

JUSTICE OR EQUALITY? EXAMINING ARTICLE 97 OF THE KHI IN THE CONTEXT OF POST-DIVORCE PROPERTY DIVISION

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Abstract

This study aims to critically analyze the provisions of Article 97 of the Compilation of Islamic Law (KHI) in the context of the division of joint assets after divorce, emphasizing the need for legal reform that prioritizes the principle of substantive justice. The main issues examined include the extent to which these provisions reflect the principle of substantive justice and how Article 97 of the KHI is implemented in religious court practice. The research method used is normative juridical with a statutory, conceptual, and case-based approach. The results show that Article 97 of the KHI is still oriented towards rigid arithmetic equality and does not consider the actual contributions, both material and immaterial, of each party. In judicial practice, a number of judges have implemented progressive interpretations of this norm, which opens up space for the reformulation of Islamic family law in Indonesia. Therefore, this study recommends normative reform of Article 97 of the KHI to include provisions that explicitly accommodate proportional division of assets, as well as implementing steps in the form of training on a substantive justice perspective for judges.

Keywords: *Division of Assets, Substantive Justice, Article 97 of the KHI*

Background

Marriage from an Islamic legal perspective is a sacred agreement that not only has a spiritual dimension, but also carries social and legal consequences.¹In married life, divorce is an unavoidable reality, and the law must be able to regulate its consequences fairly. One of the most crucial impacts of divorce is the issue of the division of joint assets. In the Indonesian legal system, particularly in the Compilation of Islamic Law (KHI), this issue is regulated normatively in Article 97, which states that divorced widows or widowers are each entitled to half of the joint assets, unless otherwise stipulated in the marriage agreement. However, the application of Article 97 of the KHI textually without considering the concrete conditions of household life, actual contributions, and the dynamics of socio-economic relations between husband and wife, often gives rise to substantive injustice.²The division of assets based on the principle of mathematical equality (equal share) assumes that each party has contributed equally to the acquisition of joint assets. However, in practice, these contributions are not always balanced, both materially and immaterially. This is where the tension between formalistic values and the principle of substantive justice arises. One important case highlighting the need for a fairer approach to Article 97 of the Compilation of Islamic Law is Supreme Court case No. 266K/AG/2010 between Tri Hastuti Nur Rochimah and Sutrisno Baskoro. In this case, the Supreme Court ruled that the plaintiff (wife) was entitled to three-quarters ($\frac{3}{4}$) of the joint property, while the defendant (husband) only received one-quarter ($\frac{1}{4}$) of the share.³This decision was based on the consideration that during the eleven years of marriage, the husband failed to provide for the family, was

¹ Muhammad Ashsubli, 'Marriage Law in the Plurality of Religious Law (Judicial Review of Articles on Interfaith Marriage)', Jurnal Cita Hukum 2, no. 2 (2015): 40841.

² Fatimah Fayrus, 'Analysis of Decisions on the Division of Joint Assets at the Class IA Religious Court of Yogyakarta in Terms of Legal Certainty, Justice, and Benefit' (Postgraduate Program in Notary, Gadjah Mada University, 2001).

³ Dra. Hj. Muhayah, SH,MH, 'CONSIDERATIONS OF JUDGES' DECISIONS IN THE DIVISION OF JOINT PROPERTY [Dra. Hj. Muhayah, SH,MH]', Samarinda High Religious Court, 2024, <https://pta-samarinda.go.id/artikel-pengadilan/2217-pertimbangan-putusan-hakim-dalam-pembagian-harta-bersama>.

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abusive, committed domestic violence, and failed to fulfill his duties and obligations as head of the family. Instead, the wife worked as a lecturer and consultant to support the family's financial needs, while raising the children and facing serious psychological stress due to her husband's actions. This ruling not only sets an important precedent in religious court practice but also reflects the fact that substantive justice can be achieved through progressive interpretation of existing norms. The judge in this case was not bound by the 50:50 distribution of rights as explicitly stated in Article 97 of the Compilation of Islamic Law (KHI), but rather considered the actual contributions and context of the husband and wife's relationship during the marriage. This means that the law should not be understood as a rigid text, but as a living instrument capable of providing justice according to the concrete needs of society.⁴

In the context of classical Islamic law, there is no explicit concept of joint property. The property of a husband and wife during marriage remains considered their individual property unless there is an explicit agreement to merge it. Therefore, Article 97 of the Compilation of Islamic Law (KHI), which adopts the principle of joint property, represents a compromise between Islamic law, customary law, and national law. However, this compromise is not necessarily adequate to address contemporary issues, particularly those related to the protection of women, who are often structurally more vulnerable after divorce. Modern legal philosophy has extensively discussed the importance of distributive justice in formulating and implementing legal norms. In his theory, Aristotle emphasized that justice does not mean treating everyone equally, but rather treatment that is appropriate to each individual's needs and contributions.⁵ John Rawls's theory also emphasizes that a fair distribution of resources must favor the least advantaged within the social structure. Therefore, the principle of equitable distribution of wealth without considering contributions and vulnerabilities has the potential to perpetuate structural injustice, particularly against women.

