

# THE ROLE OF ISLAMIC LAW IN THE EQUITABLE DIVISION OF JOINT ASSETS POST-DIVORCE WITHIN URBAN SOCIETY: A DESCRIPTIVE STUDY OF ITS APPLICATION IN BANDUNG HIGH RELIGIOUS COURT

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## Abstract

This research examines the legal certainty of joint property, defined as assets jointly acquired by spouses during marriage, particularly within the context of urban Muslim society. Using a descriptive-analytical method, it explores the relevance of joint property in the lives of married couples and its division post-divorce. The study highlights the legal ambiguities in Indonesia's current framework, particularly in Law No. 1 of 1974 on Marriage and the Compilation of Islamic Law (KHI). These regulations often fail to address modern family dynamics, such as when the wife is the primary breadwinner. This gap has resulted in inconsistent rulings in religious courts, particularly in urban areas where economic roles and gender dynamics are rapidly evolving. Focusing on the Bandung High Religious Court, the research emphasizes the importance of equitable asset division that reflects fairness, justice, and the lived realities of urban Muslim families. Findings suggest that while courts generally provide justice and legal certainty, there is a growing need for updated legal interpretations that accommodate changes in societal roles and expectations.

**Keywords:** Equitable assets division; Islamic law; Urban religious courts.

## A. Introduction

The breakup of marriage due to the will of the husband or wife or the will of both due to the absence of harmony is called the term divorce, which stems from the non-implementation of rights and obligations as husband and wife as they should be according to applicable marriage law (Undang-Undang Nomor 1 Tahun 1971 Tentang Perkawinan, 2016). The association between husband and wife who do not respect each

other, do not keep each other's secrets, domestic conditions that are not safe and peaceful, and cross-disputes or conflicts of opinion that are very principled are factors causing divorce.

A man and woman who are bound by a marriage as husband and wife have the right to terminate the marriage by divorce based on the applicable divorce law. However, the husband and wife who are going to divorce must have certain legal reasons, and the divorce must be before the court after the court concerned has tried and failed to reconcile both parties (Undang-Undang Nomor 1 Tahun 1971 Tentang Perkawinan, 2016).

From the perspective of Islamic Law, divorce is an emergency door that will be used to overcome divisions and turmoil in a household that can no longer be reconciled after both sides of the married family in good faith perform "*ishlah*" or reconciliation repeatedly between husband and wife but without success. The legal consequences of divorce on the division of joint property, according to Law Number 1 of 1974 in Article 37, are as follows: "If the marriage breaks up due to divorce, the property is regulated according to their respective laws". What is meant by their respective laws is religious law, customary law, or other applicable laws. The marriage law does not expressly stipulate how much each spouse shares in the joint property. However, this Marriage Law provides leeway by leaving to the divorced husband and wife which law and what law will be applied in resolving the dispute over the division of joint property, and if it turns out that there is no agreement, then the Judge can consider according to a reasonable sense of justice (Undang-Undang Nomor 1 Tahun 1971 Tentang Perkawinan, 2016).

Allah SWT says in the Qur'an Surat An-Nisa, verse 32: "And be not jealous of what God hath given to one part of you more than another. For men, there is a part of what they work for, and for women (also), there is a part of what they work for, and they ask God for a part of His gift. Verily Allah knows all things" (Kementerian Agama, 1971). Muhammad Quraish Shihab in Tafsir Al Misbah interprets the verse as follows: Men should not be jealous of the gifts Allah has given to women. Likewise, women should not envy anything God has given men. Each gets a share, according to the nature of his deeds and rights. So, we should each hope that God will increase our gifts by developing talents and taking advantage of the advantages God has entrusted to us. Allah is All-Knowing of all things and gives to every kind of creature something according to its occurrence (Shihab, 2000).

The division of joint property after a marriage ends – whether through divorce or death – is a relatively new topic in Islamic law (*fiqh*). This is primarily because the concept of joint property was not present in classical jurisprudence, which continues to influence legal frameworks today. In Indonesia, the rules governing the division of joint property are outlined in Articles 96 and 97 of the Compilation of Islamic Law (KHI). These articles establish guidelines for distributing assets between spouses upon marital dissolution. Article 97, in particular, highlights the flexibility in property division, allowing for unequal splits based on specific circumstances. This flexibility indicates that the distribution does not have to be equal and can be adjusted based on the situation, reflecting the dynamic nature of urban Muslim society where individual contributions and roles may vary significantly (Khosyí'ah, 2018).

The marriage law (UUP) and KHI only stipulate that all property acquired during the marriage is joint property, as stipulated in article 35 paragraph (1) of the Marriage Law, *juncto* article 1 Letter f KHI. As for property obtained as a result of the development of "*gono-gini*" Property that has not been divided after divorce, it is not regulated by law (Undang-Undang Nomor 1 Tahun 1971 Tentang Perkawinan, 2016;

Direktorat Jenderal Bimbingan Agama Islam, 2018).

This problem stems from the vagueness of the limits and scope of joint property mentioned in Law Number 1 of 1974 concerning Marriage and Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law. The definition of common property in the regulations above, when correlated with the existence of household bread, becomes biased and even contains interpretive probabilities, especially in answering the question of who is obliged to provide for the household. Where exactly does the household come from? As a result, at the theoretical level, there is friction in legal norms as norms for behavioral guidelines (Satjipto, 2000). It may even be a clash of principles: "which is the basis on which thinking or acting is based or truth on which to think, act and so on" (Ali, Atabik, Zuhdi Muhdlor, 1998). Thus, in practice, dispute resolution in religious courts causes disparity in verdicts. Based on the above, judges in deciding cases not only consider the rules that apply textually but explore information contextually as an effort to find law on cases that have not or are not clear legal rules.

