the economy of a marital life.¹ However, it also has a potential of becoming a source of long-term conflicts. Property-related conflicts in a marriage are becoming more dynamic and inevitable in a modern family closely related to the industrial society lifestyle. Social transformation from agrarian to industrial society,² in turn affects how people think and act. Besides, disputes over ownership of the marital property have strengthened the increasing position of women in the

¹ Klaus Schwab, *The Fourth Industrial Revolution* (New York:: Crown Business, 2017), p. 19.

² Nur Mazidah, "Relijiusitas dan Perubahan Sosial dalam Masyarakat Industri", *The Sociology of Islam*, vol. 1, no. 1 (2011), p. 54.

wider asset ownership.³

One of the biggest conflict triggers related to property in a marriage is marital property acquired by both husband and wife.⁴ These marital property conflicts factually lead to property division, child custody, living rights, and other asset division issues.⁵ According to Sayuti Thalib, marital property is one acquired together excluding gifts and inheritance. In other words, it is property earned by either the husband or the wife while the married lasted.⁶ This definition is in line with the law No.1 of 1974 on marriage (to be later referred as UUP) article number 35 (1) which states that property acquired during marriage is marital property. The construction of shared family is then elaborated technically within the Presidential Decree No.1 of 1991 on Islamic Law Compilation (to be later referred as KHI), distributed in chapter XIII articles 85 to 97.⁷

Legal legitimacy of marital property is closely related to the spirit of self-actualization of a wife in public law and social life. As an individual, a wife also has hopes, needs, interests, and even self-independence for the sake of their self-development.⁸ In this context, women's social and economic roles keep increasing; they have been proven to be able to reposition their mere previous functions which were to reproduce, cook, and dress up.⁹ Their roles were often assumed based on their nature

³ Felix M. Muchomba, "Parents' Assets and Child Marriage: Are Mother's Assets more Protective than Father's Assets?", *World Development*, vol. 138 (2021), p. 105226.

⁴ Bina Agarwal, "Gender and Command Over Property: A Critical Gap in Economic Analysis and Policy in South Asia", *World Development*, vol. 22, no. 10 (1994), pp. 1455–1478.

⁵ Lily Faizal, "Harta bersama dalam Perkawinan", *Ijtima'iyya: Jurnal Pengembangan Masyarakat Islam*, vol. 8, no. 2 (2015), pp. 77–102.

⁶ Sayuti Thalib, *Hukum Kekeluargaan Indonesia* (Jakarta: UI Press, 1986), p. 85.

⁷ Ahmad Rofiq, *Hukum Islam di Indonesia* (Jakarta: Raja Grafindo Persada, 1995), p. 53.

⁸ Elizabeth Kristi Poerwandari, "Aspirasi Perempuan Bekerja dan Aktualisasinya", *Kajian Wanita dalam Pembangunan*, ed. by Tapi Omas Ihromi (Jakarta: Yayasan Obor Indonesia, 1995), p. 314.

⁹ Javanese women used to have such roles as *masak* (cooking), *macak* (putting make up), *manak* (giving birth) Anam Miftakhul Huda, "The Identity of Javanese Woman (The study of Phenomenology Toward Indonesian Migrant Women Workers)", *JARES (Journal of Academic Research and Sciences)*, vol. 1, no. 1 (2016), pp. 61–72. See Hamam Burhanuddin, "Pendidikan Berperspektif Gender di Pesantren", *Al-Murabbi: Jurnal Studi*

as women. Moreover, such theological campaigns telling wives to fully comply to their husbands as a sacred act were also kept repeated.¹⁰ This social stratification of wives also went to the economic side of domestic affairs, in which wives were labeled as ones who received, not ones who provided. However, things are changing; women are now having equal position in politics,¹¹ education, law, as well as social and economic lives. Therefore, some of the police, army, politicians, entrepreneurs, and even presidents are now women. This role shift of women is an evidence that gender equality is getting better.

To this day, marital property has been proven to contribute to legal issues and justice either in terms of the property division or the formulation.¹² Theoretically, property rights go to those working.¹³ Regarding this matter, Kieff stated that property belongs to those work hard and professionally for it.¹⁴ If a husband works and earns salary, it means that he has a full right to it. On the other hand, a wife has a full right of her salary if she works (*milk al-tam*). In short, property belongs to individuals without any process of combining or dividing. However, the legal substance stated in the UUP and KHI stated the

opposite; property earned during marriage belong to everyone in the family, meaning that whoever works, the property should actually be

Kependidikan dan Keislaman, vol. 2, no. 1 (2015), pp. 111–132.

¹⁰ Mirya Anggraeni and Suyanto, “Ajaran tentang Bakti Istri kepada Suami dalam Serat Wulang Reh Putri”, *Nusa: Jurnal Ilmu Bahasa dan Sastra*, vol. 12, no. 2 (2017), pp. 108–17.

¹¹ Rizkika Lhena Darwin and Haryanto, “Women Candidates and Islamic Personalization in Social Media Campaigns for Local Parliament Elections in Indonesia”, *South East Asia Research*, vol. 29, no. 1 (2021), pp. 72–91.

¹² Theoretically, the provisions on the distribution of marital property with a half-share system for each husband and wife is in accordance with Article 96 paragraph 1 KHI stating that “in the event of a divorce by death, half of the marital property becomes the right of the spouse living longer”. Whereas, the provisions on the distribution of marital property in divorce cases contained in Article 97 KHI states that “widowers of divorce have the right to half of marital property as long as it is not stipulated otherwise in the marriage agreement”.

¹³ Muhammad Rusfi, “Filsafat Harta: Prinsip Hukum Islam Terhadap Hak Kepemilikan Harta”, *Al-Adalah*, vol. 13, no. 2 (2016), pp. 239–58.

¹⁴ F. Scott Kieff, “Property Rights and Property Rules for Commercializing Inventions”, *Minn. L. Rev.*, vol. 85 (2000), p. 697.

shared. This legal construction of marital property within marriage life triggers conflicts. The conflicts often lead both husbands and wives to fight for their marital property – related rights starting from first degree court, appellate court, and even the supreme court.¹⁵ Sometimes, even though the issues are legally solved within the court, the conflicts between the two families last longer. Some of the cases even end up with casualties on a side of the fighting families. In this type of case, one of the biggest reasons is one side's dissatisfaction in relation to the marital property due to gender bias.

B. The Concept of Marital Property and Gender Equality in Indonesian Culture

Historically, the solution to division of marital property prior to the existence of the law No.1 of 1974 on marriage was done through religious figures, fatwa of a *qadi*, local court namely *pengadilan serambi*, and an institution namely *sara*.¹⁶ The division formulation also varied, depending on the existing local culture and the shifting roles of husband and wife. The social dynamics of women started to appear when they also work to provide for their family.

The movement of wife emancipation,¹⁷ occurred in such areas in Indonesia as Banda Aceh, West Sumatera, and such ethnicities as Javanese, Maduranese, Sundanese, Balinese, and Bugisnese.¹⁸ According

¹⁵ Arifah S. Maspeke and Akhmad Khisni, 'Kedudukan Harta Bersama dalam Perkawinan Menurut Fiqih dan Hukum Positif Indonesia Serta Praktek Putusan Pengadilan Agama', *Jurnal Hukum Khaira Ummah*, vol. 12, no. 2 (2017), pp. 173–84.

¹⁶ The settlement of marital property disputes in the 17th century was carried out through religious leaders, fatwas and *qadbi* rulings. One example of the settlement of marital property is implemented in *Adat Badamai* of Banjar, South Kalimantan. Irfan Noor, 'Barang Perpentangan: Sebuah Akomodasi Hukum Waris Islam atas Budaya Relasi Jender dalam Masyarakat Banjar', *Jurnal Kebudayaan Kandil Melintas Tradisi*, vol. 2, no. 7 (2004), p. 68; A. Hassan, *Al-Fara'id: Ilmu Pembagian Warisan* (Surabaya: Pustaka Progressif, 2003), p. 121; Jumadi, 'Institusi Sara' Di Maros Sulawesi Selatan', *Attoriolong: Jurnal Pemikiran Pendidikan dan Penelitian Kesejaraban*, vol. 7, no. 2 (2010), pp. 34-50.

¹⁷ Lee MacLean, "Beyond the Established Categories: An Alternative Approach to Feminist Thought Starting From Debates About Women and The Rise of the Market Economy", *Feminist Theory* (February, 2018).

