



Original Article

Post-Divorce Division Of Marital Assets From The Perspective Of The Maslahah Mursalah Theory

Encep Ahmad Yani^{1✉}, Atip Latipulhayat², Dedy Hernawan³

^{1,2,3}Universitas Pasundan

Correspondence Author: encepahmadyani@gmail.com ✉

Abstract:

Joint property from an Indonesian Islamic jurisprudence perspective is equated with the concept of syirkah., as regulated in Article 1 letter f of the Compilation of Islamic Law (KHI) which states that "Property in marriage or syirkah". Further regulations are contained in Article 97 of the KHI which states that "Widows or widowers who are divorced are each entitled to half of the joint property, as long as it is not stipulated otherwise in the marriage agreement." However, in practice, this provision has experienced deviations in various Religious Court decisions. The composition of the division varies, such as 1/3 to 2/3, 1/4 to 3/4, even up to 1/5 to 4/5. This raises a number of problems, including: how to classify husband and wife obligations, how to implement the formula and form of division, and how the concept of distribution of joint property after divorce is reviewed from the perspective of the theory of benefit. The focus of this research is more on the Distribution of Joint Property After Divorce with the Parameters of Husband and Wife Obligations from the Perspective of the Theory of Maslahah Mursalah. This research method is descriptive analysis, while the approach method used is normative juridical. The research stage used is carried out in 2 (two) stages, namely: library research and field research. The data collection technique used in this research is as follows: document and interviews. The obligations and prohibitions of husband and wife from the perspective of the theory of benefit are classified based on their urgency into three categories: dharuriyyah (primary), hajiyyah (secondary), and tahsiniyah (tertiary). In judicial practice, the implementation of the division of joint assets is based on the theory of syirkah. Religious court decisions show the existence of legal flexibility, which is evident from the variation in the composition of the division such as 4/5 and 1/5, 2/3 and 1/3, and 3/4 and 1/4. From the perspective of the theory of benefit, the division of joint assets reflects the value of contextual justice, for example (1) If the husband works and the wife takes care of the household, the husband gets 58%, the wife 42%. (2) If the wife continues her domestic role but has an emotional relationship with another man, then



<https://jurnal.usk.ac.id/riwayat>

the division becomes 70% for the husband and 30% for the wife.

Keywords: division, joint property, partnership, maslalah mursalah

Introduction

The Indonesian Ulama Council (MUI) has reiterated the importance of the syirkah theory in determining joint property. In its view, this theory serves as the basis for understanding and determining ownership of assets acquired during a marriage, which involve contributions from both parties, both directly and indirectly. As its fatwa states

Joint property can be likened to a partnership. KH. Ma'ruf Amin, Chairman of the Indonesian Ulama Council (MUI) Fatwa Commission, stated that joint property can be equated with or classified as partnership property, meaning that assets accumulated during marriage must be divided proportionally in the event of divorce. Joint property can be likened to partnership property because it is understood that the wife can also be counted as a working partner or partner, even though she does not work in the true sense. This means that a wife who works in the sense of taking care of the household, such as cooking, washing clothes, caring for children, cleaning the house, and other domestic chores, is also considered a work activity whose role cannot be underestimated. [\(Susanto, 2005, p. 59\)](#)

This fatwa further strengthens the legitimacy of the syirkah theory in the context of Islamic family law in Indonesia, particularly as reflected in Article 1 letter f of the Compilation of Islamic Law (KHI), which states that "Property in marriage or syirkah." In addition, Article 96 of the KHI emphasizes that in the event of a divorce due to death (divorce by death), half of the joint assets become the right of the surviving spouse. Meanwhile, Article 97 explains that in a divorce, both the widow and the widower are each entitled to half of the joint assets, unless otherwise stipulated in the marriage agreement. Thus, this fatwa provides normative reinforcement of the principles of justice and the principle of togetherness in the distribution of marital assets.

