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Reassessment of Islamic Legal Bases for Matrimonial Property in Malaysia

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Abstract

Most Islamic countries do not implement laws related to matrimonial property (*harta sepencarian*). This is due to the absence of specific provisions in the Quran and hadith that permit such practices. However, Malaysia has long practiced this and has a comprehensive legal framework concerning matrimonial property. Given this, is the practice in Malaysia truly in line with the teachings of the Quran and hadith? Therefore, this study aims to revisit the foundations of Islamic law regarding the implementation of matrimonial property laws. This research adopts Islamic normative legal research based on the principles of *usul al-fiqh*. This study reveals that the legal foundations cited by proponents of matrimonial property implementation, which include *'urf*, *syirkah*, *istishab* and *maslahat mursalah* are inaccurate and do not align with the principles of *usul al-fiqh*. Thus, a new principle or legal basis is needed to legitimize Islamic matrimonial property distribution in Malaysia.

Keywords: Matrimonial Property, Custom, Usul Al-Fiqh, *Harta Sepencarian*

Abstrak

Sebagian besar negara Islam tidak menerapkan undang-undang terkait harta sepencarian (matrimonial property). Hal ini disebabkan tidak adanya ketentuan spesifik dalam Al-Quran dan hadits yang memperbolehkan praktik tersebut. Namun, Malaysia telah lama mempraktikkan ini dan memiliki kerangka hukum yang komprehensif mengenai harta sepencarian. Dengan demikian, apakah praktik di Malaysia benar-benar sejalan dengan ajaran al-Quran dan hadits? Oleh karena itu, penelitian ini bertujuan untuk mengkaji ulang landasan hukum Islam mengenai penerapan undang-undang harta sepencarian. Penelitian ini mengadopsi penelitian hukum normatif Islam berdasarkan prinsip-prinsip usul al-fiqh. Studi ini menemukan bahwa landasan hukum yang dikemukakan oleh pendukung penerapan harta sepencarian tidak akurat dan tidak selaras dengan prinsip-prinsip usul al-fiqh. Oleh karena itu, prinsip baru atau dasar hukum diperlukan untuk melegitimasi distribusi harta sepencarian di Malaysia.

Kata Kunci: *Harta perkawinan, adat, usul fiqh, harta sepencarian*

Introduction

The term "*harta sepencarian*" is usually defined as the income or assets acquired from the joint efforts of husband and wife, including income derived from the capital shared between them.¹ The concept of the division of matrimonial property has been said to be practiced by the Malay community since ancient times as it is part of their customs. Although the laws regarding matrimonial property were not discussed by scholars in the past, it is a tradition that does not contradict Islamic teachings as claimed.

Islamic law recognizes the property owned by individuals, including the property owned by a husband or wife. The marriage contract does not allow the husband to own the property owned by the woman. Therefore, the assets accumulated by the woman along with her husband during the marriage are jointly owned by both of them and should be divided based on the percentage of each party's contribution to acquiring that property.² However, the concept of joint matrimonial property has been expanded to include assets acquired by the husband after marriage, even if the wife does not have a direct contribution in the effort to acquire that property.³

This means that the wife is entitled to joint property even if she does not work or is a housewife. The wife is considered to have contributed indirectly to her

¹ Azlina Abdul Latiff, *Harta Sepencarian: Perlaksanaan dan Penilaian Menurut Hukum Syarak*, (Bangi: Universiti Kebangsaan Malaysia, 2004) p. 14.

² Jefry Tarantang, et.al., "Rereading the Concept of Joint Property: Fiqh Literacy in the Book of Sabailal Muhtadin and the Genealogy of Sheikh Arsyad's Thoughts", *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 8, no. 3 (2024), p. 1840-1858.

³ Hani Sholihah, "Pembagian Harta Bersama Menurut Hukum Islam", *Al-Manahij: Jurnal Kajian Hukum Islam* 1, no. 2 (2007), p. 179-188.

husband because she creates calmness and peace for her husband, enabling him to succeed. The concept of joint property has several ambiguities based on the arguments presented to support it.

This research adopts Islamic normative legal research based on the principles of *usul al-fiqh*. Legal reasoning using the concept of *'urf*, *syirkah*, *istishab* and *maslahat mursalah* were analysed according to their terms and conditions. The practice of dividing matrimonial property has long been established in Malaysia, even though it is not recognised in the Middle East. Discussions on this topic are rarely found in Islamic jurisprudence texts, except for a few brief mentions regarding the joint property of spouses.⁴ Therefore, the question arises whether this practice is sanctioned by Islamic law or not. The discourse touches on marriage and maintenance, as well as the evidence supporting the legitimacy of matrimonial property within the agreed and disputed sources of Islamic legal frameworks. Previous studies emphasise on the concept of *shirkah* and *'urf* as legal bases for matrimonial property.