¹⁸ A. Hassan, *Al-Fara'id: Ilmu Pembagian Warisan* (Surabaya: Pustaka Progressif, 2003), p. 121.

to the societal norms and values at that time, when death or divorce took place, their marital property was divided one third for the wife and two third for the husband. The formulation was known as *hareuta sehareukat* in Aceh, *suarang* in Jambi, *massow bebesak* in Lambung, *guna kaya* in Sunda, *gono gini* in Java, *ghuna ghana* in Madura, *druwe gabro* in Bali, and *cakkara* in Bugis.¹⁹ This pattern expanded to other areas as time went by; however, it was agreed that the pattern did not represent the equality values since sometimes the marital property was predominantly contributed by the wife.²⁰

Unlike the culture-based formulation existing in Aceh, West Sumatera, Lampung, Sunda, Java, Bali, and Bugis, the formulation in South Borneo offered another pattern. There was local wisdom related to this namely *barang perpantangan*. This local wisdom refers to the Banjar culture which is *adat badamai*. There was a unique formulation in which the ratio was fifty-fifty.²¹

Banjar ethnicity is a society whose majority is Muslims,²² and has a lot of famous Islamic figures.²³ According to Alfani Daud as cited by Ahmadi Hasan,²⁴ Banjar people was historically identical to Islam. This is shown by their behaviors instilling Islamic values. One of the most popular Banjarian Muslim figures is Muhammad Arsyad Al-Banjari,²⁵ the

¹⁹ M. Yahya Harahap, *Kedudukan Kewenangan dan Acara Peradilan Agama (Undang-undang No 7 tahun 1989)* (Jakarta: Pustaka Kartini, 1997), p. 298.

²⁰ Kellen Zale, "Sharing Property", *University of Colorado Law Review*, vol. 87, no. 2 (2016), p. 517.

²¹ Irfan Noor, "Barang Perpantangan: Sebuah Akomodasi Hukum Waris Islam atas Budaya Relasi Jender dalam Masyarakat Banjar", p. 68.

²² Azyumardi Azra, *Jaringan Ulama Timur Tengah dan Kepulauan Nusantara Abad XVII dan XVIII* (Bandung: Mizan, 1998), p. 252; A. Gazali Usman, *Kerajaan Banjar Sejarah Perkembangan Politik Ekonomi Perdagangan dan Agama Islam* (Banjar: Universitas Lambung Mangkurat, 1994), pp. 19–20.

²³ Azyumardi Azra, *Jaringan Ulama*, p. 252.

²⁴ Alfani Daud, *Islam & Masyarakat Banjar: Diskripsi dan Analisa Kebudayaan Banjar* (Jakarta: RajaGrafindo Persada, 1997), p. 110.

²⁵ Al-Banjari was born in Lok Gabang village, Astambul subdistrict, Intan Martapura district, South Kalimantan province on March 19, 1710 AD, and died 6 Sawal 1227 H to coincide on October 13, 1812 AD and was buried in Dalam Pagar, Kalampayan, Astambul, Martapura, South Kalimantan province. M.S. Kadir, "Shaikh Muhammad Arshad al-Banjari Pelopor Da'wah Islam di Kalimantan Selatan", *Mimbar*

author of a phenomenal book entitled *Sabilal Muhtadin*.²⁶ The fifty-fifty formulation in *barang perpantangan* patterns also derives from one of the thoughts of al-Banjari which became living law within the Banjarian society to solve the issues of marital property.

The fifty-fifty formulation is in contradiction with the existing formulation of marital property division issues. Despite the difference with the mainstream patterns, *barang perpantangan* has successfully drawn the attention of Indonesian industrial society and law practitioners.²⁷ There are several reasons of the people's selection upon *barang perpantangan* pattern. First, this formulation is considered just either in terms of gender equality or economic rights between husband and wife for it applies the principles of equality. Second, the formulation shows clarity as it demonstrates how culture and religion value the role of women in the modern era, particularly where they work and support the financial state of the family.²⁸ According to the principles of *barang*

Ulama, 6th edition (1976), p. 69; Abu Daudi, *Maulana Shaikh Muhammad Arshad al-Banjari (Tuan Haji Besar)* (Banjarmasin: Madrasah Sullam Al-Ulum, 1996), p. 15.

²⁶ In addition to writing *Sabilal Muhtadin*, Al-Banjari also wrote other works such as *Tuhfab Raghabin* which contains monotheism (1774 AD), *Risalah Qaul Mukhtasar fi 'Alamat Mabd Muntaẓar* (1781 AD), and *Ushbuluddin*. While his works in the field of tasawwuf are *Fathurrahman*, *Waliyurruслан*, and *Kanzul Ma'rifah*. While his writings are the *Parukunan Basar*, *Luqtab al-'Ajlān fi Haidhi wa Istibāzah wa Nifas Nisyan* (1778 AD), and *Sabilal Muhtadin* (1780 AD), the Book of Marriage, the Science of Falak, and the Book of Fara'id. It is said that it is in the book of al-Fara'id that Al-Banjari formulated "Barang Perpantangan" as a fair solution in resolving the marital property conflict in Banjar community in South Kalimantan. S. H. Abdurrahman, "Mengenal Karya Tulis Ulama Banjar: Menelusuri Kaya-Karya Syaikh Muhammad Arsyad al-Banjari", *Makalah Diskusi Kelompok Ikatan Cendekiawan Muslim Indonesia (ICMI)* (Banjarmasin: 1988), pp. 11–6.

²⁷ *Barang perpantangan* becomes the principle in the resolution of marital property disputes in Indonesia as stipulated in Law Number 1 of 1974 concerning marriage, and in Presidential Instruction Number 1 of 1991 concerning Compilation of Islamic Law. Law Number 1 of 1974 concerning marriage and Presidential Instruction Number 1 of 1991 concerning Compilation of Islamic Law became the reference in resolving marital property disputes and supported by relevant fiqh books.

²⁸ Ismuha, *Pencabarian bersama Suami Isteri di Indonesia: Adat Gono-Gini Ditinjau dari Sudut Hukum Islam* (Jakarta: Bulan Bintang, 1978), p. 41; Nur Khoirin, "Marriage Treasure Ownership in Arabic and Nusantara Fiqh Perspectives", *Addin*, vol. 12, no. 2 (2018), p. 567.

perpantangan, women have been respected in Banjar since long time ago.²⁹

According to Zuhdi,³⁰ Indonesians have a long history of involving women in public such as in the market and the government. The public role of Banjarian women in their daily life has been stated by KH. Anang Ramli HAQ³¹ as follows:

*Galuh (girls) banjar tu saban hari mambantu laki maulah buah tangan nangkaya topi dari purun, tikar, wadai, wan bajualan sayur, buah lawan iwak di pasar tarapung lawan pasar dimana baja.*³²

It is said that Banjarian women should help their husbands in creating such handicrafts as *topi purun*, *tikar*, *kue*, and sell vegetables, fruit, and fish in the market and other shopping centers. The Banjarian women used to row their canoe to sell their goods in the river banks and the closest market. In the meantime, their husbands worked in the rice field, farms, and went fishing in the river. This habit kept on going on and became a tradition creating marital property in a marriage.

In the perspective of gender, the role and performance of Banjarian women and wives attract the attention in terms of the law in the context of marital property. This is due to the fact that the fifty-fifty pattern is an alternative of gender equality.

It is known that the dynamics of women roles in the industrial

²⁹ Irsyad Zein, interview (3 Jul 2009).

³⁰ Muhammad Zuhdi, "Challenging Moderate Muslims: Indonesia's Muslim Schools in the Midst of Religious Conservatism", *Religions*, vol. 9, no. 10 (2018), p. 310.

³¹ Kyai Haji (an Indonesian term for a leader of an Islamic boarding school who has successfully completed the Hajj to Mecca) was Anang Ramli HAQ, also known as Tuan Guru Ramli Bati-Bati, was the founder of both Majelis Dzikir Al-Syafa'atul Kubra, a dhikr group, and the Islamic boarding school of Ubudiyah in Bati-Bati, Tanah Laut, South Kalimantan, Indonesia. Born in Kampung Bati-Bati (now Desa Benua Raya) on April 12, 1927, he was a charismatic and influential Banjarese ulama contributing a lot to the Banjarese community development through da'wa and education. He passed away on Friday, March 7, 2013. Syarifin Anang Ramli, *Profil al-Haj Anang Ramli bin al-Haj Abdul Qadir* (Bati-Bati: Pondok Pesantren Ubudiyah, 2015); *Manaqib ahli bayt*, Pesantren of Ubudiyah, Banjarmasin (2015), p. 6; MUI Kalsel & LP2M UIN Antasari, *Ulama Banjar Dari Masa Ke Masa* (Banjarmasin: Antasari Press, 2018), pp. 299–302.