On the other hand, the *maqashid al-shari'ah* approach in Islamic law also emphasizes the need to consider *maslahah* (benefit) in every legal decision-making process. In this context, substantive justice must be seen as part of efforts to safeguard the five *maqashid*: religion, life, intellect, posterity, and property. Therefore, the norms of Article 97 of the Compilation of Islamic Law (KHI) should not be understood as isolated provisions, but as a framework that can be progressively interpreted to achieve greater *maslahah*. In Indonesian religious court practice, there has been growing discourse on the importance of a more contextual approach to Article 97 of the Compilation of Islamic Law (KHI). Some judges have begun interpreting the law, taking into account actual contributions, gender inequality, and the socioeconomic conditions of each party. However, due to the lack of explicit normative guidelines in Article 97, the application of this approach still depends on the sensitivity and courage of each judge. As a result, decisions regarding the division of joint property are inconsistent and create legal uncertainty.

Based on these issues, this study seeks to answer two main research questions: First, do the provisions of Article 97 of the Compilation of Islamic Law (KHI) reflect the principle of substantive justice in the context of divorce? Second, how is Article 97 of the KHI applied in religious court practice, and to what extent do judges consider the principle of justice when deciding cases of division of joint property after divorce? These two questions are crucial in examining the effectiveness of legal norms in addressing the social realities faced by Indonesian Muslim communities. **Novelty** The focus of this research lies in a critical approach to the need for legal reform in Article 97 of the Compilation of Islamic Law (KHI). This research not only examines existing norms descriptively but also offers a rereading oriented towards substantive and contextual justice. Furthermore, this research makes a new contribution by highlighting progressive jurisprudence as a basis for reformulating norms, thus hopefully serving as a reference for national legal policy makers. This reform is crucial so that the law becomes not only a tool of formal certainty, but also a means of social protection and empowerment for vulnerable groups, especially post-divorce women. Thus, this study is expected to not only fill the gap in the Islamic family law literature, but also provide a real contribution in encouraging a national legal system that is more just, responsive, and contextual to changes in societal values and needs.

Research methods

This research uses a normative juridical method, namely an approach that emphasizes the study of written legal norms and applicable legal doctrines.⁶ The main focus of this research is to examine the provisions of Article 97 of the

⁴ Dista Anggraeni and Novi Damayanti, 'Just Law Enforcement in Indonesia', *Indigenous Knowledge* 1, no. 2 (June 2023): 2.

⁵ Zakki Adhiyati and Achmad Achmad, 'Tracing Justice in Polygamy Regulation: A Study of the Philosophy of Justice of Aristotle, Thomas Aquinas, and John Rawls', *Undang: Jurnal Hukum* 2, no. 2 (2019): 409–31, <https://doi.org/10.22437/ujh.2.2.409-431>.

⁶ Peter Marzuki Mahmud, *Introduction to Legal Science Revised Edition* (Jakarta: Kencana Prenada Media Group, 2016).

Compilation of Islamic Law (KHI) in relation to the principle of substantive justice in the distribution of joint assets after divorce. This research was conducted through three approaches: first, a statutory approach, which is used to analyze the Marriage Law and the Compilation of Islamic Law (KHI) as the basis for legal regulation. Second, a conceptual approach, which explores the theory of distributive justice, *maqashid al-shari'ah*, and the principles of justice in Islamic law. Third, a case approach, which examines jurisprudence, including Supreme Court Decision No. 266K/AG/2010 as an important precedent in the division of joint property. The legal materials used include primary legal materials (regulations and court decisions), secondary legal materials (scientific literature and journals), and tertiary legal materials (legal dictionaries and encyclopedias). The analytical technique used is descriptive analysis with systematic and teleological legal interpretation to assess the extent to which the provisions of Article 97 of the Compilation of Islamic Law (KHI) fulfill the principle of substantive justice. With this approach, the research is not only evaluative of norms but also argumentative in offering a more just and contextual legal reformulation.

Discussion

1. Substantive Analysis of the Principle of Justice in the Provisions of Article 97 of the Compilation of Islamic Law

An analysis of the principle of justice in the context of the division of joint property in Islamic marriages in Indonesia cannot be separated from the basic concepts underlying these provisions. Islamic marriage law in Indonesia, particularly regarding the distribution of joint property after divorce, is regulated in the Compilation of Islamic Law (KHI). This provision does not stand alone but is part of an effort to harmonize Islamic law, customary law, and positive law that has developed in Indonesian society.⁷In this case, it is important to understand that the concept of justice is a fundamental principle that is the goal of the formation of the law itself. Theoretically, the concept of justice has long been a topic of discussion in law and philosophy. Aristotle, in his theory of distributive justice, explained that justice is not merely mathematical (numerical) equality, but rather proportionality, namely, a balance between what is given and what is received, based on the role and contribution of each individual.⁸Furthermore, John Rawls in his views on justice states that the distribution of resources must be based on the individual's position in society by paying attention to the difference principle.⁹Rawls explains that inequality can only be justified if it benefits the least advantaged in the social structure.¹⁰These two theories offer a rich perspective for evaluating whether Article 97 of the KHI has fulfilled the principle of justice substantively or is merely formalistic.