In some cases, judges serve not only as the mouthpiece of the law, but are also required to more actively explore the values of justice. This is done so that the decisions taken are not only legally valid but also provide benefits and protection for both parties in dispute, especially in family matters. This approach aligns with the primary objectives of Islamic law (maqasid al-syari'ah), namely protecting religion, life, intellect, descendants, and property. This indication is evident from the method of legal reasoning (istimbath al-ahkam) used by the panel of judges, which appears to refer to the principle of maslalah mursalah, namely the consideration of the public interest beyond the explicit text. [\(Zuhriandi, 2023\)](#)

The implementation of the division of joint assets in current Religious Court decisions shows significant variation. The division is not always based on the same proportion, but varies from 1/2: 1/2, 3/4: 3/4, 1/4: 3/4, and even 3/4: 3/4. This diversity is understandable because the formula used refers to the syirkah theory, a theory that emphasizes the actual contribution of each party during the marriage. Therefore, the division is based on the actual contribution made, not solely on the formal aspects of husband or wife status. In this context, if one party is proven to have committed an internal violation, "such as nusyuz behavior or disobedience to their partner," this does not automatically reduce their rights to joint assets, because

the assessment remains focused on the real economic contribution to the marital syirkah.

Based on the author's observations, the syirkah theory in the context of the division of joint assets after divorce lacks clearly structured and measurable parameters. In practice, the husband and wife's contributions to the household are often viewed solely from an outward perspective, such as economic and material contributions. Meanwhile, the inner contributions, which are crucial for building a family, are often overlooked. This is understandable, given that the syirkah theory emphasizes tangible, tangible benefits. This was confirmed by several judges interviewed.

This is in contrast to the theory of benefit, which offers a more comprehensive and systematic conceptual framework. This theory refers to six assessment parameters (including the division of Islamic law), with weighting of the husband and wife's contributions that include obligations and prohibitions, both in primary (dharuriy), secondary (hajjyy), and tertiary (tahsiniyy) aspects. With this approach, the theory of benefit not only provides clear limits regarding the amount of post-divorce property acquisition for each party, but is also able to accommodate spiritual contributions as part of the ideal goal of marriage within the framework of sakinah, mawaddah, and rahmah. This framework is the basis for the birth of the research entitled: "Division of Joint Property After Divorce Perspective of the Theory of Maslahah Mursalah."

Based on this background, this study identifies a number of key issues: first, how is the classification of obligations and prohibitions of husband and wife viewed from the perspective of the theory of benefit; second, how is the implementation of the formula and form of division of joint assets currently in effect in religious courts; and third, how is the construction of the concept of division of joint assets after divorce according to the approach of the theory of benefit.

Methods

This research falls into the category of legal research, structured based on the unique characteristics of legal science (jurisprudence), which differs methodologically from approaches in the social and natural sciences. Its primary focus is on gaining a deep understanding of a particular legal phenomenon. (Marzuki, 2010, p. 45) This legal research is normative in nature, which means that the study is conducted by searching library materials or secondary data as the main source. (Soekanto, S and Mamudji, 2021)

The initial step in this research is to determine a method that is appropriate to the formulation of the problem, namely the division of joint assets after divorce from the perspective of the maslahah mursalah theory. (Ronny Hanitijo Soemitro, 1990) This research uses a descriptive-analytical approach, namely by explaining the applicable legal provisions and connecting them with legal theories and the practice of implementing positive law that is relevant to the problem being studied. (Ronny Hanitijo Soemitro, 1990, p. 66) The approach method used is normative juridical, namely research that focuses on the analysis of legal norms, but still takes into account the existence of legal rules that develop in society. (Ronny Hanitijo Soemitro, 1990, p. 106)

The research phase was conducted in two ways: library research and field research. Data collection was conducted through document studies, aimed at

exploring concepts, theories, opinions, and previous research findings that were closely related to the focus of the study. Meanwhile, in field research, data was collected through interviews with informants directly relevant to the research issue. These interviews were conducted with the aid of interview guidelines and supported by a voice recorder to accurately document the interview results.

Results

As explained in the introduction, the theory used to determine joint property of divorced husband and wife in several of the decisions above is the syirkah approach, which is very different from the theory *The Benefits of Mursalah* (Hallag, 2000). he offers an Islamic legal basis that considers the public interest contextually.

Etymologically, the word *benefit* comes from the root word *wrong* which means benefit, advantage, or something good. this term has the same meaning as *benefits*. Where *mursalah* means "apart from" or "not bound", referring to not being bound by certain texts or propositions. So therefore, *The Benefits of Mursalah* interpreted as a form of legal consideration that prioritizes public interest even though there is no specific textual evidence, but is still rooted in the principles of justice and benefit in Islamic law.

