

## Women's Rights and Islamic Divorce Law: Between Religious Autonomy and Minority Protection

Adelya Putri Utami,<sup>1</sup> Nunung Rodliyah,<sup>2</sup> Fristia Berdian Tamza,<sup>3</sup>  
Sepriyadi Adhan S.,<sup>4</sup> Kasmawati<sup>5</sup>

Faculty of Law, Universitas Lampung, Indonesia

Email: [adelyaptr02@gmail.com](mailto:adelyaptr02@gmail.com)

**Abstract:** *The application of Islamic divorce law in societies that adhere to legal pluralism presents unique challenges, particularly in the context of protecting women's rights when the Muslim community is a minority. In a number of countries, Islamic family law is still used as an internal guideline for Muslim communities in resolving divorce and property division issues. However, this practice often conflicts with human rights principles, particularly those related to gender equality. This study aims to analyze how pluralistic countries balance respect for religious freedom with the state's obligation to protect individual rights. The research methodology used is a qualitative approach with normative and comparative juridical methods, through analysis of legislation, court decisions, and legal literature in the United Kingdom, India, and Indonesia. The study results indicate that the protection of women's rights should not be compromised in the name of cultural tolerance or religious autonomy. The state has a crucial role to ensure that the application of religious law is fair, voluntary, and transparent, and in line with the principles of justice and equality for all citizens.*

**Keywords:**  
Women's Rights;  
Islamic Divorce  
Law;  
Religious  
Autonomy;  
Minority  
Protection.

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## INTRODUCTION

Marriage in Islamic law is understood as a legal contract intended to legitimize sexual relations and establish reciprocal rights and obligations between a man and a woman who are not mahrams. Classical fiqh scholars across the major madhabs agree that nikah or zawaj constitutes a binding agreement that permits lawful sexual relations and ensures the continuation of lineage.<sup>1</sup> Despite its foundational purpose of creating stability and harmony, marriage in practice often encounters serious challenges, with divorce emerging as one of its most critical consequences. Although divorce is permitted under Islamic law, it is widely regarded as an act disliked by Allah SWT, reflecting its profound social and moral implications. In contemporary societies, divorce rates among Muslim families have shown a significant increase, giving rise to complex legal and social problems, particularly concerning the protection of women's rights and the division of marital property<sup>2</sup>. Divorce not only terminates the marital bond but also alters civil relationships between spouses, including rights to maintenance, inheritance, and joint property acquired during the marriage. In Indonesia, for example, Islamic law recognizes divorce upon the pronouncement of talaq by the husband; however, such religious validity does not automatically confer legal recognition under state law. For a divorce to have

<sup>1</sup> Lestari Lestari et al., "Praktek Cerai Rujuk Di Desa Pedamaran Menurut Hukum Islam Dan Hukum Positif," *Muqaranah* 6, no. 2 (2022): 99–112, <https://doi.org/10.19109/muqaranah.v6i2.14545>.

<sup>2</sup> Muhammad Arsad Nasution, "Perceraian Menurut Kompilasi Hukum Islam (KHI) Dan Fiqh," *Jurnal EL-QANUNIY: Jurnal Ilmu-Ilmu Kesyariahan Dan Pranata Sosial* 4, no. 2 (2018): 157–70, <https://doi.org/10.24952/el-qanuniy.v4i2.2385>.

legal effect, it must be processed through the Religious Court<sup>3</sup>. Legal uncertainty may arise when divorce is pronounced outside the court, leaving women vulnerable to the loss of legal protection over their marital rights. Furthermore, Article 137 of the Compilation of Islamic Law (KHI) stipulates that divorce proceedings are nullified if either spouse dies before the court issues its decision, illustrating the procedural complexities that can further disadvantage the parties involved. These realities highlight the urgent need for a legal framework that not only respects Islamic legal principles but also ensures legal certainty and substantive justice, particularly for women affected by divorce<sup>4</sup>.

According to Karim, divorce is a break in a marriage between a husband and a wife resulting from either party's failure to fulfill their obligations. In this case, divorce is viewed as the end of marital instability. Then, choosing to separate is officially recognized by the applicable law<sup>5</sup>. Even though religious teachings forbid divorce, the reality is that divorce often occurs among couples who are legally married<sup>6</sup>. Law Number 1 of 1974 concerning Marriage is a source of Islamic marriage and family law, which regulates in a comprehensive and modern manner the marriage and divorce of Muslims, which is rooted in the Islamic religion<sup>7</sup>. Ideally, the concept of property is fully addressed in Islam. Married life has established a system of rights and obligations within the family, including in matters of bringing rights that ideally become the husband's obligations. The rights and responsibilities as intended are ideally regulated by law. In normative juridical terms, the joint property instrument in Indonesia is the Marriage Law and the Compilation of Islamic Law. Both of these rules detail the forms of property in marriage. Article 33 of the Marriage Law categorizes property in marriage into two categories: property brought in by each spouse and joint property<sup>8</sup>. Culturally, in Indonesia, it is still taboo to talk about joint property or marital property. This is due to societal cultural norms that still consider marriage sacred and eternal. This means that every husband and wife is required to maintain the sanctity of marriage from the ceremony to caring for the household, as it is a sacred bond. Discussing property before and during marriage is considered taboo and not something to be addressed<sup>9</sup>. However, most married couples question this only after a court has made a divorce decision, and in most court proceedings there are often disputes over marital assets<sup>10</sup>.

