

The Comparison of Marital Property Division Between Indonesia and Malaysia from the Perspective of Fiqh Rules

Harwis Alimuddin^{1*}, Syaifuddin², Sucipto³

¹Institut Agama Islam Negeri Ternate, Indonesia. E-mail: harwis@iain-ternate.ac.id

²Institut Agama Islam Negeri Ternate, Indonesia. E-mail: ifudsby@iain-ternate.ac.id

³Institut Agama Islam Negeri Ternate, Indonesia. E-mail: scipto29@yahoo.co.id

*Corresponding Author

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Abstract: The regulations regarding the division of marital property post-divorce in Indonesia and Malaysia are the result of the juristic interpretation by scholars that has been adjusted to the socio-cultural context of the society and subsequently legislated into law. The regulations governing the division of marital property post-divorce in Indonesia refer to Law No. 1 of 1974 articles 34–37 and the Compilation of Islamic Law (KHI) articles 85-97, while in Malaysia it refers to Act 303 Islamic Family Law (Federal Territories) 1984. The majority of scholars in Indonesia and Malaysia analogize it to shirkah abdan (partnership in skill). This research is a literature study using a normative research type with a comparative study approach using the analysis of the principle of al-kharaj bi al-dhaman. This fiqh rules desire that the right to profit must be proportional to the obligation to bear risks. This principle is generally used in matters of transactions. Therefore, if the marital relationship in marital property is analogized to shirkah abdan, then it is only appropriate that this principle can also be applied in the rules of marital property division between spouses. This study concludes that the division of marital property in Indonesia, which adopts a civil law legal system, tends to divide marital property equally. Meanwhile, in Malaysia, which adopts a common law system, it considers the contributions made by the husband or wife. Through the analysis of the principle of al-kharaj bi al-dhaman, the provisions regarding the division of marital property post-divorce by considering the contributions of the husband or wife in marital property are more relevant to this principle.



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Introduction

In the classical fiqh literature, there is no rule about marital property. A husband who divorces his wife in fiqh is only required to pay maintenance during the 'iddah period, provide mut'ah, childcare costs, and unpaid dowry (Wahbah al-Zuhaili, n.d.). Countries around the world also have different regulations on the division of marital property post-divorce (Pelu & Dakhoir, 2021). Indonesia and Malaysia are two large Muslim countries in Asia that regulate the division of marital property post-divorce. This means that the regulations for the division

of marital property applied in Indonesia and Malaysia are the result of the juristic interpretation by scholars that have been adapted to the socio-cultural context of society.

Women often earn less than men, and in many instances, they continue to be the primary caregivers for children, while men contribute through maintenance payments to support the children. Additionally, both men and women may face financial challenges as single parents with custody of children. However, not all marriages end in the same manner, and the associated costs and financial strategies for coping will differ accordingly. Nevertheless, these observations shed light on some of the probable factors influencing changes in wealth distribution following marital dissolution, and underscore the potential variations in financial outcomes across different stages of the dissolution process and between genders (Kappelle & Baxter, 2021).

Indonesia is a country where the culture places the wife as a partner of the husband in building a household. A wife, even if she does not work outside the home and manages the household within the home, is considered a partner of the husband who supports him in his work outside the home. Especially if a wife works in her profession outside the home. Therefore, it can be said that all wives in Indonesia are considered to be working either inside or outside the home. This culture requires the wife to receive a share of the property obtained since the marriage occurred (Djawas et al., 2022).

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The division of marital property, which is also regulated in Malaysia, has also been adjusted to the customs existing in Malaysia. As it is known, marital property only exists within the Malay culture or the Malay Archipelago. This is because the concept of property ownership for married women is different from the English common law principle which states that when a woman marries, her property becomes part of her husband's property (Mat Hussin & Daud, 2020).

