Volume 6, Issue 2, July–December 2026
Syakhshiyyah: Journal of Islamic Family Law
P-ISSN 3032-212X; E-ISSN 2986-5409

Reconstruction of the Division of Joint Property in Classical Fiqh and Indonesian Positive Law: A Perspective from the Theory of *Ma'ālāt al-Af'āl*

Rekonstruksi Pembagian Harta Bersama dalam Fikih Klasik dan Hukum Positif Indonesia: Perspektif Teori Ma'ālāt al-Af'āl

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Article History:

DOI: https://doi.org/10.32332/6jh14m25
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Received: 01-07-2026	Revised: 05-09-2026	Accepted: 07-10-2026	Published: 15-11-2026

Abstract: This study examines the normative tension in the division of joint property between the principle of separation of ownership (*istiklāl al-dhimmah*) in classical fiqh and the provisions on the division of joint property in Article 97 of the Compilation of Islamic Law (KHI). Both constructs have the potential to raise issues of fairness when the contributions of the husband and wife are not balanced. This study employs a normative legal method using legislative, case-based, conceptual, and comparative approaches. The analysis is based on four indicators from the *Ma'ālāt al-Af'āl* theory: *At-Tashrīh al-Nashshī*, *Az-Zhunūn al-Mu'tabarah*, *Al-Qarāin wa al-Mulābāsāt*, and *Tajribah*. The results of the study indicate that neither classical fiqh nor Indonesian positive law currently provides a mechanism for measuring non-financial contributions. This study proposes a four-step framework for reconstructing judicial deliberations: using Article 97 of the KHI as a starting point; identifying imbalances in contributions based on trial

evidence; adjusting the division proportionally; and limiting judicial discretion through objective parameters. This assessment can be supported by the Replacement Cost approach to measure the value of domestic work and the Opportunity Cost approach to account for the sacrifice of economic opportunities. This model is expected to serve as the basis for drafting guidelines for judges through a Supreme Court Circular Letter to realize substantive justice and legal certainty.
Keywords: Joint Property, *Ma'ālāt al-Af'āl*, Substantive Justice, Islamic Family Law, Legal Reconstruction.

Abstrak: Penelitian ini mengkaji tentang ketegangan normatif dalam pembagian harta bersama antara prinsip pemisahan kepemilikan (*istiklāl al-dhimmah*) dalam fikih klasik dan ketentuan pembagian harta bersama dalam Pasal 97 Kompilasi Hukum Islam (KHI). Kedua konstruksi tersebut berpotensi menimbulkan persoalan keadilan ketika kontribusi suami dan istri tidak seimbang. Penelitian ini menggunakan metode hukum normatif dengan pendekatan perundang-undangan, kasus, konseptual dan komparatif. Analisis ini dilakukan berdasarkan empat indikator teori *Ma'ālāt al-Af'āl*, yaitu *At-Tashrīh al-Nashshī*, *Az-Zhunūn al-Mu'tabarah*, *Al-Qarāin wa al-Mulābāsāt*, dan *Tajribah*. Hasil penelitian menunjukkan bahwa fikih klasik maupun hukum positif Indonesia belum menyediakan mekanisme penilaian kontribusi nonfinansial secara terukur. Penelitian ini menawarkan rekonstruksi pertimbangan hakim melalui empat langkah, yaitu menjadikan Pasal 97 KHI sebagai titik tolak, mengidentifikasi ketimpangan kontribusi berdasarkan fakta persidangan, melakukan penyesuaian pembagian secara proporsional, dan membatasi diskresi melalui parameter objektif. Penilaian tersebut dapat didukung oleh pendekatan *Replacement Cost* untuk mengukur nilai kerja domestik dan *Opportunity Cost* untuk memperhitungkan pengorbanan peluang ekonomi. Model ini diharapkan dapat menjadi dasar penyusunan pedoman bagi hakim melalui Surat Edaran Mahkamah Agung guna mewujudkan keadilan substantif dan kepastian hukum.
Kata Kunci: Harta Bersama, *Ma'ālāt al-Af'āl*, Keadilan Substantif, Hukum Keluarga Islam, Rekonstruksi Hukum.

A. INTRODUCTION

Disputes over joint property are one of the issues that frequently arise in post-divorce family law cases. The Directory of Decisions of the Supreme Court of the Republic of Indonesia records 28,340 decisions classified as "Joint Property" based on data accessed on September 2, 2026.[1] This number indicates that the resolution of joint property disputes is a significant issue in the Indonesian judicial system. This issue relates not only to the certainty of ownership status but also to the

[1] Mahkamah Agung Republik Indonesia, "Direktori Putusan Mahkamah Agung Republik Indonesia: Harta Bersama," accessed September 2, 2026.

determination of each party's rights to property acquired during the marriage, which has legal implications for the personal relationship and the marital assets of the husband and wife. Article 35(1) of Law No. 1 of 1974 on Marriage stipulates that property acquired during the marriage becomes joint property. Furthermore, Article 36(1) provides that any action regarding joint property requires the consent of both parties. This provision indicates that the formation and management of joint property carry legal consequences that must be considered in dispute resolution.[2]