The journal article "Settlement of Joint Property Disputes Resulting from Divorce in the Religious Courts" (Mahdianur et al., 2024), remarks that the concept of partnership is important in settling disagreements over joint property during divorce. The study emphasizes how the Compilation of Islamic Law (KHI) needs more precise criteria to guarantee that decisions are equitable and fair, especially when one side – typically the husband – neglects their financial obligations. According to the study, legal changes are required to effectively safeguard each spouse's rights.

The Journal (Ridwan et al., 2023), about the structure of joint property distribution, as governed by Law No. 1 of 1974 and the Compilation of Islamic Law, should fully embody justice and legal clarity. This journal addresses the need for a more equitable and legally precise division of joint property post-divorce within marital law. The study, a normative-legal analysis, suggests future legal reforms should incorporate the principle of balanced justice, rooted in Pancasila, into the relevant articles of the aforementioned laws. The findings emphasize revisiting certain legal provisions to align with this principle.

The joint property distribution under the Compilation of Islamic Law is effective due to legal certainty, ensuring equal shares for ex-spouses. However, this standard approach may not suit all couples due to differing family dynamics and roles. This study examines the fairness of asset distribution based on household roles using a normative-legal method and a gender equity analysis tool. The findings suggest that while traditional roles are outlined, modern circumstances show flexibility, with both husbands and wives sharing responsibilities, necessitating a more nuanced interpretation of these roles (Rouf et al., 2023).

The distribution of joint assets after divorce plays a critical role in family law, especially within the context of Islamic law in Indonesia. This paper discusses how Islamic legal principles guide post-divorce asset division, highlighting key aspects such as fairness, equity, and family welfare. It draws from Islamic jurisprudence, including Quranic verses and the teachings of the Prophet, which serve as the foundation for these practices. Additionally, it examines how Indonesian legal scholars and courts interpret these principles, considering the country's evolving family structures, economic conditions, and gender roles. By exploring the overlap of Islamic law, cultural values, and contemporary legal frameworks, this research provides insights for legal professionals, policymakers, and scholars working on family law reform. The goal is to enhance understanding and contribute to more just and equitable practices in post-divorce asset division within Islamic societies (Zainurohmah et al., 2023).

The study on the Telis community in Delhi examines the relationship between Islamic divorce laws and their practical application within this group. It explores how principles like *'talaq'* (husband-initiated divorce) and *'khula'* (wife-initiated divorce) are implemented in everyday life, highlighting the impact of social, cultural, and economic factors on the divorce process in urban Muslim settings. The research addresses the gap between religious ideals and the real-world experiences of divorce, focusing on issues like gender equality, legal rights, and societal stigma. Additionally, it sheds light on how urbanization influences the interpretation and application of Islamic divorce laws, providing insights into the changing roles of men and women within family structures (Sahay, 1998).

In urban Muslim societies, the principle of partnership plays a critical role in joint property disputes, especially in the context of marriage. This principle emphasizes cooperation, respect, and complementarity between spouses, reflecting Islamic values in urban settings. In cases where a husband neglects his financial responsibilities, this research examines how the Compilation of Islamic Law (KHI) provides solutions for the fair distribution of joint property, ensuring that both wives and children are protected. Judges utilize this principle to achieve equitable outcomes in urban Muslim family dynamics.

## **B. Methods**

This study used a descriptive research method of analysis (Ahmad Saebani, 2017). Descriptive research analysis is research based on descriptive exposure to existing phenomena in an argumentative form (Sulistyo, 2006). This study uses a qualitative approach to explore the basis of thought and arguments in the use of laws and regulations (normative) in the judicial context, journals, and Google Scholar. This research highlights how joint property laws in marriage are interpreted and applied in the context of urban society, particularly in the Bandung Religious High Court. In urban settings, family dynamics often involve shared financial responsibilities and evolving gender roles. These realities shape how joint assets are divided post-divorce. By examining court rulings, the study reveals how Islamic law adapts to modern urban challenges, ensuring fairness in asset distribution. This comparative analysis emphasizes the need for jurisprudence that reflects the socio-economic conditions of urban Muslim communities, promoting justice and equity in family law decisions.

## **C. Findings and Discussion**

### **1. Findings**

#### **Religious court decisions in Bandung high religious court (PTA) area on common property**

The practice of joint property division in the Religious Courts shows that justice in asset division cannot simply be interpreted as each party receiving an equal share. Instead, fairness refers to the contributions made by both parties, whether material or non-material. Therefore, the decisions made by the Religious Courts regarding joint property are not always aligned with the provisions of the Islamic Law Compilation (KHI), reflecting the views of modern urban Muslims (Muslimin & Fatma, 2020). After divorce, disputes over joint marital property are common. These disputes can be resolved through mediation, either within the court (litigation) or outside of it (non-litigation). Religious Courts have exclusive jurisdiction over such cases. However, mediation success rates in Religious Courts across Indonesia were relatively low, with 6.2% in 2018 and 5.5% in 2019 (Syafei & Djazimah, 2021). In Indonesia, since its independence, three legal systems have coexisted: customary law, Islamic law, and

Western law. These systems have deeply influenced not only the theoretical framework but also practical legal proceedings in courts across the country. This pluralistic legal landscape persists because a comprehensive national legal framework has not been fully developed. Even within the Religious Courts, the integration of these legal systems is evident. For example, Article 54 of Law No. 7 of 1989 (amended by Laws No. 3 of 2006 and No. 50 of 2009) mandates that civil procedural law applied in general courts also applies in the Religious Courts, except where specifically regulated otherwise (Undang-Undang Nomor 50 Tahun 2009, 2009).

