



## Imperfect ownership in common property: An analysis of islamic law and judicial policy

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### ABSTRACT

This paper aims to examine the imperfect status of ownership in the distribution of common property (*gono-gini*) from the perspective of Islamic law and positive Indonesian law, especially in the context of assets that are still pledged or have not been paid off. This problem becomes particularly relevant considering the number of married couples who acquire assets in the form of credit during their marriage period. This study employs a normative juridical method with a comparative approach, analyzing the norms of Islamic law, the Compilation of Islamic Law (KHI), and the Supreme Court Circular Letter (SEMA) No. 3 of 2018, and comparing them with judicial practices in religious courts. The results show that positive legal approaches that emphasize formal ownership tend to overlook each party's actual contribution in acquiring property, thereby risking the creation of injustice. On the contrary, the principle of substantive justice in Islamic law provides room for recognizing real contributions through conditional apportionment mechanisms and proportional assessments that are more adaptable to the socio-economic dynamics of households.

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## Introduction

Divorce is a form of breakup of marriage ties that has a wide impact, not only emotionally and socially, but also in legal aspects. One of the most complex aspects of law is the division of joint property (*gono-gini*) between married couples. Divorce is not just the end of a domestic relationship, but it also has significant legal consequences. Property acquired during the marriage period is often a source of dispute because it involves great economic value. Additionally, the property serves as a symbol of each party's contribution to building a life together. Furthermore, it is important to consider the social impact of divorce and the division of joint property. The consequences of divorce are not only felt by the couples themselves, but also have an impact on their children and extended families.

In practice, the distribution of common property (*gono-gini*) does not always go smoothly. Some couples do choose to settle it as a family, but not a few end up involved in legal disputes that end up in court. Complexity increases when the object of distribution is an asset whose ownership status is not fully clear or imperfect, such as a house that is still under a Home Ownership Credit (KPR) arrangement, a motor vehicle that is still being financed, or land that

is still collateralized with a financial institution. This type of issue often presents legal challenges because it involves complex legal relationships with third parties. Joint property assets have significant legal implications because their ownership is still linked to outstanding debt obligations and agreements {Formatting Citation}. Therefore, in many cases, the settlement of the division of common property requires a careful legal approach and considers aspects of substantive justice for both parties.

The problem becomes crucial when one of the parties claims a certain asset as part of the joint property, while legally, the ownership of the asset has not been completely transferred to the married couple. This condition creates ambiguity in determining the feasibility of categorizing the asset as a gono-gini property. One of the main challenges in distributing joint assets is the existence of assets that are still tied to debt, including houses purchased through the Home Ownership Credit (KPR) scheme, motor vehicles obtained on credit, and household goods purchased in installments, as well as online debt. When either party seeks to claim the right to the asset, they must face the legal fact that the title to the object cannot be fully transferred until the debt obligation is settled. This situation is further complicated by the lack of clarity in regulations that specifically govern the mechanism for managing and distributing assets still under financing in the context of legal relations between husband and wife, especially in the event of divorce.

In Islamic law, although the concept of joint property is not explicitly mentioned, its settlement is based on the principles of justice, deliberation, and recognition of each spouse's contribution during the marriage. Joint property is understood as property acquired during the marriage period, and its distribution is directed to reflect justice according to the contribution and responsibility of each party. Nurdin's research in Aceh reveals that deliberation at the gampong level and settlement at the Sharia Court are the primary mechanisms for resolving joint property disputes fairly {Formatting Citation} This approach emphasizes that the distribution of wealth is not just a private issue, but part of a social responsibility that maintains balance in the structure of society.

The practice of religious justice in Indonesia faces a significant challenge in harmonizing the values of Islamic law with national positive law, particularly in the context of dividing common property. One of the important references is the Supreme Court Circular Letter (SEMA) Number 3 of 2018, which states that assets that have not been paid off or are still pledged cannot be categorized as joint property. This provision raises a dilemma between formal legal principles and substantive justice principles in Islam, especially when one of the parties makes a significant contribution during the marital period. Hayatuddin's research reveals that the legal legitimacy of distributing joint property often fails to provide comprehensive justice, as proving contributions by one party is a significant obstacle in the litigation process (Hayatuddin et al. 2023).