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<sup>3</sup> Irzak Yuliardy Nugroho and Ramdan Wagianto, "Konsep Pembagian Harta Bersama Pasca Perceraian Perspektif Maqoshid Syariah Jasser Auda," *Asy-Syari'ah : Jurnal Hukum Islam* 10, no. 1 (2024): 83–102, <https://doi.org/10.55210/assyariah.v10i1.1541>.

<sup>4</sup> Lilis Handayani, "Prosedur Perceraian Ditinjau Berdasarkan Hukum Fiqh Dan Hukum Positif," *Journal of Legal and Cultural Analytics* 1, no. 1 (2022): 1–18, <https://doi.org/10.55927/jlca.v1i1.897>.

<sup>5</sup> Shafa Salsabila, "Pembagian Harta Bersama Dalam Perceraian Ditinjau Dari Perspektif Teori Keadilan," *Zaaken: Journal of Civil and Business Law* 4, no. 2 (2023): 225–41, <https://doi.org/10.22437/zaaken.v4i2.27272>.

<sup>6</sup> Agoes Dariyo, "Memahami Psikologi Perceraian Dalam Kehidupan Keluarga," *Jurnal Psikologi* 2, no. 2 (2004).

<sup>7</sup> Ahmad Fauzi, "Hakikat Perceraian (Sebuah Tinjauan Filosofis Terhadap Makna Perceraian)," *Mahkamah : Jurnal Kajian Hukum Islam* 6, no. 1 (2021): 55, <https://doi.org/10.24235/mahkamah.v6i1.7542>.

<sup>8</sup> "Persepsi Harta Bersama Menurut Hukum Islam Dan Hukum Positif Indonesia | AL-AQWAL : Jurnal Kajian Hukum Islam," accessed November 13, 2025, <https://ejournal.iainfmpapua.ac.id/index.php/alaqwal/article/view/832>.

<sup>9</sup> Bernadus Nagara, "Pembagian Harta Gono-gini atau Harta Bersama Setelah Perceraian Menurut Undang-undang Nomor 1 Tahun 1974," *Lex Crimen* 5, no. 7 (2016): 148458.

<sup>10</sup> Zaiyad Zubaidi, "PROBLEMATIKA PEMBAGIAN HARTA BERSAMA DI SAMALANGA-BIREUEN," *JURNAL AL-IJTIMAIYYAH* 5, no. 2 (2019): 55–74, <https://doi.org/10.22373/al-ijtimaiyyah.v5i2.4779>.

Failure to fulfill wives' rights or neglect husbands' obligations toward women's rights in divorce procedures under Islamic law often receives less recognition and protection, particularly in diverse societies. Although disputes related to husband nusyuz are generally settled within families, this approach does not always offer sufficient protection for women, especially when power imbalances or social pressures hinder their ability to seek justice<sup>11</sup>.

Gono-gini is a legal term widely used in Indonesian society to refer to property acquired jointly during a lawful marital relationship. In legal and social practice, the division of marital property is often the first and most contentious issue to be resolved following divorce, as it directly affects the long-term economic security of both parties. Although Indonesian customary law, Islamic law, and positive law all recognize the concept of joint property, their interpretations and mechanisms of distribution are not always applied consistently. Normatively, Islamic law emphasizes the separation of assets between husband and wife, while Indonesian legal practice acknowledges the possibility of asset mixing through the concept of gono-gini. This divergence creates legal ambiguity, particularly in Religious Court decisions, where judges must reconcile Islamic legal principles with statutory regulations and customary norms. Previous studies have largely focused on doctrinal explanations of marital property or normative legal provisions, without sufficiently examining how these differing legal frameworks are negotiated in judicial practice and how they impact the realization of substantive justice, especially for women after divorce. Therefore, this study addresses this research gap by analyzing the legal inconsistencies and practical challenges in the division of gono-gini property in divorce cases, aiming to provide a clearer understanding of the intersection between Islamic law, customary law, and state law in Indonesia.<sup>12</sup>

The relationship between religious autonomy and human rights protection remains a central concern in pluralistic societies, particularly in family law. Islamic divorce law, which regulates various aspects of marital dissolution, including the division of property, often presents a unique challenge when applied within Muslim minority communities in secular legal systems. While the implementation of Islamic family law may be perceived as an exercise of religious freedom and cultural identity, it can also generate tensions with universal human rights principles, especially concerning gender equality. In many cases, women find themselves at the intersection of these two competing frameworks, on the one hand, bound by religious norms, and on the other, entitled to equal protection under national and international legal standards. This raises important questions regarding the extent to which Islamic legal principles uphold or undermine women's rights, particularly in post-divorce financial arrangements.

