



The Application of *Ra'yu* and *Istihsan* in the Settlement of Marital Property in Modern Times: A Normative Study of the Principle of Proportional Justice

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Abstract: The issue of the division of marital property has become increasingly complex as economic relations between husbands and wives have changed, with contributions from both parties whether economic or non-economic—not always being equal. Normative provisions that emphasize an equal division often fail to fully reflect this reality, thereby potentially leading to substantive injustice. This study employs a normative legal research method with a comparative approach, analyzing the doctrine of *usul al-fiqh*, classical and contemporary Islamic legal thought, and relevant legislation, particularly the Compilation of Islamic Law. The results of the study indicate that *ra'yu* functions as a rational instrument for assessing the actual contributions of the parties during the marriage, while *istihsan* serves as a corrective mechanism to deviate from general principles when their application has the potential to result in injustice. The synthesis of *ra'yu* and *istihsan* provides a methodological framework that allows for the contextualization of law without disregarding the normative foundations of Sharia. The division of marital property should not be carried out mechanically and formalistically, but must be based on the principle of proportional justice that takes into account the actual contributions of each party, both economic and non-economic. The integration of *ra'yu* and *istihsan* underscores the adaptive nature of Islamic family law and provides a normative justification for the application of substantive justice in resolving disputes over marital property in Indonesia. These findings can also serve as a conceptual foundation for reforming the Compilation of Islamic Law, particularly in reformulating the provisions on the division of joint property to be more oriented toward the principle of proportional justice and the contributions of the parties.

Kata Kunci:

Harta Gono-Gini, Keadilan Proporsional, Ra'yu, Istihsan.

Abstrak: Persoalan pembagian harta bersama dalam perkawinan semakin kompleks seiring dengan perubahan relasi ekonomi antara suami dan istri, di mana kontribusi kedua belah pihak tidak selalu bersifat seimbang, baik dalam bentuk kontribusi ekonomi maupun non-ekonomi. Ketentuan normatif yang menekankan pembagian secara sama rata sering kali tidak sepenuhnya mampu merefleksikan realitas tersebut, sehingga berpotensi menimbulkan ketidakadilan substantif. Penelitian ini menggunakan metode penelitian hukum normatif dengan pendekatan perbandingan mazhab, melalui analisis terhadap doktrin ushul fiqh, pemikiran hukum Islam klasik dan kontemporer, serta peraturan perundang-undangan yang relevan, khususnya Kompilasi Hukum Islam. Hasil kajian menunjukkan bahwa ra'yu berfungsi sebagai instrumen rasional untuk menilai kontribusi nyata para pihak selama perkawinan, sementara istihsan berperan sebagai mekanisme korektif untuk menyimpangi kaidah umum ketika penerapannya berpotensi melahirkan ketidakadilan. Sintesis antara ra'yu dan istihsan memberikan kerangka metodologis yang memungkinkan kontekstualisasi hukum tanpa mengabaikan landasan normatif syariat. Pembagian harta gono-gini tidak semestinya dilakukan secara mekanis dan formalistik, melainkan harus didasarkan pada prinsip keadilan proporsional yang mempertimbangkan kontribusi nyata masing-masing pihak, baik ekonomi maupun non-ekonomi. Integrasi ra'yu dan istihsan menegaskan karakter adaptif hukum keluarga Islam serta memberikan justifikasi normatif bagi penerapan keadilan substantif dalam penyelesaian sengketa harta bersama di Indonesia. Temuan ini juga dapat menjadi landasan konseptual bagi reformasi Kompilasi Hukum Islam, khususnya dalam merumuskan kembali ketentuan pembagian harta bersama agar lebih berorientasi pada prinsip keadilan proporsional dan kontribusi para pihak.

INTRODUCTION

Disputes over spouses' economic contributions in the division of joint property known in Indonesian cultural context as marital property are a phenomenon that is becoming increasingly common as the social and economic structures of modern Muslim families change. In the Indonesian context, the increasing participation of women in the public sector, shifts in domestic roles, and the complexity of family income sources have given rise to new legal issues that are not fully accommodated by the formalistic legal norms of family.¹ Joint property legally defined as assets

¹ Soerjono Soekanto, *Sosiologi Keluarga: Tentang Ikhwal Keluarga, Remaja, dan Anak* (Jakarta: Rineka Cipta, 2017): 112-114.

acquired during the marriage often becomes the subject of disputes when a marriage ends, particularly when the economic contributions of the husband and wife are not symmetrical or easily quantifiable.