³² KH. Anang Ramli HAQ, interview (26 May 2012).

society are getting more serious and not limited to the private functions.³³ Based on the research Gilroy,³⁴ Poverty and domestic violence in an intimate relationship committed by one party have created a difficult cycle for women. For educated women, on the other hand, this situation could position them as a special subject and makes middle class claims.³⁵ Nowadays, the number of working wives is growing bigger and bigger. According to T.O. Ihromi as cited by Zikry Darussamin,³⁶ in 1976, the percentage of urban women working as employees was 46.29%, those who were independent entrepreneurs was 28.43%, and those who were partnering-entrepreneurs was 6.6%. They had an important role both in the family and in the nation. In the political world, there are some many women who are the members of the legislative boards, governors, mayors, and even a president.³⁷ Meanwhile, in the social and economic dimensions, women have been playing important roles in public sectors such as company leaders, lecturers, teachers, drivers, pilots, doctors, etc. Changes in the role of women in economic and social based on the increasing skill they have.³⁸ The data from the World Bank in 2019 showed that 53.81% of Indonesian women above 15 years old participate in working.³⁹

This reality is different from the period of *jabiliyah*, *tirkab* in the

³³ Mahsun Fuad, *Hukum Islam Indonesia: Dari Nalar Partisipatoris Hingga Emansipatoris* (Yogyakarta: LKiS Pelangi Aksara, 2004), p. 42.

³⁴ Heidi Gilroy, Angeles Nava, and Judith McFarlane, “Developing a Theory of Economic Solvency for Women Who Have Experienced Intimate Partner Violence”, *Violence Against Women Violence Against Women*, vol. 26, no. 9 (2020), pp. 1–17.

³⁵ Ayesha Khurshid, “Islamic Traditions of Modernity: Gender, Class, and Islam in a Transnational Women’s Education Project”, *Gender & Society*, vol. 29, no. 1 (2015), pp. 98–121.

³⁶ Zikri Darussamin and Armansyah Armansyah, “Hak Harta Bersama bagi Istri yang Bekerja Perspektif Maqashid asy-Syari’ah”, *Asy-Syir’ah: Jurnal Ilmu Syari’ah dan Hukum*, vol. 51, no. 2 (2017), p. 371; T.O. Ihromi, *Bunga Rampai Sosiologi Keluarga* (Jakarta: Yayasan Obor Indonesia, 1999), p. 169.

³⁷ Zuhdi, “Challenging Moderate Muslims”, p. 11.

³⁸ Daniela Casale and Dorrit Posel, “Women and the Economy: How Far Have We Come?”, *Agenda: Empowering Women for Gender Equity*, vol. 19, no. 64 (2005), pp. 21–9.

³⁹ World Bank, *Labor force participation rate, female (% of female population ages 15+) (modeled ILO estimate) - Indonesia*, <https://data.worldbank.org/indicator/SL.TLFCACT.FE.ZS?locations=ID>, accessed 3 Jan 2021.

pra-Islam Arabic culture suggested, only belonged to the husband; their wife did not have any rights to the property. One of the reasons was that men were ones professionally working, riding horses, and going to war.⁴⁰ In the *jabiliyah* tradition, there was a premise “*la nurithu man la yarkabu farasan wa la yahmilu kallon wa la yanka’u ’adwan,*” meaning that we do not share any property or wealth to those who do not ride horses, provide for the family, and go to war.

The conflict of marital property division usually happens in two occurrences; post-divorce and post-death of one of the spouses. In the divorce case, that principles of *perpantangan* where all the marital property earned during marriage is collected before the division are adopted. After the collection is done, the next step is to share the property evenly; half for the husband and the other half for the wife. The half part of the wife is her independent rights obtained during their marriage time, not as *nafkah*, *kiswah*, or *maskanah*.

In the meantime, when death occurs, the division method is quite different. First, all the property is collected then divided evenly. The first half belongs to the living spouse and the other half is the inheritance to be distributed to the rest of family members, or sometimes called *tirkah*. In the principles of *barang perpantangan*, the living spouse still has the right to receive the inherited wealth or property (*tirkah*) in accordance with the Islamic law. Considering this rationale, *barang perpantangan* – based property division formulation is such a novel paradigm in dealing with conflict of marital property division, particularly in the marital law context, which is more just and nont gender-biased.

C. The Establishment of the Concept of Marital Property in National Laws

The problem of dividing marital property in Indonesia is progressively increasing as the issue of gender equality in marriage law is strengthened. The issue of gender equality rematerialized around the 21st century, that the family law system in the world experiences a substantial difference in looking at relations and equality between husband and wife. In many cases, the women’s emancipation movement is oriented to the

⁴⁰ Syafiq Hasyim, *Hal-hal yang Tak Terpikirkan Tentang Isu-isu Keperempuanan dalam Islam* (Bandung: Mizan, 2001), pp. 19–20.

importance of equality and greater protection for women in marriage and domestic matters.⁴¹ The phenomenon of gender equality movement in many countries could not be separated from the emerging movements for new interpretations of managing the relation among the marriage law, traditional Islamic law, along with legal theories and ethics.⁴²

The birth of *barang perpantangan* in the 17th century was a milestone for wives' marital property rights in Indonesia. The formulation was born from the soul of (volkgeist) Banjar culture which stipulates that women have the same marital property shares as husbands. Al-Banjari's, also known as Datuk Kalampaian, thought was built based on legal and social phenomena that occurred in the community, that the wife also worked to provide for the family. Husbands' and wives' wages and income were conjointly mixed to develop wealth in marriage in Banjar community

This rational underlies the development of post-independence marriage law. UUP which was promulgated on January 2, 1974 became Law No. 1 of 1974 which became the legal in resolving disputes over marital property. Law No. 1 of 1974 concerning marriage Article 35 paragraph (1) states that: Any property obtained during marriage becomes marital property.

The abovementioned regulation states that assets obtained during marriage are categorized as marital property. Based on these provisions, all sources of assets attained during marriage become joint rights between husband and wife except for the assets mentioned in the next paragraph, namely congenital property, gifts or inheritance. This provision is based on Article 35 paragraph (2) which states:

The congenital property of each husband and wife obtained as a gift or inheritance respectively, is under the control of the respective party as long as the parties do not specify otherwise.

Based on the provisions of Article 35 paragraph (2), assets obtained during marriage will automatically become marital property. These provisions become the basic concept of the totality and absolute

⁴¹ Donna Lee Bowen, Valerie M. Hudson, and Perpetua Lynne Nielsen, "State Fragility and Structural Gender Inequality in Family Law: An Empirical Investigation", *Laws*, vol. 4, no. 4 (2015), pp. 654–72.

⁴² Adis Duderija, "Contemporary Muslim Male Reformist Thought and Gender Equality Affirmative Interpretations of Islam", *Feminist Theology*, vol. 28, no. 2 (2020), pp. 161–81.

asset pooling. Automatic ownership of marital property can obviously be limited in the sense that it can be separated, when the husband and wife have agreed to determine marital property division in the marriage agreement. Based on the agreement, the position of marital property and other forms of assets become relative property rights, depending on the contents of the agreement. This is in accordance with Article 97 KHI which states that:

Each divorcee or widower is entitled to one half of the marital property as long as there is no other provision in the marriage agreement.