Furthermore, as states seek to accommodate religious diversity, they are required to delineate clear boundaries of tolerance, particularly when religious or community practices intersect with the rights of vulnerable individuals. Building on this concern, this study addresses two central research questions: (1) how Islamic divorce law principles shape the legal status and rights of women, particularly in relation to the division of marital property after divorce; and (2) how the application of Islamic family law within

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<sup>11</sup> Jayusman Jayusman et al., "Maslahah Perspective on Husband Nusyuz in Islamic Law and Positive Law In Indonesia," *Muqaranah* 6, no. 1 (2022): 69–84, <https://doi.org/10.19109/muqaranah.v6i1.11164>.

<sup>12</sup> Etty Rochaeti, "Analisis Yuridis Tentang Harta Bersama (Gono Gini) Dalam Perkawinan Menurut Pandangan Hukum Islam Dan Hukum Positif," *Jurnal Wawasan Yuridika* 28, no. 1 (2013): 650–61, <https://doi.org/10.25072/jwy.v28i1.61>.

Muslim minority communities affects the protection of women's rights in pluralistic legal systems. The contribution of this research lies in its comparative legal analysis of Islamic divorce practices across different pluralistic contexts, specifically examining how religious norms are integrated into state legal frameworks in both Muslim-majority and Muslim-minority settings. By systematically comparing cases from England, India, and Indonesia, this study provides a nuanced understanding of the tensions between religious autonomy and state obligations to uphold gender equality. Moreover, the research contributes to existing scholarship by highlighting the legal and ethical implications of applying Islamic family law beyond doctrinal interpretations, offering policy-relevant insights for lawmakers and courts seeking to ensure that the protection of women's rights is not subordinated to claims of cultural or religious tolerance.

## **METHOD**

This research employs a normative and conceptual approach, focusing on legal norms, gender justice principles, and minority rights within the framework of Islamic divorce law. The study is situated in a comparative legal context, examining Muslim minority communities in England and India, alongside Indonesia as a Muslim-majority reference case, in order to provide a balanced analytical perspective. By analyzing statutory regulations, court decisions, and authoritative legal doctrines from these jurisdictions, this research aims to assess how the application of Islamic divorce law affects the legal status and protection of women's rights, particularly in relation to property division after divorce. This comparative scope enables the study to identify structural similarities and differences in how pluralistic legal systems respond to the intersection of religious norms and gender justice. The study is descriptive and analytical, examining regulations, court decisions, Islamic legal literature, and international documents related to women's and minorities' rights. It does not aim to test empirical hypotheses but to explore legal frameworks and their safeguards for women's protection. Data collection involved library research and the review of primary legal sources, including national and international legislation and jurisprudence, as well as secondary materials such as academic journals, books, and other scholarly publications. Tertiary sources such as legal dictionaries and encyclopedias were also consulted. The analysis applied normative methods, reviewed legal regulations and doctrines, and involved conceptual analysis of core concepts such as religious autonomy, women's human rights, and minority protection.

## **RESULTS AND DISCUSSION**

### **The Principles of Islamic Divorce Law Regulate the Position and Rights of Women, Particularly in Terms of Property Division After Divorce**

The word "ownership" in Indonesian itself is taken from the word "milik". It is a loan word from the word "al-milk". In the concept of ownership, al-milk is a very influential aspect in muamalah. In Islam itself, everything in this world belongs to Allah SWT. The word of Allah that has been explained in the Qur'an: "To Allah belongs everything that is in the heavens and on the earth" (QS. Al-Baqarah: 284).

