

Istihsān and Judicial Recalibration of Marital Property Rights in Indonesia's Religious Courts

doi [10.15408/ajis.v26i1.50333](https://doi.org/10.15408/ajis.v26i1.50333)

Darmawan^{1*}, Nur Lailatul Musyafaah², Mohammad Ikhwanuddin³, and Muhammad Syafiq Mughni⁴

^{1,2}UIN Sunan Ampel Surabaya, Indonesia, ³Universitas Muhammadiyah Surabaya, Indonesia, ⁴Institut Alif Muhammad Imam Syafi'i Lamongan, Indonesia

✉ Author Corresponding: darmawan@uinsa.ac.id*

Abstract

This study analyzes the evolution of marital property division (*harta bersama*) jurisprudence in Indonesia's Religious Courts through the lens of *istihsān* as a method of Islamic legal reasoning (*uṣūl al-fiqh*). Traditionally, courts applied a rigid 50:50 division upon divorce or death, grounded in the Compilation of Islamic Law and Law No. 1 of 1974. Recent Supreme Court cassation decisions, however, demonstrate a shift toward proportionate division while maintaining doctrinal coherence. Using doctrinal analysis and a structured synthesis of three leading decisions, this study identifies three jurisprudential patterns: 1) reaffirmation of equal division when deviation is unjustified; 2) calibrated adjustment based on economic contribution, unpaid domestic labor, maintenance failure, and childcare responsibilities; and 3) proper sequencing in death cases by allocating marital property before distributing the estate through inheritance. These rulings operationalize *istihsān* within the *maqāsid al-sharī'ah* framework to achieve substantive justice where formal equality undermines fairness. The study proposes a practical framework to enhance consistency, gender justice, and legal certainty in future adjudication.

Abstrak

Penelitian ini menganalisis perkembangan yurisprudensi pembagian harta bersama di Pengadilan Agama Indonesia melalui pendekatan *istihsān* sebagai metode penalaran hukum Islam (*uṣūl al-fiqh*). Selama ini, pengadilan cenderung menerapkan pembagian kaku 50:50 dalam perkara perceraian maupun kematian, sebagaimana diatur dalam Kompilasi Hukum Islam dan Undang-Undang Nomor 1 Tahun 1974. Namun, sejumlah putusan kasasi Mahkamah Agung terbaru menunjukkan pergeseran menuju pembagian proporsional tanpa meninggalkan konsistensi doktrinal. Melalui analisis doktrinal dan sintesis terstruktur terhadap tiga putusan kunci, penelitian ini mengidentifikasi tiga pola utama: 1) penguatan pembagian setara ketika tidak terdapat alasan pembeda; 2) penyesuaian proporsional berdasarkan kontribusi ekonomi, kerja domestik tidak dibayar; 3) kegagalan *nafkah*, dan beban pengasuhan anak; 3) serta penegasan urutan hukum dalam perkara kematian dengan memisahkan harta bersama sebelum pembagian waris. Pendekatan ini menempatkan *istihsān* dalam kerangka *maqāsid al-sharī'ah* untuk mewujudkan keadilan substantif, kepastian hukum, dan keadilan gender.

Keywords:

Gender justice; Islamic court; *Istihsān*; Legal interpretation; Marital Property Right (MPR)

How to Cite:

Darmawan., et al. (2026). The Progressiveness of Sharia Economic Fatwas: Direction of Islamic Legal Thoughts within NU and Muhammadiyah. AHKAM: Jurnal Ilmu Syariah, 26(1). <https://doi.org/10.15408/ajis.v26i1.50333>

Introduction

The adjudication of marital property disputes in Indonesia's Religious Courts presents a compelling case for examining how classical Islamic legal methodology (*uṣūl al-fiqh*) operates within a modern codified legal system (Khosyi'ah, 2018). At the heart of this inquiry lies *istiḥsān*, a method of juristic preference that authorizes departure from general rules when strict application would frustrate justice or public welfare (*maṣlaḥah*). This methodological tool, developed extensively in the Hanafi school, finds contemporary expression in Indonesian cassation jurisprudence that calibrates marital property division beyond mechanical equality toward context-sensitive proportionality (al-Shāṭibī, 1975; Hefni et al., 2025; Mudzhar & Atho', 1994; Wibowo & Fathiyaturrahmah, 2025).

For over three decades, Indonesia's Religious Courts have adjudicated marital property (*harta bersama*, conceptually related to *shirkah* in classical *fiqh*) on the premise that assets acquired during marriage are divided equally upon dissolution (Daud & Saputra, 2017; Rajafi, 2019). This default is grounded in the *Kompilasi Hukum Islam* (Compilation of Islamic Law; KHI), particularly Articles 1(f), 96(1), and 97, as well as Articles 35–37 of Law No. 1 of 1974 on Marriage (Direktorat Pembinaan Badan Peradilan Agama, 1991; Mashdurohatun, 2020; Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan, 1974). The equal split has operated as both a settlement-facilitating default and a gender-protective device where women's labor remains heavily domestic and undocumented (Anderson & Bidner, 2015; Chen et al., 2018; Kurniawan, 2017; Nurlaelawati, 2010; Setiyawan et al., 2024; Zavareh, 2023).

Recent Supreme Court cassation decisions reveal a shift toward proportionate division that is sensitive to contribution, fault, and post-divorce caregiving responsibilities, while acknowledging the statutory baseline. Some judgments reaffirm the 50:50 rule, where evidence does not justify a departure from equal division. Others allocate shares such as 25:75, 40:60, or 2:1, depending on demonstrated economic contribution, unpaid domestic labor, persistent maintenance (*nafkah*) failure, and asset registration. Illustrative examples include Supreme Court Decision No. 266/K/AG/2010, Supreme Court Decision No. 197 K/Ag/2015, and Supreme Court Decision No. 164/K/AG/2015 (Mahkamah Agung, 2016, 2017; Putusan MA No.266/K/AG/2010, 2010).