Based on this provision, if a divorce takes place and the agreement of marital property has been determined, then the formulation of marital property division as stated in Article 97 KHI becomes null and void. Based on this marriage agreement, the position of the marriage agreement can discrete the mixing of marital property, and the the amount of marital property is divided based on husband and wife mutual agreement. Although the provisions on the merging of marital property have been regulated in detail in the UUP and KHI, the percentage of ownership rights aside from the half to half formulation is still open through a marriage agreement

The unification of marital property is in line with the spirit of togetherness values. Togetherness in marriage does not only involve immaterial issues, but it also covers material, mental and physical aspects. This is in accordance with the principle of marriage *aqad* namely *mitsaqan ghalidzan* or a strong agreement. Marriage is not just *aqad budhu*⁴³ that is, the agreement to have halal intimate intercourse, but the marriage relationship is based on a strong agreement (*mitsaqan ghalidzan*). *Aqad mitsaqan ghalidzan* in marriage is a sacred contract that is not playful and easy to break or dissolve.⁴⁴

⁴³ According to *fiqh munakabat*, marriage *aqad* is *aqad budhu* completed to validate the bodily relationship between husband and wife. This is based on the words of the Prophet Muhammad SAW which states “*wafi budh’i abadikum sadaqah*” which means “in conducting *budhu*” (intimate relations of husband and wife) is an alms. Rosmini, “Misi Emansipatoris Alqur’an dalam Relasi Seksualitas Antara Majikan dan Budak Perempuan”, *Al Daulah: Jurnal Hukum Pidana dan Ketatanegaraan*, vol. 4, no. 1 (2015), pp. 151–67.

⁴⁴ Allah SWT says in An-Nisa: 21; “And how could you take it while you have gone in unto each other and they have taken from you a solemn covenant? (*mitsaqan*

The principle of togetherness is materially seen in the provisions of Article 93 paragraphs (3) and (4) KHI which states “if the marital property is inadequate, it will be charged to the husband’s shares.” The provisions describe the condition of the husband or wife who are unable to meet their economic needs, or the wife who fails to carry out her functions properly. Under Article 93 (3), the husband is obliged to fulfill the economic needs. This obligation is undeniably for the husband in providing for the family, and is obliged to provide for his wife and family. The principle of togetherness is further contained in Article (4) KHI which states “if the husband’s property is not available or sufficient, then it is charged to the wife’s assets.” This provision is the norm relating to the hierarchy of delegating economic responsibility, which positions the wife as the last line in maintaining family economic security.

The legal hierarchy regarding the role of husband and wife in the use of marital property has a unique character to position the owner of excessive assets as the guarantor of the family. If the husband has the ability to work and abundant wealth, then he is responsible for the fulfillment of the family’s economy. Conversely, if a wife has work ability and abundant wealth, then she is responsible for fulfilling the family’s economy. The principle of togetherness causes the wealth obtained by both husband and wife united. The unification of joint property in a marriage is built based on the philosophy of mutual cooperation (*syirkah*)⁴⁵ inherent in husband and wife rights and obligations.

The formulation of marital property in Indonesia is different from

ghalidzan.” Wahbah Zuhaili explained that the meaning of the above verse is that the law of touching (sexual intercourse) of the wife before the marriage contract is unlawful for a husband because to obtain the halal status and pleasure of a wife, it is obligatory for a husband to give dowry first (in *aqad nikah*) to prospective marriage wife. If the husband has sexual intercourse with his wife, then the law is haram because he has not compensated a dowry, and the prospective wife then justifies herself to have intercourse with her husband, surrenders her sanctity to her husband lawfully too, and by that time the wife’s virginity is taken away. Then could the chastity that has been taken away be given back. Based on these explanations, the *mitsaqan ghalidzan* is oriented towards maintaining the importance of the integrity of the marriage which is compared to the impossibility for a husband to restore the sanctity he has snatched away. Wahbah Zuhaili, *Fiqih Islam wa Adillatuhu*, vol. 4 (Damascus: Dar Al-Fikr, 2010), p. 29.

⁴⁵ Muhammad Nasroen, *Falsafah Indonesia* (Jakarta: Bulan Bintang, 1967), p. 14; *ibid.*, pp. 24–5; *ibid.*, p. 33; *ibid.*, p. 38.

the patterns of marital property in other Muslim countries. Malaysia is one of the countries that recognizes the principle of joint property for husband and wife. The country has regulated the issue of joint property in the Law on the Administration of Islamic Treasures in Malaysia. In Malaysia, the term joint property is referred to as *harta pencarian*. *Harta pencarian* is assets earned from husband and wife during marriages. In case of divorce and death, this property may be distributed according to Islamic law.⁴⁶ The application of *harta pencarian* of the husband and wife is based on the long-practiced Malay tradition and fatwas that have been broadcast throughout Malaysia. The marital properties are regulated by the Selangor Islamic Family Laws Act 2003 section 122 (2) of a letter stating that:

List of the contributions made by each of the parties in the form of money, property and work to acquire those assets.⁴⁷

So does the division of *harta pencarian* in *Undang-Undang Wilayah Persekutuan* (UUWP) 1984 (Act 303 - Article 58), *Undang-Undang Perak* (UUP) 1984, *Undang-Undang Negeri Sembilan* (UUN.9) 1983, and *Undang-Undang Keluarga Islam Malaka* (UUKIM) 1983.⁴⁸ All formulations of marital property in Malaysia are based on contribution. The application of the formulation is based on a judicial institution's decision in divorce cases. If the wife's contribution is greater, then the wife will get more shares. The fundamental difference is that the concept of *harta pencarian* based on statutory regulations in Malaysia does not explicitly mention the formulation in the regulation. It is different from the formulation of marital property in Indonesia which states that each party gets half of the marital property in the case of death, and one-half to one-half in divorce cases. The difference of sharing pattern of marital property between Malaysia and Indonesia lies in its legal reasons (*illat*) that underlie the formulation of marital property. In Malaysia, marital property is divided based on the quantity of donations (contribution) and the quality

⁴⁶ Muallimin Mochammad Sahid et al., 'Justifikasi Hukum Syarak ke Atas Amalan Adat Perpatih Dalam Pewarisan Tanah Adat/Ulayat di Indonesia dan Malaysia', *MJSL: Malaysian Journal of Syariah and Law*, vol. 5 (2017), p. 383.

⁴⁷ *Ibid.*, p. 384.

⁴⁸ John L. Esposito and John Obert Voll, *Demokrasi di Negara-Negara Muslim* (Bandung: Mizan, 1999), p. 63.

of performance. On the other hand, in Indonesia, the division is based on the cooperation agreement (*syirkah 'abdan*). *Syirkah abdan* is *aqad* of cooperation between husband and wife attached to during marriage. Regarding the half or one-half formulation, the *syirkah 'abdan* agreement does not assess the quantity and quality of each performance. It measures togetherness, compliance and loyalty in the marriage. If one is unable to work, or is unable to meet his financial obligation and property, or fail to fulfill the agreement, one of the parties can cover the shortage, and vice versa.

D. The Debate of the Legal Position of the Property in Marriage; Separation or Integration

The position of marital property in Indonesia adheres to the principles of togetherness and unity. Any assets obtained by husband and wife either conjointly or separately, will automatically be assorted and become joint property. The values of togetherness in managing marital property do not change, even though the husband and wife experience a split that results in divorce, or one of them passes away. Marital property remain united as joint property rights. Filing a lawsuit related to a legal dispute over the marital property is the form of a social life that make a family as a political domain of the marriage law. McLaenly states,⁴⁹ that married life could be divided into two domains. The sacredness of an intimate relationship is a form of family institution as a religious domain. As a domain of women's political work and rights, the family is therefore a feminine environment. In the form of a family in the second domain, women's rights to have property belong to a secular domain that is separate from a religion. The secularization of husband's and wives' rights in the domain of a feminine environment certainly contradicts the values of togetherness in life and a cooperation between spouses. The division of marital property in the case of divorce situates the husband and wife as partners in a separate partnership, so that both parties get the same shares, that is, one half. Likewise, in the case of the death, the husband and wife remain as partners split by the death, so that one of the parties who is still alive and dead gets a half share. The living party

⁴⁹ Ellen McLarney, "The Private is Political: Women and Family in Intellectual Islam", *Feminist Theory*, vol. 11, no. 2 (2010), pp. 129–48.

obtains one half of the marital property, and the dead party obtains one half of the marital property, hereinafter referred to as inheritance (*tirkah*).⁵⁰ However, the formulation is altered when the two parties determine the distribution of the joint property or other assets in the marriage agreement.⁵¹ In general, a marriage agreement contains arrangements for the assets of a prospective husband and wife. The purpose of making a marriage agreement is to regulate the consequences of a marriage involving property.⁵² Under these conditions, the provision of marital property depends on what is explicitly stated on the agreement.