In Islamic legal theory, humans are regarded as khalifah (trustees) over property, entrusted with its use in accordance with Shari'a principles. Ownership (al-milk) in classical fiqh confers upon a person the legal authority to utilize, transfer, or withhold property freely, unless restricted by what jurists term shari'a obstacles ('awarid al-

ahliyyah). Conceptually, 'awāriḍ al-ahliyyah are legal impediments recognized in classical fiqh that limit a person's capacity (ahliyyah) to exercise full proprietary rights. Classical jurists divide these obstacles into two main categories. First are personal or inherent obstacles ('awāriḍ dhātiyyah), which arise from the legal incapacity of the owner, such as minority (ṣighar), mental incapacity (safah or junūn), or financial insolvency (taflīs), where restrictions are imposed to prevent harm to the individual or to creditors. Second are external or relational obstacles ('awāriḍ ghayr dhātiyyah), which exist not because of the owner's personal incapacity, but due to the rights of others or the public interest (ḥuqūq al-ghayr and maṣlaḥah 'āmmah). This second category is particularly relevant to joint or marital property, where individual ownership rights are limited to protect the equitable interests of another party. Within this framework, classical fiqh conceptualizes property ownership not as absolute dominion, but as a qualified right subject to moral, social, and legal constraints designed to uphold justice and prevent harm.<sup>13</sup>

Islamic law acknowledges multiple forms of marital dissolution, each with unique legal processes and implications, especially regarding women's rights. The most recognized form is ṭalāq, a divorce declaration made solely by the husband. Classical jurists assert that this type of divorce imposes minimal obligations on the husband, aside from settling the deferred mahr (dowry) and offering maintenance during the 'iddah period. In contrast, khul' is a divorce initiated by the wife, often necessitating her to return the mahr or provide compensation, which is frequently seen as a "ransom" to extricate herself from the marriage contract (Al-Qur'an, 2:229). Scholars have debated whether this requirement is prejudicial to women, particularly in circumstances involving abuse or coercion. Ziba Mir-Hosseini argues that khul' illustrates a power imbalance since it compels women to "purchase their freedom" in a system that favors men when it comes to initiating divorce<sup>14</sup>.

A third mechanism, faskh, enables a wife to seek court annulment based on specific legal grounds such as cruelty, abandonment, or a lack of financial support. Unlike ṭalāq or khul', faskh requires judicial approval, which can be challenging to secure due to the burden of proof and sociocultural pressures. Welchman (2007) notes that in numerous Muslim-majority areas, women's access to faskh is hindered by both legal and procedural obstacles, even though Islamic jurisprudence allows for it. This scenario illustrates that although Islamic law theoretically offers various divorce options, practical access and equity are still disputed and inconsistent, especially for women pursuing economic justice post-divorce<sup>15</sup>.

According to M. B. Hendrie Anto in his book Introduction to Microeconomics, ownership is divided into individual, public, and state ownership. Islam. The following is an explanation of ownership (al-milkiyyah) according to the Islamic perspective, namely:

1. Individual ownership (al-milkiyat al-fardiyyah or private property)

Individual ownership grants a person full legal authority to control and utilize property acquired through lawful means such as employment (al-'amal), inheritance (al-irṭh), or gifts. In the context of divorce, this category is particularly

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<sup>13</sup> Ali Akbar, "Konsep Kepemilikan Dalam Islam," *Jurnal Ushuluddin* 18, no. 2 (2012): 124–40, <https://doi.org/10.24014/jush.v18i2.704>.

<sup>14</sup> Akbar, "Konsep Kepemilikan Dalam Islam."

<sup>15</sup> Ziba Mir-Hosseini, *Islam and Gender: The Religious Debate in Contemporary Iran* (Princeton University Press, 2021), <https://doi.org/10.2307/j.ctv1h9dgq0>.

significant for women because Islamic law recognizes a wife's independent legal personality and proprietary capacity. Property that a woman owns prior to marriage, acquires during marriage through her own earnings, inheritance, or gifts, remains exclusively hers and is not subject to division as marital property. This principle provides important legal protection for women, ensuring economic autonomy after divorce. However, in practice, women may face limitations due to unequal access to documentation, social pressure, or judicial misinterpretation, which can weaken their effective control over individually owned assets.

2. Public ownership (al-milkiyyat al-'ammah or public property)  
Public ownership refers to property held collectively for the benefit of the community, such as natural resources and public facilities. Although this category does not directly form part of marital property subject to division after divorce, it indirectly affects women's post-divorce economic security. Access to public resources, social welfare, and communal assets can mitigate the economic vulnerability of divorced women, particularly in Muslim minority contexts where state welfare systems may play a crucial role. Restrictions on privatizing public property ensure that women, as members of the community, retain equal access regardless of marital status.
3. State ownership (al-Milkiyyat al-Dawlah or State property)  
State-owned property is managed by the government in the public interest and may, under certain policies, be transferred into individual ownership. In the post-divorce context, this category affects women through state policies related to land distribution, housing programs, or social assistance. Where legal frameworks allow divorced women to access state-owned assets or benefit from state-managed resources, this can enhance their economic stability and independence. Conversely, discriminatory policies or weak legal protections may limit women's ability to benefit from such transfers, particularly in pluralistic legal systems where religious norms and state law intersect<sup>16</sup>.