Everyone can find a law. Legal discovery made by judges is law, and legal discovery made by people other than judges is doctrine. However, please note that in legal science, doctrine is not a law, but a source of law (Muwahid, 2017). According to Scholten, legal discovery is not the same as simply applying existing laws; it involves finding something new within the law. Legal discovery is achieved through methods such as interpretation, analogy, or legal smoothing. Judges, therefore, are not merely bound to follow existing rights and obligations like machines; they can create new rules where necessary. This approach highlights the dynamic role of judges in shaping law beyond its static form, emphasizing their active participation in legal evolution (Siti Malikhatun, 2017).

Meanwhile, according to Sudikno Mertokusumo, legal discovery is the concretization, crystallization, or individualization of legal regulations or *das sollen*, which is general by remembering concrete events or *das sein*. These concrete events must be linked to the rule of law, to be covered by that legal regulation. Instead, legal regulations must be adapted to concrete events to be applicable (Siti Malikhatun, 2017).

Legal construction (Muwahid, 2017), is carried out when the following things occur: there are no legal provisions that can be applied to the case that occurs; in the regulations there is none; there is a legal vacuum or *recht vacuum*; There is a legal vacuum or *wet vacuum*. To fill the gaps in the statute, the judge uses his logical reasoning to further develop a statutory text. That is, judges no longer adhere to the sound of the text of the law, but judges also do not ignore the principle of law as a system (Muwahid, 2017). By one of the legal principles, judges are bound by the principle that judges are prohibited from rejecting cases submitted to them because the law does not exist, rules are incomplete, and events are not regulated, but judges are obliged to try existing cases as long as the cases meet material requirements and are by absolute competence and relative competence (Muwahid, 2017).

The occurrence of divorce will certainly cause problems that must be resolved between both parties; that is, the problem of the division of common property. Common property will be a problem if both parties cannot accept and always want to control the property. The issue of joint property is regulated in Chapter VII in Articles 35, 36, and 37 of Law Number 1 of 1974 concerning Marriage. Article 35 explains that property acquired during marriage becomes joint property. Husband and wife can own the joint property by the agreement of both parties listed in Article 36. Article 37 explains that in the event of divorce, joint property is regulated according to their respective laws. This article does not explain what is meant by redaction according to each law, especially in Indonesia has various kinds of laws used, in the Compilation of Islamic Law regarding marital property regulated in Chapter XIII in Articles 85 to 97 (Undang-Undang Nomor 1 Tahun 1971 Tentang Perkawinan, 2016).

This joint property problem arises when there is a divorce between husband and wife or when the divorce process is underway in the judiciary so that various legal problems arise that sometimes deviate from the applicable legislation (Manan, 2006). In this case, the judge's interpretation is needed, considering that the judge as a decision

maker is obliged to put justice in a decision. The judge's interpretation of one decision is inseparable from the fulfillment of three legal objectives, namely justice, expediency, and legal certainty (R. Ahmad, 2011).

The Positive Law does regulate the division of joint property and marital property in Article 97 of the KHI states that divorced widows or widowers are each entitled to one second of the joint property as long as it is not otherwise specified in the marriage agreement (Instruksi Presiden R.I. Nomor 1 Tahun 1991, 1998). However, several rulings are different from the judgments by the rules in the KHI, the judgment divides the joint property for the ownership of the ex-husband and ex-wife and even the share for children as well, and the Judgment that gives the Judgment gives 3/4 part of the joint property to the Wife and 1/4 part to the Husband. The following are the decisions of the Religious Courts of Bandung, Cimahi, Purwakarta, and Sukabumi which decided that the ex-wife's share was greater than that of the ex-husband as follows: (Register Perkara Kasasi Nomor 266K/AG/2010, 2010).

Table 1: Religious Court Decisions in Bandung High Religious Court (PTA) Area on Common Property

No	Verdict No.	Decisions PA		Information	Brief Analysis
		Widow	Widower		
1	Bandung City Religious Court Decision Number: 2340/Pdt.G//2019/PA. Badg.	3/4	1/4	Determine the division of joint property at 1/4 (one-quarter) share for the Plaintiff (Widower) and 3/4 (three-quarters) share for the Defendant (Widow);	The Defendant Party (Ex-Wife) Gets a larger share of the plaintiff (Ex-husband)
2	Cimahi Religious Court Verdict Number: 2850/Pdt.G//2016/PA. Cmi	3/4	1/4	Stipulate that the Plaintiff is entitled to the joint property in the amount of 3/4 part or Rp. 39,195,000, - while the Defendant is entitled to 1/4 part or Rp. 13,065,000, - (thirteen million sixty-five thousand rupiah);	The Plaintiff (Ex-Wife) Gets a larger share than the defendant (Ex-husband)
3	Purwakarta Religious Court Decision Number: 1327/PDT.G//2018/PA. Pwk	3/4	1/4	Stipulate that the Plaintiff is entitled to the joint property at 3/4 share while the Defendant is entitled to 1/4 share;	The Plaintiff (Ex-Wife) Gets a larger share than the defendant (Ex-husband)
4.	Sukabumi Religious Court Decision Number: 135/Pdt.G//2022	2/3	1/3	Stipulates that the share of the joint property as dictum in convention number (2) between Plaintiff	The Defendant Party (Ex-Wife) Gets a larger share

/PA. Smi

and Defendant is 1/3 of the (one-third) share for plaintiff (Ex-Plaintiff and 2/3 (two-thirds) share for the defendant

The judge's consideration of the decision, based on the facts of the trial, turned out that the husband did not provide a living from the results of his labor, and all joint property was obtained by the wife from the results of his labor. The court has an important role in deciding the case of Common Property which must be divided by the sense of justice and must be reviewed through consideration of the judge's decision on the case. The judge has the right to *ijtihad* to see the subject matter he is handling and is expected to produce a fair verdict. In deciding cases, judges use in two ways, namely, referring to the laws and regulations that have been in force and using their *ijtihad*, namely by referring to community customs, '*urf*', or customs that apply or are adopted by the person in dispute (Register Perkara Kasasi Nomor 266K/AG/2010, 2010).