In practice, resolving disputes over joint property is not always straightforward. Issues may arise due to the intermingling of separate property and property acquired during the marriage, the use of assets for family purposes, the involvement of third parties, and the lack of evidence regarding the origin and acquisition of the property. These conditions require judges not only to identify the legal status of an asset but also to assess each party's contribution to its formation and management. Thus, the resolution of disputes over joint property requires considerations that link normative provisions to the factual circumstances of the family.[3] In classical fiqh, the concept of joint property as known in Indonesian family law is not formulated as an automatic consequence of marriage. A review of the views of the four schools of Islamic jurisprudence shows that the ownership of the husband and wife remains fundamentally separate. In the Shafi'i school, the principle *of istiklāl al-dhimmah* affirms the independence of each party's responsibilities and ownership. Therefore, the marriage contract does not, by itself, make the husband's and wife's property a single unit of ownership. Recognition of joint ownership requires a separate basis, such as a contract or evidence of cooperation in acquiring the property.[4] The Shafi'i school, which is dominant in Indonesia, affirms the principle of separation of property. Based on this principle, property acquired by each party is fundamentally considered personal property.

[2] Erina Nur Afifa et al., "A Comparative Study of Marriage Agreements Between Cross-National Couples in Indonesia and the Netherlands," *Media Hukum Indonesia (MHI)* 4, no. 1 (2026): 160.

[3] Law No. 1 of 1974 on Marriage, Pub. L. No. 1 (1974).

[4] Abdul Manaf, "The Concept of Syirkah (Partnership) as the Basis for the Existence of Joint Property in Marriage," *Al-Muamalat Journal of Sharia Law and Economics* 9, no. 1 (2024): 63–64.

The marriage contract, therefore, does not automatically result in the commingling of the husband's and wife's property.[5]

The absence of specific provisions regarding joint property in the textual sources does not preclude the recognition of joint ownership through the mechanisms of fiqh al-mu'amalah. One relevant concept is *syirkah*, which is a partnership between two or more parties in an economic activity, entailing the division of specific rights and obligations. Forms that can be discussed in this context include *syirkah abdan* and *syirkah 'inān*.[6] However, acceptance of syirkah abdan is not uniform across the schools of thought.[7] The Shafi'i school rejects it, while the Hanafi, Maliki, and Hanbali schools permit it under their respective conditions. Therefore, the recognition of property acquired through the cooperation of husband and wife must take into account the form of the contract, the type of contribution, and the provisions of the school of thought being referenced. [8]

Unlike classical fiqh, which fundamentally maintains the separation of a husband's and wife's property, Indonesian positive law recognizes joint property as a legal consequence of marriage. Articles 35 through 37 of Law No. 1 of 1974 on Marriage distinguish between property acquired during the marriage and the separate property brought by each party.[9] These provisions are further elaborated in Articles 85 through 97 of the Compilation of Islamic Law (KHI). Thus, Indonesian positive law provides a normative basis for the recognition of joint property, while also regulating its division and management.[10]

[5] Hasanuddin Hasanuddin, "Eksekusi Putusan Pengadilan Agama Atas Harta Bersama Dalam Perkara Perceraian: Studi Literatur Terhadap Konstruksi Hukum Eksekutorial Dan Gagasan Fiqih Modern Tentang Kepemilikan," *ANDREW Law Journal* 4, no. 2 (2025): 804, 813.

[6] Mumaddun Khaerudin Salami, Meriza Elpha Darnia, and Tike Murti Sari Dewi, "An Analogy Between Islamic Marital Joint Property Law and the Concept of Islamic Economics (Syirkah)," *Riau Law Journal* 9, no. 1 (n.d.): 60.

[7] Yureza Azzani, "Syirkah Dalam Harta Bersama Suami Istri," *Jurnal Masharif Al-Syariah: Jurnal Ekonomi Dan Perbankan Syariah* 10, no. 5 (2025): 6, 8.

[8] Muhammad Salim Mahmudi, *Harta Bersama Dalam Perspektif Hukum Islam Dan Hukum Positif*, 2024; Azzani, "Syirkah Dalam Harta Bersama Suami Istri."

[9] Panal Herbet Limbong, Syawal Amry Siregar, and Muhammad Yasid, "Pengaturan Hukum Dalam Pembagian Harta Bersama Perkawinan Menurut Hukum Perdata Yang Berlaku Saat Ini Di Indonesia," *Retentum Journal* 3, no. 2 (2023): 180.

[10] Cahya Alifya Nazwa et al., "Harta Bersama Dan Problematikanya: Analisis Hukum Positif Di Indonesia," *Al-Zayn: Journal of Social Sciences & Law* 4, no. 2 (2026): 1997–98.

Specifically, Article 97 of the KHI stipulates that a widow or widower following a divorce is each entitled to one-half of the joint property, unless otherwise specified in a marriage contract. This provision provides a relatively definitive guideline for the division of assets between the parties. However, the application of an equal division can raise issues when the contributions of the husband and wife to the accumulation of joint property differ significantly. In judicial practice, such circumstances have led to greater consideration of the parties' contributions and factual circumstances when determining their shares of the joint property.

Article 97 of the KHI does not yet outline a structured mechanism for assessing each party's contributions. Consequently, when disparities in contributions arise, judges must evaluate the facts and evidence presented by the parties to determine whether a 50-50 division reflects fairness in the case. Without clear assessment parameters, considerations regarding contributions have the potential to result in differing approaches across court decisions. This issue highlights the need for an analytical framework that can link normative provisions to the consequences of their application.