This theory is later known as the theory of welfare. (Suratmaputra, nd), which emphasizes the importance of considering the public interest in establishing laws. This idea was later popularized by Imam al-Ghazali (Al-Ghazali, 1997) through the concept of *maslahah*, which he terminologically defines as *Maslahah Mursalah*, a concept in Islamic law that accommodates the welfare of the community without being tied to explicit textual evidence. This approach provides flexibility for lawmakers in responding to contemporary issues while adhering to the principles of justice and benefit.

Mashlahat is: "Taking benefits and rejecting harm in order to maintain sharia goals." He views that a benefit must be in line with sharia goals, even though it conflicts with human goals. (Zamakhshari, 2015) This is in line with what is meant by *siyasa syar'iyah*, namely: the government's authority to make policies that are in the interests of the public, through regulations that do not conflict with religion, even though there is no specific evidence (that regulates it)." (Sukardja & Syarif, 2012)

Norms of obligations and prohibitions of husband and wife from the perspective of the theory of welfare classified according to their level of urgency into three main categories: *dharuriyyah* (primary), *hajiyyah* (secondary), and *tahsinyyah* (tertiary). *Dharuriyyah* obligations have direct legal implications, including the responsibility of leading the household, providing material sustenance, educating the wife in religious aspects, caring for and raising children, and granting permission for the wife to work in emergencies. *Hajiyyah* obligations, on the other hand, do not have direct legal consequences, such as providing a place to live, loving the wife, and respecting her family. *Tahsinyyah* obligations, on the other hand, include complementary and polite aspects of domestic relations, such as fulfilling household needs, being tactful in speaking, and making special time for the wife.

In terms of prohibitions, husbands' actions that are mandatory and have legal consequences include practicing polygamy without the wife's permission and committing adultery. Meanwhile, those that are *hajiyyah* include taking a dowry without the wife's consent and restricting the wife's freedom to manage household needs.

Similarly, a wife's obligations are classified hierarchically. Essential obligations, which have legal consequences, include obedience to her husband, pregnancy and childbirth, and childcare. Hajj obligations include breastfeeding, emotional support for her husband, and helping with the family income. Tahsiniah obligations, meanwhile, include maintaining her appearance for her husband and maintaining family unity. Acts prohibited by the essential obligations include adultery, refusing sexual intercourse, leaving the house without permission, and disobeying her husband. Prohibitions from the hajj include hurting her husband and lying in the household.

Implementation of the Formulation for the Division of Joint Assets in Judicial Practice, as in the Depok Religious Court Decision No. 1833/Pdt.G/2016/PA.Dpk., the Panel of Judges based its considerations on Article 1 letter (f) of the Compilation of Islamic Law which defines assets in marriage as partnership. Then in the Decision of the High Religious Court of Surabaya No. 345/Pdt.G/2020/PTA.Sby., the legal basis used was Article 35 paragraph (1) of Law Number 1 of 1974 and Article 1 letter f of the KHI. Meanwhile, in the Decision of the Supreme Court No. 266K/AG/2010, legal considerations were based on the more dominant contribution of the wife in the formation of joint assets, which indicates the use of the theory partnership by emphasizing the value of each partner's contribution during the marriage.

Variations in the form of division of joint assets as reflected in a number of religious court decisions indicate the flexibility of the legal approach in assessing the contribution of spouses in the household. In the Depok Religious Court Decision Number 1833/Pdt.G/2016/PA.Dpk., the division of assets was carried out in a composition of $\frac{4}{5}$ and $\frac{1}{5}$; in the Surabaya High Religious Court Decision Number 345/Pdt.G/2020/PTA.SBY, the division was carried out in a composition of $\frac{2}{3}$ and $\frac{1}{3}$; while in the Supreme Court Decision Number 266K/AG/2010, assets were divided proportionally at $\frac{3}{4}$ and $\frac{1}{4}$. These differences indicate that judges' considerations in practice are more directed towards the syirkah theory approach which emphasizes the aspect of physical contributions without considering the psychological aspects of each party.