In Islam, ownership involves both rights and responsibilities. Property owners are expected to respect the rights of others, including relatives, neighbors, and the community at large. In Indonesia, when dividing joint property after divorce, it is common to split it equally, with each ex-spouse receiving fifty percent, according to Article 97 of the KHI. However, this method often overlooks the contributions of working wives, prompting suggestions for a more just distribution that recognizes a wife's earning participation. While fairness and equity are emphasized as core principles, their practical application frequently falls short<sup>17</sup>. The protection of women's financial rights after divorce, such as alimony (nafkah iddah), is mandated by laws like the KHI and Supreme Court regulations. However, these rights are not always effectively realized in practice, particularly when the husband is absent from divorce proceedings or when there are

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<sup>16</sup> "Mengenal Konsep Kepemilikan Dari Sudut Pandang Islam | Kumparan.Com," accessed November 13, 2025, <https://kumparan.com/hauzan-fathurrohman/mengenal-konsep-kepemilikan-dari-sudut-pandang-islam-1vwWMyI8T1f>.

<sup>17</sup> Jayusman Jayusman, "The Decision on Joint Properties in Bengkulu High Religious Court Jurisdiction," *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 21, no. 1 (2021): 99–118, <https://doi.org/10.18326/ijtihad.v21i1.99-118>.

issues of the wife's disobedience (*nushuz*)<sup>18</sup>.

In many Islamic nations, it is customary to equally divide joint property between spouses in the event of a divorce. This practice is reflected in the Compilation of Islamic Law (KHI) in Indonesia, which requires an equal split of joint property, irrespective of income generation. Indonesian law states that any property acquired during marriage is regarded as joint property of both the husband and the wife, regardless of who works or holds the property title. If the marriage ends, whether due to death or divorce, the property must be divided equally. Overall, this study found that a panel of judges in the religious court typically resolves cases involving joint property distribution in accordance with statutory regulations. In instances where there is no agreement or reconciliation between the disputing husband and wife regarding property division, the judge rules that the joint property should be split equally. However, if a contract exists between the spouses, the division of joint property will be governed by that agreement<sup>19</sup>.

The rights and status of the wife are balanced with those of the husband within the household and in society. Each has the right to perform legal acts. The husband is the head of the household, and the wife is the housewife. In Article 34, paragraph (1), the husband is obliged to protect and provide for his wife and manage household needs according to his ability. The wife is obliged to manage household affairs as best as possible. If either the husband or wife neglects their respective obligations, they can file a lawsuit in court<sup>20</sup>. Nonetheless, there are occasions when courts may stray from this rule based on particular circumstances. For instance, the Supreme Court of Indonesia has held that, in certain cases, an ex-wife may receive a larger share of the joint property if she made a more substantial contribution to its acquisition. In Islamic law, the fundamental principle is to divide joint property equally upon divorce. However, courts may modify this distribution based on individual contributions and specific circumstances to guarantee fairness and justice. Islamic divorce law encompasses various principles that regulate the position and rights of women, particularly concerning property division after divorce. Muslim divorce law addresses the financial rights of women after divorce through various legal provisions and principles. However, implementing and enforcing these rights poses challenges, especially in specific cultural and social contexts. The principles of Islamic divorce law regulate the position and rights of women, particularly in terms of property division after divorce.

### **The Implementation of Islamic Family Law Within Muslim Minority Communities Affects the Protection of Women's Rights in Pluralistic Countries**

The implementation of Islamic family law within Muslim minority communities has a direct and significant impact on women's property rights after divorce in pluralistic legal systems. While Islamic law conceptually recognizes women's independent ownership over property acquired before and during marriage, the realization of these rights is often constrained by local cultural practices, limited legal awareness, and weak institutional enforcement. In many Muslim minority settings, customary norms prioritize

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<sup>18</sup> Lilik Andar Yuni and Akhmad Haries, "Protection of Women's Rights After Divorce in Religious Courts: What Makes This Mission Difficult to Achieve?," *Mazahib* 23, no. 2 (2024): 595–630, <https://doi.org/10.21093/mj.v23i2.7958>.

<sup>19</sup> Mesraini Mesraini, "Konsep Harta Bersama Dan Implementasinya Di Pengadilan Agama," *AHKAM : Jurnal Ilmu Syariah* 12, no. 1 (2014), <https://doi.org/10.15408/ajis.v12i1.980>.