The theory *of Ma'ālāt al-Af'āl* is used in this study as a tool to evaluate the consequences of implementing a legal provision. Etymologically, the term *ma'ālāt* refers to consequences or outcomes, while *al-af'āl* means actions. In usul al-fiqh, consideration of *ma'ālāt* relates to the assessment of the potential impacts—whether beneficial or harmful—that may arise from a legal action or ruling. Al-Syāṭibī is one of the scholars who discussed the consideration of consequences within the framework of Islamic law application. The relevance of this approach in disputes over joint property lies in its ability to assess whether the application of a legal provision has taken into account the circumstances and interests of the parties involved. With this approach, the division of joint property is assessed not only based on its formal compliance with legal norms but also based on its impact on the protection of property (*hifẓ al-māl*) and the fulfillment of the objectives of Islamic law (*maqāṣid al-syarī'ah*).[11]

[11]Ahmad Muflihul Wafa and Muhammad Harfin Zuhdi, "The Decline in Generation Z Marriage Rates: Ma'ālāt Al-Af'āl Perspective," *Al-Afkar, Journal For Islamic Studies* 8, no. 2 (2025): 418.

Previous research indicates that the Ma'ālāt al-Afʿāl theory has been applied in various contemporary Islamic legal studies. Adib[12] discusses the theory's position within the discourse on usul al-fiqh in Indonesia. Wafa and Zuhdi[13] use it to analyze the phenomenon of declining marriage rates among Generation Z, while Rachmadhani[14] applies it in a study of fatwas regarding interfaith marriage and the boycott of Israeli products. Subhan and Jumni[15] also use this theory to discuss the urgency of marriage registration during the syibhul 'iddah period. Although these studies demonstrate the breadth of the application of the *Ma'ālāt al-Afʿāl* theory, its application in evaluating the division of joint property and formulating parameters for assessing spousal contributions still requires further discussion.

Given this gap, this study employs the *Ma'ālāt al-Afʿāl* theory to evaluate the framework for the division of joint property in classical fiqh and Indonesian positive law. Unlike previous studies that examined this theory in the context of fatwas or socio-religious phenomena, this study focuses on evaluating the application of legal norms in the resolution of disputes over joint property. This study also proposes a framework for assessing contributions that encompasses three dimensions: financial contributions, contributions through domestic work and child-rearing, and the sacrifice of economic opportunities experienced by one party during the marriage. Thus, the novelty of this study lies in the integration of an evaluation of the consequences of legal application with an assessment of the contributions of both spouses through these three dimensions as factors to be considered in the resolution of disputes over joint property.

[12]Muhammad Adib, "Analisis Dampak (I 'Tibār Al-Ma'Āl): Teori Yang Terpinggirkan Dalam Wacana Usul Fikih Di Indonesia," *MAQASHID* 7, no. 1 (2024): 26–44.

[13]Ahmad Muflihul Wafa and Muhammad Harfin Zuhdi, "The Decline in Generation Z Marriage Rates: Ma'ālāt Al-Afʿāl Perspective," *Al-Afkar, Journal For Islamic Studies* 8, no. 2 (2025): 409–28.

[14] Fajar Rachmadhani, "Fajar Rachmadhani, "Konsep Fiqh Al-Maālāt Dan Urgensinya Dalam Konstruksi Hukum Islam: Studi Analisis Terhadap Fatwa Majelis Ulama Indonesia Tentang Pernikahan Beda Agama," *Maqasid: Journal of Islamic Legal Studies* 13, no. 2 (2024): 16–34.

[15] Muhammad Subhan and Nelli Jumni, "The Urgency of Registering Marriage for Men During the Syibhul 'Iddah Period Based on the Theory of Maʿālāt al-Afʿāl: The Urgency of Registering Marriage for Men During the Syibhul 'Iddah Period Based on the Theory of Maʿālāt al-Afʿāl," *Academia Open* 11, no. 1 (2026): 10–21070.

B. METHODOLOGY

This study is a normative legal research aimed at examining the construction of the division of joint property in classical fiqh and Indonesia's positive law as well as formulating a reconstruction model based on the theory *of Ma'ālāt al-Af'āl*.[16] This study employs the statutory approach, the conceptual approach, and the comparative approach. The statutory approach is used to analyze provisions regarding joint property in the Marriage Law and the Compilation of Islamic Law. The conceptual approach was used to examine the principle of ownership in classical fiqh, the concept of *syirkah*, and the *Ma'ālāt al-Af'āl theory.* The comparative approach was used to compare the frameworks for the division of joint property in classical fiqh, Indonesian positive law, and relevant provisions of Malaysian family law.

The primary legal sources for this study include Law No. 1 of 1974 on Marriage, the Compilation of Islamic Law, the Islamic Family Law (State of Selangor) Enactment 2003, and court decisions related to the division of joint property. Secondary legal sources include books on fiqh, literature on usul al-fiqh, books on Islamic family law, scholarly journal articles, and relevant legal studies. The legal materials were collected through a literature review and analyzed qualitatively by interpreting, comparing, and evaluating legal provisions based on the four indicators of the *Ma'ālāt al-Af'āl* theory. The results of the analysis were used to formulate a contribution assessment model that can be considered in the resolution of disputes over joint property.