The concept of sharing joint assets from the perspective of the theory of welfare This begins with understanding the theory's working mechanisms, both in relation to external and internal obligations within the husband-wife relationship. In this context, a fundamental aspect of the theory of benefit is how the principle of benefit forms the basis for determining fairness in the division of joint property. To explain this, two illustrative situations will be presented: first, an external relationship in which the husband works and the wife manages the household; and second, an internal relationship in which the wife continues to fulfill her domestic role but forms an emotional bond with another man.

First, The condition where the husband works and the wife takes care of the household, according to the perspective of the theory of benefits, fulfills the main elements of benefits, namely Mu'tabarah Benefits (Al-Sinqithi, 2001) This theory refers to the Islamic argument that explicitly emphasizes the obligation to provide for the family, as stated in Surah Al-Baqarah verse 233: "And it is the duty of the father to provide food and clothing to the mothers in a way that is ma'ruf." This verse emphasizes that the husband's obligation to fulfill the family's basic needs is a manifestation of the principle of welfare recognized in Islamic law.

When linked to the theory of benefit in the context of fulfilling basic needs, the

husband's obligation to support the family fulfills the element of *maslahah dharuriyah*. ([Az-Zuhaili, 1986, p. 219](#)), namely the primary need to maintain the continuity of the soul (*hifz al-nafs*). Providing adequate sustenance will prevent the family from deteriorating health conditions, illness, and even the risk of death. From the perspective of the *maqasid sharia*, mental health is the primary foundation for fulfilling religious obligations, including the complete functioning of the family.

From the perspective of the requirements of the theory of benefit as put forward by [Al-Namlah \(2000\)](#), the husband's obligation to provide a living fulfills four main criteria: (1) it is a *dharuri* (primary need) which aims to maintain the continuity of the soul (*hifz al-nafs*), (2) it is general and applies to all Muslim families, (3) it is in line with *maqashid al-syari'ah* or the main objectives of Islamic law. (Zaidan, 1996), and (4) is *qath'i* or certain according to the evidence. Furthermore, according to the principles of the theory of benefit (Al-Namlah, 2000, p. 394) This obligation to provide for his wife and children is in line with two important principles: (a) *Sharia* does not order anything unless it contains genuine benefits, and does not prohibit anything except because of clear damage, and (b) anything that is approved by *Sharia* as a benefit becomes a *sharia* argument. Therefore, when linked to the classification of law in Islam, the husband's obligation to provide for his wife and children falls into the category of obligatory law. (Shidiq, 2011, p. 127), and become the main obligation that must be fulfilled in household life.

In the second illustration, when a wife outwardly carries out household duties but inwardly develops an attraction to another man, then this action contradicts the principle of complete *maslahah* in the theory of welfare. This *maslahah* is part of the category of welfare based on Islamic law. In this context, the Qur'an, Surah An-Nisa, verse 34, emphasizes that: "Pious women are those who obey Allah and guard themselves in (their husband's) absence because Allah has protected them." This verse shows that the moral integrity and loyalty of a wife are essential parts of the building of household welfare that must be maintained. Therefore, a wife's actions that violate the value of loyalty while still carrying out domestic functions cannot be justified within the framework of *maqashid al-shari'ah*.

When linked to the theory of welfare, which focuses on fulfilling basic needs (*maslahah dharuriyyah*), a wife's love for another man falls into the category of violating obedience to her husband. This act not only damages the moral fabric of the household but also has the potential to disrupt the stability of marriage, a sacred institution in Islam. From a *sharia* perspective, the wife's position in marriage necessitates two fundamental forms of obedience: obedience to Allah and obedience to her husband. If either of these elements is compromised, the *maqasid al-shari'ah*, particularly in the aspects of *hifz al-nasl* (protecting offspring) and *hifz al-din* (protecting religion), is at risk of not being achieved to its ideal.

From the perspective of the theory of benefit, a wife's action in having a relationship with another man does not fulfill the four main requirements of benefit. First, this act is contrary to the *dharuriy* (primary needs), especially in maintaining religion (*hifz al-din*), because it directly damages the institution of marriage, which is a *Sharia* commandment. Second, this act does not have a general benefit, but is individual and destructive. Third, this act is contrary to the main objective of Islamic law (*maqasid al-syari'ah*), and fourth, it contradicts the principle of *qath'i* (definite legal provisions). Based on the principles of the theory of benefit, this act violates the

principle that Sharia law never commands anything except to bring benefit, and does not prohibit something except because of its dominant harm. Therefore, when viewed from the perspective of the division of Sharia law, this act is included in the category of haram and contradicts the basic values of Islamic teachings.