<sup>20</sup> Fadhilah Fadhilah et al., "Talakh Suami Pada Saat Istri Hamil Menurut Kompilasi Hukum Islam (KHI) Dan Budaya Lokal," *Muqaranah* 5, no. 1 (2021): 45–54, <https://doi.org/10.19109/muqaranah.v5i1.9209>.

male control over marital assets, resulting in the marginalization of women's claims to individually owned property or their share of jointly acquired assets. This situation is exacerbated when divorce occurs informally or outside state-recognized legal mechanisms, leaving women without formal documentation to assert their property rights. Furthermore, insufficient understanding of Islamic legal principles such as the distinction between individual and joint ownership undermines women's ability to retain control over property during the iddah period, a phase in which economic dependency often increases. Consequently, the gap between normative Islamic ownership concepts and their practical application places women at heightened risk of economic vulnerability after divorce, particularly in Muslim minority communities where legal protections are inconsistently enforced.

1. Obtaining and Controlling the Permissible

Properties not included in honorable ownership and free from sharia obstacles, such as spring water, grass in the desert, unowned trees, game on land and in the sea, and similar resources, are considered permissible. Each individual has the right to determine what is acceptable based on their capabilities and the things they manage, to own them. Concerning the acquisition and management of permissible ownership, two factors are essential: first, no one else has preceded them; second, the intention to own. A person does not truly own something if it is within their grasp, but they have no intention to use it.

2. Work

To obtain wealth, one way is to work. He can work as a teacher, doctor, employee, laborer, architect, or in other roles; as long as the work is done ethically, the rewards of the work are his.

3. Inheritance.

The assets a person owns during their lifetime will be passed on to their heirs if they die without anyone taking over their estate. One method of ownership is this. This further shows that a person's ownership of property is limited while he is still alive.

4. Reproduce

In the rule: *إن ما يتولد أو ما ينشأ من المملوك مملوك*

*"What is born from something or that develops from something from what is owned is also what is owned."*

5. Contract

Because the contract reflects human achievements and activities in the economic and legal fields, it is the primary source of ownership and a crucial condition in both civil and legal matters<sup>21</sup>.

6. Found goods

The term 'found goods' is general. If someone finds an item scattered, dropped, or lost that belongs to someone else whose owner is not yet known, the first step is

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<sup>21</sup> Maryam Batubara et al., "Konsep Harta Dan Kepemilikan Dalam Islam," *Journal Sains Student Research* 1, no. 1 (2023): 223–31, <https://doi.org/10.61722/jssr.v1i1.81>.



to announce it. However, if the owner of the item is not found within 1 year, then the item becomes the property of the person who finds it<sup>22</sup>.

Overall, these six principles of ownership illustrate how protecting women's rights depends not only on the wording of Islamic law but also on the social context in which it is applied. In minority Muslim communities, tensions between religious laws, local cultures, and national legal systems often hinder the implementation of substantive justice for women. The article stresses that legal pluralism must be supported by a state mechanism capable of ensuring that Islamic family law is practiced in a fair, transparent, and non-discriminatory way, including in matters of ownership and control of property after divorce.

In Malaysia, Islamic family law is governed by the Islamic Family Law Enactments specific to each state, along with the Islamic Family Law (Federal Territories) Act of 1984. The Sharia court system in Malaysia adjudicates Muslim family law matters and formally recognizes jointly acquired property (*harta sepencarian*) under Islamic Family Law, enabling spouses to claim a proportion of assets accumulated during marriage. Malaysian Sharia law also allows divorced women to claim *mut'ah* (compensation) even in cases where divorce occurs without proven fault on the wife's part. From a critical perspective, these legal provisions have the potential to strengthen women's post-divorce property rights; however, their effectiveness largely depends on judicial discretion and the operation of legal pluralism in practice. Judges are granted broad authority to determine the amount and distribution of *harta sepencarian* and *mut'ah*, which can lead to inconsistent outcomes across cases. While such discretion allows courts to consider fairness and the wife's non-financial contributions to the household, it may also limit women's rights when conservative interpretations, evidentiary barriers, or cultural assumptions about gender roles influence judicial reasoning. Moreover, the coexistence of Islamic law, civil law, and customary practices within Malaysia's plural legal system can create uncertainty in enforcement, particularly when women lack legal representation or awareness. As a result, legal pluralism and judicial discretion function as a double-edged sword: they can serve as instruments for substantive justice, but they may also constrain women's economic security after divorce if not guided by clear standards of gender equality. Usually, the amount of *mut'ah* is mutually agreed upon by the husband and wife. If no agreement is reached, the court assesses the appropriate amount based on the wife's financial and social circumstances family.<sup>23</sup>

### **Division of Divorce Assets in the Concept of justice**

Joint property is a term in the study of Islamic family law, well-known in several Indonesian cultures and Malay countries<sup>24</sup>. Joint property is property acquired jointly by

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<sup>22</sup> Abdulloh Arif Mukhlas, "Proses Kepemilikan Dalam Perspektif Islam: Kritik Terhadap Uang Money Politik," *KASBANA: Jurnal Hukum Ekonomi Syariah* 4, no. 1 (2024): 65–86, <https://doi.org/10.53948/kasbana.v4i1.124>.