There are several writings by past scholars that discuss the property of husbands and wives. According to Mat Hussin & Jamaludin, shared property can be referred to as *mata' al-bayt* (household items) or *mal al-zawjayn* (the property of the husband and wife). There is also an opinion that attempts to relate wife's rights to joint property in the same way as her involvement in *shirkah al-abdan* (partnership in physical labour without capital) or *shirkah al-mufawadah* (equitable partnership). It is considered *shirkah al-abdan* because both husband and wife work together and strive to earn a daily livelihood, as well as to save assets for their old age and provide for their children after they pass away.⁵ *Muamalat* (human-to-human activities) between husband and wife in generating jointly acquired property falls under the category of *shirkah al-abdan*, which is recognized and valid within the Hanafi school of thought, regardless of whether the types of work are the same or different. This means that the wife's contributions in various aspects to acquire property during the marriage are also acknowledged as a form of partnership.⁶ The argument is taken out of context since shariah does not recognize a marriage as a partnership contract. It is well known in Islamic law that marriage is a standalone contract differs from *shirkah* or partnership contract. This situation provides preliminary evidence for a reassessment of the legal basis used to support matrimonial property.

As stated by Muhammad Serji et. al., *'urf* (custom) is considered a legal basis for matrimonial property according to prominent scholars such as Ahmad Ibrahim, Salleh Buang, Suwaid Tapah and Ridzuan Awang. It is a mixture of Malay or

⁴ Walid Mohamed Abdelrahman Mohamed and Muhamad Mustakim Abdul Halim, "The Concept of Matrimonial Property: Conditions and Regulations", *Linguistics and Culture Review* 5, (2021), p. 2203-2210.

⁵ Mursyid Djawas., et.al., "The Construction of Islamic Inheritance Law: A Comparative Study of the Islamic Jurisprudence and the Compilation of Islamic Law", *Juris: Jurnal Ilmiah Syariah* 21, no. 2 (2022), p. 207-219.

⁶ Mohd Norhusairi Mat Hussin and Mohd Hafiz Jamaludin, "Harta Sepencarian vs Harta Perkahwinan dalam Perundangan Sivill: Satu Sorotan Ringkas", *al-Basirah* 6, No. 1, (2016), p. 79-96.

indigenous people's customs and Islamic Law. It is often based on the lives of married couples in Malay society who engage in land exploration and farming together, alongside the wife's responsibilities in managing the household according to custom.⁷ Mat Hussin also states that the legitimacy of matrimonial property has a legal basis on the concept of *'urf* as supported by Abdul Kadir Ismail, Md. Akhir Yaacob, Abdullah Abu Bakar, Daud Muhammad and Siti Zalikhah Mohd Nor.⁸ Nonetheless, Siraji and Halim argue that *'urf* does not fit to be a legal basis for matrimonial property since it contradicts the text of the Quran.⁹

In the opinion of Sahid, Gunardi and Zahalan, the matrimonial property falls under the third type of *maslahat* (benefit), known as *maslahat mursalah*, where its implementation will bring goodness to women. This includes safeguarding them from the consequences of divorce and assisting them in continuing their lives with their children after a divorce occurs or if their husband remarries.¹⁰ Therefore, it can be concluded that the practice of dividing matrimonial property will bring *maslahat* to women and protect them from potential harms that may arise thereafter.¹¹ Nevertheless, no elaboration or justification on how *maslahat mursalah* fits to be a legal basis for matrimonial property. Hence, a new study should provide its legitimacy.¹² According to Robbi and Mahmud, the essence of the benefits found in the practice of the law regarding matrimonial property can be seen through the value it seeks to highlight, which is to protect the rights and privileges of women.¹³ The approach of *ijtihad* or *fatwa* based on *maslahat mursalah* is fundamentally aimed at safeguarding the *maqasid al-shariah* (sharia objectives),¹⁴ which refers to the meanings or wisdom that are upheld by the holders of the religion, whether the

⁷ Rabi'ah Muhammad Serji, et.al., "Jointly Acquired Property: Legal Issues and Conflicts in After-Death Claims from Malaysian Land Law Perspective", *Islamiyyat*, 43 (Isu Khas) (2021), p. 43–53.

⁸ Mohd Norhusairi Mat Hussin and Raihanah Abdullah, "Distribution Practice of Harta Sepencarian in Malaysia: A Literature Review", *Journal of Shariah Law Research*, (2016).

⁹ Ahmad Hussein Abdul Shakoor Siraji and Muhamad Mustakim Abdul Halim, "Matrimonial Property: Concept and Ruling", *Linguistics and Culture Review* 5 (2021), p. 2139-2145.