C. RESULTS AND DISCUSSION

1. Normative Framework for the Division of Joint Property in Classical Fiqh and Indonesian Positive Law

The discussion regarding joint property in classical fiqh cannot be reduced to a single perspective. In the Shafi'i school of thought, the ownership of the husband and wife is fundamentally independent *(istiklāl al-dhimmah)*. Marriage does not automatically create a joint ownership partnership over the property owned by

[16] Peter Mahmud Marzuki, *"Penelitian Hukum"*, Jakarta: Kencana Prenada Media 55 (2005).

each party. Therefore, joint ownership requires a separate legal basis, such as a contract or proof of cooperation in acquiring the property (*syirkah*).

One concept in the fiqh tradition relevant to the issue of contributions to the formation of family wealth is Kadd wa al-Si'āyah. This concept is recognized in Maliki fiqh discussions and pertains to the acknowledgment of the effort or labor a person expends in generating wealth.[17] In the context of the relationship between husband and wife, this concept can serve as a framework for explaining the potential recognition of one party's contribution to the formation of family assets, particularly when the wealth is acquired through cooperation or the tangible involvement of both parties. Thus, the assessment of family wealth does not rely solely on formal records of ownership but may also take into account provable contributions. Nevertheless, its application to domestic work must be distinguished from productive contributions that directly generate assets and must be based on adequate fiqh arguments.

The concept *of Kadd wa al-Si'āyah* in the Indonesian context can serve as a comparative perspective to enrich the discussion regarding the contributions of husbands and wives in the formation of family wealth. Its use is not intended to replace the principle of independent ownership in the Shafi'i school of thought, but rather to demonstrate that recognition of contributions to the acquisition of wealth also has a foundation in fiqh tradition. These two approaches can be viewed as complementary: the principle *of istiklāl al-dhimmah* affirms the independent ownership of husbands and wives, while the concept *of Kadd wa al-Si'āyah* focuses on the efforts and contributions made in the accumulation of wealth. This perspective is relevant for assessing disputes over joint property, provided that its application continues to take into account the basis of ownership, the nature of contributions, and the burden of proof in each case.

Unlike classical fiqh, which essentially upholds the independence of the husband's and wife's property, Indonesian positive law recognizes joint property as

[17] Adied Najiyurrahman and Agustina Rahayu Husein, "Hibah Dalam Sengketa Harta Bersama: Kajian Putusan Pengadilan Agama Dalam Perspektif Maqashid Syariah," *El-Faqih: Journal of Islamic Thought and Law* 12, no. 1 (2026): 134. ;&Dr Muhammad Asif Khan and Qaisar Abbas, "Marriage, Contribution, and Retained Enrichment: Towards a Classificatory Framework for Pakistani Law," *Submitted to the Rabel Journal of Comparative and International Private Law*, 2026, 18.

a legal consequence of marriage. Article 35 of Law No. 1 of 1974 on Marriage distinguishes property acquired during the marriage from the separate property of each party. Provisions regarding control over and legal actions concerning such property are further regulated in Article 36, while Article 37 stipulates that if the marriage is dissolved by divorce, the joint property is governed by the respective laws of each party. These provisions are detailed in Articles 85 through 97 of the Compilation of Islamic Law (KHI). Specifically, Article 97 of the KHI stipulates that a divorced widow or widower is each entitled to one-half of the joint property, unless otherwise specified in the marriage contract.

Some scholars view the Compilation of Islamic Law as the result of collective ijtihad by Indonesian ulama that accommodates local values of justice within the framework of Islamic law. From this perspective, the acceptance of the gono-gini custom can be understood as a form of recognition of *'urf*, provided it does not conflict with the principles of sharia.[18] This view differs from the critical approach that examines the formation of the KHI through the lens of gender relations and legal politics.[19] This distinction indicates that the normative legitimacy of joint property must be distinguished from an evaluation of the process of its formation and the consequences of its application. Therefore, the subsequent discussion is directed toward assessing whether the application of provisions regarding the division of joint property has taken into account the factual conditions and their consequences for the parties involved through the theory *of Ma'ālāt al-Af'āl*.

Based on this discussion, classical fiqh and Indonesian positive law have different starting points in constructing marital property. Classical fiqh emphasizes the independent ownership of the husband and wife and requires specific grounds for recognizing joint ownership. In contrast, Indonesian positive law recognizes joint property as a legal consequence of marriage, and the Indonesian Compilation of Islamic Law (KHI) stipulates a 50-50 division under Article 97 of the KHI. This difference highlights an issue that requires further examination: whether the

[18]Muhammad Ridwan, Arbanur Rasyid, and Maulana Arafat Lubis, "Harta Bersama Suami Istri Ditinjau Dari Hukum Islam Dan Hukum Adat," *Yurisprudentia: Jurnal Hukum Ekonomi* 7, no. 2 (2021): 206.