Although not all decisions explicitly deploy Islamic legal theory vocabulary, many display reasoning that resonates with *istiḥsān*. In Islamic jurisprudence, *istiḥsān* authorizes departure from a general rule (*qiyās jalī*) where strict application would frustrate justice, framed as choosing a stronger legal consideration (*dalīl akhaṣṣ*) that better realizes *maṣlaḥah* (A. Hasan, 1977). The classical debate between Imam al-Shāfi'ī, who rejected *istiḥsān* as arbitrary, and Hanafi jurists who systematized it through categories such as *istiḥsān bi al-naṣṣ* (text-based), *istiḥsān bi al-maṣlaḥah* (welfare-based), and *istiḥsān bi al-darūrah* (necessity-based), demonstrates the method operates within recognizable constraints (al-Sarakhsī & Sahl, 1993; al-Shāṭibī, 1975; Belhaj, 2012; A. Hasan, 1977; Hefni et al., 2025; Nashirudin, 2009; Opwis, 2008; Saleh, 2019; Shahawy, 2019). Indonesian judicial practice aligns most closely with *istiḥsān bi al-maṣlaḥah*, in which the general rule yields to calibrated adjustment serving the objectives of marriage law: protecting vulnerable spouses, recognizing marital contributions, and preventing injustice (*ẓulm*) (M. Hasan, 2023).

The judicial mandate to excavate living values reinforces this interpretive openness, as articulated in Article 229 of the KHI and Article 5(1) of Law No. 48 of 2009 (Direktorat Pembinaan Badan Peradilan Agama, 1991; Sudrajat et al., 2022). Two landmark Constitutional Court decisions have significantly shaped the evidentiary landscape. Constitutional Court Decision No. 64/PUU-X/2012 established a judicially supervised exception to bank secrecy (Iskandar, 2023; Mahkamah Konstitusi Republik Indonesia, 2013), while Constitutional Court Decision No. 69/PUU-XIII/2015 affirmed the validity of post-nuptial agreements (Mahkamah Konstitusi Republik Indonesia, 2015; Turatmiyah, 2019).

The doctrinal shift stakes are significant for legal certainty and gender justice (Hook, 2019; Sudrajat et al., 2022). Where documentary evidence of paid work and registered titles is available, courts may privilege monetary contribution. Domestic labor often lacks standardized proof and can be systematically undervalued unless judges treat unpaid care as wealth-enabling labor. Without frameworks recognizing indirect contributions, proportionate division risks reproducing structural gender bias (Hook, 2019; Khadijah et al., 2017; Mutiso, 2019; Rahmawati, 2020; Zavareh, 2023).

From a *fiqh al-mu'āmalāt* perspective, the equal division principle reflects the *shirkah* (partnership) character of marital economic relationships. The KHI's *harta bersama* concept operationalizes that marriage creates not merely personal status (*nikāh*) but economic partnership wherein both spouses contribute through income generation or domestic labor, enabling the other's productivity (Kurniawan, 2017). This understanding finds support in classical discussions of *shirkah al-'aqd* and the principle that contribution (*sa'y*) establishes entitlement (*haqq*) (al-Shāfi'ī & Idrīs, 1983). Indonesian legal development has been narrated as integrating Islamic jurisprudence, statutory law, and judicial practice, forming what is known as a National Madhhab (Fahimah et al., 2024; Feener, 2002).

The question of how marital property should be divided upon divorce or death extends beyond a purely domestic legal issue in Indonesia. It forms part of a broader global discourse that has gained increasing significance in contemporary family law across both Muslim-majority and legally pluralistic societies. Four interrelated concerns animate this discourse. The first is the pursuit of justice in recognizing both monetary and non-monetary contributions to marital wealth. This challenge arises wherever formal legal frameworks default to rigid division rules without accounting for the unequal distribution of paid and unpaid labor within marriage.

The second is the navigation of legal pluralism, particularly in jurisdictions where religious, customary, and state law intersect and sometimes conflict in governing marital property rights, creating interpretive tensions that courts must resolve through principled reasoning rather than mechanical application of any single normative source (Feener, 2002; Nurlaelawati, 2010). The third is the advancement of gender equality, which requires that legal frameworks move beyond formal symmetry toward substantive recognition of the structural conditions that shape spousal contributions, including the persistent undervaluation of domestic and caregiving labor that disproportionately falls on women (Hook, 2019; Mutiso, 2019; Rahmawati, 2020). The fourth is the protection of spouses' rights in an era of evolving family structures, where changes in employment patterns, household arrangements, and marriage duration create new vulnerabilities that rigid property division rules are ill-equipped to address (Anderson & Bidner, 2015; Chen et al., 2018).

Comparative frameworks from Malaysia's *harta sepencarian* doctrine, Morocco's Mudawwana reforms, and Egyptian jurisprudence on *ujrat al-mithl* all reflect a shared recognition that formal equality in property division often fails to capture the substantive realities of marital contribution. Indonesia's Religious Courts stand at the intersection of these global currents, making the evolution of their marital property jurisprudence a case study of broader significance for Islamic family law reform worldwide (Khadijah et al., 2017; Khosyi'ah, 2018).

Three gaps motivate this study. First, no consolidated mapping of cassation-level marital property outcomes juxtaposes apportionment ratios with ratio decidendi, including explicit or implicit *istihsān* use. Second, an integrated analytical framework linking *istihsān* and *maqāṣid al-sharī'ah* with contemporary legal hermeneutics is needed, addressing the classical tension between *zāhir al-naṣṣ* (apparent textual meaning) and *maqṣūd al-shāri'* (lawgiver's intended purpose). Third, no widely endorsed doctrinal tool disciplines judicial discretion while protecting gender equality baselines.

This article pursues two research questions. First, how and why do cassation panels depart from the 50:50 default, and what legal reasoning patterns, including *istihsān* use, can be identified? Second, what are the implications for legal certainty (*dabt*) and gender justice (*'adālah jinsiyyah*), particularly regarding systematically undervaluing domestic work?

Method

This study employs a doctrinal and jurisprudential design that integrates black-letter analysis of primary legal sources with structured synthesis of Supreme Court cassation decisions (Ayu et al., 2022; Duarte et al., 2019; Slocum, 2015). The methodological approach is grounded in the *uṣūl al-fiqh* analytical framework, examining how *istihsān* operates as an interpretive tool within codified Islamic family law. Primary sources include KHI (Articles 1(f), 96, 97, 171), Law No. 1 of 1974 (Articles 35-37), Law No. 48 of 2009 (Article 5(1)), and Constitutional Court Decision No. 64 of 2012 and Constitutional Court Decision No. 69 of 2015. Secondary sources include classical *uṣūl al-fiqh* texts by al-Shāṭibī, al-Sarakhsī, and al-Shāfi'ī (al-Shāṭibī, 1975; Hudaefi & Noordin, 2019).