This has the potential to harm parties who are entitled to the property but lack sufficient formal evidence. Ramadhan and Nasrulloh, in their research within this framework, there is a need for a review of the juridical basis and norms contained in SEMA in order to create a legal mechanism that is more inclusive and adaptive to the social dynamics of society. (Muhammad Rizqi Ramadhan and Nasrulloh Nasrulloh 2024), The principle of justice in Islamic law is not only a moral demand, but must also be reflected in effective legal policies and practices. Thus, legal reforms that accommodate the principle of substantive justice are essential to ensure the protection of rights for all parties involved.

The issue of imperfect ownership in joint property is a matter of particular urgency that warrants in-depth study because it is directly related to the principle of substantive justice for the parties involved in divorce disputes. The unclear legal status of assets that are still in the process of being repaid or pledged often leads to a deadlock in judicial practice, especially when the contributions of each spouse are not fairly reflected in the division of joint property. Therefore, a comprehensive understanding of the Islamic law perspective and judicial policy is crucial as a normative foundation for balancing legal certainty and social justice. This article aims to critically examine how the principles in Islamic law position imperfect ownership in

the context of common property, as well as how judicial policies, especially through regulations such as SEMA Number 3 of 2018, form a legal framework that can accommodate the value of substantive justice and the protection of the rights of both parties in divorce.

## Method

This study employs a normative juridical method with a comparative approach to examine the legal principles governing property ownership from the perspectives of Islamic law and positive law in Indonesia. The normative juridical method is employed to analyze the legal norms contained in laws and regulations, as well as Islamic legal literature, both classical and contemporary, and jurisprudence from relevant religious court decisions. Meanwhile, a comparative approach is employed by examining the principle of ownership in Islamic law about positive legal provisions, particularly the Supreme Court Circular Letter (SEMA) No. 3 of 2018. The analysis focused on the compatibility between the principles of ownership according to Islam and the provisions of national law, as well as the extent to which these principles reflect the principle of justice in the distribution of common property (gono-gini property). With this approach, it is hoped that the research will provide a more comprehensive and in-depth understanding of the harmonization between Islamic law and national law in the practice of religious justice.

## Results and Discussion

### 1. The Concept of Ownership in Islamic Law

From the perspective of Islamic law, ownership (*al-milk*) is an individual's right legitimized by the sharia to use and control an object according to the provisions of the law. Ownership is not only physical, but it also encompasses legal and moral dimensions that grant the owner full authority. According to Imam al-Kasani in *Bada'i al-Shana'i*, perfect ownership (*milk tam*) requires two elements: *qabdhu* (real or legal control) and freedom from the burden of third-party rights. The element of *qabdhu* can be in the form of physical or legal control, depending on the context of the object. In credit transactions, even though the goods have been received, the ownership status remains imperfect as long as debt obligations or guarantees remain outstanding.

The fiqh rule "*al-milku la yatimmu illa bi al-qabdhi wa intifa' minhu bighairi mani*" affirms that an object cannot be considered as a perfect property unless a third party does not restrict its use and has been in the owner's lawful possession. This principle has direct implications for understanding joint property in the context of marriage, as per Islamic law. In this case, assets that remain in credit status or are collateral do not qualify as absolute joint property. As explained by Maknun, Islamic law does not specifically regulate common property in either the Qur'an or Al-Hadith, presenting challenges in defining and creating a clear legal framework for the situation {Formatting Citation} Kasim also explained that the concept of *al-milk* must align with contemporary understandings of ownership in various fields, including trade and investment, where restrictions on activities that have the potential to create uncertainty about ownership status must always be considered to avoid greater legal problems (Kasim 2024).

Dalam konteks hukum Islam, harta bersama dikaitkan dengan konsep *syirkah*, yaitu wealth obtained by husband and wife during the marriage period from the results of joint and individual efforts. The Compilation of Islamic Law (KHI) Article 1, letter f, states that the involvement of both parties in acquiring property is the basis for the creation of joint property, so that all income generated during marriage is categorized as common property. It should be emphasized here that joint property must be divided proportionally in the event of divorce. In contrast, Umar in his article emphasizes that the principle of justice must be the main

foundation in the division, namely social justice includes the consideration of individual rights in a broader framework, ensuring that each party in the marriage is recognized. Their rights are obeyed (Umar, Rasmuddin, and Hikmawanti 2023). This approach emphasizes the importance of the moral and social dimensions in judicial decision-making related to property. On the other hand, Islamic law still recognizes the existence of private property, such as inherited property, grants, or inheritances, which are under the full control of the owner. Although personal property is not part of the common property, the consent of the spouse is still required in the transfer process to maintain balance and justice in the domestic relationship (Rachma Ruslan 2024).