The formulation of article 54 of the law is so thick that even as the main basis for proceedings within the Religious Court body, the substance of the procedural law applicable in the Religious Court is the procedural law applicable in the Court in the general judicial environment which is none other than HIR-RIB (*Indonesian Reglemen*) which was updated based on stb. 1941 Number 44 (for Java and Madura) and Rbg. (*Reglement Buitegewesten*) for the opposite region, namely other than Java and Madura which is enforced based on STB. No. 227 of 1927 (Satjipto, 2012).

Such a procedural law system is not only proof that the legal system in Indonesia does not yet have a unification pattern but it can be said that in the Indonesian legal system, there is still a conflict between three legal systems, namely Islamic law, civil law (BW) and customary law system (Bustanul, 1996). Bustanul Arifin further said that in Indonesia conflicts occur not only between civil law and sharia law (Islamic law) but also between three legal systems, namely Islamic law, civil law (western), and customary law. The conflict between the three legal systems began with the entry of Dutch colonialists into Indonesia and continues until now so there has been no legal harmony in Indonesia (Bustanul, 1996).

Indonesian jurists have actually continuously struggled to resolve the conflict by providing inputs and opinions to legal stakeholders spearheaded by the National Legal Entity, but until now it has also not been completed, for example every five years in the era of the New Order government at that time with the planning of short-term, medium-term and long-term development programs through the State Direction Outline (GBHN) always outlined Efforts to resolve the three conflicts of the legal system through the development and development of national law. However, the problem of conflict between the three legal systems has not been resolved until now, a historical fact related to the conflict of the three legal systems is that the conflict between the three legal systems not only occurred naturally but conflicts deliberately caused by the colonialism government system at that time (Jaenal, 2008).

Legal conflicts mean conflicts of social values and legal culture that were caused intentionally and sometimes artificially by the needs of colonial politics at that time, so it was difficult to eliminate these conflicts satisfactorily, which is why Indonesia is still in the era of national legal development, which is still in the stage of looking for a national legal concept that is really in accordance and line with the legal culture of the Indonesian nation, namely Pancasila So that it can satisfy the awareness of the legal

culture of the community and can truly support all the efforts and hopes of the nation that is building the law (Jaenal, 2008).

As mentioned above, legal culture itself is an atmosphere of social thought and social forces that determine how laws are made, used, avoided, or abused, without legal culture, the legal system itself is powerless (Jaenal, 2008). The opinions of Smith and Blumberg as quoted by Jaenal Aripin, the judge in the court according to his view are divided into 6 typologies, namely: (1). intellectual type; (2). type of wage worker; (3). type of political adventurer; (4). money adventurer type; (5). hatchet man type and (6). tyrannical type. Therefore, different judges also differ in how to make decisions, just look at the typology category of how the judge is (Jaenal, 2008).

According to Soerjono Soekanto, several factors affect law enforcement, namely: 1). "The legal factors themselves; 2). law enforcement, namely those who form and apply the law; 3). Factors of facilities or facilities that support law enforcement; 4). Community factors, namely the environment in which the law applies or is applied; 5). Cultural factors, namely the results of work, creation, and taste based on human charities in the association of life (Soerjono, 1982).

Legal culture itself is closely related to people's legal awareness. The higher the legal awareness of the community, the better the legal culture will be created and can change the mindset of the community about the law so far. In simple terms, the degree of compliance of society with the law is one of the indicators of the functioning of the law. So it can be understood otherwise that if the community's legal compliance with the law has not been good, then it is also an indicator that the law has not functioned properly, therefore efforts must still be made so that the law is truly in line with the culture of the community (Soerjono, 1982).

Therefore, to overcome this problem, do not let the Religious Court give a decision on the division of joint property always based on Article 97 of the KHI, which is to divide each window in half, but look casuistically. Because the provisions of article 97 KHI are no longer able to complete the division of joint property due to divorce at this time (Direktorat Jenderal Bimbingan Agama Islam, 2018). In other words, judges are required to conduct *ijtihad* or legal discovery to find a living law in the right community to apply to the case, to realize the verdict reflects a sense of justice, as done by the Religious Court in the PTA West Java area in its decision Bandung PA Decision Number 2340/Pdt.G/2019/PA.Bdg, Purwakarta PA Decision Number 1327/Pdt.G/2018/PA. Pwk, Cimahi Religious Court Decision Number: 2850/Pdt.G//2016/PA. Cmi, Sukabumi Religious Court Decision Number: 135/Pdt.G//2022/PA. Smi, who in his judgment determined that, because in acquiring joint property during marriage, the wife is more dominant and plays an active role as the breadwinner, therefore the Court ruled that the husband gets one-third of the joint property, while the wife gets two-thirds of the joint property (PTA, 2024).