Case selection focused on three leading decisions: Supreme Court Decision No. 266/K/AG/2010 (divorce, 25:75 favoring wife), Supreme Court Decision No. 197 K/Ag/2015 (death, 40:60 sequencing before inheritance), and Supreme Court Decision No. 164/K/AG/2015 (divorce, 2:1 contribution-based). Cases were selected for doctrinal influence and pedagogical value, prioritizing those demonstrating engagement with justice (*'adl*), welfare (*maṣlahah*), and contribution (*sa'y*) principles. The selection also reflects a deliberate effort to capture variation across dispute types, apportionment outcomes, and *istihsān* categories, ensuring that the analytical framework developed here is grounded in a range of judicial contexts rather than a single fact pattern. While three decisions cannot constitute a statistically representative sample of Indonesian Religious Court jurisprudence, they function as paradigmatic cases (*nawāzil*) in the classical *uṣūl al-fiqh* tradition, serving as the evidentiary basis from which general legal principles are derived and refined. This methodological choice is consistent with doctrinal legal research that prioritizes theoretical depth and principle development over quantitative breadth (Duarte et al., 2019; Slocum, 2015).

The analytical framework draws on *istihsān* and *maqāṣid al-sharī'ah* combined with contemporary legal hermeneutics. Each case was analyzed in three layers: identifying baseline rules and departure ratios establishing *zāhir al-naṣṣ* of KHI Articles 96-97; reconstructing *ratio decidendi* by aligning facts with normative anchors, identifying evidentiary basis including economic contribution (*musāhamah māliyyah*), domestic labor (*'amal manzili*), maintenance failure (*taqṣīr fī al-nafaqah*), and childcare burdens (*a'bā' al-ḥiḍānah*); and interpreting outcomes through *maqāṣid* framework assessing whether departures serve Islamic family law objectives, particularly *ḥifẓ al-nasl* (preserving lineage/children's welfare) and *ḥifẓ al-māl* (preserving property through just distribution).

The interpretive method aligns with Hanafī *istihsān* categorization. *Istihsān bi al-naṣṣ* applies where specific KHI provisions authorize contextualized interpretation. *Istihsān bi al-maṣlahah* applies where courts adjust apportionment to prevent harm (*mafsadah*) to vulnerable spouses or children. *Istihsān bi al-darūrah* applies in severe fault cases where strict equality perpetuates injustice (Saleh, 2019; Shahawī, 2019).

Limitations are threefold. First, the study analyzes three leading cases rather than comprehensive datasets, supporting theory development but not statistical generalization, consistent with traditional *uṣūl al-fiqh* methodology, which develops legal principles through paradigmatic cases (*nawāzil*). Second, published judgments do not uniformly record full evidentiary detail on domestic contributions. Third, time-use reconstruction and structured

affidavits for valuing unpaid care remain underdeveloped. These limitations underscore the need for standardized *ḍawābiḥ* (regulatory factors) and transparent *ta'īl* (reasoning justification) in future Supreme Court guidance.

Overview of Observed Patterns at the Cassation Level

The analyzed cassation decisions indicate three broad outcome patterns in marital property rights disputes within Indonesian Religious Courts. First, some panels reaffirm the equal division baseline, where the record does not demonstrate compelling reasons to depart, and maintain the partnership ethic embedded in KHI Articles 96-97. Second, a number of decisions move toward proportionate division that reflects economic contributions, domestic and caregiving work, persistent failure of maintenance, and post-divorce childcare burdens, operationalizing *istiḥsān bi al-maṣlahah* to prevent outcomes that would constitute *ẓulm* in concrete circumstances. Third, in death cases, the Supreme Court consistently separates the marital property pool before applying inheritance rules (*farā'id*) and will, on evidence, assign more than 50% to the deceased spouse before distribution to heirs, properly sequencing the analysis under KHI Article 171(d) (Direktorat Pembinaan Badan Peradilan Agama, 1991; Mahkamah Agung, 2016, 2017).

These patterns advance existing scholarship by providing the first structured analysis of apportionment ratios alongside their *ratio decidendi*, revealing that Indonesian panels operationalize *istiḥsān* even when not explicitly invoking the term (Nurlaelawati, 2010). The patterns documented here fill the gap between general recognition of equal division principles and the actual judicial practice of calibrated departures, demonstrating how *ijtihād* continues within codified legal systems through principled flexibility rather than mechanical application.

Table 1 presents a concise summary of three leading cassation decisions, selected for their clear apportionment ratios, articulated reasoning, and doctrinal influence on lower courts. The analysis explicitly maps each case onto the Hanafī categorization of *istiḥsān* types to demonstrate how classical *uṣūl al-fiqh* methodology operates within contemporary Indonesian jurisprudence.

Before examining the patterns that emerge from these decisions, it is important to situate each case within its factual and procedural context briefly. Supreme Court Decision No. 266/K/AG/2010 arose from a divorce dispute. The wife sought a larger share of the marital assets, arguing that she had been the primary contributor to their acquisition. She also alleged that the husband had persistently failed to fulfill his legal obligation to provide maintenance (*naḥkah*) and had engaged in abusive conduct. The lower courts had applied the default 50:50 division, which the Supreme Court subsequently revised at the cassation level upon finding that the evidentiary record clearly supported contribution asymmetry (Putusan MA No.266/K/AG/2010, 2010). Supreme Court Decision No. 197 K/Ag/2015 involved a dispute over the estate of a deceased wife, where the surviving husband and other heirs contested the extent of the marital property share prior to inheritance distribution. The central issue was whether the court should first delineate the deceased wife's share of joint marital assets before applying inheritance rules, a sequencing question with significant consequences for the quantum available to each heir (Mahkamah Agung, 2016).