Regarding common property used as collateral and still in the credit stage, Islamic law regulates it through the concept of *rahn* (pawn), which requires that the pledged goods must be the legal property of the requesting party. If the joint property is used as collateral, then it requires the consent of both parties, as both have equal rights and responsibilities over the asset. Providing legal unsecured credit can pose legal risks, so an important mitigation step is to ensure clarity on the ownership status of each asset used as collateral (Arnanda, Ardhan, and Khoirunnisa 2023). If the bank accepts the joint property as collateral, then the explicit consent of the husband and wife is an absolute prerequisite. In Islamic banking practice, goods used as collateral must be free from disputes and have a clear and unproblematic ownership status. Execution of the guarantee can only be carried out in the event of default, by the initial agreement that has been agreed upon by all parties concerned.

The process of dividing joint property over assets that are still encumbered by debt becomes complicated when divorce occurs, so legally, full ownership of the property remains with the lender, namely the financing institution. However, in the context of joint property, rights and obligations to the object remain the responsibility of the husband and wife during the marriage. In the event of a divorce, the division of joint property over the assets should take into account the remaining debts and the involvement of third parties in the credit agreement (Mazaqi et al. 2023). Therefore, this sharing mechanism is often done through the courts or mutual agreements to reach a fair solution. This demonstrates that legal foresight is crucial in considering the formal aspects related to property rights and the material contributions of each party.

Concrete examples of imperfect ownership in current practice include mortgage houses, credit vehicles, and land that are still being paid off in installments. Although the couple has used it during their marriage, the asset remains legally bound to the financing institution. This means that, juridically, the marital status of the asset is that of a conditional user or purchaser. Not as the absolute owner until the repayment process is completed. Therefore, formal ownership remains a benchmark in many legal considerations.

In positive Indonesian law, the regulation of joint property is governed by the Compilation of Islamic Law (KHI), specifically Article 85, which stipulates that property acquired during marriage is considered joint property, except for those acquired through grants or inheritance. However, given the absence of detailed provisions regarding the status of assets that have not been paid off or that are still in the process of financing, this creates a wide scope of interpretation in judicial practice. In many cases, religious courts usually refer to legal documents such as certificates or proof of repayment to establish ownership status (Putri and Wahyuni 2021).

Property that is still a credit status of Islamic law from the perspective of *fiqh* is not considered as full property that can be divided. However, the contribution to the property still has legal and moral value. In this case, sharia principles require that the distribution of joint property not only refers to formal ownership documents, but also takes into account the real contribution made by each party in acquiring or maintaining the property. Then the

contribution of the individual in the relationship must be valued in the process of division, regardless of the issue of formal ownership status (Yusuffendra, Ramadhan, and Wismanto 2024). In practice, when divorce occurs, a religious court or mutual agreement can be a way to resolve the division of common property based on the principles of justice and deliberation. Muzaqi and Friends said to ensure that all aspects, including the remaining unpaid debts and each party's contributions, are considered in the division of property and need to underline that the laws in Indonesia already cover many matters related to the division of joint property and emphasize the importance of prenuptial agreements as a solution to prevent problems from arising in the future (Mazaqi et al. 2023).

## **2. SEMA 3 of 2018 and Judicial Position**

The Supreme Court Circular Letter (SEMA) No. 3 of 2018 plays a crucial role in providing guidelines for religious courts regarding the distribution of common property, emphasizing that assets still pledged or unpaid cannot be included in the distribution. These provisions aim to provide legal certainty and protect the rights of third parties, such as financing institutions, as well as prevent the potential for more complex disputes. However, in practice, this provision poses problems because it does not adequately account for the actual contributions of both parties in acquiring the asset. It is essential to consider each party's contribution, even if the legal ownership of the collateralized assets is not absolute. On the property that is being pledged (Alfan Syafi'i and Walagri Ikhwanda Novita Anggraini 2023).