Indonesia as an independent and sovereign legal state ideally has a national legal system built on the foundation of the philosophy and culture of the Indonesian nation itself. This is in line with the provisions of Article II of the transitional rules of the 1945 Constitution which states that all state bodies and existing legal provisions remain in force as long as new regulations have not been made. This statement is an indication that efforts to develop national law are carried out to replace various legal rules inherited by the Dutch colonial government (Irfan, 2012).

The legal development is intended as an effort to develop law towards the establishment of a national legal system based on various legal groups (legal *pluralism*) in force in Indonesia. This phenomenon creates political difficulties because it is



necessary to formulate the basis and principles of the national legal system extracted from the sources of living *law* in Indonesian society, not positive *law*, which will be a guide for legal development in Indonesia (Irfan, 2012).

The involvement of Islamic law in the development of national law is an effort to constitutionalize Islamic law in Indonesia. Although not all Islamic laws can be made national law. Because Islamic law has lived in society, since Islam came to Indonesia, Islamic law has a very big opportunity in the formation of Islamic law in Indonesia (Gunawan, 2017). The presence of religious courts as one of the executors of judicial power, can elaborate and apply Islamic law that has become part of national law. This can be seen from several products of Islamic law that become national law and fall within the absolute authority of religious courts. The development of Islamic law in Indonesia has progressed compared to the early days of independence. Although the progress of Islamic law in Indonesia into national law has not been fully accommodated, there are still many Islamic laws that have not become part of national law, especially Islamic criminal law (Gunawan, 2017).

The development of national law through religious courts goes two ways; First, the formation of laws and regulations. Second, the decisions of judges or jurisprudence. The first way is closely related to the political system in Indonesia, although Indonesia is a Muslim-majority country, the legislators are representatives of the people who are directly elected by the people. However, it cannot guarantee that if the draft law has Islamic nuances that are the aspirations of the people will be easily enacted and decided to be part of national law (Gunawan, 2017).

The second way is through jurisprudence or ruling. Religious court jurisprudence is expected to be part of Indonesia's national legal development. First, the discovery of legal principles and principles. Legal principles and principles are the most important sub-system of a legal system, legal principles and principles are at the top of the rule system, not only because they are more universal, but legal principles reflected values and cultural messages that should be realized by a rule of law, into legal principles and principles extracted from Islamic teachings and laws contained messages of religious values that become the character and character of the people and nation of Indonesia (Irfan, 2012).

Secondly, the establishment of legal methods. The role of religious judicial jurisprudence as a medium for transforming rules derived from Islamic teachings and law into part of the national legal system. Thus, there will be no more dualism between Islamic law and national law because it has been fully reflected in jurisprudence, because religious judicial jurisprudence can also contain the meaning of adjusting the rules of jurisprudence that are considered no longer by the demands and developments of the times or because of the increasing ability to understand Islamic teachings that are the source or that affect a rule of jurisprudence (or called progressive *ijtihad*) (Irfan, 2012). Ibn al-Qayyim al-Jauziyyah's thoughts on legal changes to the social development of Islamic law are outlined in his book '*Ilam al-Muwaqq' in 'an Rabbi al-'Alamin*', "Changes and differences in fatwas based on changes in time, place, conditions, and intentions and customs" (Ibnu al-Qayyim, n.d.). The essence of Ibn al-Qayyim al-Jauziyyah's view is that the establishment of law is associated with five things, namely *al-azmina* (the situation of the times), *al-amkinah* (the situation of the place), *al-ahwal* (conditions), *al-niyāt* (motivation or intention), and *al-'awāid* (customs). These five things are the cause (*al-illah*) of changing the legal fatwa. Legal fatwas change along with changes in the situation of the times, the situation of the place, conditions, motivations or intentions, and customs of local traditions (Ibnu al-Qayyim, n.d.).

Ibn al-Qayyim states that the Sharia is enforced for the benefit of the servants in this world and in the Hereafter. Furthermore, it is affirmed that the true foundation and principles of Sharia are the law and the benefit of the servant in the life of the world and the hereafter. Sharia brings justice, mercy, wisdom, and benefit to all. The statement shows that benefit as a basis for changing legal fatwas according to changes in time, place, circumstances, and customs that apply in a place by the goals and benefits desired by the makers of sharia when promulgating a law. Therefore, the Shari'a provides different laws for different situations, conditions, and activities (Ibnu al-Qayyim, n.d.).

The theoretical basis of Ibn al-Qayyim al-Jauziyyah's thought about legal changes to the social development of Islamic law in principle refers to the nature of Islamic sharia which is always oriented towards human benefit. Islamic Sharia is present on earth through the Holy Prophets. Which aims to realize legal justice, benefit, and virtue. Therefore, any provision or rule of law that does not meet the principle of justice, is considered contrary to Islamic sharia (Ibnu al-Qayyim, n.d.).

Ibn al-Qayyim al-Jauziyyah in his legal thought asserted that the law influenced by these five factors is a law that is adjusted to the demands of benefit in certain situations of time, place, and circumstances such as the size, type, and nature of punishment. In this condition, the Sharia gives freedom to choose the one that best suits its benefit. The law is standard and does not change because of the times, places, and *ijtihad* ulama. Such as mandatory and haram matters, and sanctions for criminal acts that have been stipulated by Sharia and others. Such laws have not changed and do not make room for other different *ijtihad* (Ibnu al-Qayyim, n.d.).