Supreme Court Decision MA No. 164/K/AG/2015 concerned a divorce case in which the wife sought equal division under the KHI default, while the husband argued that his substantially greater economic contribution to asset acquisition warranted a proportionate departure. The Supreme Court found a sufficient evidentiary basis to adjust the apportionment in a ratio of 2:1 in favor of the husband, while affirming that the equal division rule remained the baseline from which departure must be justified (Mahkamah Agung, 2017).

Table 1.
Summary of Selected Cassation Decisions with *Uṣūl al-Fiqh* Analysis

Case number	Posture	Core facts	Normative anchors	Istiḥsān Type Applied	Final apportionment
MA No. 266/K/AG/2010	Divorce	Husband persistently failed <i>nafkah</i> duties. Evidence showed the wife primarily acquired and titled disputed assets. Wife carried child-rearing burdens. Allegations of abusive conduct documented.	KHI Articles 1(f), 97, 229; Law No. 48 of 2009 Article 5(1)	<i>Istiḥsān bi al-maṣlahah</i> : Court departed from equal division to prevent <i>mafsadah</i> (harm) where strict equality would reward fault and ignore contribution asymmetries. <i>Istiḥsān bi al-darūrah</i> : Severe fault (<i>taqṣīr fī al-nafaqah</i>) combined with violence created a necessity for protective adjustment.	25% husband, 75% wife (Putusan MA No. 266/K/AG/2010, 2010).
MA No. 197 K/Ag/2015	Death	No children. Dispute over inheritance. Substantial marital assets with evidence of strong contribution by the deceased wife during marriage.	KHI Articles 96(1), 171(d); requirement to separate marital property from inheritance	<i>Istiḥsān bi al-naṣṣ</i> : KHI Article 96(1) explicitly requires vesting the survivor's share before inheritance, providing textual authorization for sequencing. <i>Istiḥsān bi al-maṣlahah</i> : Recognizing deceased wife's larger contribution (60%) before applying <i>farā'id</i> advances <i>hiḏm al-māl</i> by ensuring just distribution.	40% husband, 60% deceased wife, then <i>farā'id</i> applied to 60% (Mahkamah Agung, 2016).
MA No. 164/K/AG/2015	Divorce	Wife sought an equal split. The court found differential contributions warranting an adjustment from baseline.	KHI Article 97 as baseline, with KHI Article 229 and Law No. 48 of 2009 Article 5 paragraph 1 as interpretive mandates.	The Court endorsed a proportionate allocation after finding contribution asymmetries. The reasoning aligns with an <i>istiḥsān</i> -oriented move that tempers formal equality in favor of justice in the concrete case, while maintaining systemic coherence with KHI.	Two to one in favor of the husband, as recorded in the judgment. See Supreme Court 2017.

The three decisions illustrate a common methodology grounded in *uṣūl al-fiqh* reasoning. Panels identify the baseline rule (*zāhir al-naṣṣ*), confirm whether evidence supports departure (*dalīl akhas*), then articulate justice-based reasons (*ta'līl*) for the deviation. In Supreme Court Decision No. 266/K/AG/2010, the Court's reasoning combines *istiḥsān bi al-maṣlahah* (preventing harm to a vulnerable spouse) with *istiḥsān bi al-darūrah* (severe fault

creating necessity), demonstrating how multiple *istihsān* categories can operate concurrently when circumstances warrant protective intervention. The use of 75% allocation reflects judicial assessment that the wife's dual role as primary acquirer and caregiver, combined with the husband's persistent *nafkah* failure, created contribution asymmetries that mechanical equality would fail to recognize.

In Supreme Court Decision No. 197 K/Ag/2015, the Court's sequencing approach exemplifies *istihsān bi al-naṣṣ*, wherein explicit textual authorization (KHI Article 96(1)) provides the *dalīl* for contextual application. The decision to allocate 60% to the deceased wife before applying inheritance rules advances *ḥifẓ al-māl* (preservation of property through just distribution), one of the five essentials *maqāṣid*. This sequencing prevents a common error where courts treat the entire marital property pool as inheritance, thereby diluting the surviving spouse's partnership entitlement. The approach aligns with classical *fiqh* principles, distinguishing between *milk al-zawjayn* (joint spousal ownership) and *tirkah* (estate for inheritance distribution).

Supreme Court Decision No. 164/K/AG/2015 demonstrates *istihsān bi al-maṣlahah* in its purest form, where no explicit textual authorization mandates departure but welfare considerations justify calibrated adjustment. The Court's acknowledgment that equal division is the starting point preserves systemic coherence, while the 2:1 allocation reflects documented contribution evidence. This case reveals the tension between formal equality and substantive fairness, resolved through *istihsān* as a bridge between *ẓāhir al-naṣṣ* and *maqṣūd al-shārīʿ*.

Across all three decisions, a consistent but underexamined dimension emerges: the relationship between these judicial outcomes and the broader imperative of gender justice. The patterns documented above are not merely technical adjustments to apportionment ratios. They represent a judicial reckoning with a structural reality that has long shaped marital property disputes in Indonesia and beyond, namely the systematic invisibility of domestic labor as a form of marital contribution (Nurlaelawati, 2010; Zavareh, 2023). In the vast majority of Indonesian households, the gendered division of labor assigns women a disproportionate share of unpaid domestic and caregiving work, including household management, child-rearing, emotional sustenance of the family unit, and the sacrificing of career opportunities to support the other spouse's professional advancement (Hook, 2019; Mutiso, 2019; Rahmawati, 2020). This labor is real, economically significant, and materially wealth-enabling, yet it leaves few formal traces in the documentary record that courts conventionally rely upon (Anderson & Bidner, 2015; Khadijah et al., 2017).

The cassation decisions analyzed here reflect an emergent judicial awareness that a property division framework anchored exclusively in formal financial contribution will systematically disadvantage those whose contributions took domestic rather than market form. By departing from mechanical equal division and recognizing contribution asymmetries that include non-monetary inputs, these decisions begin to correct a long-standing pattern of legal invisibility that has historically worked against women in marital property adjudication (Attah, 2018; Mutiso, 2019). This trajectory is consistent with the *maqāṣid al-sharīʿah* objective of *ḥifẓ al-nasl*, understood broadly as protecting the conditions necessary for dignified and just family life, including fair recognition of those whose labor sustains it (al-Shāṭibī, 1975; Hudaefi & Noordin, 2019).