<sup>23</sup> Zanariah Noor, "Wanita Islam Dan Cedaw: Isu-Isu Berkaitan Dengan Undang-Undang Kekeluargaan Islam Di Malaysia Muslim Women and CEDAW: Issues Related to Islamic Family Law in Malaysia," *Jurnal Syariah* 31, no. 1 (2023): 1–38, <https://doi.org/10.22452/syariah.vol31no1.1>.

<sup>24</sup> Zaiyad Zubaidi, "Problematika Pembagian Harta Bersama Di Samalanga-Bireuen," *Jurnal Al-Ijtima'iyah* 5, no. 2 (2019): 55, <https://doi.org/10.22373/al-ijtima'iyah.v5i2.4779>.

husband and wife during the marriage<sup>25</sup>. The mention of joint property is regulated in Article 157 of the KHI. The division of joint property is governed by Articles 96 and 97 of the KHI. In a divorce, the panel of judges assists in determining the division of joint property and is guided primarily by Ijtihad (the determination of law). The Ijtihad carried out by the panel of judges is Ijtihad Tathbiqiy, which the panel employs in determining the division of joint property following divorce.

The division of joint or marital property is a crucial issue that often involves benefits and drawbacks. According to the Compilation of Islamic Law, the typical approach is to divide it equally between husband and wife. Article 97 states that widowers and divorced widows are each entitled to half of the joint property unless specified otherwise in a trust agreement. Islamic law emphasizes principles of justice and fairness. It recognizes distinct rights and ownership of property for each spouse. Property acquired before marriage, like gifts or inheritances, is considered that individual's property. Conversely, property obtained after marriage is regarded as joint property.

If during their marriage, the husband fails to provide all the necessities of household life to his wife as required by Article 31, Paragraph (3), and Article 34, Paragraph (1), of Law Number 1 of 1974 concerning Marriage<sup>26</sup>, while the wife acts as a housewife managing household affairs as regulated in Article 31 Paragraph (3) and Article 34 Paragraph (2) of the same law, and if the wife also fulfills all household needs or becomes the family's breadwinner with joint assets resulting from her hard work, then in case of divorce, her share of joint assets will be larger than the husband's. Specifically, in certain judicial decisions, the wife has been awarded a larger share of jointly acquired property up to two-thirds while the husband received one-third. These proportions do not represent a general legal rule under Islamic family law, but rather reflect the exercise of judicial discretion on a case-by-case basis. Such determinations are typically influenced by factors including the wife's financial and non-financial contributions during the marriage, her economic dependency following divorce, and considerations of substantive fairness. This approach illustrates how courts may depart from equal division in order to achieve equitable outcomes, particularly where evidence shows that the wife played a dominant role in asset accumulation or household management. This larger distribution to the wife aims to recognize her strength as the main party. The role of the Sharia Court judge in deciding a divorce case significantly influences the fair allocation of rights between husband and wife, including rights related to iddah maintenance, child custody, joint assets, madhiah, Kiswah, and others<sup>27</sup>.

It is crucial to evaluate the various factors that affect the division of joint property in divorce cases. Financial contribution is a primary factor. If the wife becomes the main breadwinner, whether because the husband is unemployed or for other reasons, this should be considered in the property division. Her contributions during marriage, both financial and non-financial, can justify her claim to a larger share. Furthermore, principles of justice and fairness in Islamic law and Indonesian marriage law stress that property division should meet each party's needs. When the wife assumes the primary breadwinner

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<sup>25</sup> Sawitri and Mochamad Mansur, "Pembagian Harta Bersama Dalam Konteks Penghasilan Istri Lebih Besar Dibanding Suami:," *JUSTITIABLE - Jurnal Hukum* 5, no. 1 (2022): 58–74, <https://doi.org/10.56071/justitable.v5i1.407>.

<sup>26</sup> Eko Sugianto et al., "Pembagian Harta Bersama Akibat Perceraian," *Majelis: Jurnal Hukum Indonesia* 1, no. 3 (2024): 141–49, <https://doi.org/10.62383/majelis.v1i3.346>.

<sup>27</sup> Muhamad Beni Kurniawan, "Pembagian Harta Bersama Ditinjau Dari Besaran Kontribusi Suami Istri Dalam Perkawinan," *Jurnal Yudisial* 11, no. 1 (2018): 41, <https://doi.org/10.29123/jy.v11i1.224>.

role, her contributions must be acknowledged in light of the couple's specific circumstances. Even if the judge finds the husband neglects his obligations, causes trouble, engages in domestic violence, wastes resources, gambles, or drinks excessively, the court may decide to deny him a share of the joint property<sup>28</sup>.