From a classical Islamic legal perspective, there is no explicit concept of joint property as recognized in the Indonesian legal system. Property in Islam is traditionally considered the personal property of each spouse, unless otherwise agreed upon or otherwise arranged (contract). Islamic law holds the husband to have the absolute responsibility to provide for his wife, while the wife's personal property is not automatically mingled into joint property. The concept of joint ownership in Islamic law is called *syirkah*, a partnership or cooperation between a husband and wife in acquiring property, which is then considered jointly owned according to their respective contributions.¹¹In the event of a divorce, the division is based on the principle of real contributions (both material and immaterial) made by each spouse during the marriage. In Indonesian positive law, the Compilation of Islamic Law (KHI) is a written norm that explicitly regulates the status and mechanism for the division of joint property in Islamic marriages. Article 97 of the KHI normatively states that in the event of divorce, each party is entitled to half of the joint property, unless there is a specific agreement stipulated in the marriage contract. This rule generally creates uniformity in the process of asset division. While this provision provides legal certainty for both parties, it also raises debate, particularly when linked to the principle of

⁷ Wahyudi Umar, Rasmuddin, and Andi Hikmawanti, 'DIVISION OF JOINT PROPERTY IN ISLAMIC LAW PERSPECTIVE: IMPLEMENTATION OF MORAL JUSTICE AND SOCIAL JUSTICE', *Jurnal Al-Ahkam: Jurnal Hukum Pidana Islam* 5, no. 1 (March 2023): 11–17, <https://doi.org/10.47435/al-ahkam.v5i1.1724>.

⁸ Adhityati and Achmad, 'Tracing Justice in Polygamy Regulation'.

⁹ William A. Edmundson, 'John Rawls: Reticent Socialist', Cambridge University Press, 2017.

¹⁰ Jian Kang et al., 'RawlsGCN: Towards Rawlsian Difference Principle on Graph Convolutional Network', *Proceedings of the ACM Web Conference 2022* (New York, NY, USA), WWW '22, Association for Computing Machinery, 25 April 2022, 1214–25, <https://doi.org/10.1145/3485447.3512169>.

¹¹ Jamhuri Ungel, Rispalman Rispalman, and Taufiq Hidayat, 'Neglect of Maintenance in the Divorce Process in Pintu Rime Gayo District, Bener Meriah Regency', *El-Usrah: Jurnal Hukum Keluarga* 3, no. 2 (August 2020): 259–88, <https://doi.org/10.22373/ujhk.v3i2.7678>.

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substantial justice, as justice cannot be measured solely by mathematical formulas. The discussion of the principle of substantive justice in Article 97 of the Compilation of Islamic Law (KHI) is also closely related to the concept of *maqashid al-shari'ah*, which is the fundamental objective of Islamic law itself. According to Imam Al-Ghazali, *maqashid al-shari'ah* aims to preserve five essential elements: religion, life, intellect, descendants, and property. In the context of the division of joint assets after divorce, protecting property is essential to ensure that neither partner experiences injustice or exploitation.¹² In legal implementation, the principle of *maslahat* or benefit is the primary instrument for measuring whether a regulation aligns with the objectives of sharia or not. Therefore, the provisions of Article 97 of the Compilation of Islamic Law (KHI) need to be evaluated not only based on the formal text but also in terms of the benefits obtained by the parties in order to achieve substantive justice.

In social reality, the division of joint assets according to this half-and-half formula is often considered to not reflect complete justice. Indirect contributions, such as the wife's role in household management, childcare, and other domestic social roles, are not fully accommodated in the concept of strictly dividing assets into two equal parts. Substantive justice, as emphasized by legal feminism or gender perspectives, demands broader recognition of women's immaterial contributions to the household. These contributions, while not materially or financially visible, still have significant economic value in maintaining family stability and enabling the other spouse to maximize their economic potential. In many cases, women who have sacrificed their careers or economic opportunities to care for their households are disadvantaged when assets are divided equally without considering these sacrifices. This situation underscores the importance of a more flexible and proportional approach to the division of joint assets, where judges are not solely fixated on formal provisions but also progressively interpret these norms. In such circumstances, substantive justice will better reflect society's sense of justice and provide real protection for those who are more economically and socially vulnerable.

Furthermore, Article 97 of the Compilation of Islamic Law (KHI) also faces challenges in cases involving a clear imbalance in material contributions between husband and wife. For example, if one spouse is highly dominant financially while the other is inactive or even neglects to fulfill his obligations, is a half-share still relevant and fair? Social reality shows that situations often arise where one spouse contributes minimally or is even proven to have committed serious violations in the marriage, yet still receives an equal share according to the formal provisions of the KHI.¹³ In this context, a substantive approach with a distributive justice perspective would be much more appropriate to use than a normative-formalistic approach. This theoretical study demonstrates that the principle of justice in law cannot be reduced to simply equal distribution of assets, but must consider the actual contributions and benefits of both parties. Therefore, religious court practice in Indonesia increasingly demonstrates a tendency for judges to use substantive justice considerations in deciding cases concerning the division of joint property. This is evidenced by a number of progressive decisions, in which judges do not strictly adhere to the legal text but instead employ flexible interpretations based on justice and the common good. However, this practice is not yet fully uniform and still relies on the individual interpretations of judges in each religious court.