In later legal developments, it turns out that the dispute over marital property contemplate began on the quantity of contributions.⁵³ In fact, the provisions of marital property had never previously been stipulated in a marriage agreement. Based on these legal phenomena, the legal paradigm in resolving marital property disputes undergoes a fundamental change. From a legal paradigm based on the value of togetherness, towards a legal paradigm of separation. Indeed, the separation of marital property must first be established by law in a marriage agreement. This is the reason that the ownership of marital property is determined based on the contribution and the quantity of donations given. The legal paradigm is very similar to the pattern of dispute resolution in Malaysia. In the states of Selangor, Klantan, Negeri Sembilan and all of Malaysia, the distribution of marital property is based on the contributions. Therefore, after seeing various cases of joint property dispute resolution, especially in divorce cases, it is evident that the legal paradigm developed in the

⁵⁰ Inheritance (*tirkah*) also comes from half share of the marital property. Based on inheritance theory, when marital property has become the property of deceased party, then the property becomes the object of inheritance subject to *faru'id* system. Based on the provisions of *faru'id*, both husband and wife have the right to the inheritance.

⁵¹ According to Happy Susanto, a marriage agreement is an agreement made by a prospective bride and groom, both male and female before their marriage takes place, the contents of the agreement bind their marriage relationship. Happy Susanto, *Pembagian Harta Gono-Gini Saat Terjadi Perceraian* (Jakarta: VisiMedia, 2008), p. 78.

⁵² R. Soetojo Prawirohamidjojo, *Hukum Orang dan Keluarga* (Surabaya: Airlangga University Press, 2000), p. 87.

⁵³ La Ode Muhammad Akhmar, "Mediasi Harta Bersama Dalam Perkara Nomor 0127/Pdt. G/2016/Pa Pw.(Studi Kasus Pada Pengadilan Agama Pasarwajo Klas II)", Master Thesis (Jakarta: Universitas Muhammadiyah Jakarta, 2017).

distribution of marital property rights has changed.

There are several arguments that form the theoretical basis for developing the legal paradigm for solving marital property disputes based on the quantity of direct contributions. That legal reasoning⁵⁴ and *ratio legis (illat al-hukm)*⁵⁵ in determining joint property rights are always based on the contribution of each parties. Conceptually, such determination is in accordance with the rules in quantitative justice theory. Quantitative justice, in the distribution of marital property, is more based on quantitative indicators in mapping family's property, assets, and economics. Likewise, the determination of assets is based on the role of the parties' hard work. The level of hard work of the parties is also a measure in determining marital property rights. The solution pattern of marital property based on the level of quality of performance is in accordance with the rules in qualitative justice theory. Qualitative justice is more based on the level and quality of the performance.

The legal paradigm in determining marital property based on gender justice both quantitatively and qualitatively is disagreeing to the values of togetherness in marriage. Marriage is not *aqad muamalah* that can be calculated quantitatively or qualitatively because marital relations are built based on physical and spiritual bonds and cannot be measured materially. Marriage is a unique *Aqad* which aims to form a *sakinah, mawaddah* and *rahmah* family.

Berthoci has a basic foundation of the social psychology of a wife in the current millennial era. Over time, he states, a married woman has a higher tendency to sue for a family asset. A modern portrait of wife's roles such as in Europe exhibits the fact that in several economic activities a married woman could take a higher risk than a single one did

⁵⁴ Legal reasoning is the search for "reasons" about the law or the basic search for how a judge decides a case or legal case he faces. Enju Juanda, "Penalaran Hukum (Legal Reasoning)", *Jurnal Ilmiah Galuh Justisi*, vol. 5, no. 1 (2017), pp. 157–67.

⁵⁵ *Ratio legis* is a term that each has a different meaning. Based on the Law Dictionary, *Ratio* is reason or understanding (reason or consideration). *Legis* means law or construction of Law (law or legal construction). According to the term, the *Ratio legis* is the reason or occasion of law, and the occasion of making of law. Based on this understanding, the *Ratio legis* in the context of means reasoning considerations as legal reasons. Henry Cambell Black, *Black's Law Dictionary*. (St. Paul's, Minn.: West Pub. Co., 1979), p. 1262.

in terms of investment.⁵⁶

The three main objectives of marriage will not be achieved if the marriage is still based on numerical calculations without unconditional love and sacrifice. The values of love in marital relations cannot be reduced by calculative material interests, which can change the pattern of marital property distribution pattern. The formulation of marital property cannot be completed based on quantitative or qualitative justice alone. The distribution must be settled based on *Mahabbah* justice. The quality of togetherness in a marital relationship is in line with Fethullah Gulen's view that movements after movements in the name of women's human rights to settle a dispute over the marital property should position women in particular as partners who have equal status.⁵⁷ Therefore, the provisions in the UUP and KHI is a division that is in harmony with the *Mahabbah* justice in distributing marital property. It stipulates that the property will be mixed inherently as a form of togetherness. The mixing and sharing of marital property cannot be separated based on contribution alone but it must be in accordance with the principle of strong physical and spiritual bonds. This principle is explicitly stated in Article 1 (1) of the UUP which states that marriage is an inner and outer bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on belief in the one and only God. A physical bond in Article 1 (1) of a UUP is a bond that includes all external dimensions, such as physical, assets or property including marital property.

E. The Actual Application within Islamic Courts: Variety of Decisions

1. *Multiculturalism impact*

The problem is related to the marital property distribution, which is considered to be in conflict and not in accordance with the values

⁵⁶ Graziella Bertocchi, Marianna Brunetti, and Costanza Torricelli, "Marriage and Other Risky Assets: A Portfolio Approach", *Journal of Banking & Finance*, vol. 35, no. 11 (2011), pp. 2902–15.

⁵⁷ Tore Fougner, "Fethullah Gülen's Understanding of Women's Rights in Islam: a Critical Reappraisal", *Turkish Studies*, vol. 18, no. 2 (2017), pp. 251–77.

of justice.⁵⁸ The potential for negligence of the KHI is in its litigation process. Disrespect for half-to-half formulations is seen when the judge has the authority to explore fair laws based on the principles of applicable laws and regulations and explore the existing laws in the community.

The phenomenon of negligence towards the marital property distribution based on regulations (UUP and KHI) has been revealed in various judicial decisions that have permanent legal force. As in the ruling MA No. 266K/AG/2010, the panel of judges turned out to give 3/4 parts of marital property to the wife, and the rest (1/4 part) to the husband based on the evidence and facts that the husband had not provided a living from his work, and all the joint property had been earned by the wife. The case of marital property dispute in Bukit Tinggi Religious Court also reflected the decision of the *contra legem*, which decided to divide shared assets 1/3 for husbands and 2/3 for wives, with legal considerations to each contribution in forming the marital property. According to Rahmat Raharjo,⁵⁹ the legal ruling regarding the division of marital property based on a 1/2 to 1/2 pattern must investigate closely the cases and legal issues that cause the divorce. The decisions according to the panel of judges are considered more reasonable than dividing the marital property with provisions of 1/2 part for ex-husband and 1/2 part for ex-wife.⁶⁰ *Contra legem* verdict,⁶¹ can be a portrait of the potential negligence of marital property in Indonesia because it is not in accordance

⁵⁸ Rahmat Raharjo, "Rekonstruksi Pembagian Harta Bersama Direktorat Jenderal Badan Peradilan Agama", *Mahkamah Agung Republik Indonesia Direktorat Jenderal Badan Peradilan Agama* (5 Feb 2014), <https://badilag.mahkamahagung.go.id/suara-pembaca-badilag/suara-pembaca/rekonstruksi-pembagian-harta-bersama-oleh-rahmat-raharjo-shi-msi-52>, accessed 10 Oct 2019.

⁵⁹ *Ibid.*, p. 7.

⁶⁰ Muhamad Beni Kurniawan, "Konsep Pembagian Harta Bersama Berdasarkan Kontribusi dalam Perkawinan", *Abkam: Jurnal Ilmu Syariah*, vol. 17, no. 2 (2017), p. 366.

⁶¹ *Contra legem* is a court judge's ruling that overrides existing legislation so that the judge does not use it as a basis for consideration or even opposes the articles of the law as long as the articles of the law are no longer in accordance with the development and sense of justice of the community. This is basically permissible under Law No.4 of 2004 Article 28 (1) which states that judges are required to explore, follow and understand the legal values and a sense of justice prevailing in society. Muhamad Beni Kurniawan, "Konsep Pembagian Harta Bersama Berdasarkan Kontribusi dalam Perkawinan", *Abkam: Jurnal Ilmu Syariah*, vol. 17, no. 2 (2017), p. 308.

with the UUP and KHI. The dynamics continue when it is viewed from the sociological aspect. The community tends not to apply one-half to one-half after the death of either husband or wife.