Normatively, Indonesian positive law has regulated joint property through Law No. 1 of 1974 on Marriage, and this is further clarified in the Compilation of Islamic Law (KHI). Article 35 of the Marriage Law states that property acquired during the marriage becomes joint property,² while Article 97 of the KHI affirms that a divorced widow or widower is entitled to half of the joint property.³ This formulation reflects a formal approach to justice that places husbands and wives on an equal footing mathematically, without explicitly considering the variations in economic and non-economic contributions that occur within a household.⁴

In religious court practice, the application of these provisions does not always proceed mechanically. Judges are often faced with the reality that one party has made a dominant contribution to the acquisition of assets, while the other party has played a greater role in domestic work or child-rearing. This situation has led to the emergence of substantive justice considerations that often go beyond the normative wording of written regulations.⁵ Case law indicates that religious judges have begun to use sociological considerations and principles of justice to determine a more proportional division of joint property, although they do not yet have a well-established methodological basis within the framework of *usul al-fiqh*.

In classical Islamic law, the concept of joint property or community property is not explicitly recognized as it is in modern legal systems. *Fiqh* places greater emphasis on the separation of property between husband and wife, except in the form of a *syirkah* (partnership) based on a specific contract.⁶ The absence of explicit regulations makes the issue of joint property a matter of *ijtihad*, which opens the door to the use of legal reasoning methods such as *ra'yu* and *istihsan* as tools for addressing contemporary issues.

In the tradition of Islamic law, *ra'yu* is understood as the use of reason and rational judgment in determining the law when no explicit textual evidence (*nash*) is available. Although its legitimacy has been debated, *ra'yu* has historically played an important role in the development of Islamic law, particularly within the Hanafi school of thought.⁷ In the context of family law, *ra'yu* allows for an assessment of the social

² Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan, Pasal 35.

³ Kompilasi Hukum Islam (Instruksi Presiden No. 1 Tahun 1991), Pasal 97.

⁴ Mardani, *Hukum Keluarga Islam di Indonesia* (Jakarta: Kencana, 2016): 158.

⁵ Euis Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in Indonesia Religious Courts* (Amsterdam: Amsterdam University Press, 2010): 323-325.

⁶ Wahbah Al-Zuhayli, *al-Fiqh al-Islami wa Adillatuh* (Damaskus: Dar al-Fikr, 2010): 7: 339-342.

⁷ Joseph Schacht, *An Introduction to Islamic Law** (Oxford: Clarendon Press, 2014): 34-36.

and economic realities underlying the relationship between husband and wife, so that the law does not stop at the text but moves toward substantive justice.

Meanwhile, *istihsan* is a method of *ijtihad* that aims to depart from general legal principles or *literal qiyas* in favor of other provisions deemed more just and beneficial. Al-Syatibi regards *istihsan* as part of the effort to uphold the objectives of Sharia (*maqāṣid asy-syarī'ah*), particularly justice and the welfare of humanity.⁸ In the context of the division of joint property, *istihsan* can be understood as a normative basis for avoiding the injustice that may arise from an equal division that is not proportional to each party's contribution.

The principle of proportional justice, which has evolved in modern legal discourse, has strong parallels with the objectives of *istihsan* and *maslahat* in Islamic law. Justice is not always synonymous with numerical equality, but rather with fairness in light of the roles, contributions, and burdens borne by each party.⁹ Therefore, an approach based on *ra'yu* and *istihsan* is relevant for contextualizing Islamic family law so that it aligns with the socioeconomic dynamics of Indonesian Muslim society.

Nevertheless, gaps in the study of Islamic family law remain evident. Most research on joint property focuses on a normative analysis of positive law or a comparison between the Compilation of Islamic Law (KHI) and classical *fiqh*, without delving deeply into the *usul al-fiqh* foundations of the practice of proportional justice that is beginning to emerge in judicial rulings. Studies that specifically position *ra'yu* and *istihsan* as a methodological framework for the division of joint property remain very limited and have not yet been systematically structured.

Based on this background, this study formulates two main research questions: how *ra'yu* is applied as the basis for considering *the public interest* in the settlement of joint property, and how *istihsan* can be used as a normative instrument to achieve proportional justice in the division of joint property. The objective of this study is to examine and formulate the normative basis for the application of *ra'yu* and *istihsan* in the context of Islamic family law, particularly in the resolution of modern disputes over joint property.

The contribution of this study lies in its effort to strengthen the theoretical framework of Islamic family law through the integration of classical *usul al-fiqh* methods with the contemporary principle of proportional justice. This study is expected to serve as a conceptual reference for religious court judges in exercising judicial discretion responsibly, as well as to enrich the academic body of Islamic law in responding to the challenges of modernity.

⁸ Abu Ishaq al-Syatibi, *al-Muwafaqat fi Usul al-Shari'ah* (Beirut: Dar al-Kutub al-'Ilmiyyah, 2013) 2:195–197.

⁹ Gustav Radbruch, "Legal Philosophy," dalam *The Legal Philosophies of Lask, Radbruch, and Dabin* (Cambridge: Harvard University Press, 2009): 107.