Ibn al-Qayyim al-Jauziyyah revealed that in understanding the passage must be able to compare the purpose of sharia and textuality in *nash* so that the understanding of religious texts is not partial but comprehensive. Ibn al-Qayyim al-Jauziyyah's thoughts on legal changes to the social development of Islamic law show that Islamic sharia is flexible and adaptive in responding to every change and development. Ibn al-Qayyim al-Jauziyyah argued that Islamic law could be interpreted and translated according to the social context of the Ummah (Ibnu al-Qayyim, n.d.). Third, religious judicial jurisprudence can transform, give birth to, or adapt legal teachings according to Islam into teachings in the national legal system (Irfan, 2012).

Although the position of Islamic law as one of the sources of national law was not very firm at the beginning of the new order, efforts to reinforce it were still made. One form of effort to reinforce Islamic law as national law is through proposing a marriage bill to the DPR. It did not stop there, but the effort continued by submitting a draft formal law regulating the judiciary in Indonesia in 1970. The effort then bore fruit with the enactment of Law No. 14 of 1970 concerning Judicial Power which recognized religious courts as one of the judicial institutions under the auspices of the Supreme Court. Based on this law, Islamic law itself has been applied independently in Indonesia (Undang-Undang Tentang Kekuasaan Kehakiman, 2009).

The affirmation of the enactment of Islamic law became even clearer when Law No. 7 of 1989 on Religious Courts was enacted. Based on the stipulation of Law No. 7 of 1989 concerning Religious Courts, it became the starting point for intensive efforts to optimize the implementation of Islamic law in Indonesia, as stipulated by Presidential Instruction No. 1 of 1999 concerning the Compilation of Islamic Law and the dissemination of its enactment (Direktorat Jenderal Bimbingan Agama Islam, 2018).

Consideration or what is often referred to as considerations is the basis of the decision. What is contained in the consideration section of the decision is the judge's reasons as an account to the community why the judge came to make such a decision,

so that it has objective value. Considerations in civil judgments are divided into two, namely considerations about sitting cases or legal events and considerations about the law (S. A. S.; S. Bambang, 2011). Consideration of the sitting of the case provides a brief but clear and chronological description of the trial process, which includes peace efforts, arguments presented in the lawsuit, responses from the defendant, replicas, *duplices*, evidence presented, and conclusions from witnesses. In addition, this consideration also explains how the judge evaluates the arguments presented by both sides. Meanwhile, legal considerations explain how judges qualify facts or events that occur, assess evidence submitted by both parties, and explain the legal bases used by judges in making decisions, both from written law and unwritten law (Arto, 2005).

The basis of the law used by the judge in deciding matters is the rule of law of the country and the law of *syara'* (Roihan, 2016). The legal rules of the country are arranged in order of their degrees by observing the basics, types, and hierarchy of the rules of law. The basis of *syara'* law seeks it from the Qur'an, Hadits, *Qaul* Fuqaha', which is translated into the language of the law (Peter, 2017). Based on the explanation above, the results of this research align with the theories discussed, particularly regarding the judge's role in making decisions based on principles of justice, legal certainty, and benefit. The legal considerations and findings by judges in resolving cases reflect an effort to balance these principles, especially within the context of urban Muslim society. In such settings, where social dynamics and economic structures are rapidly evolving, judges must take into account not only the letter of the law but also the societal needs, including those related to family, property, and business disputes. This is especially relevant in urban Muslim communities where traditional Islamic legal frameworks intersect with modern realities, requiring judges to interpret laws in ways that uphold justice and reflect the lived experiences of these communities. The findings show that judicial decisions aim to promote fairness and adapt to the challenges of urban life while remaining grounded in Islamic legal principles.

## 2. Discussion

### Consideration of Philosophical, Juridical and Sociological Aspects in Judges' Decisions

The Supreme Court of the Republic of Indonesia as the highest body for the exercise of judicial power that oversees four judicial bodies, namely the general court, religious court, military court, and state administrative court, has determined that the judge's decision must consider all aspects that are philosophical, juridical and sociological, so that the justice to be achieved, realized and accounted for in the judge's decision is justice oriented to legal justice, moral justice and social *justice*. The juridical aspect is the first and foremost aspect based on the applicable law. Judges as applicators of law, must seek and understand the law related to the case at hand. Judges must assess whether the law is fair, has merit, or provides legal certainty if enforced because one of the purposes of the law is to create justice. Regarding the philosophical aspect, it is an aspect that is centered on truth and justice. According to John Rawls, justice is the primary virtue in social institutions, as is truth in systems of thought (R. John, 2006).

While the sociological aspect considers the cultural values that live in society. Philosophical and sociological aspects, in their application, require extensive experience and knowledge as well as wisdom that can follow values in neglected societies. The application is very difficult because it is not tied to the system. The inclusion of these three elements is none other than so that the verdict is considered fair and accepted by the community (R. Ahmad, 2011).

**Principles of Legal Certainty, Justice and Expediency in Judges' Decisions.**

The judge's decision must contain *the idée des recht* which includes three elements, namely: justice (*gerechtigheit*), legal certainty (*rechtsicherheit*) and expediency (*zweckmassigkeit*). These three elements must be considered and applied proportionally (S. Bambang, 2006). But in judicial practice, it is very difficult for a judge to accommodate all three principles in one ruling. If likened to a line, the judge in examining and deciding a case is between two points of demarcation in the line, which stands at the point of justice and legal certainty, while the point of expediency is between the two. As for the emphasis on legal certainty, it is more likely to maintain written legal norms than existing positive laws. The emphasis on the principle of justice means that judges must consider the laws that live in society, which consist of customs and unwritten legal provisions based on justice (Muhammad, 2011).