[19] Durotun Nafisah, "Politisasi Relasi Suami-Istri: Telaah KHI Perspektif Gender," *Yinyang: Jurnal Studi Islam Gender Dan Anak* 3, no. 2 (2008): 195.

application of each legal framework has taken into account its implications for justice for the parties, particularly when there is an imbalance in contributions. It is this issue that forms the basis for evaluating the division of joint property through the theory of *Ma'ālāt al-Af'āl.*

2. Evaluation of the Division of Joint Property Based on the Theory of Ma'ālāt al-Af'āl

Ma'ālāt al-Af'āl is an approach in Islamic law that considers the effects or consequences of an action or legal ruling. This consideration is used to assess whether the application of a provision leads to public interest or, conversely, causes harm. Al-Syāṭibī is one of the scholars who discussed the consideration of consequences within the framework of Islamic law.[20] In this study, this theory is used to evaluate the consequences of applying provisions regarding the division of joint property on the parties involved, particularly when there are differences in the contributions made by the husband and wife.

This study expands the application of the *Ma'ālāt al-Af'āl* theory by applying it to the evaluation of the division of joint property in judicial practice. A number of previous studies have used this theory to examine issues related to fatwas and specific socio-religious phenomena. Departing from this trend, this study focuses on assessing the consequences of applying legal norms in disputes over joint property. This approach is used to analyze the relationship between the provisions of Article 97 of the KHI, the factual circumstances of the parties, and the consequences of asset division. Thus, this study proposes the use *of Ma'ālāt al-Af'āl* as an analytical framework to assist judges in evaluating evidence of contributions and formulating considerations when there are grounds to deviate from the general provisions regarding division.

The normative framework outlined above is further analyzed through the four indicators of *Ma'ālāt al-Af'āl*, namely explicit text (*At-Tashrīh al-Nashshī*), rational and well-founded presumptions (*Az-Zhunūn al-Mu'tabarah*), supporting indications and context (*Al-Qarā'in wa al-Mulābasāt*), and experience and empirical

[20] Abu Ishaq Ibrahim bin Musa As-Syatibi, *Al-Muwafaqat* (Beirut: Dar al-Ma'rifah, 2004).

data (*Tajribah*). In this study, these four indicators are used as an analytical framework to assess the relationship between norms, factual conditions, and the consequences of legal application. Their development draws upon the thought of al-Syāṭibī in *al- Muwāfaqāt*, particularly the discussion regarding texts, indications, strong presumptions, and empirical experience.[21]

These four indicators can also be understood as a complementary procedural sequence. The analysis begins by examining whether the nash specifically addresses the issue (*juz'ī*) or merely provides a general principle (*kullī*). If no specific provision exists, the assessment proceeds by projecting the consequences of legal application through rational reasoning. This projection is then tested by considering the factual context and the circumstances of the parties. In the final stage, empirical data and experience are used to assess whether the anticipated consequences have a sufficient basis. Thus, the four indicators not only function as categories of analysis but can also be organized into stages of evaluating the application of the law in disputes over joint property.

The first indicator, *At-Tashrīh al-Nashshī*, is used to assess whether the Qur'an and Sunnah explicitly regulate the mechanism for dividing assets acquired during marriage. In this context, the texts of Islamic law contain principles regarding ownership, the obligation of maintenance, justice, and the prohibition against causing harm, but they do not specify in detail the mechanism for dividing joint property following a divorce. Therefore, the resolution of disputes over joint property requires ijtihad while remaining guided by the general principles of Islamic law. The principle *of mu'āsyarah bi al-ma'rūf* and the rule of *lā ḍarar wa lā ḍirār* can serve as a foundation for ensuring that the application of division provisions does not cause harm or injustice to either party.

The second indicator, *Az-Zhunūn al-Mu'tabarah*, emphasizes the use of rational reasoning to project the consequences of applying a legal provision. In the division of joint property, the application of Article 97 of the KHI—which mandates an equal division—can lead to problems when the contributions of the parties show significant differences. For example, an equal division may create an imbalance if

[21]As-Syatibi, *Al-Muwafaqat*, 277,282,333-334.

the majority of the assets were acquired through the capital and efforts of one party, while the other party did not make a comparable contribution. Conversely, an assessment based solely on income may also overlook domestic and childcare contributions that enable the spouse to earn an income. Therefore, an assessment of the consequences of the division must consider all relevant and provable contributions, rather than merely comparing the parties' formal incomes.

The third indicator, *Al-Qarā'in wa al-Mulābasāt*, emphasizes the importance of considering the factual context and the circumstances of the parties in the application of the law. In disputes over joint property, the judge must assess the origin of the assets, the nature of the contributions, the fulfillment of household obligations, and the economic circumstances of each party. These considerations can help determine whether a 50-50 division aligns with the factual circumstances or, conversely, creates inequality. Thus, the application of Article 97 of the KHI must be accompanied by an examination of relevant evidence and concrete circumstances, rather than being based solely on mathematical calculations.

The fourth indicator, *Tajribah*, is used to assess the consequences of applying the law through empirical data and historical experience. In the context of the division of joint property, this indicator can be used to evaluate whether the applicable division mechanism has provided adequate protection for the parties. One relevant point of comparison is the regulation of joint property in Malaysia. The Islamic Family Law (State of Selangor) Enactment 2003 governs the division of property based on joint efforts as well as the sole efforts of one party. These provisions also allow the court to consider the contributions of a party who did not make direct financial contributions, including family support, child care, and household management.[22]

The practice of marital property division in Malaysia can serve as a point of comparison for understanding how courts assess financial and non-financial contributions. However, case examples from Sharia courts and civil courts must be

[22] Article 122, paragraph (2), subparagraph (a): Emphasizes the primary consideration in the division of property, namely *"the extent of contributions made by each party in the form of money, property, or labor toward acquiring said assets."* See more at Islamic Family Law (State of Selangor) Enactment 2003 (2003).

distinguished because they operate under different jurisdictional structures. Each ruling must also be explained based on the case's specific circumstances, the proven facts, and the legal considerations. Therefore, Malaysia's experience can be used to explore the possibility of recognizing non-financial contributions, but it cannot be directly applied to the Indonesian legal system. Adjustments are still necessary, taking into account the judicial structure, substantive law, and the nature of evidence in cases involving joint property.