There are some interesting fundamental reasons to study from the methodological aspects of marital property based on *barang perpantangan* concept. The concept of *barang perpantangan* which are related to *adat badamai* in Banjar community has stipulated that the husband or wife, in any situation, always obtain $\frac{1}{2}$ to $\frac{1}{2}$ shares. These provisions do not change under any circumstances, including when a husband or wife is ill, or fails to fulfill his or her obligations.

The provisions in the concept of *barang perpantangan* which stipulate equal shares are standard provisions determined under various conditions because the rationale in the determination *barang perpantangan* is that marital property is a contract (*aqad*) of cooperation between bodies (*syirkah 'abdan*) which in any situation, if one party cannot carry out his obligation, then other work such as collecting firewood, fruits or equivalent to the work can be considered as compensating work.

However, the dynamics of the family life in the millennial era have changed considerably. The cooperation between husband and wife must be measured quantitatively which takes into account the contribution of each individual and the failure to fulfill one's respective obligation is measured as one of indicators in determining the shares. In the midst of an ever-changing situation, if the sharing of marital property still insists on an equal distribution pattern or $\frac{1}{2}$ to $\frac{1}{2}$ it will instead be considered an unfair decision.⁶²

Therefore, to find the source of potential acceptance and negligence of the application of marital property, a judicial body is needed as the final step to seek for justice. In this institution, the dynamics marital property distribution are performed more objectively in assessing each other's rights. The judiciary is a cultural representation, and figures in the past that gave birth to the values of wisdom from the lives of virtuous people, as well as a portrait of the example that issues *fatwas* in deciding a value of justice.

⁶² Khuloud Alsaba and Anuj Kapilashrami, "Understanding Women's Experience of Violence and the Political Economy of Gender in Conflict: The Case of Syria", *Reproductive Health Matters*, vol. 24, no. 47 (2016), pp. 5–17.

2. *Qualitative or quantitative contribution*

Nowadays jurists' polemics and debates over the resolution of marital property disputes have converged into the standards of contribution. There are two types of standards of contributions for the resolution of marital property disputes, i.e., the distribution based on qualitative contributions and that on quantitative ones. The qualitative one is a standard for sharing marital property based on the relations of quality performance between spouses. This contribution places the marital property as a product acquired from the results of joint performance in a marriage bond. Both spouses are a teamwork having responsibilities of acquiring all property through ideas, efforts, and capital.⁶³ In terms of *muamalat* (commercial and civil acts or dealings under Islamic law), such a teamwork on the basis of ideas, efforts, and energy is also known as *syirkah abdan*. Meanwhile, the quantitative contribution is the standard for sharing the marital property based on asset relations. If a spouse's investment in the property is greater than another spouse's one, the spouse's share of the marital property is higher than the other spouse's one. The contribution to marital property, as measured from the amount of marital property, is an object of economic human rights both spouses are taking into account more seriously.⁶⁴ The two paradigms are reflected in some decisions on disputes over marital property in Indonesia.

From 1900 to March 2021, disputes over marital property were judged by litigation and gradually from district courts to high courts to the Supreme Court of Cassation.⁶⁵ Based on the data compiled by the Indonesian Supreme Court, the number of disputes over marital property was 15,117 cases in total and had a permanent legal force (*in kracht van gewijsde*). From year to year, the number of marital property disputes continues to show an increasing trend.

Since 2006 the number of cases of marital property disputes has

⁶³ Derica A. Kotzé, "Role of Women in The Household Economy, Food Production and Food Security", *Outlook on Agriculture*, vol. 32, no. 2 (2003), pp. 111–21.

⁶⁴ Abby Kendrick, "Economic Policy and Women's Human Rights: A Critical Political Economy Perspective", *The International Journal of Human Rights*, vol. 24, no. 9 (2020), pp. 1353–69.

⁶⁵ Mahkamah Agung Republik Indonesia, "Publikasi Dokumen Elektronik Putusan seluruh Pengadilan di Indonesia", *Direktori Putusan*, <https://putusan3.mahkamahagung.go.id/>, accessed 18 March 2021.

increased drastically. Even in 2020 when the outbreak of Covid-19 took place, such cases did not decrease nationally. The number of disputes over marital property reflects that the basic role of a husband in traditional Islamic teachings has undergone significant changes because in the modern family law a wife could participate and even reposition the main roles. However, noted Sakai,⁶⁶ an economically successful wife was put in an awkward position. On the one hand Muslim women of Indonesian middle class negotiated the implementation of Islamic values, but on the other hand they had to expand their responsibilities to public spaces to meet their economic needs. It is in the aspect of defending economic rights that formulations for dispute resolution have emerged. With regard to the data, closer attention should be paid to the number of litigation decisions based on the qualitative contributions and quantitative contributions or other possible patterns. Of 15,117 cases decided by the district Religious Courts, provincial High Religious Courts, and the Supreme Court of the Republic of Indonesia, there were at least five models of settlement of marital property disputes.⁶⁷

First, 57% of cases were completed with the 1/2:1/2 formulation. The terms used for the formulation in judicial decisions varied such as “*separuh*” (half), “*setengah*” (half) and using the number of 1/2. Court decisions resolving disputes with the formula of 1/3: 3/4 or 1/4: 3/4 constitutes 14% of the total decisions. Decisions leading to an agreement between parties and kinship (by nature) are not small in number either, namely 10% of the total cases. Of the three patterns of litigation decisions within the perspective of contribution-based resolution, the 1/2: 1/2 pattern then reflects decisions imposing the formulation of marital property as stated in the Indonesian Marriage Law and Compilation of Islamic Law. Meanwhile, the 1/3: 3/4 or 1/4: 3/4 pattern is a reflection of decisions based on the level of investment in assets or quantitative contributions. Viewed from the phenomena, the assumption that decisions on marital property are mainly based on

⁶⁶ Minako Sakai and Amelia Fauzia, “Performing Muslim Womanhood: Muslim Business Women Moderating Islamic Practices in Contemporary Indonesia”, *Islam and Christian–Muslim Relations*, vol. 27, no. 3 (2016), pp. 229–49.

⁶⁷ Mahkamah Agung Republik Indonesia, “Publikasi Dokumen Elektronik Putusan seluruh Pengadilan di Indonesia”. Data retrieved and processed by the author from February, 1 to March 26, 2021.

property contributions is an assumption should carefully be reexamined. The decisions emphasizing the quantitative patterns tends to increase from year to year.

Such quantitative patterns also emerge in the world's asset distribution. Even the contribution of assets reached up to 60% of assets.⁶⁸ The percentage did not include the budget for security guarantees and compensation for the lost income or post-divorce employment. The divisions varying from cases to cases have complicated the quantitative division. The legal phenomenon of resolution of marital property dispute through various formulation suggests that gender relations are a dynamic problem in family life to date.⁶⁹ Therefore, the pattern of resolutions of litigation disputes considered as fair decisions would actually never achieve a sense of justice for all parties. For this reason, Kanter provides an alternative dispute settlement including disputes over marital property, i.e. by mediation and other non-litigation patterns of resolution.⁷⁰

F. Concluding Remarks

The formulation of marital property in multicultural societies varies greatly. The division of marital property in Indonesia before independence era was divided into two models, namely $\frac{1}{2}$ to $\frac{1}{2}$, and $\frac{1}{3}$ to $\frac{2}{3}$. Whereas after the independence, the distribution of marital property is regulated in the UUP and KHI with a $\frac{1}{2}$ to $\frac{1}{2}$ formulation pattern applied nationally. The pattern of distribution is different from the pattern of distribution in Malaysia, which instructs the distribution based on the quantity of contribution from a husband or wife. Marital property in marriage law in Indonesia adheres to the principle of togetherness that has been inherently sacred in *aqad mitsaqan ghalidzqan*. The principle of togetherness is inherent in all aspects of both physical and spiritual, material and immaterial. The principle of togetherness is what causes the

⁶⁸ Ellen Goodman, "Property Law Following Dissolution of Marriage: Is There a Future for Judicial Discretion?", *Federal Law Review*, vol. 13, no. 2 (1982), pp. 131–49.

⁶⁹ Christine E. Bose, "Global Variations in Gender Inequalities", *Contemporary Sociology*, vol. 43, no. 1 (2015), pp. 29–36.