RESEARCH METHODOLOGY

¹⁰ A normative legal research approach was chosen because the primary focus of this study is an examination of the concepts of *ra'yu* and *istihsan* as methods of *ijtihad* in *usul al-fiqh*, as well as their relevance to the resolution of disputes over marital property based on the principle of proportional justice. This approach allows for an in-depth analysis of the normative structure of the law without relying on empirical field data, but rather on the authority of authentic legal texts and doctrines.

The approaches used in this study are *the conceptual approach* and the *comparative madhhab approach*. The conceptual approach is used to examine the concepts of *ra'yu*, *istihsan*, *maslahat*, and proportional justice as normative categories that form the basis of legal argumentation. Meanwhile, the comparative madhhab approach was employed to examine how each school of fiqh positions *ra'yu* and *istihsan* within its legal methodology, particularly the differences among the Hanafi, Maliki, and Shafi'i schools regarding their acceptance or restriction of the use of these two instruments.¹¹

The legal sources in this study are categorized into primary, secondary, and tertiary sources.¹² Primary legal sources include the Qur'an and hadiths related to the principles of justice and *muamalah*, classical books on *usul al-fiqh* such as *al-Muwafaqat* by al-Shatibi and *Ushul al-Fiqh al-Islami* by Wahbah al-Zuhayli, as well as relevant legislation such as Law No. 1 of 1974 on Marriage and the Compilation of Islamic Law. In addition, religious court rulings regarding the division of joint property were also used as supporting normative sources.

Secondary legal sources consist of textbooks on Islamic law, family law, and legal research methodology, as well as scholarly journal articles discussing joint property, substantive justice, and judicial discretion in religious courts. Tertiary legal sources, such as legal dictionaries and Islamic encyclopedias, were used to clarify key terms and concepts. All of these legal materials were collected through systematic and targeted *library research* to ensure the validity and relevance of the sources.¹³

The analysis of legal materials was conducted using a qualitative-normative approach, employing both deductive and interpretive reasoning.¹⁴ Deductive reasoning was used to draw conclusions from general principles of *usul al-fiqh* and apply them to the specific context of the division of marital property, while the interpretive approach was used to interpret positive law and fiqh doctrines in a

¹⁰ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2017).

¹¹ Amir Syarifuddin, *Ushul Fiqh Jilid II* (Jakarta: Kencana, 2014).

¹² Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Jakarta: Rajawali Press, 2015).

¹³ Soekanto and Sri Mamudji.

¹⁴ Johnny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif* (Malang: Bayumedia Publishing, 2006).

contextual manner. Through this method, *ra'yu* and *istihsan* are analyzed not only as theoretical concepts but also as normative instruments that can bridge the gap between legal texts and the demands of proportional justice in contemporary Islamic family law practice.

RESULTS AND DISCUSSION

***Ra'yu* as the Basis for Considering the Public Interest in the Settlement of Marital Property**

In the tradition of Islamic law, *ra'yu* is a form of rational reasoning used to determine legal rulings when the *nash* does not provide explicit or detailed provisions. In the context of the division of marital property, the absence of explicit regulations in classical fiqh makes this issue a legitimate area of *ijtihad*, thereby giving *ra'yu* strong methodological relevance. The use of *ra'yu* is not intended to replace *the nash*, but rather to operationalize the normative values of Sharia so that they remain relevant and responsive to an ever-evolving social reality.¹⁵

Differences in perspective among the schools of thought regarding the use of *ra'yu* in matters of marital property can be seen in the extent to which each school allows for rational consideration and social realities in determining the law. The Hanafi school is known as the school that makes the most extensive use of *ra'yu*, particularly through the methods of *qiyas* and *istihsan*.¹⁶ In the context of marital property, this approach allows for recognition of the wife's contribution to building the family's economy, even though it is not explicitly mentioned in *the nash*. Therefore, the division of marital property can be understood as a form of justice based on contribution and benefit, rather than solely on individual ownership.

Unlike the Hanafi school, the Maliki school uses the approaches of *maslahah mursalah* and *'urf* as the basis for *ra'yu*.¹⁷ In the context of modern society, where the concept of joint property is recognized as a social custom and a matter of state law, the Maliki school tends to accept an equal 50-50 division because it is considered to serve the public interest and maintain stability after divorce. However, if in practice an equal division actually results in injustice for example, if one party has predominantly built up the assets without the other party's involvement then the judge may consider the proportion of each party's contribution based on the principles of utility and justice.

Meanwhile, the Shafi'i school is more restrictive in its use of *ra'yu* because it assigns a more limited role to *nash* and *qiyas*. The Shafi'i school takes a more textual approach. Therefore, in the event of a dispute over the division of joint property, the

¹⁵ Syarifuddin, *Ushul Fiqh Jilid II*.

¹⁶ Wael B. Hallaq, *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 2010).

¹⁷ Abdul Wahab Khallaf, *Sejarah Pembentukan dan Perkembangan Hukum Islam* (Jakarta: Rajawali Press, 2016).