The nature of justice according to John Christman, is divided into three types, namely retributive justice theory, corrective and distributive justice. However, in general, the theory of justice is divided into two types, namely retributive and distributive theories of justice. Retributive justice is justice related to the occurrence of wrongdoing. While distributive justice is justice related to the distribution of benefits and burdens (C. John, 2002).

In distributive justice, there is disagreement regarding the content of the principle of justice that governs the distribution of rights and obligations in society. The application of justice in decisions must be based on principles that can be accounted for, both intuitively and rationally (Mawardi, 2011). The emphasis on the principle of expediency is more nuanced to the economic aspect, with the premise that the law exists for humans, so the purpose of the law must be useful for society (R. Ahmad, 2011).

**Judge's Consideration by Legal Discovery Method.**

The task of finding the law on a matter being examined by a judge is the most difficult thing to do (Abdul, 2006). Because, every law used as a source of law is static and cannot follow the development of society, thus creating a space to be filled (R. Ahmad, 2011). For this reason, judges every decision always make legal discoveries, because the language of law is always too poor for human thinking which is very nuanced (Abdul, 2006).

Judges carry out the functions and authority of judicial power to be able to hand down decisions that contain a sense of community justice, for that must be released from the shackles of rigidity from the attachment of the spokesperson of the law according to the formulation of dead words, judges should be given the freedom to revive the formulation of dead words in laws and regulations (Ahmad Kamil; M. Fauzan, 2008). Judges must be free and independent in matters of interpreting the formulation of laws with various interpretation methodologies taught by the doctrine of legal science; seek and explore and formulate legal rules and principles during the development of changes in public legal awareness by changes in place, time and circumstances and are authorized to contra legitimate if the provisions of an article of law conflict with propriety, public order and not by the reality of the dynamics of conditions and circumstances that develop in public consciousness (Ahmad Kamil; M. Fauzan, 2008). So that the verdict handed down by the judge, contains the aura of Pancasila values and basic constitutional values in the 1945 Constitution (Asshiddiqie, 2006), and emits concrete philosophical value considerations characterized by divinity, humanity, maintaining unity, full of virtue and justice for all Indonesian people (K. Ahmad, 2012).

In addition to being guided by written law, judges are also required to find the law by exploring the law based on facts and events revealed by the plaintiff and defendant as well as evidence submitted by the parties in the trial (Abdul, 2006). In finding facts and events in the trial, the judge must constitute and quantify these facts and events to find concrete facts and events. Furthermore, its constitutions establish laws and provide justice for litigants (Mertokusumo, 2006). The phenomenon of the creation of joint property in marriage that develops in Indonesian Muslim society is very diverse, ranging from the husband who dominates, or also the wife who takes many roles, it is even very possible that the husband has spent joint property without the wife's knowledge (for example because the husband has an affair). In other cases it can be the other way around, i.e. the wife has spent joint property without the husband's knowledge (e.g. because the wife is '*nushuz*') (Direktorat Jenderal Bimbingan Agama Islam, 2018). The application of Article 97 KHI is no longer a dead property. Moreover, the Qur'an Surat An-Nisa', verse 32 which is the philosophical basis for the formulation of joint property in marriage does not provide clear provisions at all regarding the amount of each husband or wife's share of the joint property. This is because of the flexibility of the Qur'an in determining the share of husband and wife which is certainly adjusted to the role and contribution of each party, husband and wife in obtaining joint wealth. Therefore, this matter becomes a space and field of *ijtihad* whose determination of its share is left to humans, in this case, the judge as the enforcer of law and justice (Instruksi Presiden R.I. Nomor 1 Tahun 1991, 1998).

The compilation of Islamic Law Article 96 of the KHI explains that "In the event of a death divorce, half of the joint property becomes the right of the spouse who lives longer". Meanwhile, Article 97 of the IHL explains that "widows or divorced widowers are each entitled to one second of the joint property as long as it is not otherwise specified in the marriage agreement". The sentence as long as it is not otherwise specified in marriage indicates that other provisions for division are not divided in half but determined by mutual agreement by the conditions affecting the acquisition of the property. Sayuthi Talib equated the agreement in the property with the *shirkah* in the form of business so that the division of common property could be determined together by the agreement in the agreement. Article 97 of the KHI provides a clear picture of flexibility in the distribution of joint property, especially in certain cases, because the article is regulating (*regelen*) not forcing (*dwingen*) so that the division is not absolute so (Instruksi Presiden R.I. Nomor 1 Tahun 1991, 1998). Therefore, casuistically the provision can be set aside. The phrase is in line with the rules of jurisprudence: الأصل بقاء ما كان على ما كان (Syindriy; Muhammad Ihsan; Abi Hendri, 2020). If this is related to the formulation contained in Article 97 of the KHI, which originally the joint property between the widower and the widow received a share of a carry-on (half share), then it may change, if in certain cases there are elements that change it (Instruksi Presiden R.I. Nomor 1 Tahun 1991, 1998).

Concerning the application of the law (*istinbath al-hukmi*) in joint property cases in Religious Courts, law enforcers, for the sake of upholding law and justice for justice-seeking parties may use the discretionary method, namely: the wisdom of deciding something not based on the provisions of regulations, laws or applicable laws but based on wisdom, consideration or justice (Direktorat Jenderal Bimbingan Agama Islam, 2018). Islamic legal literature, this method of discretion is identical to the method of *ijtihad*, namely: as a way to obtain some legal provisions from the proposition as the main basis. In addition, it can also be used as a method to provide legal certainty that arises due to claims and interests in *mu'amalah* (Oni, 2019).