A substantial analysis of the principle of justice in Article 97 of the Compilation of Islamic Law (KHI) shows that this provision requires a more progressive and contextual interpretation to fulfill the principle of true justice. Justice in Islamic law, particularly in matters of community property, must reflect the diverse and complex social realities of Indonesian society, not merely fulfilling formalistic aspects. Therefore, judges, as the primary actors in the judicial process, must be able to explore the legal values entrenched in society, which serve as the basis for rendering decisions that are truly just for the parties. Therefore, understanding of Article 97 of the Compilation of Islamic Law (KHI) must continue to evolve to accommodate various social dynamics and evolving values of justice. This effort is crucial to ensure that the resulting justice is not merely formal and normative but also reflects substantive justice capable of providing protection and welfare for all parties involved in the division of joint property after divorce. Only with this approach can the law fulfill its function as a true instrument of social justice. An analysis of Article 97 of the Compilation of Islamic Law (KHI) cannot be separated from efforts to achieve substantive justice in the context of the division of joint assets after divorce. This article stipulates that each party is entitled to half of the joint assets, unless otherwise stipulated in the

¹² Abu Umar Faruq Ahmad and Mohammad Ashraf Mobin, 'Promoting Maqashid Al-Shari'ah and Achieving Sustainable Economic Development: The Potential of Proposed Two Tier Mudarabah Business Model on Cash Waqf', *Media Syari'ah: A Forum for the Study of Islamic Law and Social Institutions* 19, no. 1 (2017): 1–36, <https://doi.org/10.22373/jms.v17i1.1926>.

¹³ Eka Ristianawati, 'Joint Property Distribution upon Divorce Reviewed from the Contribution of Husband and Wife in the Household', *Walisongo Law Review (Walrev)* 3, no. 1 (2021): 1–20, <https://doi.org/10.21580/walrev.2021.3.1.8078>.

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marriage agreement. This provision provides legal certainty, but if applied rigidly without considering the socio-economic context and the real contributions of each party, it has the potential to lead to injustice. Theoretically, the concept of justice has been developed since the time of Aristotle, who introduced the idea of distributive justice, namely justice that aligns the granting of rights with the contributions or conditions of each individual. Meanwhile, John Rawls, in his theory of justice, stated that the distribution of wealth should benefit the weakest in the social structure. Rawls's difference principle is important in the context of the distribution of joint property because it demonstrates that mathematical equality is not the only form of justice.

In the context of classical Islamic law, the concept of joint property (*syirkah al-zawjain*) is not explicitly recognized. Each spouse retains individual ownership of property unless a *syirkah* agreement is established. However, the Compilation of Islamic Law (KHI), as a syncretic legal product, attempts to accommodate the needs of modern society by establishing the concept of joint property. Nevertheless, Article 97 of the KHI reflects more formalistic principles than the substantive values of Islamic law, which are truly oriented toward welfare and justice. When the principles of *maqasid al-shari'ah* are used as a foundation, it is clear that the division of joint assets must consider the protection of assets and welfare after divorce. Imam Al-Ghazali and other *maqasid* scholars emphasized the importance of safeguarding assets as one of the five main *maqasid*. Therefore, from a *maqasid* perspective, a 50:50 division may be unfair if it does not consider unequal contributions or conditions that disadvantage one party, especially in economically and socially unequal relationships.

In judicial practice, the application of Article 97 of the Compilation of Islamic Law (KHI) is not uniform. Some judges adhere to normative provisions, while others adopt a progressive approach. One notable example is Supreme Court Decision No. 266K/AG/2010, which ruled that a wife was entitled to three-quarters of the joint property because the husband was proven to have failed to provide for her, committed violence, and failed to contribute to the formation of the property during the 11-year marriage. This decision reflects the application of the principle of substantive justice, which considers the actual contributions and burdens borne by each party in the household. A gender perspective is also crucial in this discussion. In patriarchal societies, women's domestic contributions are often overlooked as part of their economic contribution. Yet, women's sacrifices in childcare, household management, and emotional support significantly contribute to a couple's success in acquiring property. When the law only assesses financial contributions, women are often disadvantaged. Therefore, substantive justice must recognize these immaterial contributions as factors worthy of consideration in the division of property.

Furthermore, the half-and-half division norm in Article 97 of the Compilation of Islamic Law (KHI) does not provide a mechanism for considering domestic rights violations such as *nusyuz* (infidelity), domestic violence, and neglect of maintenance. In many cases, the victimized wife still receives the same share of property as the husband who has harmed her for years. This creates structural inequality that harms divorce victims, especially women. Thus, Article 97 of the Compilation of Islamic Law (KHI) needs to be understood not merely as a static provision, but as a norm that needs to be developed through a progressive legal approach. Judges must be given the space to interpret this provision contextually based on the concrete circumstances of the parties. A living law approach and teleological interpretation are essential to exploring the values of justice that exist within society. The urgency of legal reform regarding Article 97 of the Compilation of Islamic Law (KHI) also stems from growing awareness of the importance of legal protection that favors vulnerable groups. Reformulation of this article requires consideration of the principles of proportionality, real contributions (both material and immaterial), and the conditions of the marital relationship. By explicitly incorporating these indicators into legal norms, substantive justice can be achieved more consistently in judicial practice. Therefore, this analysis confirms that justice in the division of joint assets cannot simply refer to fixed figures or proportions. True justice must consider the context, actual contributions, and socio-economic impact on the parties following a divorce. Article 97 of the Compilation of Islamic Law (KHI) must be reformulated so that it becomes not a tool that perpetuates inequality, but rather an instrument of liberation and genuine legal protection for those who experience losses within the institution of marriage.