Shafi'i school tends to apply an automatic 50:50 split, as this is considered to have a clear legal basis.

The Hanbali school of thought occupies a relatively moderate position. This school is generally cautious about the use of *ra'yu*, but still allows for flexibility through the concepts of *maslahat* and the practical needs of society. Regarding joint property, the Hanbali view recognizes a wife's economic rights if she can prove that she made a tangible contribution to acquiring or increasing the family's wealth.

In the context of modern marital property, *ra'yu* serves as a tool for interpreting the reality of a husband and wife's contributions more comprehensively. Contributions are no longer interpreted narrowly as financial contributions, but also include domestic work, child-rearing, and social support that enable the accumulation of family assets. Assessing these non-financial contributions is difficult if one relies solely on a normative-formal approach without contextual rational reasoning. *Ra'yu* allows judges or lawmakers to weigh the causal relationship between domestic roles and the household's economic productivity. In many cases, the economic success of one spouse cannot be separated from the domestic role of the other spouse.¹⁸ Therefore, *ra'yu* opens up space to understand joint marital property as the result of collective labor that is not always quantifiable but is sociologically real.

Maslahat is the primary objective of using *ra'yu* in Islamic law. From the perspective of *usul al-fiqh*, valid *ra'yu* is that which aligns with *the maqāṣid asy-syari'ah*, particularly the protection of property (*hifz al-mal*) and justice (*'adl*).¹⁹ A division of marital property that is based solely on mathematical equality risks neglecting substantive public interest, particularly when the spouses' contributions are vastly disproportionate.

In the practice of religious courts in Indonesia, *ra'yu-based* considerations have begun to appear in rulings that do not rigidly apply a 50:50 division of joint property. Judges use considerations such as contributions, post-divorce economic conditions, and roles during the marriage as the basis for determining a division deemed more equitable. This phenomenon indicates that *ra'yu* has implicitly functioned as the basis for considerations of public interest, even though it has not always been explicitly stated in *the ratio decidendi*.²⁰ Judicial discretion in cases involving joint property often stems from considerations of substantive justice rooted in social and humanitarian values. Methodologically, such discretion can be justified through *ra'yu*, provided it does not conflict with the fundamental principles of sharia and positive law. Thus,

¹⁸ Euis Nurlaelawati and Arskal Salim, "Gendering the Islamic Judiciary: Female Judges in the Religious Courts of Indonesia," *Al-Jami'ah: Journal of Islamic Studies* 51, no. 2 (2013): 247–278, <https://doi.org/10.14421/ajis.2013.512.247-278>.

¹⁹ Al-Syatibi, *Al-Muwafaqat Fi Usul Al-Shari'Ah*.

²⁰ Abdul Manan, *Penerapan Hukum Acara Perdata di Lingkungan Peradilan Agama* (Jakarta: Kencana, 2018).

ra'yu serves as a bridge between written norms and the social realities faced by the parties.

Judgment No. 2440/Pdt.G/2019/PA.Smg is one of the rulings in a case involving joint property in which the judge did not divide the assets on a 50:50 basis. The panel of judges found that the majority of the disputed assets were acquired through the husband's more dominant economic contributions during the marriage. Based on the findings of the trial and the evidence presented, the judge determined that the husband was the one actively working and served as the primary source of the family's income, whereas the wife's contribution to acquiring the marital property was deemed disproportionate to the husband's contribution. Additionally, there were facts regarding the commingling of separate property and marital property, as well as funds provided by the husband's parents. Based on these facts, the judge ruled that the joint assets be divided in the proportion of 80% (or 4/5) for the husband and 20% (or 1/5) for the wife, thereby deviating from the general provision of equal division as stipulated in Article 97 of the Compilation of Islamic Law.

The judge's reasoning in this case demonstrates a rational and argumentative pattern of reasoning. From the perspective of *ra'yu*, this ruling shows that the judge has room for *ijtihad* in determining the form of justice appropriate to the concrete facts of the case. The judge held that an equal division does not necessarily reflect justice if the parties' contributions to acquiring the marital property differ significantly. Therefore, the ruling emerged from a process of legal reasoning that emphasizes the analysis of facts, evidence, and the judge's conception of justice.

From the perspective of positive law, the use of *ra'yu* is not necessarily contrary to the Compilation of Islamic Law. Article 97 of the Compilation of Islamic Law does indeed stipulate an equal division, but it does not preclude room for interpretation when applied to complex, concrete circumstances. *Ra'yu* allows for a contextual interpretation of this norm by prioritizing justice and the public interest as the primary guiding principles, rather than merely formal certainty. *Ra'yu* has the potential to resolve the tension between legal certainty and justice. In cases involving the division of marital property, legal certainty is often realized through an equal division, while substantive justice demands a proportional division. *Ra'yu* serves as a balancing mechanism that allows the law to remain certain without losing its ethical and social dimensions.²¹

The predominance of *ra'yu* in the division of marital property also reflects a paradigm shift in Islamic family law from a textual approach toward a contextual one. This shift aligns with the needs of modern Muslim societies, which are experiencing marriage relationships based on partnership rather than traditional hierarchical

²¹ M. Anshary MK, *Harta Bersama Perkawinan dan Permasalahannya* (Bandung: Mandar Maju, 2016).

relationships. *Ra'yu* provides a rational framework for interpreting these changes without having to abandon the normative legitimacy of Sharia.