The concept of calculating joint property in the context of religious courts adopts a quantitative approach, given the material nature of joint property. This is reinforced by the provisions of the Compilation of Islamic Law (KHI), which uses the term "half" or "half" in the division of property, which quantitatively means a 50%:50% division between husband and wife.

Within the framework of the theory of welfare, the weighting of obligations between husband and wife is determined based on a hierarchy of needs. Primary obligations, such as providing for the family, are given the highest weight, namely three (3), as explained by [Zuhaili \(1986\)](#). Furthermore, secondary obligations receive a weight of two (2) and tertiary obligations receive a weight of one (1). (Zaidan, 1996) Conversely, violating these obligations will negatively impact the distribution of assets. Therefore, in cases where the husband serves as the head of the family and provides for the family, while the wife continues to manage the household but fails to demonstrate obedience to her husband, the distribution of joint assets should be adjusted based on the level of contribution of each party, from the perspective of the theory of welfare.

- a. Illustration of division of joint assets in the form of birth bonds:
Husband works and wife takes care of the household

ISSUE CATEGORY	HUSBAND'S OBLIGATIONS	BBT	WIFE'S OBLIGATIONS	BBT
Dharuriyah (Primary)	Leading the family,	3	Obey your husband	3
	Providing a living,	3	Pregnancy and childbirth	3
	Teaching religious needs,	3	Raising children	3
	Caring for and nurturing children	3		
	Subtotal	(12)	Subtotal	(9)
Hajjiyah (Secondary)	love wife	2	Loving husband	2
	honoring the wife's family	2	Breastfeeding a child	2
	provide a place to live	2		
	Subtotal	(6)	Subtotal	(4)
Tahsiniyah (Tertiary)	Wise	1	Beautify yourself	1
	Complete residential needs	1	Maintaining family continuity	1
	Dower	1		
	Subtotal	(3)	Subtotal	(2)
	AMOUNT	21	AMOUNT	15

The total value of husband and wife is $21 + 15 = 36$, so the share of widowers and widows is:

1. Widower's part $21 : 36 \times 100\% = 58\%$
2. Widow's section $15 : 36 \times 100\% = 42\%$

b. Illustration division of joint assets in the form of spiritual bonds:

Wife loves another man

ISSUE CATEGORY	HUSBAND'S OBLIGATIONS	BBT	WIFE'S OBLIGATIONS	BBT
Dharuriyah (Primary)	Leading the family	3	Obey your husband	0
	Providing a living	3	Pregnancy and childbirth	3
	Teaching religious needs	3	Raising children	3
	Caring for and nurturing children	3		
	Subtotal	12	Subtotal	6
Hajjiyah (Secondary)	Loving wife	2	Loving husband	2
	Honoring the wife's family	2	Breastfeeding a child	2
	Providing a place to live	2		
	Subtotal	6	Subtotal	4
Tahsiniyah (Tertiary)	Wise	1	Beautify yourself	1
	Complete residential needs	1	Maintaining family continuity	1
	Dower	1		
	Subtotal	3	Subtotal	2
Maslahah Category	Husband's Prohibition		Wife's Prohibition	
Dharuriyah (Primary)			Loving another man (Dharuriyah)	-3
			Subtotal	-3
Total number		21		9

The total value of husband and wife is $21 + 9 = 30$, so the share of widowers and widows is:

1. Widower's part $21 : 30 \times 100\% = 70\%$
2. Widow's section $09 : 30 \times 100\% = 30\%$

Conclusion

Obligations and prohibitions of husbands that have and do not have legal implications from the perspective of the theory of welfare classified according to their level of urgency into three main categories: dharuriyyah (primary), hajjiyyah (secondary), and tahsiniyah (tertiary). Similarly, the obligations and prohibitions of wives which has legal implications and does not have legal implications from the perspective of the theory of welfare classified hierarchically. Includes obligations and