Interpreting Judicial Moves through *Istiḥsān*, *Maqāṣid*, & Legal Hermeneutics

The doctrinal architecture of KHI and Law No. 1 of 1974 provides a general framework for marital assets classification and division. KHI Article 97 requires equal division upon divorce, while Article 96(1) requires that in death cases, half of the marital property immediately vests in the surviving spouse. These rules express a partnership ethic (*shirkah*) and historically created a gender-protective floor where women's contributions are often indirect or domestic (Nurlaelawati, 2010). Where courts face hard cases in which mechanical application would frustrate justice, panels invoke justice-based reasoning aligning with *istiḥsān* and the statutory duty in Law No. 48 of 2009, Article 5(1), to follow living values and social justice.

In Islamic legal theory, *istiḥsān* is a method for choosing a stronger justification that better advances *maṣlaḥah* in a particular case. It permits departure from a general rule where strict application would generate hardship or injustice, provided the departure is tethered to recognized *maqāṣid*. Classical expositions describe several subtypes: reliance on a text that displaces an analogy (*istiḥsān bi al-naṣṣ*), consensus (*istiḥsān bi al-ijmāʿ*), necessity (*istiḥsān bi al-darūrah*), custom (*istiḥsān bi al-ʿurf*), or welfare (*istiḥsān bi al-maṣlaḥah*) (al-Sarakhsī & Sahl, 1993; Hefni et al., 2025). These categories translate into modern judicial practice through hermeneutic tools of ordinary meaning, purposive reading, and systemic integration.

The Indonesian panels deploy justice language to justify calibrated departures. In Supreme Court Decision No. 266/K/AG/2010, the repeated *naṣṣ* failure combined with evidence about the wife's earnings, asset registration, and child-rearing burden created reasons making equal division an inadequate proxy for justice. The Court's move exemplifies *istiḥsān bi al-maṣlaḥah* since the distribution better reflects actual contributions and protects the welfare of children and the spouse who performed both acquisition and caregiving roles, thereby advancing *ḥifẓ al-nasl* (preservation of lineage through protecting children) alongside *ḥifẓ al-māl*.

From a *fiqh al-muʿāmalāt* perspective, this reasoning operationalizes the principle that contribution (*saʿy*) establishes entitlement (*ḥaqq*). Classical jurists recognized that *shirkah al-ʿaqd* (contractual partnership) requires proportionate distribution based on each partner's input, though they developed this principle primarily in commercial contexts. The contemporary judicial challenge lies in adapting *shirkah* principles to marital contexts where contributions include not only monetary capital but also domestic labor, caregiving, and opportunity costs such as career sacrifice. The KHI's *harta bersama* concept provides the statutory bridge. However, its operationalization requires judges to develop evidentiary standards that capture non-monetary contributions, a gap that *istiḥsān bi al-maṣlaḥah* helps address by authorizing contextual adjustments advancing substantive fairness.

The implication is that Indonesian courts do not abandon the KHI structure but rather operationalize a two-step reasoning path grounded in *uṣūl al-fiqh* methodology. Step one affirms the KHI default (*ẓāhir al-naṣṣ*), signaling partnership and protecting gender equality. Step two evaluates whether the record contains factors justifying different apportionment, with explicit reference to justice and living values. Where departure is justified, it must be explained (*taʿlīl*), linked to objective indicators, and rationalized as promoting welfare (*maṣlaḥah*) and preventing harm (*mafsadah*) in that particular case, preserving coherence with *maqāṣid* (al-Shāṭibī, 1975; Hudaefi & Noordin, 2019).

Structured Matrix of Factors for Proportionate Division

To reconcile equity with certainty, courts require a structured tool for reasoning about departures from an equal split. Table 2 offers a proposed matrix synthesizing factors recurring

in Indonesian judgments and comparative literature. The matrix does not bind outcomes mechanically but provides transparent considerations, indicates evidence types, and specifies safeguards protecting against undervaluation of domestic and care work. Each factor is analyzed through the lens of classical *fiqh* principles to demonstrate doctrinal continuity.

Table 2.
Matrix of Factors for Proportionate Division with *Fiqh* Foundations

Factor	Typical evidence	Presumptive effect	<i>Fiqh</i> Foundation	Safeguards
Economic contribution to acquisition (<i>musāhamah māliyyah</i>)	Payslips, bank statements, tax returns, business records, and property purchase documents.	Upward adjustment where the spouse demonstrates sustained quantitatively significant contributions.	Classical <i>shirkah</i> principle: capital contribution (<i>ra's al-māl</i>) establishes proportionate entitlement in partnership (al-Shāfi'ī & Idrīs, 1983).	Do not reduce the other spouse below 50% solely on this factor. Consider that domestic work enabled an earning spouse to generate income (Khadijah et al., 2017).
Domestic and caregiving labor (<i>'amal manzilī</i>)	Custody orders, time-use narratives, school/health records, community attestations, and evidence of career sacrifices.	Positive weight as wealth-enabling contribution, substituting for market services.	The principle that labor (<i>'amal</i>) creates value; domestic services have calculable market value (<i>ujrat al-mithl</i>) in Islamic law (Anderson & Bidner, 2015).	Create a rebuttable parity presumption between domestic labor and economic input where both are substantial. Avoid requiring impossible proof for each hour.
Fault, especially persistent <i>nafkah</i> failure or violence (<i>taqṣīr ft al-nafaqah</i>)	Prior judgments, police/medical reports, social services records, and corroborated testimony.	Downward adjustment for at-fault spouse where fault is serious, persistent, causally linked to deprivation.	<i>Nafkah</i> is a mandatory obligation (<i>wājib</i>); persistent failure constitutes breach of marital contract, creating liability (Direktorat Pembinaan	Guard against opportunistic allegations. Require probative evidence. Consider that some fault may have