SEMA No. 3 of 2018 is based on the general principle in Indonesian civil law that the title to a new object is considered perfect if it has been fully paid off and is no longer subject to collateral. In the context of property law, as stipulated in the Civil Code (KUHPerdara), ownership is absolute if there are no dependent rights that limit the owner's freedom to use the property. Therefore, if an asset remains collateral or has not been fully paid off, the installment party has not acquired full ownership rights. This principle was then judicially adopted in religious courts to prevent conflicts with the interests of third parties. However, the application of this principle poses challenges when considering substantive justice in the distribution of common property.

With the enactment of SEMA No. 3 of 2018, efforts to maintain legal certainty for third parties have become increasingly important, as these institutions rely on the clarity of collateral status in their financial transactions (Hyma Puspytasari, This confirms that without full repayment, the legal authority over the assets cannot be fully recognized, making the process of dividing the joint property more complex. However, the application of this principle often poses challenges when courts must consider substantive fairness in the division of common property. Situations in which husband and wife contribute jointly to acquiring property can make determining legal ownership complicated (Mazaqi et al. 2023). Although this property does not have full status officially because it has not been paid off, recognition of the contributions of both parties must still be considered in the judicial decision-making process.

In modern household practices, it is very common to find married couples who jointly pay off their house through mortgages, motor vehicles, or other properties with a credit system. The assets are acquired during the marriage period and substantially involve financial contributions from both parties, either directly or indirectly. However, when a divorce occurs before the credit is repaid, the legal status of the assets becomes unclear. Husbands or wives who also pay installments often lose their rights to the asset because their formal status has not been recognized as perfect property. This certainly creates an imbalance between actual contributions and the formal recognition that is applied.

This problem highlights the disparity between the actual contribution made by each party in the acquisition of property and the formalistic legal recognition that often prevails.



Positive law, as stipulated in the Civil Code and affirmed through SEMA No. 3 of 2018, recognizes full ownership only after repayment and is free from the burden of dependents. As a result, contributions made in the form of installments during the marriage period are often overlooked in the property division process, thereby creating injustice when divorce occurs. Divorce not only raises disputes over child custody and the rights of ex-spouses, but also disputes over marital property that are complex and touch on substantive justice aspects (Alvandi et al. 2024). Individuals who go through divorce can experience a variety of emotional reactions, ranging from sadness to disappointment (Sarkanto, Ibrahim Adeyemi Adewumi 2025).

Furthermore, Pratama, in his article, emphasized that the separation of assets is a crucial aspect in the divorce process, especially when there are strict formal requirements related to property control (Pratama and Suryono, In practice, each party's contribution, either in the form of direct installments or indirect financial support, is often not legally documented. This situation makes it difficult for the judge to assess a fair proportion when the ownership document is only recorded in the name of one party. Therefore, an approach that considers the reality of contributions, rather than mere formalities of documents, is indispensable for achieving fairness in the distribution of common property.

If the goods, such as a house or vehicle, are still in the status of collateral (*rahn*) at the bank and have not been paid off when the divorce occurs, then, according to SEMA No. 3 of 2018, the goods cannot be included in the division of joint property. Thus, even if the assets were acquired during the marriage period and used together, their legal status did not qualify as a *gono-gini object*. In this case, the religious court will exclude the assets from the property division agreement. However, in some rulings, judges may suggest a conditional distribution mechanism, such as postponing the distribution until repayment is completed or determining the portion of the claim against the value of the assets after repayment has been made. This step is taken to maintain a balance between the principles of legal certainty and justice for the parties.

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From the perspective of Islamic law, justice (*al-'is*) is the main principle in dispute resolution, including in the division of common property. In the case of assets that are still collateralized and unpaid, ignoring the spouse's contribution is considered contrary to substantive justice, which demands recognition of each party's actual role. Islam not only

emphasizes formal ownership, but also the principle of benefits and contributions during the marriage period. Consideration of financial and non-financial contributions in the distribution of wealth to achieve justice and equality (Nurdin 2020). Therefore, even if the legal status of ownership is not perfect, the real contribution should still be considered in the judicial process. The study by Umar et al also underlines that the principles of morality and social justice in Islam must be the foundation for the distribution of common property (Umar, Rasmuddin, and Hikmawanti 2023). This approach underscores the importance of balance and acknowledges the joint efforts required to achieve justice in marital relationships.