Table 1
Evaluation of the *Ma'ālat al-Af'āl* Indicator Regarding the Division of Joint Property in Classical Fiqh and Indonesian Positive Law

No	***Ma'ālat al-Af'āl* Indicators**	**Operational Definition**	**Classical Fiqh**	**Indonesian Positive Law**	**Comparative Evaluation**
1	*At-Tashrīh al-Nashshī* (Explicit Text)	The impact of an action is measured by its relationship to the nash.	There is no *specific nash*, but it is bound by the principle of universal justice; it establishes the absolute division of property.	Article 97 of the KHI accommodates customary law (gono-gini) to fill the gap in *specific scriptural texts*.	Both operate within the realm of ijtihad due to the absence of *specific textual provisions*, yet remain subject to an evaluation of their impact on *the general principle* (anti-oppression).
2	*Az-Zhunūn al-Mu'tabarah* (Rational Presumptions)	Rational predictions based on strong causal arguments.	Closes loopholes for past exploitation but creates new vulnerabilities for those without independent income.	Article 97 intends to protect, yet its rigid 50:50 ratio irrationally disregards disparities in contributions.	Positive law takes a step forward in its protective intent, yet suffers from a lack of proportional rationality when faced with asymmetrical contributions.
3	*Al-Qarā'in wa al-Mulābāsāt* (Contextual Indications)	Assessing the impact based on the specific realities and	Relying on past *'Urf* (custom), it is less adaptive to family	First-instance judges are positivistic; the Supreme Court uses *qarain*	Substantive justice in positive law depends on jurisprudence

		circumstances of the parties.	structures with dual contributions.	(jurisprudence) to deviate from the 50:50 ratio, but " " is not binding on lower courts.	that gives rise *to* " " resulting in systemic *mafsadah* in the form of elitism in access to justice at the cassation level.
4	*Tajribah* (Empirical Data & Experience)	Validation of impact through objective historical and sociological facts.	*A practice* rooted in the classical agrarian economic tradition (*"Adah muttharidah* lama"), which ignores the reality of *unpaid care work*.	It exacerbates post-divorce vulnerability among domestic partners. It has not yet adopted standards for assessing non-financial contributions, such as those used in Malaysia.	Evidence-based regulatory modifications (such as the recognition of domestic work) are absolutely necessary to replace the mechanical application of the 50:50 rule.

Source: Compiled by the Author, 2026

The four *Ma'ālāt al-Af'āl* indicators are used sequentially and complementarily in evaluating the division of joint property. The analysis begins by examining the relevant textual provisions (nash) and general principles of Sharia. Next, the consequences of applying these norms are projected through rational reasoning, then tested by considering the factual context and the circumstances of the parties. In the final stage, empirical data and experience are used to assess whether these projections have a sufficient basis. Through this process, the application of Article 97 of the KHI can be evaluated not only in terms of legal certainty but also in terms of its consequences for the parties when there are differences in contribution. The results of this evaluation form the basis for developing a model for the reconstruction of the division of joint property in the following section.

3. Reconstruction of the Division of Joint Property Based on the *Ma'ālāt al-Af'āl* Theory

The reconstruction of the division of joint property in this study encompasses three interrelated aspects. First, the operational steps for applying the

Ma'ālāt al-Af'āl theory by judges in Religious Courts. Second, a framework for assessing the contributions of the husband and wife proportionally. Third, the legal basis that can be used to support the application of this model within Indonesia's positive legal system. These three aspects are necessary to ensure that the reconstruction does not remain merely a normative concept ( ), but rather provides an implementation framework that can be considered in dispute resolution.

In operationalizing the *Ma'ālāt al-Af'āl* theory, this study limits the classification of predicted consequences to two levels: *qaṭ'ī al-taḥaqquq* and *ẓannī al-taḥaqquq*. The first level refers to consequences that can be ascertained through strong reasoning, while the second level refers to consequences that are strongly suspected to occur based on rational considerations and available facts. As for *nādir al-taḥaqquq*—that is, consequences that occur very rarely—it is not used as a primary basis in this model because it is not representative enough to form general guidelines. This limitation is a methodological choice of this study; it does not imply that al-Syāṭibī's entire discussion recognizes only two levels of consequences. Thus, the evaluation focuses on the consequences of applying the division of joint property that have a rational basis and are justifiable.

The theoretical foundation of this reconstruction rests on the concept *of Ma'ālāt al-Af'āl* in al-Syāṭibī's thought. In *al-Muwāfaqāt*, al-Syāṭibī explains the importance of considering the consequences of an action, whether certain or based on strong presumption. Such considerations encompass both the consequences that arise at the time the action is taken and those anticipated to occur later. Thus, the evaluation of a legal action cannot be based solely on its original purpose but must also take into account the consequences it produces. Al-Syāṭibī explains "For indeed, the leniency sought will be achieved—both immediately and in the long run—with certainty in general… if sought through a means not prescribed by Sharia, such leniency cannot be guaranteed nor is it based on a strong presumption, neither immediately nor in the future."[23]

[23] As-Syatibi, *Al-Muwafaqat*, 349.