⁷⁰ Allen Kanter, "Divorce and Non-Binding Mediation: An Alternative to Resolving Property Division Disputes", *Transactional Analysis Journal*, vol. 14, no. 3 (1984), pp. 205–8.

wealth obtained by husband and wife to be united since the beginning of the marriage.

If there is a dispute over marital property without prior agreement, the husband and wife get half of the shares respectively. However, if a husband and wife establish an agreement on the management of marital property, the formulation is dynamic depending on the agreement postulated in the marriage agreement. Based on the socio-historical analysis, it could be concluded that the legal position of marital property distribution has been regulated in the Indonesian Marriage Law and Compilation of Islamic Law coming into force nationally. Under this legal framework, the property acquired during a marriage belongs to both spouses. The ownership status of marital property is based on the principle of togetherness in all aspects of marriage physically and mentally along with materially and immaterially. The principle of togetherness is therefore the driver that makes the assets acquired by both spouses integrated from the very beginning of a marriage. In practice, however, the spousal rights to share the property ownership becomes broken in two situations, i.e., 1) when the husband and wife agree to include the formulation of the distribution of marital property in their marriage agreement; 2) when one of them files a lawsuit for the marital property by either litigation or non-litigation. The distribution of marital property, as can be seen in Religious Court Judgements, ends in varied products, i.e., court judgements based on a qualitative contribution, those based on the quantitative contribution and agreement reached by both parties. Decisions based on the qualitative contributions have turned out to be more dominant in the history of settling disputes over marital property in Indonesia.

BIBLIOGRAPHY

- Abdurrahman, S. H. , “Mengenal Karya Tulis Ulama Banjar: Menelusuri Kaya-Karya Syeikh Muhammad Arsyad al-Banjari”, Makalah Diskusi Kelompok Ikatan Cendekiawan Muslim Indonesia (ICMI), 1988.
- Agarwal, Bina, “Gender and Command Over Property: A Critical Gap in Economic Analysis and Policy in South Asia”, *World Development*, vol. 22, no. 10, 1994, pp. 1455–78 [https://doi.org/10.1016/0305-750X(94)90031-0].
- Akhmar, La Ode Muhammad, “Mediasi Harta Bersama Dalam Perkara Nomor 0127/Pdt. G/2016/Pa Pw.(Studi Kasus Pada Pengadilan Agama Pasarwajo Klas II)”, Master Thesis, Jakarta: Universitas Muhammadiyah Jakarta, 2017.
- Allen Kanter, “Divorce and Non-Binding Mediation: An Alternative to Resolving Property Division Disputes”, *Transactional Analysis Journal*, vol. 14, no. 3, 1984, pp. 205–8 [https://doi.org/10.1177/036215378401400307].
- Azra, Azyumardi, *Jaringan Ulama Timur Tengah dan Kepulauan Nusantara Abad XVII dan XVIII*, Bandung: Mizan, 1998.
- Black, Henry Cambell, *Black’s Law Dictionary*, St. Paul’s, Minn.: West Pub. Co., 1979.
- Bose, Christine E., “Global Variations in Gender Inequalities”, *Contemporary Sociology*, vol. 43, no. 1, 2015, pp. 29–36 [https://doi.org/10.1177/0094306113514536a].
- Burhanuddin, Hamam, “Pendidikan Berperspektif Gender di Pesantren”, *Al-Murabbi: Jurnal Studi Kependidikan dan Keislaman*, vol. 2, no. 1, 2015, pp. 111–32.
- Darussamin, Zikri and Armansyah, “Hak Harta Bersama bagi Istri yang Bekerja Perspektif Maqashid asy-Syari’ah”, *Ayy-Syir’ab: Jurnal Ilmu Syari’ab dan Hukum*, vol. 51, no. 2, 2017, pp. 345–65.
- Daud, Alfani, *Islam & Masyarakat Banjar: Deskripsi dan Analisa Kebudayaan Banjar*, Jakarta: RajaGrafindo Persada, 1997.
- Daudi, Abu, *Maulana Shaikh Muhammad Arshad al-Banjari (Tuan Haji Besar)*, Banjarmasin: Madrasah Sullam Al-Ulum, 1996.

- Duderija, Adis, “Contemporary Muslim Male Reformist Thought and Gender Equality Affirmative Interpretations of Islam”, *Feminist Theology*, vol. 28, no. 2, 2020, pp. 161–81 [<https://doi.org/10.1177/0966735019886076>].
- Faizal, Liky, “Harta bersama dalam Perkawinan”, *Ijtimaiyya: Jurnal Pengembangan Masyarakat Islam*, vol. 8, no. 2, 2015, pp. 77–102.
- Fauzia, Amelia, and Minako Sakai, “Performing Muslim Womanhood: Muslim Business Women Moderating Islamic Practices in Contemporary Indonesia”, *Islam and Christian-Muslim Relations*, vol. 27, no. 3, 2016, pp. 229–49 [<https://doi.org/10.1080/09596410.2015.1114243>].
- Fougner, Tore, “Fethullah Gülen’s Understanding of Women’s Rights in Islam: a Critical Reappraisal”, *Turkish Studies*, vol. 18, no. 2, 2016, pp. 251–77 [<https://doi.org/10.1080/14683849.2016.1245582>].
- Fuad, Mahsun, *Hukum Islam Indonesia: Dari Nalar Partisipatoris Hingga Emansipatoris*, Yogyakarta: LKiS Pelangi Aksara, 2004.
- Goodman, Ellen, “Property Law Following Dissolution of Marriage: Is There a Future for Judicial Discretion?”, *Federal Law Review*, vol. 13, no. 2, 1982, pp. 131–49 [<https://doi.org/10.1177/0067205X8201300202>].
- Harahap, M. Yahya, *Kedudukan Kewenangan dan Acara Peradilan Agama (Undang-Undang No 7 Tahun 1989)*, Jakarta: Pustaka Kartini, 1997.
- Haryanto, Rizkika Lhena Darwin, “Women Candidates and Islamic Personalization in Social Media Campaigns for Local Parliament Elections in Indonesia”, *South East Asia Research*, vol. 29, no. 1, 2021, pp. 72–91 [<https://doi.org/10.1080/0967828X.2021.1878928>].
- Hassan, A, *Al-Fara'id: Ilmu Pembagian Warisan*, Surabaya: Pustaka Progressif, 2003.
- Hasyim, Syaifiq, *Hal-hal yang Tak Terpikirkan Tentang Isu-isu Keperempuanan dalam Islam*, Bandung: Mizan, 2001.
- Huda, Anam Miftakhul “The Identity of Javanese Woman (The study of Phenomenology Toward Indonesian Migrant Women Workers)”, *JARES (Journal of Academic Research and Sciences)*, vol. 1, no. 1, 2016, pp. 61–72.
- Ihromi, T.O., *Bunga Rampai Sosiologi Keluarga*, Jakarta: Yayasan Obor

Indonesia, 1999.

Ismuha, *Pencabarian bersama Suami Isteri di Indonesia: Adat Gono-Gini Ditinjau dari Sudut Hukum Islam*, Jakarta: Bulan Bintang, 1978.

Juanda, Enju, “Penalaran Hukum (Legal Reasoning)”, *Jurnal Ilmiah Galuh Justisi*, vol. 5, no. 1, 2017, pp. 157–67.

Jumadi, “Institusi Sara’ Di Maros Sulawesi Selatan”, *Attoriolong: Jurnal Pemikiran Pendidikan dan Penelitian Kesejaraban*, vol. 7, no. 2, 2010, pp. 34-50.

Kadir, M.S., “Shaikh Muhammad Arshad al-Banjari Pelopor Da’wah Islam di Kalimantan Selatan”, *Mimbar Ulama*, 6th edition, 1976.

Kapilashrami, Anuj and Khuloud Alsaba, “Understanding Women’s Experience of Violence and the Political Economy of Gender in Conflict: The Case of Syria”, *Reproductive Health Matters*, vol. 24, no. 47, 2016, pp. 5–17 [<https://doi.org/10.1016/j.rhm.2016.05.002>].

Kendrick, Abby, “Economic Policy and Women’s Human Rights: A Critical Political Economy Perspective”, *The International Journal of Human Rights*, vol. 24, no. 9, 2020, pp. 1353–69 [<https://doi.org/10.1080/13642987.2020.1811695>].