				Badan Peradilan Agama, 1991).	triggered separate family law remedies.
Title registration assets	and of	Land certificates, vehicle registrations, share certificates	Weak proxy for contribution. Use as corroboration only.	Islamic law distinguishes formal title (<i>milk zāhir</i>) from substantive ownership (<i>milk bāṭin</i>) based on actual contribution (Al-Shayrāzy & Al-Fayrūzabādy, 1992).	Avoid formalism that rewards opportunistic titling. Substantive acquisition history should control.
Post-divorce childcare burdens (<i>a 'bā' al-ḥiḍānah</i>)		Parenting plans, custody arrangements, school obligations, and medical care responsibilities.	Upward adjustment for the custodial parent, possibly as a lump sum or percentage uplift.	<i>Ḥiḍānah</i> (childcare) is a recognized obligation in Islamic family law, creating entitlement to support; advancing <i>ḥifz al-nasl</i> (<i>maqāṣid</i>).	Consider time limits and rebalancing if custody changes. Ensure uplift does not duplicate maintenance awards.
Debts and liabilities incurred for family benefit.		Loan contracts, bank statements showing payment, and creditor testimony.	Shares adjusted net of liabilities. Spouse who benefited more or who incurred debt unilaterally may bear a larger portion.	Partnership principle: debts incurred for partnership benefit reduce shared assets before distribution (Kurniawan, 2017).	Protect the non-incurring spouse from private debts that did not benefit the family.
Special equities		Disability, major career sacrifice, relocation for others' employment, and long separations.	Discretionary increments where evidence shows significant opportunity costs or vulnerability.	Principle of preventing harm (<i>mafsadah</i>) and recognizing sacrifice as a contribution form.	Document with employment records, medical evidence, and credible testimony.

The matrix operationalizes *istiḥsān* and *maqāṣid* by making explicit that departures aim to advance welfare (*maṣlahah*) and prevent harm (*mafsadah*) in concrete cases while keeping outcomes within a predictable range. Each factor reflects classical *fiqh* principles adapted to contemporary marital property contexts. The economic contribution factor draws on *shirkah* jurisprudence, recognizing capital input as a basis for entitlement. The domestic labor factor operationalizes the principle that labor (*'amal*) creates value, extending classical discussions of *ujrat al-mithl* (fair wage for comparable work) to household contexts. The fault factor

reflects the mandatory nature of *nafkah* obligations and the principle that contractual breach creates liability. The post-divorce childcare factor advances *hifẓ al-nasl*, one of the five essential *maqāṣid*, by ensuring that custodial parents receive adequate resources.

A dimension that the matrix must explicitly address concerns the evidentiary treatment of non-economic contributions in marital property disputes. The analyzed cassation decisions reveal that Indonesian judges did not confine their assessment to formal financial documents such as paystips, bank statements, or property registration records. Instead, the courts extended recognition to a broader evidentiary register encompassing testimonial accounts of domestic roles, patterns of childcare responsibility, records of maintenance failure, and circumstantial evidence of contribution asymmetry (Mahkamah Agung, 2016, 2017; Putusan MA No.266/K/AG/2010, 2010).

This judicial posture reflects an important methodological commitment: that the legal valuation of marital contribution must correspond to the full reality of spousal labor, not merely to its formally documented and monetized fraction. Non-economic contributions, including domestic work, childcare, emotional support, and career sacrifice, are structurally invisible in conventional evidentiary frameworks because they leave few formal documentary traces (Khadijah et al., 2017; Mutiso, 2019). A spouse who forgoes employment to manage the household, raise children, and enable the other's career advancement contributes materially to the accumulation of marital wealth, yet this contribution is rarely captured in title deeds or income records (Anderson & Bidner, 2015; Hook, 2019).

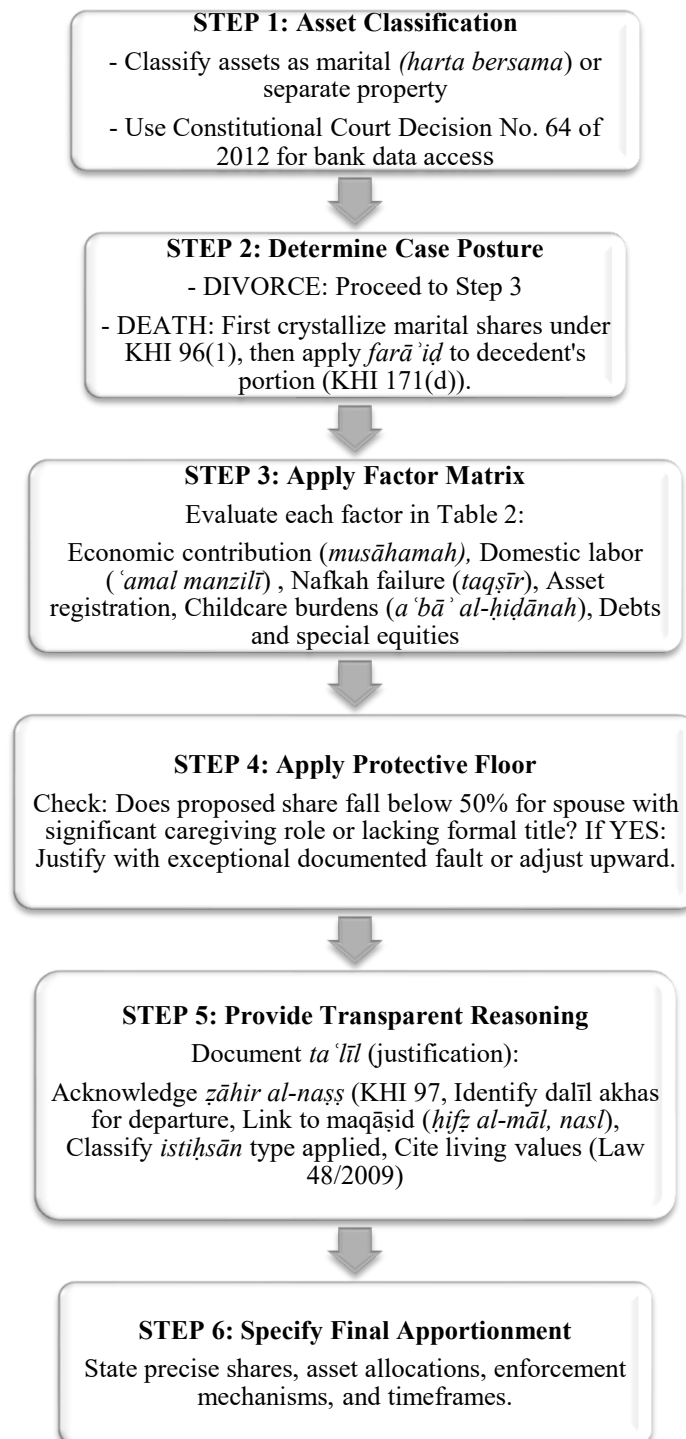
The courts in the decisions under analysis implicitly acknowledged this evidentiary gap by accepting corroborated testimonial accounts and inferring contribution from circumstantial patterns. This judicial posture aligns with the *fiqh* principle that *'amal* (labor) constitutes a recognized basis for entitlement (*ḥaqq*), and that the market-equivalent value of household services (*ujrat al-mithl*) provides a legitimate framework for calibrating the worth of unpaid domestic labor (al-Shāfi'ī & Idrīs, 1983; Anderson & Bidner, 2015). The practical implication for the matrix presented in Table 2 is therefore direct: courts should be prepared to receive structured testimonial evidence, time-use reconstructions, and community attestations as valid evidentiary instruments for establishing non-monetary contributions, rather than defaulting to documentary proof that systematically disadvantages those whose labor occurred within the home (Khadijah et al., 2017).