Certainty regarding future consequences cannot always be achieved. Therefore, legal considerations may be based on strong presumptions that have a rational foundation. Al-Shāṭibī explains that strong presumptions— —may be used in determining the law in subsidiary matters as long as they meet the criteria for justifiable consideration. He states, "Indeed, the Legislator has treated strong presumption in legal implications as equivalent to certainty... It has been firmly established that various presumptive evidences apply in various branches of Sharia just as certain evidences do."[24]

Although strong presumptions may be used in legal deliberations, their application still requires limits so as not to degenerate into a subjective justification for judicial discretion. Therefore, presumptions regarding legal consequences must be supported by verifiable indications and experience. Al-Shātibī distinguishes between presumptions grounded in evidence and those based on untested conjectures that are merely illusory. He states "And the conclusion of this classification is that various conjectures and estimates that have not been verified by facts all fall back into the category of illusions." [25]

Based on this foundation, this study employs two levels of consequence prediction: *qaṭ'ī al-taḥaqquq* and *ẓannī al-taḥaqquq*. The first level refers to consequences that can be established with certainty through sound reasoning, while the second level refers to consequences that are strongly presumed to occur based on rational consideration. Consequences that occur very rarely (*nādir al-taḥaqquq*) are not used as the primary basis in this model because they are not representative enough to form general guidelines. This limitation is a methodological choice made by the author in applying the *Ma'ālāt al-Af'āl* theory to evaluate the division of joint property. Thus, the analysis focuses on the consequences of applying norms that are grounded in reasoning and can be justified.

At the *qaṭ'ī al-taḥaqquq* level, one can use the illustration of a brief marriage that ends before a shared household is established. For example, all business capital and debt originate from one party, while the other party made no contribution to

[24] Ibid., 339
[25] Ibid., 334

the formation of those assets. In such circumstances, applying a 50-50 division without examining the origin of the assets has the potential to result in a division that is disproportionate to the basis of the assets' acquisition. As for the *ẓannī al-taḥaqquq* level, the absence of parameters for assessing contributions can lead to discrepancies in judicial decisions and reduce the parties' ability to predict the outcome of dispute resolution. Both of these examples demonstrate the importance of evaluating the consequences of applying legal norms based on provable facts.

The first pillar of this reconstruction is the application of the *Ma'ālāt al-Af'āl* theory through four operational steps for Religious Court judges. First, Article 97 of the KHI serves as the starting point for the division of joint assets because this provision continues to provide legal guidance for cases that do not demonstrate significant disparities in contributions. Second, the judge examines the trial facts to identify indications of an imbalance in contributions, such as neglect of maintenance obligations, provable career sacrifices, or assets predominantly originating from one party. Third, if such an imbalance is proven, the judge assesses each party's contribution proportionally and explains the basis for this assessment in the ruling. Fourth, the adjustment of shares must be based on specific facts and evidence and accompanied by clear legal reasoning. Through these steps, the theory *of Ma'ālāt al-Af'āl* serves as an analytical framework for assessing the consequences of legal application, not as a basis for unlimited discretion.

The second pillar is the framework for assessing proportional contributions, which is used to evaluate the factual circumstances of the parties. This assessment encompasses three dimensions. First, financial contributions, which can be substantiated through income documents, capital holdings, transactions, and asset acquisitions. Second, domestic and childcare contributions, which can be assessed through the duration of the marriage, the division of household responsibilities, as well as witness testimony and other relevant evidence. Third, the sacrifice of economic opportunities, such as the interruption of a career or the " " of education for one party due to family responsibilities. These three dimensions must be

assessed comprehensively so that contributions are not measured solely based on formally recorded income.[26]

To reduce subjectivity in assessing nonfinancial contributions, this study proposes the use of economic valuation instruments as a tool. Domestic work and childcare can be estimated using *the Replacement Cost Approach,* which involves calculating the costs that would be incurred if these tasks were outsourced to professional service providers. Meanwhile, economic opportunity costs can be analyzed through *the Opportunity Cost* approach—that is, the estimated income lost because one party ceases or limits professional activities for the sake of the family. These two approaches should not be automatically added together, as this risks double-counting. Their application must be tailored to the facts of the case and aimed at helping judges assess contributions proportionally.

The results of the contribution assessment can serve as a basis for the judge to consider adjustments to the division of joint property. However, such adjustments must be limited by objective parameters so as not to rely solely on subjective assessments. One reference that may be considered is relevant Supreme Court jurisprudence, while still taking into account the differences in facts and grounds for consideration in each case. The extent of the adjustment must be explained through the relationship between evidence of contribution, the origin of the assets, and the legal grounds applied. Thus, considerations of substantive justice remain within the framework of legal certainty.