¹⁰ Siti Marlina and Haris Mubarak, "Joint Property after Divorce in the Polygamous Marriage: Comparative Research in Indonesia and Malaysia", *Al-Risalah: Forum Kajian Hukum dan Sosial Kemasyarakatan* 22, no.2 (2022), p. 273-287.

¹¹ Reni Nur Aniroh, et.al., "The Bilateral Inheritance System in Islamic Family Law: Fairness, Equality, and Mutual Exchange Perspectives", *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 8, no. 2 (2024): 891-911.

¹² Mualimin Mochammad Sahid, et.al., "The Concept of *'Uruf* and *Maslahah* as Sources of Reference: A Study on Matrimonial Property in Malaysian Islamic Legal System", *Journal of Islamic Social Sciences and Humanities*, vol. 23(2), Special Issue, (2020), p. 139-156.

¹³ Dewi Sukarti, et.al., "Legal Education on Women's Property Inheritance Rights in South Sumatera", *AHKAM: Jurnal Ilmu Syariah* 23, no. 2 (2023), p. 497-518.

¹⁴ Abbas Arfan, "Maslahah Dan Batasan-Batasannya Menurut Al-Bûthî (Analisis Kitab Dlawâbith Al-Mashlahah Fi Al-Syarî'ah Al-Islâmiyyah)", *De jure: Jurnal Hukum dan Syar'iah* 5, no. 1 (2013), p. 87-96.

legislation is general or specific, in order to ensure benefit for all creatures.¹⁵ However, the claim is not corroborated by solid evidence on how *maslahat mursalah* provides legal basis for matrimonial property.

Do Wife Contributions Require Compensation?

According to Robbi and Mahmud, regarding the ownership of property each party, whether the husband or the wife, has rights over what they have worked for. Therefore, from an Islamic perspective, women are granted permission to work and strive to enjoy the fruits of their labour, which is part of a significant social demand.¹⁶ In addition to the assessment of the wife's contribution to the husband's property development, the rights of women to own property acquired during the marriage period must also be considered.¹⁷ Does the argument have its merit according to the main sources of sharia?

Marriage in Islam is a sacred bond solemnized between a man and a woman. Marriage is the path permitted by Islam for men and women to fulfill their human desires and aspirations, such as loving each other, sharing feelings, engaging in intimate relations, and having children.¹⁸ Additionally, marriage serves as a fortress to prevent people from falling into the abyss of fornication, which only invites the wrath of Allah. As stated by the Prophet Muhammad (peace be upon him):

يَا مَعْشَرَ الشَّبَابِ ! مَنْ اسْتَطَاعَ مِنْكُمُ الْبَاءَةَ فَلْيَتَزَوَّجْ فَإِنَّهُ أَغْضُ لِلْبَصَرِ وَأَخْصَنُ لِلْفَرْجِ¹⁹

Meaning: "O youth, whoever among you has the means to marry, then he should marry, for indeed marriage is the most effective way to lower the gaze and protect one's modesty."

When a marriage takes place, Islam stipulates several duties that the husband must fulfil towards his wife and her family. Among these duties is the obligation to provide financial support to the wife. This obligation is based on the Quran, Chapter al-Ahzab: "We certainly know what We have made obligatory upon them concerning their wives (Q.S. al-Ahzab, verse 50).

In the verse mentioned above, Allah declares that providing sustenance is an obligation determined upon the husband. In another verse, Allah says:

¹⁵ Mahmad Robbi, Ahmad Akram and Mek Wok Mahmud, "The Objective of Fairness (al-‘Adl) in The Matrimonial Property Conflict in Malaysia", *Journal of Islam in Asia*, vol. 17, no. 3, (2020).

¹⁶ Nurnazli, et.al., "Productive Dowry and Women's Economic Empowerment and Their Influence on Marital Assets in Bandar Lampung", *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 8, no. 2 (2024), p. 954-979.

¹⁷Nurnazli, et.al., "Productive Dowry and Women's Economic Empowerment."

¹⁸Nurunnisa, et.al., "Implications of Annulment of Marriage on the Distribution of Joint Assets according to the Compilation of Islamic Law and National Law", *Syariah: Jurnal Hukum dan Pemikiran* 23, no. 1 (2023), p. 1-23.

¹⁹ Muhammad bin Ismail al-Bukhari, *Sahih al-Bukhari*, (al-Riyad: Dar al-Salam, 1997) hadis no. 5065.

لِيُنْفِقَ ذُو سَعَةٍ مِنْ سَعَتِهِ وَمَنْ قُدِرَ عَلَيْهِ رِزْقُهُ فَلْيُنْفِقْ مِمَّا آتَاهُ اللَّهُ

Meaning: “Let a man of wealth spend from his wealth, and he whose provision is restricted – let him spend from what Allah has given him” (Q.S. al-Talaq: 7)

This verse clearly indicates that providing financial support to one’s wife is an obligation, whether in times of ease or hardship. It could be understood that these kinds of sustenance are examples of compensation for contributions in marriage.