On the other hand, Panjaitan emphasized that the principle of justice must be applied comprehensively in Islamic law, not only in the context of criminal acts, but also in the settlement of property disputes (Panjaitan 2022). Although this view focuses on cases of murder and persecution, the principle of justice described should also be applied in decisions regarding the separation of property after divorce, reflecting that justice should be the basis for every decision. This principle encourages a more open and adaptive interpretation of the judiciary as society develops. Judges should have room to scrutinize the contributions and benefits of all parties, taking into account how the common property is built through joint ventures, even if some of the assets are still in credit status.

Considering the complexity of the law and its application in household practice, SEMA No. 3 of 2018 should not be applied rigidly, but rather through a contextual approach that takes into account the factual and social conditions of the parties. In situations where assets are still collateralized and unpaid, the judge may impose a conditional judgment or make room for future repayment and division agreements. Additionally, there is a need to strengthen technical regulations through implementation guidelines, providing a more comprehensive reference for religious courts. This step is also important in providing legal certainty while maintaining the principle of justice in Islamic family law. Thus, the division of joint property not only follows formal ownership but also upholds the value of partnership and justice during the marriage.

### 3. Justice in Unsettled Property Disputes

Within the framework of *maqāṣid al-sharī'ah*, justice (*al-'adālah*) is the primary goal of Islamic law, contributing to the establishment of legal policies and dispute resolution, including the division of common property. Justice is not only defined as formal recognition before the law, but also as a principle that demands appreciation for the real contribution and social impact of legal acts. In the context of unpaid joint property, this principle is important, as the protection of the rights and interests of both parties who contribute to the acquisition of the property must be the main focus.

In situations where a husband and wife jointly install assets such as a house, vehicle, or other property, it is important to realize that both play an active role in building the property. Therefore, even if the legal status of ownership of assets becomes unclear because it has not been paid off, the contributions of each spouse during the marriage period should still be considered in legal considerations. This aligns with the view expressed by Firdausia and Attamimi, who emphasize the importance of applying the principle of *shirkah abdan* in the division of marital property, where the real contributions of each party are recognized in a balanced manner. In the division of property, an agreement between the two parties is necessary, and the division must be based on the principles of justice and equality. This emphasizes that the result of a joint effort, in this case, the accumulation of wealth, must be divided equally, reflecting the participation and contribution of each partner in the process (Firdausia and Fuad Attamimi 2024).

One of the primary issues in judicial practice is the disparity between the formal ownership status and the actual contributions of each party in the household. Assets that are still in the process of being paid off, such as a mortgage on a house or a credit vehicle, often cannot be included in the category of joint property because they do not meet the requirements of perfect ownership under positive law. Although it is still submitted to the court in practice,

the decision is often based solely on the value or amount of the debt, rather than the value of the assets as a whole. In fact, in many cases, installments on these assets are paid collectively by the husband and wife through joint financial contributions. Ignoring this fact can create injustice, especially against parties who do not have formal proof of ownership but have played a significant role in the payment process. Therefore, an approach that solely prioritizes formal legality without considering actual contributions is considered contrary to the principle of substantive justice that is at the core of Islamic law.

As explained in the research by Hayatuddin et al., the legal legitimacy of distributing common property is often not in accordance with applicable law, so the court needs to make adjustments to achieve more equitable justice (Hayatuddin et al. 2023). In response to this dilemma, some religious courts have begun to implement a progressive approach by establishing conditional distribution schemes for assets that have not been fully paid off or are still held as collateral. This mechanism enables the judge to postpone the distribution of assets until the credit is repaid, or to stipulate that the proceeds from the sale of assets after repayment be divided according to each party's contribution. This approach is considered capable of bridging the gap between positive legal provisions and Islamic principles of justice. In addition to providing legal protection to both parties, this model also encourages more flexible, adaptive, and appropriate solutions to the socio-economic needs of the community. Thus, justice is not only manifested in the final verdict, but also in the process and mechanisms that precede it.