prohibitions that are necessities (primary), hajiyah (secondary) tahsiniyah (tertiary). Implementation of the Formulation for the Division of Joint Assets in Judicial Practice, As in several Religious Court Decisions above, the theory of syirkah is used, emphasizing the value of each partner's contribution during the marriage. The variations in the distribution of joint assets, as reflected in several Religious Court decisions, demonstrate the flexibility of the legal approach in assessing a spouse's contribution to the household. Religious Court Decisions use the following compositions: $\frac{4}{5}$ and $\frac{1}{5}$; $\frac{2}{3}$ and $\frac{1}{3}$; and even $\frac{3}{4}$ and $\frac{1}{4}$. The concept of dividing joint assets from a welfare theory perspective presents two illustrative conditions: first, based on a physical relationship where the husband works and the wife manages the household, with the widower receiving 58% and the widow receiving 42%. Second, based on a spiritual relationship where the wife continues to play a domestic role but maintains an emotional bond with another man, with the widower receiving 70% and the widow receiving 30%.

References

- Al-Ghazali. (1997). *al-Mustasfa min ilm al-'Ushul, ditahqiq oleh Muhammad bin Sulaiman al-Asqar* (hal. 471). Muassasah al-risalah.
- Al-Namlah, A. K. B. A. B. M. (2000). *Al-Jami' Lil Masail Ushul Al- Fiqh Wa Tatbiqatuha 'Ala Al-Madzhah Al-Rajih* (hal. 389). Maktabah Al- Rusyd.
- Al-Sinqithi, M. al-A. (2001). *Mudzakarah fi Ushul al-fiqh* (hal. 201). Maktabah al-ulum wa al-hikam.
- Az-Zuhaili, W. (1986). *Ushul al-Fiqh al-Islami Jilid. II* (hal. 1020–1024). Dar al-Fikr.
- Hallag, W. B. (2000). *A History of Islamic Legal Theories, diterjemahkan E. Kusnadiningrat* (hal. 165–166). Rajawali Press.
- Marzuki, P. M. (2010). *Penelitian Hukum* (hal. 35). Kencana Prenada.
- Ronny Hanitijo Soemitro. (1990). *Metodologi Penelitian Hukum dan Jumetri* (4 ed.). Ghalia Indonesia.
- Shidiq, S. (2011). *Ushul Fiqh* (hal. 124–133). Kencana.
- Soekanto, S dan Mamudji, S. (2021). *Penelitian Hukum Nomatif (Suatu Tinjauan Singkat)*. PT. Raja Grafindo Persada. <http://library.stik-ptik.ac.id/detail?id=5460%5C&lokasi=lokal>
- Sukardja, A., & Syarif, M. I. (2012). *Tiga Kategori Hukum : Syariat, Fikih, & Kanun* (hal. 99). Sinar Grafika.
- Suratmaputra, A. M. (n.d.). *Filsafat Hukum Islam al-Ghazali: Masalah Mursalah dan Relevansinya dengan Pembaharuan Hukum Islam* (hal. 63–64).
- Susanto, H. (2005). *Pembagian Harta Gono-Gini Setelah Terjadinya Perceraian* (hal. 59). Alumni.
- Zaidan, A. K. (1996). *al-Wajiz fi Ushul al-Fiqh* (hal. 219). Muassasah Al Risalah.
- Zamakhshari. (2015). *Teori-teori Hukum Islam dalam Fiqih dan Ushul Fiqih* (hal. 36–37). Citapustaka Media Perintis.
- Setiawan, Deny. "KERJA SAMA (SYIRKAH) DALAM EKONOMI ISLAM." *Jurnal Ekonomi* 21, no. 3 (2015): 4.
- Suharto, Tentiyo. "Konsep Syirkah (Musyarakah) Dalam Tafsir Ibnu Katsir Telaah Al-Qur'an Surah Shaad Ayat 24 Pada Lembaga Keuangan Syariah." *Jurnal JIBF Madina* 2, no. 1 (2022): 3.
- Susanto, Hanafi Hadi, dan Mohammad Ghozali. "Konsep Syirkah Pada Perbankan Syariah." *Jurnal IAIN Ponorogo*, 2016, 608.
- Zuhriandi, Novrizal. "Contra Legam Pembagian Harta Bersama Perspektif Masalah Mursalah." *Jayapangus Pers* 6 (2023): 9.