According to al-Mawardi, when the freedom of a wife and her actions are restricted for the benefit and pleasure of the husband, it is obligatory for the husband to assist her and provide her with sustenance, just as he is required to provide sustenance to his servants who are always at his service. This situation is analogous to a leader who must provide sustenance to the Islamic army from the state treasury because their freedom is limited due to their jihad.²⁰

Mandatory support must be provided to the wife to ensure her needs are met, enabling her to fulfil her responsibilities as a wife and mother perfectly. The mandatory support includes food, clothing, shelter, household necessities, and other essentials based on current customs.

وَ عَاشِرُوهُنَّ بِالْمَعْرُوفِ

Meaning: “And live with them (your wives) in kindness.” (QS. al-Nisa` : verse 19).

“In a good way” as intended in the verse above means in a fair way, without any oppression and with full compassion.²¹ The Prophet says:

أَطْعَمُوهُنَّ مِمَّا تَأْكُلُونَ وَأَكْسُوهُنَّ مِمَّا تَكْتَسُونَ

Meaning: “Give them (your wives) food that you eat and provide them clothing equivalent to what you wear”.²²

Allah says:

أَسْكِنُوهُنَّ مِنْ حَيْثُ سَكَنْتُمْ مِنْ وُجْدِكُمْ وَلَا تُضَارُّوهُنَّ لِضَيِّقِهِنَّ عَلَيْهِنَّ

Meaning: "Lodge them (in a section) of where you dwell out of your means and do not harm them in order to oppress them" (Q.S. al-Talaq: verse 6).

The obligatory maintenance to be provided is based on the husband's ability, whether in the form of food, clothing, housing, or other necessities for the wife. If the husband is wealthy, then the maintenance provided should be commensurate with

²⁰ Ali ibn Muhammad al-Mawardi, *al-Hawi al-Kabir fi Fiqh Madhhab al-Imam al-Syafi'i*, vol. 11, (Beirut: Dar al-Kutub al-‘Ilmiyyah, 1999), p. 417.

²¹ Abu Bakr Jabir al-Jazairi, *Aisar al-Tafasir li Kalam al-‘Ali al-Kabir*, 5th. Ed., (Madinah: Maktabah al-‘Ulum wa al-Hikam, 2000), p. 213.

²² Sulaiman ibn Asy’ath Abu Dawud, *Sunan Abi Dawud*. (Amman: Bait al-Afkar al-Dawliyyah, n.d.) Hadith no. 2144.

his wealth.²³ If the husband has a moderate ability, then the maintenance provided should be in line with his moderation. If the husband is poor, then the maintenance should be based solely on his ability, as stated in verse 7, Chapter al-Talaq. Evidently, sharia has highlighted modes or ways to compensate wives in terms of their contributions towards family. No need to claim other compensation for their contributions since sharia has provided certain provisions for the husbands to fulfil.

'Urf (Customary Practice)

The act of distributing matrimonial property is alleged to be a traditional practice or custom of the Malays that has been passed down through generations. Most scholars and jurists among the Malays rely on an Islamic legal maxim of *al-'adah muhakkamah* (customarily legalised) to provide authority for this practice.²⁴ This maxim has its legality under the principle of *'urf* in *usul al-fiqh* (principles of Islamic jurisprudence). The authority of custom in Islamic law is legal and agreed upon by the majority of Muslim scholars. However, the level of acceptance varies according to individual perspectives.²⁵

Many studies have great effort to link matrimonial property issue with the writings or rulings of classical Muslim jurists in terms of dispute between spouses relating to household ownership after divorce. But they fail to understand the difference between the two. The issue of dispute is merely issue of ambiguous ownership between husband and wife. Muslim jurists provide solutions to the issue in situations where no one has the evidence to claim certain property as theirs.²⁶ Their rulings are not related to known properties or belongings of specific owners. Thus, linking this issue to the classical writings of Muslim jurists is unacceptable.

When viewed from the perspective of the conditions for practicing customs as legal evidence in Islamic law, several ambiguities arise concerning matrimonial property based on the indirect contributions of the wife. Among the conditions for practicing *'urf* as legal evidence is that the custom must be consistent;²⁷ its practice within the community, state, or country must be ongoing and widely recognized at the time of establishing the *'urf*. The reality concerning matrimonial property is quite the opposite. This is because a significant portion of Malaysians are unaware of matrimonial property and do not consistently practice it at the time of its establishment as a law. In fact, it is only known to a small group within communities or states. This is particularly true when someone petitions the court to claim

²³ Mhd. Rasidin, et.al., "The Impact of Unequal Marriage on Household Harmony (Case Study in Sungai Penuh City, Jambi)", *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 4, no. 2 (2020), p. 313-336.