The implementation of the conditional division scheme also reflects the efforts of religious courts in protecting the civil rights of husbands and wives that the formal legal system may neglect. In many situations, parties who are not administratively recorded as the owners of the asset have a large contribution to the payment or maintenance of the asset. This progressive approach enables the court to be more accommodating to complex and often not well-documented household dynamics. By taking into account the real conditions on the ground, the court can avoid rigid and formalistic rulings that can compromise rights that should be substantively protected. This is part of the transformation of Islamic family law, which is becoming more inclusive and in favor of fundamental justice.

The implementation of the conditional division scheme reflects the efforts of religious courts to protect the civil rights of husbands and wives that the formal legal system may overlook. In many situations, the rights of parties who are not administratively recorded as the owner of the asset have a significant contribution to the payment or maintenance of the asset. This progressive approach enables the court to be more accommodating to complex and often not well-documented household dynamics. By taking into account the real conditions on the ground, such a progressive approach allows courts to avoid rigid and formalistic rulings that can sacrifice rights that should be substantively protected. In line with this, legal reform in religious court decisions is crucial to respond to changes in social and economic conditions in society, ensuring the law remains relevant and fair (Abdulah Pakarti). Religious courts also have an important role in integrating Islamic legal theories that include aspects of justice (Dewi 2021).

The application of this approach demonstrates that religious courts are moving towards legal reform that is more responsive to social realities and the needs of society. This opens up space for judicial *ijtihad*, in which judges not only apply legal texts literally, but also interpret the principles of justice in contemporary contexts. In the future, it will be necessary to establish technical guidelines or consistent jurisprudence that can serve as a reference in cases of unpaid property distribution, thereby eliminating disparities in decisions. In addition, counseling the public about the importance of documenting contributions in households also needs to be intensified. Thus, Islamic law and religious justice can play a vital role in creating transformative and contextual justice in cases involving common property.

## Conclusion



The concept of ownership in Islamic law emphasizes the principle of substantive justice, which is not solely based on the formal status of ownership, but also on the real contribution of each party in acquiring and maintaining property during marriage. While Indonesia's positive law, as outlined in the Compilation of Islamic Law (KHI) and SEMA No. 3 of 2018, tends to emphasize formal ownership as a condition for the division of shared property, this often does not reflect true justice in household practice. In the context of assets that are still collateralized or unpaid, the Islamic legal approach provides more space for recognizing the contributions of both the wife and the husband, taking into account moral and social values in the distribution. Therefore, legal reform through judicial *ijtihad*, technical guidelines, and legal Education is important to create a justice that is not only legal-formal, but also fair and responsive to the socio-economic dynamics of society.

Although the Supreme Court Circular Letter (SEMA) No. 3 of 2018 provides legal certainty by emphasizing that assets that have not been paid off or are still pledged cannot be used as objects of joint property distribution, this approach tends to ignore the real contribution of each spouse in the acquisition of assets during marriage. In practice, many married couples jointly pay off assets such as houses and vehicles, so the rigid application of legal provisions risks creating injustice. Therefore, the principle of substantive justice in Islamic law must serve as the basis for resolving disputes over common property, particularly in cases involving unsettled assets, taking into account the financial and non-financial contributions of both parties. A more progressive and contextual approach to the judiciary is needed by judges to accommodate dynamic social realities, accompanied by the preparation of technical guidelines that bridge the gap between formal law and the value of justice in family life.

The division of joint property in the context of unsettled ownership requires a legal approach that not only relies on formal legality but also considers the actual contributions made by each spouse during the marital period. The principle of justice in *maqāṣid al-sharī'ah* encourages the protection of individual rights proportionately, including in cases where assets are still being repaid or used as collateral. The strict application of SEMA No. 3 of 2018, without considering the dynamics of spouse contributions, has the potential to cause injustice; therefore, alternative approaches, such as conditional division and proportional contribution assessment, need to be adopted by the courts. The role of judges is crucial in guiding the judicial process toward substantive justice through *ijtihad* that is responsive to the social context. To support this, it is necessary to update technical regulations, strengthen judicial capacity, and educate the public on the importance of recording household contributions as part of protecting rights in Islamic family law.

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