2. Implementation of Article 97 of the KHI in Religious Court Practice: Between Legal Certainty and Judicial Justice

The implementation of a legal provision is never separate from two important aspects that always interact with each other: legal certainty and a sense of justice.¹⁴ In the practice of religious courts in Indonesia, particularly regarding the application of Article 97 of the Compilation of Islamic Law (KHI), the tension between these two values is a fundamental issue that requires critical examination. Article 97 of the KHI explicitly stipulates that the division of joint property between a widow and a widower following a divorce is half for each, unless a prenuptial agreement stipulates otherwise. This norm provides clear guidelines on the procedures for dividing joint property, creating formal uniformity and clarity for disputing parties. However, this rigid rule does not necessarily address the need for more contextual, substantive justice in the various concrete cases faced by religious courts. In the legal context, legal certainty and justice should ideally go hand in hand. Legal certainty requires clarity and stability of legal norms, so that individuals know their rights and obligations with certainty and clarity in social life. However, law is not sufficient merely to provide certainty; it must also realize true justice. Justice, from a legal philosophy perspective, is not a mathematical concept, but rather a substantive balance that considers aspects of social, cultural, and economic life, as well as individual contributions, in a proportional manner.¹⁵ Thus, rigid legal certainty can become an obstacle to achieving justice if the legal norms used are too formalistic and unable to adapt to the ever-evolving needs of society.¹⁶

In the practical application of Article 97 of the Compilation of Islamic Law (KHI), judges in religious courts often face a dilemma between following normative provisions textually and adopting a substantive approach that prioritizes a sense of justice. Essentially, rigid application of norms without regard for the social, economic, and cultural context will result in decisions that do not reflect the realities of the household in question. For example, in divorce cases where the wife has spent most of her time in domestic roles, caring for the children, and managing the household, a precisely equal division of assets often fails to reflect true justice.¹⁷ This domestic role, although difficult to assess in economic figures, remains a real contribution that should be considered proportionally in the division of joint assets. This issue is further complicated by the economic situation of most Indonesian women, who often face greater economic uncertainty after divorce than men. These rigid, half-hearted provisions, if implemented without judicial discretion, can exacerbate the economic situation of women who previously did not work formally but who make significant domestic contributions. Therefore, the role of judges in this regard is not merely to implement the law textually but also to be interpreters capable of exploring the substantive values of justice in each case they handle.

In practice, judges often employ progressive interpretations of Article 97 of the Compilation of Islamic Law (KHI) in order to create fairer and more balanced decisions for both parties. These progressive decisions are often based on the principle of distributive justice, in which judges consider the material and immaterial contributions of each party during the marriage. In several cases in religious courts, jurisprudence has emerged that boldly deviates from the formal provisions of Article 97 of the KHI, particularly in situations where there is a clear disparity in the contributions of each party.¹⁸ This reflects that in judicial practice, judges actively use their discretion to realize more contextual and humane substantive justice. However, excessive judicial discretion in interpreting norms also has the potential to create new legal uncertainty. When legal norms are no longer considered strictly binding guidelines, judicial decisions can vary widely and be subjective, depending on the perspective and interpretation of each judge. As a result, in similar situations, the results of decisions between judges can differ significantly. Such a situation is certainly inconsistent with the principle of legal certainty, which is crucial for maintaining social order and regularity. Therefore, the greatest challenge in

¹⁴ Suwito *et al.*, 'Contemplating the Morality of Law Enforcement in Indonesia', *Journal of Law and Sustainable Development* 11, no. 10 (October 2023): e1261–e1261, <https://doi.org/10.55908/sdgs.v11i10.1261>.

¹⁵ Luh Putu Vera Astri Pujayanti *et al.*, 'Indonesia's Constitutional Court: Bastion of Law Enforcement and Protector of Human Rights in The Reform Era', *Jurnal Pamator : Jurnal Ilmiah Universitas Trunojoyo* 17, no. 1 (February 2024): 1, <https://doi.org/10.21107/pamator.v17i1.24128>.

¹⁶ Mohamad Hidayat Muhtar *et al.*, *Considering Justice: Dynamics of Law and Democracy at the Crossroads of the Times* (Sada Kurnia Pustaka, 2024).

¹⁷ Afrizal and Al Kodri, 'DIVISION OF JOINT PROPERTY (Analytical Study of Article 97 of the Compilation of Islamic Law from the Perspective of Maqashid Syariah)', *Islamic Law Journal* 1, no. 1 (January 2023): 47–61.