²⁴ Mohd Norhusairi Mat Hussin and Raihanah Abdullah, "Distribution Practice of Harta Sepencarian in Malaysia: A Literature Review" *Journal of Shariah Law Research*, (2016).

²⁵ Elimartati and Elfia, "Kritik Terhadap Kompilasi Hukum Islam Tentang Ketentuan Harta Bersama Dalam Perkawinan", *Juris: Jurnal Ilmiah Syariah* 19, no. 2 (2020), p. 231-243.

²⁶ Lifa Datun Nisa, et.al., "Distribution of Poh Roh Asset Due to Divorce in Gayo Lues Community Aceh", *Al-Ihkam: Jurnal Hukum dan Pranata Sosial* 14, no. 2 (2019), p. 283-303.

²⁷ Jalal al-Din 'Abd al-Rahman ibn Abi Bakr al-Suyuti, *al-Asybah wa al-Nazair*, vol. 1, (Beirut: Dar al-Kutub al-'Ilmiyyah, 1998), p. 201.

matrimonial property. While it is indeed a custom, it is a marginal one, inconsistent, and not widely recognized. It may be a custom in the state of Negeri Sembilan or Perak at that time but not in other states of Malaysia. It is evident that the *'urf* could not be a legal basis for matrimonial property.

The indirect contributions of a wife to her husband's success in acquiring property have been a custom in Islamic society since the time of the Prophet Muhammad (PBUH). However, the issue of matrimonial property has not been raised by the Muslim community. This serves as evidence that the concept of matrimonial property based on the indirect contributions of the wife is a marginal custom that cannot be recognized.

Among the other conditions for practicing customs that exist after the completion of the Sharia is that the customs must not contradict or be in conflict with the sharia legal texts of Quran and hadith. There are several ambiguities regarding this matter. It relates to the definition of matrimonial property in the state of Selangor. Section 2 of the Islamic Family Law (State of Selangor) (Amendment) Enactment 2018.²⁸ interprets matrimonial property as follows. "Matrimonial Property" refers to property acquired jointly by husband and wife during the marriage is effective according to the conditions set by Islamic law. (Emphasis added).

Direct efforts to acquire property cannot be denied. Meanwhile, indirect efforts need to be re-discussed and refined to align with Islamic requirements. Some believe that a wife who works outside the home and helps her husband alleviate his burdens, as well as a housewife who indirectly eases her husband's burdens through cooking, washing, and so forth, has the right to claim matrimonial property. In reality, this argument is based on logical reasoning. Reason can be used as a legal basis when there are no agreed-upon or disputed evidences available. This is the view of the Shia. Reason can support evidences but cannot stand alone. This is the opinion of the Sunni scholars.

Many issues arise from the phrase "indirectly". Is marriage considered a contract that legitimises a wife or husband to claim each other's property? Marriage is an agreement that legitimises the relationship between husband and wife, not an agreement that allows spouses to take each other's property, except for what is obligatory. For example, a wife can take her husband's belonging if he does not provide for her needs. However, this is only to the extent necessary to meet the wife's usual needs. If the amount taken exceeds this limit, it is categorised as consuming another person's property unlawfully, as stated in verse 188 of Chapter al-Baqarah:

وَلَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ وَتُنذِلُوا بِهَا إِلَى الْحُكَّامِ لِتَأْكُلُوا فَرِيقًا مِّنْ أَمْوَالِ النَّاسِ بِالْإِثْمِ وَأَنْتُمْ تَعْلَمُونَ

Meaning: "And do not consume one another's wealth unjustly or send it (in bribery) to the rulers in order that (they might aid) you (to) consume a portion of the wealth of the people in sin, while you know (it is unlawful)."

²⁸ Islamic Family Law (State of Selangor) (Amendment) Enactment 2018.

Therefore, this custom might contradict that Quranic verse. Evidently, the indirect contributions of the wife entitle her to receive maintenance but do not entitle her to claim matrimonial property.

Every act of kindness performed by a husband or wife is an action that cannot be measured in monetary terms. It is the interaction and relationship between husband and wife that is required. The husband provides for the physical and emotional needs, while the wife assists in managing the household. Indirectly, the husband contributes to the harmony and peace of the wife's life by helping her manage her daily affairs. They mutually support each other in married life. There is no reward except for the blessings and mercy of Allah, as stated in verse 71 of Chapter al-Tawbah:

وَالْمُؤْمِنُونَ وَالْمُؤْمِنَاتُ بَعْضُهُمْ أَوْلِيَاءُ بَعْضٍ يَأْمُرُونَ بِالْمَعْرُوفِ وَيَنْهَوْنَ عَنِ الْمُنْكَرِ

Meaning: "The believing man and believing women are allies of one another, they enjoin what is right and forbid what is wrong."