Khisni, Akhmad and Arifah S. Maspeke, “Kedudukan Harta Bersama dalam Perkawinan Menurut Fiqih dan Hukum Positif Indonesia Serta Praktek Putusan Pengadilan Agama”, *Jurnal Hukum Khaira Ummah*, vol. 12, no. 2, 2017, pp. 173–84.

Khoirin, Nur, “Marriage Treasure Ownership in Arabic and Nusantara Fiqh Perspectives”, *Addin*, vol. 12, no. 2, 2018, pp. 555–86 [<https://doi.org/10.21043/addin.v12i2.4543>].

Khurshid, Ayesha, “Islamic Traditions of Modernity: Gender, Class, and Islam in a Transnational Women’s Education Project”, *Gender & Society*, vol. 29, no. 1, 2015, pp. 98–121 [<https://doi.org/10.1177/0891243214549193>].

Kieff, F. Scott, “Property Rights and Property Rules for Commercializing Inventions”, *Minn. L. Rev.*, vol. 85, 2000, p. 697 [<https://doi.org/10.2139/ssrn.229981>].

Kotzé, Derica A., “Role of Women in The Household Economy, Food Production and Food Security”, *Outlook on Agriculture*, vol. 32, no.

2, 2003, pp. 111–21.

Kurniawan, Muhamad Beni, “Konsep Pembagian Harta Bersama Berdasarkan Kontribusi dalam Perkawinan”, *Abkam: Jurnal Ilmu Syariah*, vol. 17, no. 2, 2017 [<https://doi.org/10.15408/AJIS.V17I2.4741>].

LP2M UIN Antasari, MUI Kalsel, *Ulama Banjar Dari Masa Ke Masa*, Banjarmasin: Antasari Press, 2018.

MacLean, Lee, “Beyond the Established Categories: An Alternative Approach to Feminist Thought Starting From Debates About Women and The Rise of the Market Economy”, *Feminist Theory*, 2018 [<https://doi.org/10.1177/1464700118754956>].

Mahkamah Agung Republik Indonesia, “Publikasi Dokumen Elektronik Putusan seluruh Pengadilan di Indonesia”, *Direktori Putusan*, <https://putusan3.mahkamahagung.go.id/>, accessed 18 Mar 2021.

Manaqib ahli bayt, Pesantren of Ubudiyah, Banjarmasin.

Mazidah, Nur, “Relijiusitas dan Perubahan Sosial Dalam Masyarakat Industri”, *The Sociology of Islam*, vol. 1, no. 1, 2011, <http://jurnalfisip.uinsby.ac.id/index.php/JSI/article/view/7>, accessed 8 Sep 2021.

McFarlane, Judith, Heidi Gilroy, and Angeles Nava, “Developing a Theory of Economic Solvency for Women Who Have Experienced Intimate Partner Violence”, *Violence Against Women*, vol. 26, no. 9, 2020, pp. 955–71 [<https://doi.org/10.1177/1077801219853366>].

McLarney, Ellen, “The Private is Political: Women and Family in Intellectual Islam”, *Feminist Theory*, vol. 11, no. 2, 2010, pp. 129–48 [<https://doi.org/10.1177/1464700110366805>].

Muchomba, Felix M, “Parents’ Assets and Child Marriage: Are mother’s Assets More Protective than Father’s Assets?”, *World Development*, vol. 138, 2021, p. 105226.

Nasroen, Muhammad, *Falsafah Indonesia*, Jakarta: Bulan Bintang, 1967.

Nielsen, Perpetua Lynne, Donna Lee Bowen, and Valerie M. Hudson, “State Fragility and Structural Gender Inequality in Family Law: An Empirical Investigation”, *Laws*, vol. 4, no. 4, 2015, pp. 654–72 [<https://doi.org/10.3390/laws4040654>].

- Noor, Irfan, “Barang Perpantangan: Sebuah Akomodasi Hukum Waris Islam atas Budaya Relasi Jender dalam Masyarakat Banjar”, *Jurnal Kebudayaan Kandil Melintas Tradisi*, vol. 2, no. 7, 2004.
- Poerwandari, Elizabeth Kristi, “Aspirasi Perempuan Bekerja dan Aktualisasinya”, *Kajian Wanita dalam Pembangunan*, ed. by Tapi Omas Ihromi, Jakarta: Yayasan Obor Indonesia, 1995.
- Posel, Dorrit and Daniela Casale, “Women and the Economy: How Far Have We Come?”, *Agenda: Empowering Women for Gender Equity*, vol. 19, no. 64, 2005, pp. 21–9 [<https://doi.org/10.1080/10130950.2005.9674587>].
- Prawirohamidjojo, R. Soetojo, *Hukum Orang dan Keluarga*, Surabaya: Airlangga Universty Press, 2000.
- Raharjo, Rahmat, “Rekonstruksi Pembagian Harta Bersama Direktorat Jenderal Badan Peradilan Agama”, *Mahkamah Agung Republik Indonesia Direktorat Jenderal Badan Peradilan Agama*, 5 Feb 2014, <https://badilag.mahkamahagung.go.id/suara-pembaca-badilag/suara-pembaca/rekonstruksi-pembagian-harta-bersama-oleh-rahmat-raharjo-shimsi-52>, accessed 10 Oct 2019.
- Ramli, Syarifin Anang, *Profil al-Haj Anang Ramli bin al-Haj Abdul Qadir*, Bati-Bati: Pondok Pesantren Ubudiyah, 2015.
- Rofiq, Ahmad, *Hukum Islam di Indonesia*, Jakarta: Raja Grafindo Persada, 1995.
- Rosmini, “Misi Emansipatoris Alqur’an dalam Relasi Seksualitas Antara Majikan dan Budak Perempuan”, *Al Daulah: Jurnal Hukum Pidana dan Ketatanegaraan*, vol. 4, no. 1, 2015, pp. 151–67 [<https://doi.org/10.24252/ad.v4i1.1511>].
- Rusfi, Muhammad, “Filsafat Harta: Prinsip Hukum Islam Terhadap Hak Kepemilikan Harta”, *Al’Adalah*, vol. 13, no. 2, 2016, pp. 239–58.
- Sahid, Mualimin Mochammad et al., “Justifikasi Hukum Syarak Ke Atas Amalan Adat Perpatih Dalam Pewarisan Tanah Adat/Ulayat Di Indonesia Dan Malaysia”, *MJSL: Malaysian Journal of Syariah and Law*, vol. 5, 2017.
- Schwab, Klaus, *The Fourth Industrial Revolution*, New York: Crown Business, 2017.

- Susanto, Happy, *Pembagian Harta Gono-Gini Saat Terjadi Perceraian*, Jakarta: VisiMedia, 2008.
- Suyanto and Mirya Anggraeni, “Ajaran tentang Bakti Istri kepada Suami dalam Serat Wulang Reh Putri”, *Nusa: Jurnal Ilmu Bahasa dan Sastra*, vol. 12, no. 2, 2017, p. 108.
- Thalib, Sayuti, *Hukum Kekeluargaan Indonesia*, Jakarta: UI Press, 1986.
- Torricelli, Costanza, Graziella Bertocchi, and Marianna Brunetti, “Marriage and Other Risky Assets: A Portfolio Approach”, *Journal of Banking & Finance*, vol. 35, no. 11, 2011, pp. 2902–15 [<https://doi.org/10.1016/j.jbankfin.2011.03.019>].
- Usman, A. Gazali, *Kerajaan Banjar Sejarah Perkembangan Politik Ekonomi Perdagangan dan Agama Islam*, Banjarmasin: Universitas Lambung Mangkurat, 1994.
- Voll, John Obert and John L. Esposito, *Demokrasi di Negara-Negara Muslim*, Bandung: Mizan, 1999.
- World Bank, “Labor Force Participation Rate, Female (% of female population ages 15+) (modeled ILO estimate) - Indonesia”, <https://data.worldbank.org/indicator/SL.TLF.CACT.FE.ZS?locations=ID>, accessed 3 Jan 2021.
- Zale, Kellen, “Sharing Property”, *University of Colorado Law Review*, vol. 87, no. 2, 2016, pp. 501–80.
- Zuhaili, Wahbah, *Fiqh Islam wa Adillatuhu*, vol. 4, Damascus: Dar Al-Fikr, 2010.
- Zuhdi, Muhammad, “Challenging Moderate Muslims: Indonesia’s Muslim Schools in the Midst of Religious Conservatism”, *Religions*, vol. 9, no. 10, 2018, p. 310 [<https://doi.org/10.3390/rel9100310>].