¹⁸ Fatimah Azzahra Fitrianingrum, Achmad Hasan Basri, and Rohmad Agus Solihin, 'The Principle of Contra Legem in the Division of Joint Property (A Study of the Decision of the Surabaya High Religious Court Number 231/Pdt.G/2022/PTA.Sby)', *Syariati: Journal of Al-Qur'an and Legal Studies* 10, no. 1 (May 2024): 79–94, <https://doi.org/10.32699/syariati.v10i1.6725>.

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implementing Article 97 of the Compilation of Islamic Law (KHI) in judicial practice is finding the ideal balance between clear legal provisions and flexible interpretation to achieve substantive justice. In this regard, judges must uphold the principle that the ultimate goal of law is to achieve true substantive justice. Therefore, in each case, judges should not only refer to existing normative texts but also consider the social, cultural, and economic context of the parties to the case. This process requires judges to act not merely as mouthpieces of the law but also as active actors capable of exploring the legal values that exist within society (living law).¹⁹ Through this approach, judges will be better able to provide fair decisions and be able to respond to the real needs of society.

Furthermore, the application of Article 97 of the Compilation of Islamic Law (KHI) also needs to be analyzed within the theoretical framework of *maqashid al-shari'ah*, namely the objectives of Islamic law that emphasize the public interest and substantive justice. From a *maqashid* perspective, Islamic law was never intended to be merely a rigid and formalistic instrument, but rather as a tool capable of providing maximum protection and welfare for all parties involved. Therefore, every judge's decision must reflect real public interest, particularly in terms of protecting the socio-economically weaker party after a divorce. Criticism of the normative implementation of Article 97 of the Compilation of Islamic Law (KHI) has also emerged from feminists, who believe that Islamic marriage law in Indonesia remains too formalistic and unresponsive to the realities of women's lives. This perspective emphasizes the importance of reformulating Islamic family law to better support gender justice, particularly by recognizing women's proportional domestic contributions to joint property.²⁰ Without this recognition, existing legal norms will remain unable to provide maximum protection for women after divorce, who are often in a vulnerable position economically and socially.

Thus, it can be concluded that the implementation of Article 97 of the Compilation of Islamic Law (KHI) in religious court practice is a dynamic process that continually faces challenges between legal certainty and the need for substantive justice. Legal certainty provides clarity and social stability, but without flexibility, it can become an obstacle to the achievement of true justice. Conversely, judicial flexibility in applying norms is key to achieving substantive justice, but must be accompanied by a high level of moral and professional awareness and responsibility on the part of the judges themselves. Therefore, a mechanism for continuous development and capacity building of judges is necessary to enable them to make progressive interpretations that adhere to the fundamental objectives of legal norms. This is where the role of the Supreme Court and related authorities becomes crucial in ensuring that every religious court decision remains within the framework of positive law while providing ample opportunity for the substantive justice that society desires. Only with this approach can the implementation of Article 97 of the Compilation of Islamic Law (KHI) function optimally as an effective legal instrument, while simultaneously addressing the challenges of justice in Indonesian society as a whole.

Discussion: Implementation of Article 97 of the KHI in Religious Court Practice: Between Legal Certainty and Judicial Justice

The implementation of a legal norm cannot be separated from two main pillars: legal certainty and substantive justice.²¹ Both are fundamental goals of the legal system, but in practice, tension often exists between them. The provisions of Article 97 of the Compilation of Islamic Law (KHI), which stipulate that each party in a divorce is entitled to half of the joint property, reflect clear legal certainty, but do not always align with a sense of justice in concrete socio-economic contexts. Legal certainty requires clarity, predictability, and stability in legal norms, so that every individual understands their rights and obligations. However, the law must also adapt to social changes and the realities of community life. When rigid provisions are applied without considering the actual contributions or circumstances faced by the parties in the household, the value of justice can be neglected.

¹⁹ Judicial Commission, 'Problems of Judges in the Realm of Law, Courts, and Society in Indonesia: A Socio-Legal Study', Jakarta: Sekretariat General of the Judicial Commission of the Republic of Indonesia, 2017, <https://komisiyudisial.go.id/storage/assets/uploads/files/Problematika-Hakim-dalam-Ranah-Hukum-Pengadilan-Masyarakat-di-Indonesia.pdf>.

²⁰ Division of Joint Assets with Wife Who Also Earns a Living, 'Division of Joint Assets with Wife Who Also Earns a Living: Perspective of Islamic Law and Positive Law in Indonesia', *El-Izdiwaj Indonesian Journal of Civil and Islamic Family Law* 2, no. 2 (2022), <https://doi.org/10.24042/el-izdiwaj.v2i2.11041>.

²¹ Anwar Anwar, 'Problems of Realizing Substantive Justice in Law Enforcement in Indonesia', *Constitutional Journal* 3, no. 1 (2010): 115914.

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In religious court practice, judges face a dilemma between upholding norms textually or interpreting them substantively to achieve justice. A clear example of this substantive approach is seen in Supreme Court Decision No. 266K/AG/2010, in which the Supreme Court ruled that a wife was entitled to three-quarters of the joint property because her husband was proven negligent, did not provide for her, and committed violence. This decision marked a significant shift towards the application of the principle of distributive justice, which adjusts the distribution of property to the actual contributions and social conditions of the parties. In this situation, judges act not only as enforcers of legal texts but also as interpreters of the values of justice inherent in society. A progressive interpretation of Article 97 of the Compilation of Islamic Law (KHI) becomes crucial when reality shows that a half-assed division of assets can be detrimental to those who have previously contributed more, particularly in domestic aspects that are less visible economically.