Nevertheless, the use of *ra'yu* in the division of marital property is not without its challenges. One of the main risks is the judge's subjectivity in assessing contributions and determining the public interest. Therefore, *ra'yu* must be guided by the principles of ushul fiqh and the values of *maqāṣid al-sharī'ah* so that it does not degenerate into arbitrary personal opinion.²² This is where the importance of establishing a clear methodological framework for the use of *ra'yu* lies.

***Istihsan* as an Instrument for Realizing Proportional Justice**

In usul al-fiqh, *istihsan* is understood as a method of legal determination that allows a mujtahid to depart from a general rule or *literal analogy (qiyas)* in favor of another ruling deemed more just and beneficial. The majority of scholars, particularly those of the Hanafi, Maliki, and Hanbali schools, accept *istihsan* as a method of ijtihad and a *valid argument* in legal determination. They argue that *istihsan* is an effort to select a better legal basis or provision in order to achieve justice and the public interest, grounded in several verses of the Qur'an such as Surah az-Zumar, verses 17–18 and 55, as well as the hadith: "What is deemed good by the Muslims is also good in the sight of Allah." For them, *istihsan* is not merely following one's desires (), but rather a shift from one legal basis to another that is stronger and more in line with the objectives of Islamic law.²³

Conversely, the Shafi'i school rejects *istihsan* because it is considered to open the door to establishing legal rulings based on the subjectivity of human reason, outside of the nash and *qiyas*. Imam Shafi'i even stated that the use of *istihsan* is akin to creating a new sharia, which is the exclusive right of Allah. However, this difference essentially lies in the definition. Scholars such as Abdul Karim al-Namlah and al-Sam'ani explain that *istihsan*, as understood by the Hanafi school, is actually the shifting of a legal ruling to a stronger evidence, not the establishment of a ruling based on personal preference. Therefore, in substance, *the majority* of scholars actually accept the practice of *istihsan*, even though they differ in its terminology and methodological formulation.²⁴

In the context of Islamic family law, *istihsan* serves a strategic function in preventing the law from becoming normatively rigid, which could potentially lead to substantive injustice. Therefore, *istihsan* cannot be viewed as a form of legal

²² Ahmad Rofiq, *Hukum Perdata Islam Di Indonesia* (Jakarta: RajaGrafindo Persada, 2015).

²³ Abu Bakr ibn Mas'ud Al-Kasany, *Badai' Al-Shanai' fi Tartib Al-Syarai'*. Tahqiq: 'Ali Muhammad Mu'Awadh dan 'Adil 'Abd al-Maujud (Beirut: Dar al-Kutub al-'Ilmiyah, 1418 H).

²⁴ Mansur Bin Muhammad Bin Abdul Jabar Bin Ahmad Al-Maruni Al-Sam'aniy, *Al-Qawathi' fi Ushul al-Fiqh*, ditahqiq oleh Sholeh Suhail Ali 'Amudah (Aman-Yordania: Dar al-Faruq, 2010).

subjectivity, but rather as a corrective mechanism oriented toward the objectives of Sharia, particularly justice and the public interest.²⁵

In matters of marital property division, the application of the general rule of equal division often results in formal justice, but not necessarily proportional justice. The provision of Article 97 of the KHI, which explicitly stipulates a 50-50 division for each party, can methodologically be understood as a general rule.²⁶ However, when this rule is applied to a concrete situation characterized by unequal contributions, *istihsan* provides a normative space to make exceptions in order to prevent injustice.

Istihsan operates on the logic that justice is not always synonymous with quantitative equality, but rather with a balance between rights and contributions. In the context of modern marriage, economic contributions are often multidimensional, encompassing paid work, domestic labor, household management, and emotional support that enables family stability and productivity. *Istihsan* allows all these dimensions to be recognized as the basis for the division of joint property, even though not all of them can be measured in financial terms.

Istihsan aligns closely with the concept of proportional justice that has developed in modern legal theory. Proportional justice requires that the distribution of rights be based on the proportion of contributions and burdens borne by each party, rather than solely on formal status.²⁷ In this regard, *istihsan* serves as a bridge between the normative values of Sharia and contemporary principles of justice, without compromising the legitimacy of Islamic law.