The third pillar is the strengthening of the legal basis for the application of reconstruction. The phrase in Article 97 of the Indonesian Family Code (KHI) stating "unless otherwise specified in the marriage agreement" textually refers to the possibility of different arrangements through an agreement between the parties. Therefore, this phrase cannot be directly interpreted as granting explicit authority to the judge to deviate from the 50-50 division based solely on considerations of " " (substantive justice). The basis for the argument in favor of reconstruction must be

[26] Rahmi Rahmi et al., "Legal Dynamics of Financial Responsibility and Marital Property in Indonesian Marriages," *USRATY: Journal of Islamic Family Law* 3, no. 1 (2025): 298.

built through a systematic reading of family law provisions and the judge's obligation to explore the legal values and sense of justice that are alive in society.

First, Article 37 of Law No. 1 of 1974 on Marriage stipulates that if a marriage is dissolved by divorce, joint property is governed by its respective laws. Second, Articles 80 and 83 of the Islamic Family Law (KHI) outline the husband's obligation to provide financial support and the wife's obligation to manage the household. These provisions can serve as a context for assessing the division of roles and responsibilities during the marriage, even though they do not directly establish a ratio for the division of joint property. Third, Article 5(1) of Law No. 48 of 2009 on Judicial Power requires judges to explore, follow, and understand the legal values and sense of justice that exist within society. These three legal bases can be interpreted systematically to support a decision that takes into account the factual circumstances of the parties, without assuming that each provision explicitly grants the authority to alter the division ratio set forth in Article 97 of the Indonesian Civil Code.

Judicial practice shows that the division of joint property is not always applied using the same ratio in every case. One case discussed in legal literature is Supreme Court Decision No. 266 K/AG/2010, which reportedly awarded a larger share to the wife in a case where the husband failed to fulfill his maintenance obligations for a certain period of time.[27] This decision must be interpreted based on the facts and legal considerations presented, not merely on the resulting percentage of the division. This precedent also cannot be generalized to imply that every disparity in contributions must result in a specific division ratio. Its significance lies in the possibility that the factual circumstances of the parties may be considered by the judge as part of the process of resolving disputes over joint property.

One way to further develop this reconstruction model is to establish judicial guidelines through a Supreme Court Circular Letter. These guidelines could outline the steps for assessing contributions, the types of relevant evidence, and the judge's

[27] Hanifah Dwi Jayanti, "Pembagian Harta Bersama Tidak Selalu Dibagi Rata Dalam Perceraian," Hukum Online.Com, 2025, https://www.hukumonline.com/berita/a/pembagian-harta-bersama-tidak-selalu-dibagi-rata-dalam-perceraian-lt67ec1d15a28dc/.

obligation to explain the basis for adjusting the division if a proven disparity in contributions is found. This proposal can be considered in light of the Supreme Court's experience in issuing Circular Letter No. 1 of 2022, which contains guidelines for protecting children's right to a place of residence in divorce and joint property cases. However, the drafting of new guidelines still requires an assessment of the scope of the Supreme Court's authority and the alignment of their content with applicable laws and regulations. Thus, the *Ma'ālāt al-Af'āl* theory is proposed as a framework for *ijtihād taṭbīqī* to assist in evaluating the consequences of applying the provisions on the division of joint property, without disregarding the status of Article 97 of the Islamic Family Law Code (KHI) as a normative starting point.

D. CONCLUSION

This study shows that the framework for the division of joint property in classical fiqh and Indonesian positive law has different foundations and characteristics. Classical fiqh essentially emphasizes the independence of ownership (*istiklāl al-dhimmah*), but the fiqh tradition also recognizes contributions to the accumulation of wealth through the concept *of Kadd wa al-Si'āyah*. Meanwhile, Indonesian positive law, through Article 97 of the Compilation of Islamic Law, establishes the principle of a 50-50 division for each party following a divorce, unless otherwise specified in a marriage contract. Although this provides normative certainty, the application of a uniform division does not necessarily reflect the circumstances of each case, particularly when there is an imbalance in contributions between husband and wife.

Based on an analysis using the *Ma'ālāt al-Af'āl* theory, this study offers a framework for reconstruction that takes Article 97 of the Islamic Family Law (KHI) as a normative starting point, and then considers the possibility of disparities in contributions through relevant evidence, an assessment of the consequences of the division, and objective parameters for consideration. The assessment of contributions encompasses not only financial contributions but also domestic work, child-rearing, and the sacrifice of economic opportunities during the marriage. In this context, *the Replacement Cost Approach* and *Opportunity Cost* can be used as

tools to estimate the value of contributions, not as automatic formulas for determining each party's share. Thus, adjustments to the division must be based on proven facts and legally sound arguments.

The main contribution of this study lies in the development of an evaluation framework for the division of joint property based on the *Ma'ālāt al-Af'āl* theory, which links legal norms, the factual circumstances of the parties, and the consequences of implementing a ruling. This framework is expected to assist judges in Religious Courts in considering substantive justice without neglecting legal certainty. This study also highlights the need for more structured guidelines regarding the assessment of contributions in cases involving joint property so that judges' decisions do not rely solely on individual discretion but are grounded in consistent evidence and reasoning.

E. AI USAGE STATEMENT

The Authors acknowledge that Artificial Intelligence (AI) tools were only used in the research to edit language, translating language, check grammar, and enhance clarity and readability. AI was not used to formulate the core research ideas, processor analyse data, interpret research findings, or draw conclusions. Author retains full responsibility for the entire process of scientific reasoning, academic judgment, and research outcomes, and have consistently adhered strictly to research ethics.

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