However, it must be acknowledged that overly broad and subjective interpretations can also create new legal uncertainty. When one judge rules differently from another judge in a similar case, it raises doubts about the legal certainty that should be guaranteed. Therefore, a balance is needed between standard legal texts and the space for judicious interpretation. Judicial practice also demonstrates disparities in decisions between religious courts. This indicates the absence of binding jurisprudential standards or specific guidelines to assist judges in consistently interpreting Article 97 of the Compilation of Islamic Law (KHI). Therefore, the Supreme Court needs to issue guidelines or a circular to guide judges in applying substantive justice. Furthermore, the implementation of Article 97 of the Compilation of Islamic Law (KHI) must be viewed within the framework of the *maqasid al-shari'ah* (objectives of Islamic law), which emphasizes that the primary objective of Islamic law is public welfare. In this context, the division of assets cannot be based solely on numerical equality but must also consider protecting the vulnerable party and achieving prosperity after divorce.

A feminist legal perspective also criticizes the overly formalistic implementation of Article 97 of the Compilation of Islamic Law (KHI). Many women who do not work formally during their marriage but play a significant role in building and maintaining the household are disadvantaged because their contributions are not taken into account in the division of assets. Therefore, legal reform is needed to recognize and incorporate immaterial contributions as a basis for consideration in the division of joint assets. Thus, it can be concluded that the implementation of Article 97 of the Compilation of Islamic Law (KHI) in religious court practice requires a balance between legal certainty and substantive justice. Judges, as key actors in the judicial system, must be equipped with the capacity, social insight, and a deep understanding of progressive legal values and the *maqasid al-shari'ah* (objectives of Islamic law). Furthermore, the national legal system must provide normative instruments that allow for progressive interpretation without sacrificing legal certainty. To ensure consistency and fairness in judicial practice, it is necessary to develop flexible implementation guidelines for Article 97 of the Compilation of Islamic Law (KHI) while remaining based on the principles of proportionality, contribution, and protection of vulnerable groups. With this approach, Article 97 of the KHI can function as a legal norm that not only provides certainty but also ensures social justice in Indonesia's diverse and dynamic society.

Conclusion

Article 97 of the Compilation of Islamic Law (KHI) does not adequately reflect the principle of substantive justice because it tends to enforce the equal division of joint property without considering the actual contributions of each party to the marriage. Judicial practice shows that certain judges have adopted a progressive approach by considering non-material contributions, particularly women's domestic roles. This finding provides an important basis for the proposed reformulation of Article 97 of the KHI to make it more contextual and responsive to social dynamics. Therefore, legal reform is needed in the form of normative revisions that add explicit provisions regarding the principle of proportionality in the division of joint property, as well as strengthening the capacity of judges from the perspective of distributive justice, *maqasid al-shari'ah*, and gender justice. Thus, Article 97 of the KHI can become a legal instrument that not only provides certainty but also guarantees true justice for divorcing parties.