In reality, both husband and wife have responsibilities that must be fulfilled to ensure that each of their lives remains within the pleasure of Allah, without oppressing either party.

Today's reality demands that most husbands and wives join forces to seek halal income to meet the family's essential expenses. Although the primary responsibility for earning the family's income traditionally falls on the husband, the reality necessitates that wives also contribute to generating income. There are those who believe that wives are not obligated to manage household tasks such as cooking and washing, suggesting that husbands should hire helpers for their wives. It is important to remember that the husband holds authority over the wife. When a husband requests his wife to cook for him, it is considered an instruction that must be obeyed. However, there is no specific mandate stating that cooking, washing, and similar tasks are the responsibility of either the husband or the wife. It depends on local customs and individual tolerance. The situation in our country, as well as in various parts of the world, typically shows that wives play a significant role in managing the household. Therefore, this custom can be regarded as a rule, as it meets the criteria of tradition according to Islamic law, which differs from the concept of matrimonial property as discussed.

The issue that arises is when the basis of "indirect" contributions is used as a legal reasoning. In that sense, parents, children, siblings, and friends are also entitled to claim joint property through the assistance they provide in the form of advice, affection, and so on to individuals, especially in areas that lead to their success. This is particularly relevant for those who live with the individual and manage household affairs. Therefore, the definition of matrimonial property based on the indirect contributions of a wife needs to be re-examined and refined. What happens when a husband and wife are given a piece of land by someone, for example, before they marry, and they work on it together directly until they marry and then divorce? Can

each party claim joint property considering it does not meet the definition provided by law? Or can each of them claim it through civil court?

Syirkah (Partnership)

As discussed scientifically in the writings of scholars and academics in Malaysia, matrimonial property cannot be associated with any partnership term in Islamic jurisprudence except for *al-abdan* partnership that represents a partnership of two or more people to carry out work with their respective energy and skills, and profits are divided according to agreement. This is according to the Hanafi school of thought, as the Shafi'i school does not accept such a partnership concept. However, linking matrimonial property with the *al-abdan* partnership does not meet the criteria of analogy (*qiyas*). This is because matrimonial property involves assets, whereas the *al-abdan* partnership does not involve assets. A contract (*'aqd*) is required in this matter. In the context of husband and wife, such a contract does not exist. This situation is termed as *qiyas ma'a al-fariq* (not meeting the conditions). Matrimonial property should be analogized to the *al-amlak* partnership in accordance with direct efforts. The *al-amlak* partnership refers to the sharing of property between two or more individuals through purchase, inheritance, gifts, charity, or estate.²⁹ This clearly indicates that this is the basis that can be referenced in the practice of distributing matrimonial property according to the definition of "directly." This partnership does not require any agreements or contracts, thus fulfilling the characteristics of matrimonial property.

This means that a wife or husband can claim any contributions they have made, whether in money or effort, towards the property that exists during the marriage.³⁰ For example, after a divorce, whether due to separation or death, a wife can claim property contributed towards the construction of a house, household equipment, and so forth, which were purchased jointly with the husband, or they both bought land together for development, such as housing projects or farming.³¹ All of these represent direct efforts. Indirect efforts might convey element of *gharar* (uncertainty) when practiced. This is because the assistance and advice given by a wife to her husband, for instance, cannot be quantified. Such uncertainties can lead to conflicts between the two parties. Islam emphasizes the principle of clarity in matters of *mu'amalat* (human-to-human activities), especially those involving property.

Istishab (Status Quo)

The source of argument directly related to matrimonial property is not explicitly found in the texts of Quran or Hadith. However, this does not imply that it

²⁹ 'Ala' al-Din al-Kasani, *Badai' al-Sanai'*, (Beirut: Dar al-Kitab al-'Arabi, 1982) vol. 6, p. 56.

³⁰ Nur Avita, et.al., "Integration of Tradition and Sharia: Dowry and Dui Menre in the Marriage of the Bugis Community in Bone Regency", *El-Mashlahah* 12, no. 2 (2022), p. 124-138.