It is undeniable that classical fiqh and interpretations that have been codified during the time of the imams of the schools are also biased by patriarchal culture (Harwis Alimuddin & Abdurrahman, 2023). Therefore, it is natural that the fiqh paradigm that emerged from the understanding of the texts at that time is a fiqh paradigm formed by patriarchal culture. As a result, in classical fiqh, there is no discussion about marital property. Classical fiqh was built on the culture of property separation. Such a paradigm was certainly correct according to its

time and place. When such understanding is brought to a different time and place, it must certainly be adapted to the time, place, and circumstances. Fiqh is not something final. Fiqh is dynamic and flexible with time, place, and circumstances.

The KHI used as a reference in Indonesia is also codified by considering the culture in Indonesia (Ismail et al., 2022). The problem in KHI is that the division of marital property is divided equally between husband and wife as long as there is no other stipulation based on a marriage agreement. As stated in Article 97 of KHI: Article 97 A widow or widower is entitled to half of the marital property as long as there is no other stipulation in the marriage agreement (Indonesia, 2015). The phrase "as long as there is no other stipulation in the marriage agreement" indicates that marital property may be divided unequally between husband and wife if there is a stipulation in the marriage agreement agreed upon from the beginning.

According to the Civil Code, the division can be carried out based on the evidence submitted by the plaintiff and the defendant. Weak evidence results in more marital property being awarded to the plaintiff, so the plaintiff receives $\frac{3}{4}$ of the share and the defendant receives $\frac{1}{4}$ of the share. Thus, the division of marital property according to Article 128 of the Civil Code states that after the dissolution of marital property, the wealth is divided equally between husband and wife but can change according to legal evidence in the judicial process. The issue that arises then is whether justice in the division of marital property can be achieved if the marital property is divided equally 50:50 between husband and wife when one party's contribution to the household far exceeds the others. It is not uncommon in households for there to be an imbalance in performing rights and duties. A husband who does not contribute to household maintenance or a wife who does not manage the household. A husband with a dual role (double burden) or conversely, a wife with a dual role. Besides playing a role in earning a living, she also plays a role in managing the household.

After conducting a literature review, several studies compare the joint property distribution system in Indonesia and Malaysia, such as those by Abdul Rahman Muqshith (Muqshith, 2024), K. Aibak and Anusantri (Aibak & Anusantari, 2023), and M. Senik (Senik, 2022). However, none specifically use the analysis of the principle of al-kharaj bi al-dhaman as an approach. In fact, most contemporary scholars draw an analogy between the distribution of joint marital assets and syirkah abdan (partnerships of effort) in fiqh muamalah. Therefore, this study is unique as it examines the issue from the perspective of the al-kharaj bi al-dhaman principle.

Research Methods

This study employs a qualitative approach with a comparative method. This approach will enable an in-depth analysis of the regulations and practices of marital property division in Indonesia and Malaysia, as well as the application of the principle of al-kharaj bi al-dhaman in both contexts. The research is descriptive-analytical in nature. Descriptive as it outlines the

legal rules and practices in both countries, and analytical as it conducts an in-depth analysis of the collected data to understand the relevance and application of the principle of al-kharaj bi al-dhaman . Data is collected by reviewing legal literature, laws, and academic documents relevant to the research topic. The data is analyzed by examining the legal rules and practices of marital property division in Indonesia and Malaysia based on the collected data. The data is then compared using the principle of al-kharaj bi al-dhaman , assessing the extent to which this principle is applied in the division of marital property in both countries, and analyzing the relevance and fairness of the division based on this principle.

Discussion

The Marital Property According to The Rules in Indonesia

Article 35 (1) Property acquired during the marriage becomes marital property. (2) Property brought into the marriage by each spouse and property acquired individually as gifts or inheritance is under the control of each spouse as long as the parties do not stipulate otherwise. Article 36 (1) Regarding marital property, either spouse can act with the consent of both parties. (2) Regarding brought-in property, each spouse has full rights to perform legal actions concerning their property. Article 37 If the marriage ends in divorce, the property is regulated according to their respective laws (Indonesia, 2015).

Based on the positive law applicable in Indonesia, marital property is regulated in Law No. 1 of 1974 on Marriage, the Civil Code (KUHPer), and the Compilation of Islamic Law (KHI). The regulation of marital property is legally recognized, including in matters of administration, usage, and division (Anindya Harimurti, 2021).