REFERENCES

- Adlhiyati, Zakki, and Achmad Achmad. 'Melacak Keadilan Dalam Regulasi Poligami: Kajian Filsafat Keadilan Aristoteles, Thomas Aquinas, Dan John Rawls'. *Undang: Jurnal Hukum* 2, no. 2 (2019): 409–31. <https://doi.org/10.22437/ujh.2.2.409-431>.
- Afrizal, and Al Kodri. 'PEMBAGIAN HARTA BERSAMA (Studi Analisis Pasal 97 Kompilasi Hukum Islam Dalam Persepektif Maqashid Syariah)'. *Islamic Law Journal* 1, no. 1 (January 2023): 47–61.
- Ahmad, Abu Umar Faruq, and Mohammad Ashraful Mobin. 'Promoting Maqashid Al-Shari'ah and Achieving Sustainable Economic Development: The Potential of Proposed Two Tier Mudarabah Business Model on Cash Waqf'. *Media Syari'ah: Wahana Kajian Hukum Islam Dan Pranata Sosial* 19, no. 1 (2017): 1–36. <https://doi.org/10.22373/jms.v17i1.1926>.
- Anggraeni, Dista, and Novi Damayanti. 'Penegakan Hukum Yang Berkeadilan Di Indonesia'. *Indigenous Knowledge* 1, no. 2 (June 2023): 2.
- Anwar, Anwar. 'Problematisasi Mewujudkan Keadilan Substantif Dalam Penegakkan Hukum Di Indonesia'. *Jurnal Konstitusi* 3, no. 1 (2010): 115914.
- Ashsubli, Muhammad. 'Undang-Undang Perkawinan Dalam Pluralitas Hukum Agama (Judicial Review Pasal Perkawinan Beda Agama)'. *Jurnal Cita Hukum* 2, no. 2 (2015): 40841.
- Dra. Hj. Muhayah, S.H.,M.H. 'PERTIMBANGAN PUTUSAN HAKIM DALAM PEMBAGIAN HARTA BERSAMA [Dra. Hj. Muhayah, S.H.,M.H]'. Pengadilan Tinggi Agama Samarinda, 2024. <https://pta-samarinda.go.id/artikel-pengadilan/2217-pertimbangan-putusan-hakim-dalam-pembagian-harta-bersama>.
- Edmundson, William A. 'John Rawls: Reticent Socialist'. Cambridge University Press, 2017.
- Fitrianingrum, Fatimah Azzahra, Achmad Hasan Basri, and Rohmad Agus Solihin. 'Asas Contra Legem Dalam Pembagian Harta Bersama (Studi Putusan Pengadilan Tinggi Agama Surabaya Nomor 231/Pdt.G/2022/PTA.Sby)'. *Syariati: Jurnal Studi Al-Qur'an Dan Hukum* 10, no. 1 (May 2024): 79–94. <https://doi.org/10.32699/syariati.v10i1.6725>.
- Fatimah Fayrus. 'Analisis Putusan Pembagian Harta Bersama Pada Pengadilan Agama Kelas IA Yogyakarta Ditinjau Dari Kepastian Hukum, Keadilan, Dan Kemanfaatan'. Program Pascasarjana Magister Kenotariatan, Universitas Gajdah Mada, 2001.
- Kang, Jian, Yan Zhu, Yinglong Xia, Jiebo Luo, and Hanghang Tong. 'RawlsGCN: Towards Rawlsian Difference Principle on Graph Convolutional Network'. *Proceedings of the ACM Web Conference 2022* (New York, NY, USA), WWW '22, Association for Computing Machinery, 25 April 2022, 1214–25. <https://doi.org/10.1145/3485447.3512169>.
- Mahmud, Peter Marzuki. *Pengantar Ilmu Hukum Edisi Revisi*. Jakarta: Kencana Prenada Media Group, 2016.
- Mencari, Pembagian Harta Bersama Istri Turur. 'Pembagian Harta Bersama Istri Turut Mencari Nafkah Perspektif Hukum Islam Dan Hukum Positif Di Indonesia'. *El-Izdiwaj Indonesian Journal of Civil and Islamic Family Law* 2, no. 2 (2022). <https://doi.org/10.24042/el-izdiwaj.v2i2.11041>.
- Muhtar, Mohamad Hidayat, Dian Dewi Khasanah, Avisena Aulia Anita, Muhamad Abas, Moh Bagus, Dewi Cahyandari, Endrianto Bayu Setiawan, et al. *Menimbang Keadilan: Dinamika Hukum dan Demokrasi Di Persimpangan Zaman*. Sada Kurnia Pustaka, 2024.
- Pujayanti, Luh Putu Vera Astri, Zainun Zakya Nugrahayu, Erman I. Rahim, Mohamad Hidayat Muhtar, and Chami Yassine. 'Indonesia's Constitutional Court: Bastion of Law Enforcement and Protector of Human Rights in The Reform Era'. *Jurnal Pamator: Jurnal Ilmiah Universitas Trunojoyo* 17, no. 1 (February 2024): 1. <https://doi.org/10.21107/pamator.v17i1.24128>.
- Ristianawati, Eka. 'Joint Property Distribution upon Divorce Reviewed from the Contribution of Husband and Wife in the Household'. *Walisono Law Review (Walrev)* 3, no. 1 (2021): 1–20. <https://doi.org/10.21580/walrev.2021.3.1.8078>.
- Suwito, Deni Setiawan, Mohamad Hidayat Muhtar, and Ahmad. 'Contemplating the Morality of Law Enforcement in Indonesia'. *Journal of Law and Sustainable Development* 11, no. 10 (October 2023): e1261–e1261. <https://doi.org/10.55908/sdgs.v11i10.1261>.

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- Umar, Wahyudi, Rasmuddin, and Andi Hikmawanti. 'PEMBAGIAN HARTA BERSAMA DALAM PERSPEKTIF HUKUM ISLAM: IMPLEMENTASI MORAL JUSTICE DAN SOCIAL JUSTICE'. *Jurnal Al-Ahkam: Jurnal Hukum Pidana Islam* 5, no. 1 (March 2023): 11–17. <https://doi.org/10.47435/al-ahkam.v5i1.1724>.
- Ungel, Jamhuri, Rispalman Rispalman, and Taufiq Hidayat. 'Pengabaian Nafkah Dalam Proses Perceraian Di Kecamatan Pintu Rime Gayo Kabupaten Bener Meriah'. *El-Usrah: Jurnal Hukum Keluarga* 3, no. 2 (August 2020): 259–88. <https://doi.org/10.22373/ujhk.v3i2.7678>.
- Yudisial, Komisi. 'Problematika Hakim Dalam Ranah Hukum, Pengadilan, Dan Masyarakat Di Indonesia: Studi Sosio-Legal'. Jakarta: Sekretariat Jenderal Komisi Yudisial Republik Indonesia, 2017. <https://komisiyudisial.go.id/storage/assets/uploads/files/Problematika-Hakim-dalam-Ranah-Hukum-Pengadilan-Masyarakat-di-Indonesia.pdf>.