³¹ Syukrawati, et.al., "Post-Divorce Rights of Women and Children in Pekalongan City, Central Java: Challenges in Islamic Law Analysis", *Al-Ahkam* 34, no. 1 (2024), p. 121-146.

is impermissible. Islam is a complete religion and way of life, perfected through verse 3, Chapter al-Maidah, which clearly states the perfection of Islam. This means that all human needs and desires are addressed within the Quran or Hadith, albeit their existence may be direct or indirect. *Istishab* is a method of adhering to rational or legal evidence while being certain or uncertain about the absence of elements that may alter the situation.³² A well-known principle states, "*The default ruling for matters of transactions is permissibility unless there is evidence indicating otherwise*".³³ Based on this principle, the distribution of matrimonial property is a form of transaction that is permissible as long as it does not contradict other principles of sharia.

Nonetheless, the fundamental principle regarding a person's property is that it is protected by sharia, and it is forbidden for anyone to acquire another person's property except with their consent. This is based on the sharia legal maxim *al-asl al-'adm*, which means the basic principle of anything is that it does not exist.³⁴ In this context, there is no permission to take someone else's property unless there is the owner's consent. The maxim is based on the aforementioned verse 188, Chapter al-Baqarah, which prohibits consuming (taking) other's property without their consent. In this case, a wife or husband has to justify or provide evidence that there is consent to acquire matrimonial property from their spouse. The verse 188 sends a great reminder that one's property is protected by sharia and in order to obtain it, one must provide proofs of authority on that particular property. Indirect contribution is not one of them.

Siyasah Shar'iyah (Islamic Governance)

Among the foundations for Islamic law, there is a concept based on the *siyasah shar'iyah*. Many studies relate Islamic matrimonial property distribution based on the concept.³⁵ This is often used when dealing with government policies or regulations in state administration that do not have clear religious texts or have texts but with ambiguous meanings. It is compatible with the nature of joint property that involves the management and administration of public assets.³⁶ The government can establish laws that are not explicitly stated in the Quran and Hadith as long as they do not contradict these two sources. The contradiction referred to is of a fundamental

³² Abu Hamid al-Ghazzali, *al-Mustasfa fi 'Ilm al-Usul*. (Beirut: Dar al-Kutub al-'Ilmiyyah, 1996) p. 160.

³³ Yahya ibn Syaraf al-Nawawi, *al-Minhaj fi Syarh Sahih Muslim ibn al-Hajjaj*, 5th. Ed., vol. 13, p. 504. (Beirut: Dar al-Khair, 1999).

³⁴ Jalal al-Din 'Abd al-Rahman ibn Abi Bakr al-Suyuti, *al-Asybah wa al-Nazair*, vol. 1 (Beirut: Dar al-Kutub al-'Ilmiyyah, 1998).

³⁵ Rajnaara Chowdhury Akhtar and Faizal Ahmad Manjoo, "Matrimonial Property in Islamic Law" in *Research Handbook on Family Property and the Law*, (Edward Elgar Publishing, 2024), p. 77-91.

³⁶ Mursyid Djawas and Sri Astuti Abdul Samad, "Conflict, Traditional, and Family Resistance: The Pattern of Dispute Resolution in Acehese Community According to Islamic Law". *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 4, no. 1 (2020), p. 65-84.

nature. If it is only external or can still be interpreted or receive various interpretations, it is permissible.

The concept of *siyasah shar'iyah* in the management and administration of a state is not solely based on rational logic.³⁷ It cannot stand alone because it still needs to be grounded in secondary sources of Islamic law (sharia), such as *maslahat mursalah* (consideration of public interest), *istihsan* (juristic preference), and *sadd al-dhara'i'* (blocking the means to evil). Each of these legal sources has conditions that must be met before they can be applied.³⁸

Maslahat mursalah refers to the benefits of something that can bring goodness, but there is no religious source that either permits or prohibits it.³⁹ The application of *maslahat mursalah* depends on its terms and conditions. Different scholars have their own requirements. There are many arguments related to *maslahat mursalah* as a legal basis in sharia. Generally, some proponents of *maslahat mursalah* accept it as a legal basis without restriction, while some of them embrace it with restrictions. Accepting it as a legal basis without restriction could produce many innovations that are not sharia compliant. Many aforementioned claims linking matrimonial property with *maslahat mursalah* are of this kind.

al-Ghazzali and al-Baidawi subscribe to *maslahat mursalah* but it has to be *daruriyyah* (necessary), *qat'iyyah* (definitely effective) and *kulliyyah* (entirety).⁴⁰ In this case, distribution of matrimonial property could not be based on *maslahat mursalah* because it is not considered *daruriyyah*. *Daruriyyah* means that if the distribution of matrimonial property is denied, it leads to loss of life or harmful to human body. It is an inevitable situation that poses grave danger to someone. It represents the fundamental benefits, which are described as those on which the existence of humanity depends, where their abandonment causes total damage and disorder. They are the values of greatest importance values of life, religion, mind, property and progeny. These attributes must be safeguarded and all actions that point at protecting them must be established, whether by every unit of the community, or by government authorities.⁴¹ According to conditions by al-Ghazzali and al-Baidawi, distribution of matrimonial property could not be based on *maslahat mursalah*.