The legal basis for marital property can be traced through the following laws and regulations. First: Law No. 1 of 1974 Article 35 paragraph (1) states that marital property is "Property acquired during the marriage". This means that wealth acquired before marriage is not considered marital property. Second: Civil Code Article 119 states that "From the moment the marriage is solemnized, there is marital property between husband and wife as long as there are no other stipulations in the marriage agreement. Marital property during the marriage cannot be annulled or changed by an agreement between husband and wife." Third: Compilation of Islamic Law Article 85 states that "The existence of marital property in marriage does not preclude the possibility of each spouse having their own property". This article mentions the existence of marital property in marriage but does not preclude the possibility of each spouse having their own property.

Article 119 From the moment the marriage is solemnized, there is comprehensive marital property between husband and wife as long as there are no other stipulations in the marriage agreement. Marital property during the marriage cannot be annulled or changed by an agreement between husband and wife (Pratiwi et al., 2022).

Article 122 All earnings and income, as well as all profits and losses obtained during the marriage, also become profits and losses of the marital property. Article 124 Only the

husband may manage joint assets. He may sell it, transfer it and encumber it without the help of his wife, except in cases regulated in Article 140. He may not give marital property as a gift between those who are both still alive, whether immovable property or the whole or a part or amount certain things and movable property, if not to children born to them and their marriages, to give them a position. In fact, he may not stipulate provisions by means of a gift regarding a specific item, if he allocates to himself the right to use the proceeds of that item (Pratiwi et al., 2022).

Article 126 Joint assets are dissolved by law: 1. due to death; 2. because the marriage was with the permission of a judge after the husband or wife was not present; 3. because of divorce; 4. because the table and bed are separated; 5. due to separation of assets.

Therefore, the theory of determining marital property according to the positive rules existing in Indonesia occurs automatically after the marriage contract is legally executed, so the property obtained by husband and wife automatically becomes marital property. If a husband or wife wants their assets to be separated into personal assets, they must enter into a marriage agreement. As for the theory of determining marital property in classical jurisprudence, property acquired by husband and wife after the marriage contract remains automatically private property. If a husband or wife wants their assets to be combined, they must enter into another contract such as a shirkah contract or marriage agreement (Elimartati & Elfia, 2020).

The Marital Property According to The Rules in Malaysia

In Malaysia, marital property is known as marital property. Generally, marital property is acquired jointly by spouses during a valid marriage, regardless of whether the income is obtained from the husband or the wife. Under the Islamic Family Law Enactment of Selangor 2003, Section 122:2 (a) specifies, "The limit of contributions made by each party in the form of money, property, or labour to acquire those assets."

The legal basis used by the judge of the Syariah High Court of Melaka in deciding the division of marital property between husband and wife is Section 3 (b) (x) of the Administration of the Religion of Islam (State of Melaka) Enactment 2002. The contents regulated in this section include: "In its civil jurisdiction, to hear and determine all actions or proceedings if all parties in the action or proceeding are Muslims and the action or proceeding relates to the division or claim of jointly acquired property" (Senik, 2022).

In addition, the legal basis used is the Practice Direction No. 5 of 2003. This direction explains that Syariah courts across all provinces in Malaysia have agreed and ratified the acceptance of this Practice Direction, which relates to the timeframe for making claims on marital property between husband and wife during divorce proceedings, after divorce, or after the death of one party. Marital property cannot be claimed while the marriage is still ongoing. Another legal basis is the Practice Direction No. 6 of 2003. According to Practice Direction No. 6 of 2003, claims on marital property between husband and wife must be made in the court that has jurisdiction in the province where the divorce decree and the

confirmation of the divorce were issued. It is clear that the established laws and Practice Directions grant the Court the authority to accept and decide on such cases (Senik, 2022).