The protective floor mechanism (generally preventing shares from falling below 50% for spouses bearing significant caregiving roles or lacking formal title) serves as a *dābiṭ* (regulatory constraint) ensuring that *istiḥsān*-based flexibility does not erode the gender-protective function of equal division. This floor reflects the partnership ethic (*shirkah*) embedded in KHI and guards against systematic undervaluation of domestic labor in evidentiary practice (Attah, 2018; Mutiso, 2019).

Decision Flow for Proportionate Division

To operationalize the factor matrix and ensure consistent application across Religious Courts, Figure 1 presents a decision flowchart sequencing the analytical steps required for principled proportionate division. This flowchart translates the doctrinal framework into a practical judicial tool adoptable in Supreme Court guidance or judicial training materials.

Figure 1.
Decision Flow for Marital Property Division in Indonesian Religious Courts



This six-step flow integrates normative anchors of KHI and Law No. 48 of 2009 with the factor matrix and protective floor. Step 1 ensures accurate classification, leveraging Constitutional Court No. 64 of 2012 for evidentiary access. Step 2 differentiates divorce from death cases, with the latter requiring sequencing under KHI 96(1) and 171(d) before *farā`id* applies. Step 3 applies the factor matrix systematically. Step 4 operationalizes the protective floor preventing systematic undervaluation of domestic labor. Step 5 mandates transparent

reasoning (*ta'īl*) linking departures to *istihsān*, *maqāṣid*, and the judicial duty to excavate living values, ensuring discretion remains disciplined and justifiable. Step 6 translates analysis into concrete relief.

The reasoning embedded in each step is grounded in verified judicial language and decision-based findings rather than imposed as an external theoretical model. In Supreme Court Decision No. 266 K/AG/2010, the Court departed from equal division based on concrete evidentiary findings that the husband “failed to provide maintenance (*suami tidak memberikan nafkah*),” that “the entirety of the marital property had been acquired by the wife (*seluruh harta bersama diperoleh istri*),” and that proportional allocation was required “in the interest of justice (*demi keadilan*)” (Putusan MA No. 266/K/AG/2010, 2010). These formulations directly correspond to Steps 3 and 5 of the proposed framework: the panel first identified an asymmetry in contributions and a failure to provide maintenance, then justified the departure through justice-based *ta'īl*.

Similarly, in Supreme Court Decision No. 197 K/AG/2015, the judgment expressly stated that the plaintiff “was entitled to 60% (*mendapatkan 60 %*),” while the defendant “was entitled to 40% of the marital property (*mendapatkan 40 % dari harta bersama*)” (Hariyati & Retnowulandari, 2018; Putusan MA No. 197 K/AG/2015, 2015). The Court further determined that the decedent’s estate comprised 60% of the marital property before inheritance distribution, reinforcing the sequencing and proportionality logic of the proposed framework. This reasoning is particularly significant because it demonstrates that strict formal equality may yield to a prior determination of marital property shares when required by the evidentiary record and the structure of inheritance law. Likewise, Supreme Court Decision No. 164 K/AG/2015 illustrates contribution-based proportionality, confirming that equal division remains the default rule but may be adjusted when the evidence demonstrates a substantial asymmetry in the acquisition or preservation of marital assets. Taken together, these decisions confirm that the proposed six-step flow is not a purely theoretical construct but an analytical framework distilled from reasoning patterns already embedded in Indonesian cassation jurisprudence.

Adoption in Supreme Court Circulars (SEMA) or judicial training would standardize the analytical pathway, reduce inter-panel variance, and enhance legitimacy by making reasoning processes visible and replicable. Judicial training plays a particularly important role in this regard because the six-step flow and the factor matrix proposed in this study require interpretive competence that goes beyond familiarity with the text of KHI and statutory provisions. Specifically, training programs designed around the analytical framework presented here would enable judges to apply *istihsān* and *maqāṣid* categories in a structured and consistent manner, thereby reducing the risk that departures from the equal division baseline reflect individual judicial preferences rather than principled legal reasoning.

When judges across different panels share a common understanding of how factors such as economic contribution, domestic labor, childcare burden, and fault are to be identified, weighed, and documented, the likelihood of divergent outcomes in factually similar cases diminishes substantially. This convergence is significant not only for the parties in individual disputes but also for the overall coherence and predictability of marital property jurisprudence in Indonesia's Religious Courts. Lower courts could use the flowchart as a checklist, while appellate panels could audit compliance to ensure departures from baseline are genuinely grounded in evidence and welfare considerations rather than arbitrary discretion.

Comparative Perspectives: Marital Property Adjudication in Muslim Contexts

Situating Indonesian findings within broader regional and global developments in Islamic family law adjudication serves three purposes: validating the Indonesian trajectory as part of wider reform, identifying lessons from peer jurisdictions, and assessing the transferability of the principled proportionality model.