In the practice of religious courts in Indonesia, the tendency to apply the principle of *istihsan* can be traced in rulings that deviate from an equal division of joint property. Judges consider the duration of the marriage, the dominant role of one party in the acquisition of assets, and post-divorce economic conditions as grounds for determining a different division of assets.²⁸

For example, in Decision No. 54/Pdt.G/2024/PTA.Mtr, the panel of judges found that during the marriage, the wife not only performed domestic duties as a homemaker but also played an active role in supporting the family's economy. Based on the judges' deliberations, the wife's economic contribution was deemed more significant than the husband's, while the husband was found to have failed to adequately fulfill his

²⁵ Syarifuddin, *Ushul Fiqh Jilid II*.

²⁶ Cik Hasan Bisri, *Kompilasi Hukum Islam dan Peradilan Agama dalam Sistem Hukum Nasional* (Jakarta: Logos, 1999).

²⁷ Ongky Alexander, "Efektivitas Pembagian Harta Gono - Gini Pasca Perceraian dalam Perspektif Yuridis Sosiologis," *El-Ghiroh: Jurnal Studi Keislaman* 16, no. 1 (2019): 113-129, <https://doi.org/10.37092/el-ghiroh.v16i01.70>.

²⁸ Muhamad Beni Kurniawan, "Pembagian Harta Bersama Ditinjau dari Besaran Kontribusi Suami-Istri dalam Perkawinan," *Jurnal Yudisial* 11, no. 1 (2018): 112-130, <https://doi.org/10.29123/jy.v11i1.224>.

obligation to provide financial support as required. This fact served as the basis for the judges' decision to deviate from the general provisions of Article 97 of the Compilation of Islamic Law, which, in principle, mandates an equal division of joint property. On that basis, the judges ruled that the joint property be divided with the wife receiving 3/4 of the share and the husband receiving 1/4. This reasoning indicates that the judge did not merely consider the parties' formal status as husband and wife but also took into account the actual contributions and burdens borne by each party during the course of the marriage.

This line of reasoning by the judge is consistent with the concept of *istihsan* in Islamic law. *Istihsan* allows a judge to depart from general provisions if applying them literally would result in injustice. In this case, if the judge had strictly applied a 50:50 division, the result would have been deemed disproportionate to the parties' actual contributions. Therefore, the judge opted for an approach that prioritizes substantive justice and the public interest by awarding a larger share to the party proven to have borne both economic and domestic burdens simultaneously.

Although the term *istihsan* is not explicitly mentioned, the pattern of argumentation used reflects the characteristics of the *istihsan* method in *usul al-fiqh*. Religious judges have, *de facto*, applied the principle of substantive justice in the division of joint property. This discretion is often viewed as a form of judicial courage in prioritizing the value of justice over formal certainty. From the perspective of *ushul fikih*, such practice can be justified through *istihsan*, provided it is based on rational considerations, strong evidence, and the pursuit of the public interest.²⁹ The judge implicitly assesses that a wife's domestic labor and economic contributions are factors that should be taken into account in the division of joint property. Such an approach demonstrates that the law is not understood in a rigid and mathematical manner, but rather as an instrument to realize the public interest and a sense of justice within society.

Istihsan also plays an important role in responding to changing gender dynamics within marriage. The shift from a hierarchical model of marriage toward a partnership model requires Islamic family law to recognize women's contributions more equitably. *Istihsan* allows for the reinterpretation of legal norms so that they are not confined to patriarchal constructs that disregard women's strategic role in the accumulation of family wealth.³⁰

²⁹ Hanifah Salma Muhammad, "Analisis Yuridis Pembagian Harta Gono Gini Berdasarkan Kontribusi Suami Istri Selama Perkawinan," *Jurnal Restorasi Hukum* 5, no. 2 (2022): 143–153, <https://doi.org/10.14421/jrh.v5i2.2354>.

³⁰ Efrinaldi, Jayusman, and Mahmudin Bunyamin, "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 (2021): 82–104, <https://doi.org/10.24042/el-izdiwaj.v2i2.11041>.

From the perspective of *maqāṣid al-sharī'ah*, *istihsan* in the division of marital property directly contributes to the protection of property (*ḥifẓ al-mal*) and the protection of life and human dignity (*ḥifẓ al-nafs wa ḥifẓ al-'ird*). An disproportionate division of assets has the potential to plunge one party into economic vulnerability after divorce, which contradicts the Sharia's objective of creating justice and well-being.