The legislation regarding marital property claims explicitly grants the authority for division solely to the court that has allowed the pronouncement of talaq or the court that has issued the divorce decree, including divorces that occur outside the court that need to be confirmed for registration purposes. This also applies to other marital dissolutions made under the court's authority. However, this differs in the case of Mal No. 04100-017-0309-2008, where it was found that the disputed property was located outside the State of Melaka (Senik, 2022).

Aside from the Selangor Islamic Family Law Enactment 2003, marital property in Malaysia is also determined by the Fatwa Committee of the National Council for Islamic Religious Affairs Malaysia (MKI). Its contents are as follows: 1) Marital property after the death of one party in the marriage in Selangor can be distributed to the surviving husband or wife before inheritance, including after the iddah period. 2) The division of marital property must follow the rules of direct or indirect contribution between husband and wife. 3) The agreement on the division of marital property must be with a court order (Aibak & Anusantari, 2023).

The law regarding the division of matrimonial property in cases of polygamy is also provided for in the Islamic Family Law (Federal Territories) Act 1984 and the Administration of Islamic Law Enactments of Melaka, Pulau Pinang, Sabah, Negeri Sembilan, and Kelantan. The relevant provision is found in Section 23(9) of the Islamic Family Law Act (Federal Territories) 1984 and Section 23(10) of the respective Islamic Family Law Enactments of the states. Terengganu and Sarawak do not provide for the division of matrimonial property in polygamous marriages. This means that matrimonial property in these states can only be claimed after divorce, whether through death or during the lifetime of the spouses (Serji et al., 2021).

The Marital property from the Perspective of Fiqh and Its Principles

As far as research goes, no discussion on marital property is found in classical fiqh (Mugniyah 2001). The regulations in fiqh stipulate that the wife's property status is separate from the husband's property. Each of them is free to spend their own assets. The wife does not depend on the husband's permission to spend her wealth, and vice versa (Anindya Harimurti, 2021).

The existence of marital property can be seen from at least two perspectives. Firstly, some believe that Islam does not recognize the concept of marital property except through analogy (qiyas) with the concept of shirkah (partnership). This view does not recognize the merging of husband and wife's assets through marriage. The wife's assets remain her property and are fully controlled by her, and similarly for the husband. According to this view, the wife is still considered capable of managing her property independently without her husband's

assistance. Secondly, there is a view that marital property aligns with the aspirations and intentions of Islamic law (Asnawi, 2022).

This is understandable because the social structure of society when fiqh was codified did not recognize the merging of husband and wife's assets. The patriarchal culture only acknowledged the separation of assets between husband and wife. Therefore, the regulations on marital property outlined in the Compilation of Islamic Law (KHI) are undoubtedly the result of *ijtihad* by Indonesian scholars who have adapted them to cultural norms.

The *usul* (fundamental) basis used is *qiyas* (analogy) with *shirkah abdan* in fiqh muamalah. *shirkah abdan* is sometimes also referred to as *shirkah al-a'mal*. *shirkah abdan* is the partnership of two or more parties to perform work according to their expertise, with equal or unequal profit distribution (Khalil, n.d.). The work and skills shared may be the same or may vary among the partners involved. In the cultural perspective of Indonesia, husband and wife are considered to be collaborating, each contributing according to their competencies. A husband with a particular profession who contributes financially to the household is considered part of the partnership with his wife. Similarly, a wife who works outside the home is regarded as a member of the *shirkah*, contributing with her skills and profession. A wife who manages the household is also considered as someone working according to her expertise in household management. Therefore, a wife who takes care of the household is seen as part of the partnership, contributing to the financial gains of the household and should receive a share of the marital property in the event of a separation, whether caused by death or divorce.