Another view among al-Shafi'iyyah, according to al-Juwaini and Ibn Barhan, prominent jurists such as al-Shafi'i, Abu Hanifah and the majority of his followers is the one that subscribes to the restricted *maslahat mursalah*, provided that the benefit is almost similar to the *maslahat mu'tabarah* (certified benefit in the Quran

³⁷ Mursyid Djawas, et.al., "Harmonization of State, Custom, and Islamic Law in Aceh: Perspective of Legal Pluralism." *Hasanuddin Law Review* 10, No. 1 (1 May 2024), p. 64-82.

³⁸ Asyharul Muala, "Repositioning of Islamic Economics in the Era of Globalization from the Maqāṣid Syarī'ah Perspective", *Journal of Islamic Law* 1, no. 1 (2020), p. 45-63.

³⁹ Abu Hamid Muhammad ibn Muhammad al-Ghazzali, *al-Mankhul*, 2nd edn. (Beirut: Dār al-Fikr 1979).

⁴⁰ Abu Hamid Muhammad ibn Muhammad al-Ghazzali, *al-Mustasfa fi 'Ilm al-Usul*. (Beirut: Dar al-Kutub al-'Ilmiyyah, 1996).

⁴¹ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (2nd edn, Ilmiah Publishers 2007).

and Hadith) or accordant with the general or specific evidence of sharia, which is available in the Quran or Hadith.⁴² The second type of restricted *maslahat mursalah* is difficult or impossible to achieve. This is due to the fact that the element of similarity with the *maslahat mu'tabarrah* renders the *maslahat* no longer *mursalah*, which is out of context. In fact, the requirement for *maslahat* to be compatible with general or specific evidence in sharia renders it to be based on *qiyas* (analogical reasoning), which represents another legal basis. Therefore, the distribution of matrimonial property could not be based on *maslahat mursalah* as well, according to this strict condition.

According to al-Shatibi, among the conditions for practising *maslahat mursalah* is that it must pertain to worldly matters that can be reasoned with the intellect. Additionally, the benefits to be achieved must be of a general welfare nature. Most importantly, the outcomes must not clearly contradict the religious texts of Quran and hadith.⁴³ The distribution of matrimonial property meets the conditions of *maslahat mursalah* except for the last condition. This is because it contradicts verse 188, Chapter al-Baqarah, as discussed previously.

The majority of Muslim jurists, which comprise al-Hanafiyah, prominent jurists of al-Malikiyah, the majority of al-Shafi'iyah, al-Hanabilah, al-Zahiriyyah, al-Ibadiyyah and Shia totally reject the principle of *maslahat mursalah* as a legal basis in sharia.⁴⁴ How is it that Malaysian muslim who are allegedly claim themselves as the followers of al-Shafi'iyah contravene the principle of their *madhhab* (school of thought) by accepting *maslahat mursalah* to justify the legitimacy of matrimonial property? According to this view, specific evidence from the Quran and Hadith should endorse any benefit in order to be considered as valid. Otherwise, rulings of sharia are open to abuse, since the mind has full control over the issue and could overrule any evidence or principle of sharia. Moreover, the legal basis lies between the *maslahat mu'tabarrah* and *maslahat mulghah* (nullified benefit). It could be associated with both attributes with certain justifications, which renders the principle invalid due to the uncertainty of its status.

Conclusion

The matrimonial property based on direct contributions is recognised by Islamic law. A wife who is neglected by her husband for example or not provided with sufficient support to meet her living needs is also entitled to matrimonial property. Nevertheless, matrimonial property based on indirect contribution needs to be refined and re-examined, as it lacks strong supporting foundations from Islamic law and its principles. Current claims on its legitimacy based on *'urf*, *siyasah*

⁴² Abu al-Ma'ali 'Abd al-Malik ibn 'Abd Allah ibn Yusuf al-Juwaini, *al-Burhan fi Usul al-Fiqh*, vol 1 (Beirut: Dar al-Kutub al-'Ilmiyyah, 1997).

⁴³ Abu Ishaq Ibrahim ibn Musa al-Shatibi, *al-Muwafaqat*, vol 2 (Beirut: Dar al-Ma'rifah, n.d.).

⁴⁴ Wahbah al-Zuhaili, *Usul al-Fiqh al-Islami*, vol 2 (Beirut: Dar al-Fikr li al-Tiba'ah wa al-Nashr wa al-Tauzi' 1986).

shar'iyah and *maslahat mursalah* do not fulfil the terms and conditions of the aforementioned principles. Thus, new principle or legal basis is needed to legitimise Islamic matrimonial property distribution.

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