Nevertheless, the use of *istihsan* in the division of marital property is not without criticism, particularly regarding the potential for legal uncertainty. Therefore, *istihsan* cannot be applied freely and without limits, but must be framed within a clear methodological framework. These limitations include conformity with general principles of Sharia, consistency with positive law, and transparent and accountable legal reasoning.³¹

In the context of Indonesian positive law, *istihsan* can be positioned as an interpretive basis that complements the written norms in the KHI. This approach does not aim to nullify the provisions of Article 97 of the KHI, but rather to contextualize them in accordance with the specific circumstances of the parties. Thus, *istihsan* functions as a mechanism for harmonizing legal certainty and substantive justice. This demonstrates that *istihsan* plays a strategic role in shifting the paradigm of marital property division from a mechanistic approach toward one based on proportional justice. This approach aligns with developments in religious court jurisprudence and the demands of modern Muslim society, which seeks laws that are just, humane, and contextual.³²

A Normative Synthesis of Ra'yu and Istihsan within the Framework of Contemporary Law

The synthesis of *ra'yu* and *istihsan* in the settlement of marital property marks a significant shift in the paradigm of Islamic family law from a normative-formal approach toward a normative-contextual approach. *Ra'yu* provides a rational basis for interpreting social facts and the actual contributions of the parties, while *istihsan* serves as a corrective mechanism when the application of general legal principles has the potential to lead to injustice.³³ Both work complementarily to ensure that Islamic law remains rooted in the text but is not detached from social reality.

From the perspective of *usul al-fiqh*, this synthesis aligns with the view that the methods of *ijtihad* do not stand alone but rather complement one another in realizing *the maqāṣid al-sharī'ah*. Al-Shatibi emphasizes that the purpose of the sharia is to

³¹ Kadenun, "Istihsan Sebagai Sumber dan Metode Hukum Islam," *Qalamuna* 10, no. 2 (2018): 89–105, <https://doi.org/10.5281/zenodo.3559262>.

³² Lidya Anggraeni et al., "Dominasi Istri dalam Pembagian Harta Bersama," *Jurnal Cinta Nusantara* 2, no. 1 (2024): 1–11, <https://doi.org/10.63754/jcn.v2i1.32>.

³³ Wahbah Al-Zuhayli, *al-Fiqh al-Islami wa Adillatuh* (Damascus: Dar al-Fikr, 2010).

safeguard the overall well-being of humanity, and every method of *ijtihad* must be directed toward that goal. Therefore, the use of *ra'yu* without *istihsan* risks producing rulings that are rational but ethically lacking, while *istihsan* without *ra'yu* has the potential to fall into subjectivity.³⁴

In the practice of religious courts in Indonesia, although not always explicitly stated, the synthesis of *ra'yu* and *istihsan* is reflected in the judges' reasoning, which takes into account the facts of each case and then determines the division of joint property in a manner that differs from the formal provisions of Article 97 of the KHI. This pattern demonstrates that judges do not merely act as *la bouche de la loi* (the mouthpiece of the law), but as interpreters of the values of justice that are alive in society. This synthetic approach also bridges the classic tension between legal certainty and justice. Legal certainty is realized through written norms such as the KHI, while justice is realized through contextual assessments based on *ra'yu* and normative corrections through *istihsan*. Thus, the law does not stop at procedural certainty but moves toward a more responsive substantive justice.³⁵

This synthesis provides a more solid methodological foundation for judicial discretion. Discretion is no longer understood as a deviation from the law, but rather as part of the internal mechanisms of Islamic law to maintain its relevance and fairness. With *ra'yu* as a tool for analysis and *istihsan* as a tool for correction, judicial discretion gains scientific and normative legitimacy.³⁶ However, the application of the synthesis of *ra'yu* and *istihsan* must be constrained by strict methodological principles. These limitations include conformity with *the maqāṣid asy-syarī'ah*, consistency with the fundamental values of Islamic law, and transparency in legal reasoning. Without these limitations, such a synthesis risks leading to inconsistent rulings and legal uncertainty.³⁷

In the context of the Compilation of Islamic Law, the synthesis of *ra'yu* and *istihsan* is not intended to negate the norm of Article 97, but rather to contextualize it. That article can be understood as a general rule applicable under normal circumstances, while *ra'yu* and *istihsan* serve to address specific circumstances that

³⁴ Muhammad Sabir and Abdul Muher, "Maqasid Al-Syari'ah dan Metode Penetapan Hukum dalam Konteks Kekinian (Memahami Korelasi Antara Keduanya)," *Tahkim* 17, no. 1 (2021): 49–61, <https://doi.org/10.33477/thk.v17i1.1636>.

³⁵ Roro Retno Wulan Sari, Azhari Akmal Tarigan, and Muhammad Syukri Albani Nasution, "Ragam Putusan Hakim Tentang Harta Bersama: Analisis Kepastian Hukum Terhadap Putusan Pengadilan Agama Mengenai Harta Bersama di Indonesia," *Jurnal Interpretasi Hukum* 4, no. 2 (2023): 269–277, <https://doi.org/10.22225/juinhum.4.2.7569.269-277>.

³⁶ Muhammad Ikhsan and Azwar Azwar, "Istihsān dan Perannya dalam Eksplorasi Nalar Hukum Islam," *AS-Syar'e: Jurnal Syari'ah dan Hukum* 2, no. 2 (2023): 1–13, <https://doi.org/10.33507/as.v2i2.1861>.