*Shirkah* is an investment based on justice, where business risks will be shared with all parties involved. The principle of *shirkah* itself is profit sharing, which is a cooperation agreement between two or more owners of capital (money or goods) to finance a business. The profits from the venture are divided according to the agreement of the parties, which does not have to be equal to their respective share of capital. In case losses are carried out with their respective capital shares (Muhammad, 2004). *Shirkah* is one way to strengthen the bonds of brotherhood between one community and another (Solihin & Suarsa, 2019). Many important, difficult, and difficult jobs cannot be done by individuals and cannot be done with little capital, but must be done with the energy of shared capital (*musyarakah*) (Meutia et al., 2023).

Divorce often creates a friction or implication that is quite complicated to resolve, namely the division of “*gono-gini*” Property or *gono-gini* at the time of marriage bonds between a man and a woman. The definition of “*gono-gini*” Property in the view of jurists has similarities with one another. According to Sayuti Talib, “*gono-gini*” Property is property acquired during the marriage bond obtained by each other's efforts individually or obtained by joint efforts between husband and wife (Thalib, 1986).

Law No. 1 of 1974, “*gono-gini*” Property is divided into three categories: *first*, Property acquired during marriage. This property is property that is controlled jointly during marriage, *second*, congenital property, which is property brought by each party before the marriage process is carried out. This property is controlled by each party as long as the parties do not specify otherwise, and *third*, acquired property, which is property obtained from gifts or inheritances. This property is controlled by each as long as the parties do not specify otherwise (M. Ansyary, 2016).

Legal experts have given many definitions of “*gono-gini*” Treasure with different editorials but the essence is the same. In this paper, the author tries to avoid the differences in definitions that have been formulated by experts. The definition of “*gono-gini*” Property in this discussion will refer to the provisions of laws and regulations because even though experts differ in orientation and views in providing these definitions, with the formulation given by the law, it is not very useful to discuss the differences in definitions given by these legal experts (M. Ansyary, 2016).

Positive law in force in Indonesia, the definition of “*gono-gini*” Property is regulated in article 35 paragraph (1) of Law Number 1 of 1974 concerning marriage, which reads: “*property obtained during marriage becomes joint property*” (Undang-Undang Nomor 1 Tahun 1971 Tentang Perkawinan, 2016). The formulation of the definition of “*gono-gini*” Property is very general, namely every property obtained during the marriage bond is referred to as “*gono-gini*” Property. It does not matter who seeks to acquire wealth in the marriage. Thus, the Law requires that any property acquired during the marriage bond regardless of whose contribution is trying, whether the husband is alone while the wife stays at home taking care of the children and managing the household, or the wife only tries while the husband lives alone, or both husbands and wives actively earn a living, then all income from such business while earned in the marriage bond becomes “*gono-gini*” Property (M. Ansyary, 2016).

After reviewing theoretical studies and case analyses, the author finds that the Religious Court's rulings in the jurisdiction of the Bandung High Religious Court effectively exercise their authority in protecting the law regarding joint property post-divorce. Judges have succeeded in delivering justice, legal certainty, and appropriate law application. Furthermore, some judges have adopted a new perspective, shifting from solely prioritizing legal certainty to emphasizing justice as the primary goal of the legal process. His complexity is particularly relevant for urban Muslim communities,

where the interplay between Islamic law and modern societal norms shapes legal outcomes. In urban areas, where societal dynamics are more diverse and complex, the application of Islamic law must align with contemporary realities. This leads to legal decisions that consider not only the textual provisions of Islamic law but also the practical realities of urban life, including economic, social, and gender-related factors. Thus, the coexistence of multiple legal systems in Indonesia reflects the evolving nature of legal practice within urban Muslim society as it adapts to modern challenges while maintaining its Islamic foundations.

#### **D. Conclusion**

The conclusion regarding the division of joint property between husband and wife post-divorce, according to the Compilation of Islamic Law (KHI), emphasizes the principle of partnership and justice. In the context of urban society, particularly in cities like Bandung, where social dynamics and economic conditions are increasingly complex, the role of the Religious Court becomes pivotal. The findings at the Bandung High Religious Court demonstrate that the authority over joint property division for Muslims lies with the Religious Court, which can decide based on equitable distribution (either 1/2, 1/3, or 2/3) depending on the evidence presented by both parties. In urban Muslim societies, where the balance between modern economic roles and traditional Islamic values is critical, the court must navigate these complexities. By incorporating both legal certainty and fairness, judges ensure that their decisions reflect not just the letter of the law but also the evolving realities of family structures in an urban context. The approach of prioritizing justice alongside legal certainty aligns with the needs of urban Muslim communities, where fairness in asset distribution plays a crucial role in maintaining social harmony post-divorce. Thus, the court's decisions reflect an adaptation of Islamic principles to contemporary urban life, ensuring that justice remains at the heart of legal resolutions.

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#### **F. Author Contributions Statement**

The authors jointly contributed to the overall design, research methodology, and analysis of the study. The lead author developed the conceptual framework, focusing on the role of Islamic law in managing joint property division after divorce in urban Muslim communities. The co-author conducted a detailed review of the legal framework, particularly examining Law No. 1 of 1974 and the Compilation of Islamic Law, to identify gaps in addressing contemporary family dynamics, such as when wives serve as the main earners. Both authors collaborated on gathering and analyzing data from the Bandung High Religious Court, ensuring that the findings accurately reflect the changing socio-economic roles in Muslim families. The authors also jointly worked on drafting, revising, and refining the manuscript to ensure its relevance to legal practitioners and policy discussions regarding Indonesia's Islamic legal system.

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