Malaysia's *harta sepencarian* doctrine provides the closest regional comparison. Malaysian Syariah Courts recognize jointly acquired property through partnership logic similar to Indonesia's KHI, operationalized through explicit factor lists guiding judicial discretion. Courts routinely consider direct financial contributions, indirect contributions such as homemaking and childcare, marriage duration, and dependent children's needs. Landmark decisions such as *Shahnaz Majid v. Dato' Sri Tahir* upheld substantial awards to wives based on documented domestic roles, supported by structured affidavits and time-use reconstructions (Khadijah et al., 2017). The Malaysian experience demonstrates that factorization combined with rebuttable presumptions can discipline discretion while protecting gender equity. Indonesia could benefit from adopting similar evidentiary protocols, particularly corroborated time-use diaries and community attestations, making unpaid care visible.

Morocco's 2004 *Mudawwana* reform introduced explicit provisions recognizing women's domestic labor in marital property settlements, allowing spouses to claim compensation for contributions to household wealth even where assets are titled in the husband's name. Article 49 permits judicial adjustment based on "the effort of each spouse in the development of family assets, including care of children and management of the household." Although implementation has been uneven due to evidentiary challenges, the reform represents a statutory commitment to valuing unpaid care that Indonesia has pursued more through judicial interpretation than legislative amendment (Voyce, 2018). The Moroccan trajectory underscores the importance of clear statutory language authorizing courts to credit domestic work.

Egyptian jurisprudence and scholarly debate have engaged with pricing domestic labor within the framework of *ujrat al-mithl* (fair wage for comparable work). Some jurists advocate calculating the market value of housekeeping, childcare, and eldercare services and crediting that value to the wife's share or as a separate claim upon divorce. While Egyptian courts have not systematically adopted this approach, the conceptual framework offers a method for translating unpaid care into quantifiable contributions weighable against monetary inputs. For Indonesia, the *ujrat al-mithl* logic could be adapted as an evidentiary heuristic within the factor matrix, providing structured estimation of wealth-enabling value where direct proof is unavailable.

These comparative insights demonstrate that Indonesia's judicial-led evolution toward principled proportionality is both contextually distinctive and internationally resonant. Unlike Morocco's comprehensive legislative reform or Malaysia's highly structured factorization, Indonesia achieves calibrated flexibility through interpretive deployment of *istihsān* within the KHI framework, leveraging Constitutional Court decisions (No. 64 and 69) as evidentiary and contractual enablers. This approach offers a transferable model for jurisdictions where political consensus for statutory overhaul is elusive but where judicial capacity-building and Supreme Court guidance can institutionalize gender-sensitive proportionality without sacrificing doctrinal coherence. The critical success factor evident across all comparators is explicit valorization of domestic labor through structured evidentiary protocols, a lesson Indonesia must urgently internalize through the proposed factor matrix and protective floor mechanisms. Equally important is the recognition that comparative borrowing must be contextually sensitive. Indonesia's National Madhhab tradition, which integrates Islamic jurisprudence, statutory law, and judicial practice into a distinctively Indonesian legal identity (Fahimah et al., 2024; Feener, 2002), means that reforms must be framed within, rather than imposed upon,

the existing doctrinal architecture of the KHI. The value of comparative engagement lies not in transplanting foreign rules. However, it lies in identifying shared principles, particularly the recognition of domestic labor as a legally cognizable contribution, that can be adapted through *istihsān bi al-maṣlahah* to serve the *maqāṣid* objectives that animate Indonesia's own family law tradition.

Conclusion

This article has demonstrated that Indonesian cassation jurisprudence on marital property is undergoing a calibrated evolution from mechanical equal division toward principled proportionality, while remaining anchored in the Kompilasi Hukum Islam and Law No. 1 of 1974. Analysis of leading Supreme Court decisions reveals three systematic patterns: reaffirmation of the 50:50 baseline where evidence does not justify differentiation; proportionate adjustments calibrated to proven economic inputs, domestic and caregiving contributions, persistent *nafkah* failure, and post-divorce childcare burdens; and correct sequencing in death cases that first vests the survivor's marital share under KHI Article 96(1) before applying inheritance rules (*farā'id*) under Article 171(d). These departures operationalize *istihsān bi al-maṣlahah* within the *maqāṣid al-sharī'ah* framework, demonstrating that Indonesian panels engage in principled *ijtihad* even without explicitly invoking classical terminology. Two Constitutional Court decisions supply critical enablers: Constitutional Court Decision No. 64/PUU-X/2012 opens judicially supervised access to bank data. At the same time, Constitutional Court Decision No. 69/PUU-XIII/2015 recognizes post-nuptial agreements clarifying property regimes during marriage. Comparative insights from Malaysia's *harta sepencarian* factorization, Morocco's Mudawwana valorization of domestic work, and Egyptian *ujrat al-mithl* concepts confirm that Indonesia's model is both contextually rooted and internationally resonant.

The Supreme Court should consolidate this jurisprudential shift through a Regulation (PERMA) or Circular (SEMA) that: codifies the factor matrix in Table 2, treating domestic and caregiving labor as wealth-enabling contributions warranting evidentiary weight comparable to economic inputs; affirms equal division as a rebuttable presumptive floor, preventing shares from falling below 50% for spouses bearing significant caregiving roles absent exceptional documented fault; standardizes the decision flow in Figure 1 to ensure inter-panel consistency; and mandates evidentiary protocols including time-use reconstructions, community attestations, and structured affidavits for documenting unpaid care. Such guidance would stabilize settlement expectations, reduce appellate variance, and maintain the gender-protective function of equal split while permitting fair adjustments where contribution asymmetries or post-divorce care burdens make mechanical division unjust.

Three limitations suggest avenues for future research. First, the analysis draws on three leading decisions rather than a representative sample, limiting statistical generalizability; future research should expand the dataset across circuits and time periods to assess the penetration of cassation reasoning into lower courts. Second, published judgments do not uniformly record the full evidentiary picture for domestic contributions, and interactions with maintenance awards remain inconsistently documented; pilot programs testing time-use diaries and structured affidavits should be developed and evaluated. Third, the absence of circuit-level variance data prevents quantitative modeling of predictability gains; empirical studies combining apportionment pattern analysis with judicial interviews would identify implementation barriers and refine the proposed framework. The structured proportionality model advanced here can preserve the partnership ethic and gender-protective baseline of Indonesia's marital property regime while achieving context-sensitive fairness that fulfills the

maqāṣid-oriented mandate to realize welfare (*maṣlahah*), prevent harm (*mafsadah*), and uphold justice (*‘adl*).

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