³⁷ Sabir and Abdul Muher, "Maqasid Al-Syari'ah dan Metode Penetapan Hukum dalam Konteks Kekinian (Memahami Korelasi Antara Keduanya) .": 49-61.

require different treatment in the interest of justice. This approach also has important implications for the reform of Islamic family law in Indonesia. By adopting *ra'yu* and *istihsan* as a methodological framework, Islamic family law can evolve without always having to wait for legislative changes. Legal reform no longer depends entirely on changes to the text but also on the development of interpretive methodologies.³⁸

The synthesis of *ra'yu* and *istihsan* also reinforces the position of Islamic law as an adaptive and contextual legal system. In confronting modernity, Islamic law need not be defensive or rigid, but can demonstrate its inherent capacity for renewal through the legitimate and time-tested mechanism of *ijtihad*. This finding enriches the discourse on Islamic family law by offering an integrative analytical framework. Studies of marital property no longer stop at a comparison of norms but move toward a methodological analysis of how the law should function in practice.

Thus, the synthesis of *ra'yu* and *istihsan* affirms that the resolution of modern marital property division requires a holistic *ijtihad* approach. Islamic family law must not only be formally just but also substantively just and proportional. This approach ensures that the law remains an instrument of justice, not merely a normative administrative tool. The integration of *ra'yu* and *istihsan* serves as a strong normative foundation for developing a model for the settlement of marital property that is fair, contextual, and relevant to the realities of Indonesian Muslim society. This synthesis not only addresses the practical needs of the judiciary but also makes a significant theoretical contribution to the development of contemporary Islamic family law.

Implications for the Reform of the Compilation of Islamic Law (KHI)

The most significant implication of developments in religious court practice regarding the division of joint property is the need to reform Article 97 of the Compilation of Islamic Law (KHI). The current wording of the article, which stipulates that a widow or widower is each entitled to "half" of the joint property, essentially represents a paradigm of formal justice oriented toward mathematical equality. In reality, the dynamics of contemporary Muslim family relationships show that the contributions of husbands and wives in acquiring, maintaining, and developing joint property are not always balanced. In many cases, judges have in fact applied a proportional justice approach by considering the economic and non-economic contributions of the parties, so that the division is no longer strictly 50:50. This phenomenon highlights a gap between the textual norms of the KHI and the evolving legal practices in religious courts.

On this basis, future reform of Article 97 of the KHI should be directed toward changing the wording of the provision from a "half" division to a more flexible and

³⁸ Sari, Azhari Akmal Tarigan, and Muhammad Syukri Albani Nasution, "Ragam Putusan Hakim Tentang Harta Bersama: Analisis Kepastian Hukum Terhadap Putusan Pengadilan Agama Mengenai Harta Bersama di Indonesia.": 269-277.

contextual formulation for example, by stipulating that “joint assets shall be divided proportionally based on each party’s contributions as determined by the judge.” Such a formulation would provide judges with greater methodological leeway to assess the concrete facts within a household, including domestic contributions, child-rearing, and social support factors that have traditionally been difficult to quantify financially but play a crucial role in the accumulation of family assets. This reform would also strengthen the legitimacy of the jurisprudence that has developed within religious court practice, particularly rulings that deviate from equal division in order to achieve substantive justice.

Furthermore, this change will bring the KHI more in line with the principle of *maqāṣid asy-syarī'ah*, which emphasizes the protection of justice and the public interest. Justice in Islamic family law is not merely understood as numerical equality, but rather as a balance between the rights, obligations, and contributions of the parties throughout the marriage. Therefore, the reform of Article 97 of the KHI does not mean eliminating legal certainty, but rather shifting the legal orientation from a mechanistic approach toward one that is more adaptive, humane, and responsive to the social realities of modern Indonesian Muslim society. Thus, the KHI functions not only as a formal legal instrument but also as a means of realizing substantive justice in the resolution of disputes over joint property.

CONCLUSION

Fairness in the division of marital property is best understood within the framework of proportional justice. Proportional justice requires that the division of property reflect the relative weight of each party’s contributions and burdens borne during the marriage, so as not to reduce either domestic or productive roles to mere legal formalities. The synthesis of *ra'yu* and *istihsan* allows judges or lawmakers to contextually assess the working relationships, sacrifices, and responsibilities undertaken by husbands and wives, while ensuring that rulings align with the primary objectives of Sharia namely, the realization of public interest and tangible justice.

Thus, the fair division of joint property in the context of contemporary Muslim society requires an adaptive, rational, and substantive-justice-oriented approach to *ijtihad*. Marital property must be divided proportionally based on actual contributions, not rigidly based on the assumption of formal equality. This approach not only strengthens the legal legitimacy of Islamic family law in judicial practice but also affirms the inherent capacity of Islamic law to respond to social change without losing its normative foundation and values of justice.

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