There are at least three factors that differentiate classical and modern cultures regarding the status of wives in the household. First, the role of the wife in classical society was predominantly domestic. This was due to women in classical times being generally isolated at home, not given opportunities for education and skill acquisition that could be used in the public sphere. Modern society, however, provides women with opportunities for education and skills development for use in the public sphere. These opportunities allow women to acquire assets that contribute financially to the household. Second, the reality of financial support. In classical society, the wife tended to be the recipient of financial support. This differs from modern society, where wives also help husbands in earning a living, and in some cases, wives earn more than their husbands. Third, classical society did not recognize the merging of husband and wife's assets. The husband's property was entirely his own, and the same applied to the wife's property. This contrasts with modern society, which recognizes the merging of assets between husband and wife. A husband who works to earn a living clearly contributes financially to the household. Likewise, a working wife is considered to contribute financially to the household. A wife who manages domestic affairs is also considered to contribute financially by supporting her husband in earning a living. In modern society, both husband and wife are seen as working partners, and thus both are entitled to marital property upon separation (Alimuddin, 2021).

The Syafi'iyah and Malikiyah scholars divide shirkah (partnership) into four types. First: shirkah 'Inan, which is a partnership limited to the pooling of capital and effort to gain mutual profit. Second: shirkah abdan, which is a partnership where two or more parties collaborate on something according to their expertise, with the profits shared equally or unequally (Khalil, n.d.). The work and skills shared may be the same or may vary among the partners involved. Third: shirkah mufawadah, which is not limited to the pooling of capital and effort for mutual profit, but also includes the acquisition of each party through other means such as gifts and donations. Fourth: shirkah wujuh, which is a partnership based solely on trust (Khalil, n.d.).

Marital property falls under shirkah abdan, aligning with various types of shirkah present in Indonesian society. This is due to the fact that most husbands and wives work hard every day to support their families. If only the husband works, the wife still makes a significant contribution by maintaining family stability and unity through managing the household, raising children, shopping, and preparing food and drinks for the husband while he works. The share (percentage) received by individuals or parties involved in shirkah abdan is not determined by scholars. Therefore, the share received by individuals or parties in a shirkah is based on the initial agreement or mutual consultation.

The definition of sharikat al-abdānis is when two individuals agree to collaborate on a specific task, and the revenue generated from the task is divided between them based on the agreed-upon ratio. This form of partnership is commonly found among various professions such as carpenters, blacksmiths, porters, tailors, goldsmiths, and others. This partnership remains valid whether the partners have the same profession, like a carpenter-carpenter partnership, or if their professions differ, like a carpenter-blacksmith partnership. It is irrelevant whether all parties actively participate in the work, or if some choose not to work at all; similarly, whether they work individually or collectively does not affect the validity of this partnership. Such partnerships are known by various names, including works company (sharikat al-a'mal), bodies company (sharikat al-abdan), crafts company (sharikat al-sanā'i'), and acceptance company (sharikat al-taqabbul) (Zaghloul et al., 2021).

Therefore, the division of marital property as regulated in the KHI (Compilation of Islamic Law) with the provision of an equal 50:50 split does not have a strong basis and does not achieve justice for the spouse who has contributed more significantly. Consequently, the rule in the KHI should be considered a default law that occurs automatically (ijbari) but can be altered based on changing conditions, or through mutual consultation and other agreements made by the husband and wife, such as a prenuptial agreement.

The provision for splitting marital property into two equal parts is not an absolute solution for resolving marital property matters according to Article 36 of the Marriage Law. The wife's contribution to the acquisition of marital property in the household can be taken into account by the judge in determining the percentage share of the property obtained. Judges, in making their decisions, must consider the prevailing laws and customs in society.

Understanding the Principle of al-kharaj bi al-dhaman

The right to obtain profit is due to the obligation to bear risk. The meaning of this principle is that the person who bears the burden of loss for an item if it is damaged, will benefit from that item as compensation for having to bear the loss or damage (Alimuddin 2022). If something is under someone's responsibility, the profits generated by that thing become the right of the person who guarantees it as long as it remains under their responsibility, provided that the responsibility falls under ownership (Azzam, 2005). Therefore, this principle explains that the right to obtain profit is due to the obligation to bear loss or risk.