However, if we look at the specifics of marriage law under the Marriage Act, it is best to divide joint assets fairly to avoid injustice between the husband's and the wife's rights.<sup>29</sup> The concept of dividing joint marital assets is generally based on an equal distribution principle, whereby each party may receive 50% of the total assets. In the Indonesian legal context, this principle derives from Article 97 of the Compilation of Islamic Law (Kompilasi Hukum Islam/KHI), which stipulates that widows and widowers are each entitled to one-half of jointly acquired property, unless otherwise stipulated in a prenuptial agreement. However, this equal division is not absolute and is subject to important contextual limitations. Courts may depart from the 50:50 distribution based on judicial discretion, taking into account factors such as the respective contributions of each spouse, the existence of individual property, evidence of bad faith, or considerations of substantive justice. Moreover, in pluralistic legal systems, the application of this principle may be influenced by the interaction between Islamic law, statutory law, and judicial interpretation, which can result in varied outcomes in practice.

To ensure the achievement of the function of law as a means of engineering society towards a better life, it is not only the availability of law in the sense of rules or regulations that is needed, but also the guarantee of the realization of legal rules in legal practice, namely, the guarantee of good law enforcement.<sup>32</sup> To see the essence or paradigm of decision No. 266/K/AG/2010, it can be seen from the following idea of Satjipto Rahardjo. According to Satjipto Rahardjo, the legal paradigm must return to its philosophical meaning, namely, law for humans (law for human beings). Understanding the law for humans, as Satjipto Rahardjo meant it, is a law that can lead humans to a just, prosperous life and make them happy. With this philosophy, humans become the determinant and orientation point of law. The law is tasked with serving humans, not the other way around. Therefore, law is not an institution free of human interests. A judge's quality is determined by his ability to serve human welfare<sup>30</sup>. In cases involving joint property, more wives sue for it because they suffer the most tremendous losses in a divorce. Due to this reality, the court is required to protect the wife.

## CONCLUSION

Islamic divorce law includes principles that determine women's rights, especially regarding property division after divorce. It covers women's financial rights through various legal rules, but challenges remain in enforcing these rights, particularly in different cultural and social settings. The law's rules significantly influence women's

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<sup>28</sup> Stanley Alvin et al., "Pembagian Harta Bersama Yang Tidak Berimbang Antara Suami Dan Istri Pasca Perceraian: Studi Putusan Nomor 1910/Pdt.G/2020/PA.Gs," *Jurnal Media Akademik (JMA)* 2, no. 9 (2024), <https://doi.org/10.62281/v2i9.778>.

<sup>29</sup> Farida, N. Z., & Djanuardi, D. (2024). Akibat Hukum Perceraian terhadap Harta Bersama pada Pasangan Tanpa Perjanjian Perkawinan dan Istri yang Menjalankan Kewajiban Suami dalam Mencari Nafkah Berdasarkan Perspektif Hukum Perkawinan dan Kompilasi Hukum Islam. *Jurnal Hukum, Politik dan Ilmu Sosial*, 3(4), 155-173.

<sup>30</sup> Asni, Idealisasi Perlindungan Istri Dalam Penerapan Hukum Harta Bersama Di Pengadilan Agama, *Jurnal Al Manahij* Vol.IX No.2, Desember 2015, hal. 291.

status within Muslim minority communities, where factors like local traditions, legal awareness, and enforcement mechanisms play crucial roles. Conflicts between regional cultural norms and Islamic legal principles often hinder the effective protection of women's rights.

## RECOMMENDATIONS

This study finds that Islamic divorce law does not inherently undermine women's property rights; rather, the decisive factor lies in how pluralistic legal systems operationalize religious norms through judicial discretion and institutional enforcement. Based on a comparative analysis of England, India, and Indonesia, this research demonstrates that women's post-divorce property rights are most effectively protected where Islamic legal principles are integrated into state-recognized judicial processes that impose clear procedural safeguards and oversight. Unlike prior studies that focus primarily on doctrinal interpretations or abstract compatibility between Islamic law and human rights norms, this study identifies judicial mediation between religious autonomy and state authority as the critical mechanism shaping outcomes for women. The findings reveal that informal or community-based divorce practices particularly in Muslim minority contexts significantly weaken women's access to marital property and financial remedies, regardless of the substantive protections offered by Islamic law itself. Conversely, when courts apply flexible yet principled discretion such as recognizing non-financial contributions and departing from rigid equal-division formulas women's economic security after divorce is demonstrably strengthened. These findings underscore that legal pluralism can function as either a protective or exclusionary framework, depending on the extent to which the state enforces transparency, voluntariness, and gender-sensitive standards in religious family law adjudication.

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