In general, the above principle is also closely related to the principle of Al-Ghurmu Bilghunmi which has a similar meaning to the above principle, namely that profit depends on the risk borne. In more common terms, this is often referred to as "high risk, high return," meaning that the greater the risk borne, the greater the profit usually obtained (Nurjamil, Syafe'i, and Mustofa 2024). Some examples of the application of this principle in fiqh muamalah are as follows: If a buyer returns a purchased item due to a defect, even though they have used it, the buyer is not obliged to pay rent for using the item because if the item is damaged while under their responsibility, before they have the opportunity to return it to the seller, all the costs (price) they have incurred would be lost. If someone buys a goat, and the goat then gives birth, the kid belongs to the buyer even if they return the goat to the seller due to a defect. If someone buys an item and then rents it out to someone else, the rental income belongs to the buyer even if they later return the item to the seller due to a defect (Azzam, 2005).

Therefore, by applying this principle, the division of marital property in the event of a divorce does not always have to be equal. Instead, it should be adjusted based on who bears the most loss in the process of accumulating the marital property. The spouse who contributes more is the one who bears the most loss. Thus, through this approach, the spouse who contributes more to the household can receive a larger portion of the marital property than the one who contributes less.

The Comparative Analysis of Marital Property in Indonesia and Malaysia from the Perspective of the al-kharaj bi al-dhaman Principle

In Indonesia, before the independence era, marital property division followed two models: $\frac{1}{2}$ to $\frac{1}{2}$ and $\frac{1}{3}$ to $\frac{2}{3}$. However, after independence, the distribution of marital property is regulated by the UUP and KHI, adopting a nationally applied $\frac{1}{2}$ to $\frac{1}{2}$ formulation pattern. This distribution pattern differs from that in Malaysia, where distribution is based on the quantity of contribution from either spouse. Marital property laws in Indonesia adhere to the principle of togetherness, which encompasses all aspects, both physical and spiritual, material and immaterial. This principle underscores that the wealth acquired by spouses becomes joint from the outset of the marriage (Pelu & Dakhoir, 2021).

The differences in regulations regarding marital property in Indonesia and Malaysia are due to the formation of laws in these countries. Indonesia adheres to the civil law system, which relies on written law, meaning that judges are not obliged to follow previous judges' decisions. In other words, judges in Indonesia refer to the applicable regulations when deciding a case. On the other hand, Malaysia follows the common law system, which prioritizes unwritten law or customary law and relies on judicial precedents. In practice, judges in Malaysia refer to both the applicable regulations and customary practices or judicial precedents when deciding cases.

In contrast, the regulations in Malaysia consider both direct and indirect contributions in acquiring assets or property. Historically, marital property was divided equally when both husband and wife worked together to acquire it. Malaysian laws generally provide guidance on the division of marital property, allowing the court to order the division after a divorce, considering each party's contribution to acquiring the property. The acceptance of dividing matrimonial property between spouses by the Malaysian legal judiciary is based on evidence from customary practices and interests (Zaghloul et al., 2021).

If the *al-kharaj bi al-dhaman* principle is applied, the more appropriate method of division is based on contribution, as practiced in Malaysia. The party that contributes more bears more loss and should therefore receive a greater share of the benefits. In the context of marriage, analogized to *shirkah abdan* (partnership), the party that contributes more should receive a larger share of the marital property.

Legal protection in Malaysia extends to both Malay Muslim women and men. The contributions made by women in acquiring property should not be underestimated as they significantly contribute to the household economy and serve as catalysts for property acquisition during marriage. Marital property cases tried in the Shariah courts of Malaysia reflect the recognition of Malay women's contributions. The court-ordered division of property is subject to the parties' directions if an agreement can be reached. Further analysis of marital property division using the *al-kharaj bi al-dhaman* approach can be seen in the following table:

Country	Legal System	Method of Marital Property Division	Conformity with the <i>al-kharaj bi al-dhaman</i> Principle
Indonesia	Civil Law	Divided equally between husband and wife without considering their contributions, as both are considered to work equally, even if the wife only works	Less relevant to the <i>al-kharaj bi al-dhaman</i> principle, because equal division can disadvantage one party who has contributed more to accumulating the marital property.

		in the domestic sphere, and vice versa.	
Malaysia	Common Law	Divided based on the contributions of the husband and wife in accumulating the marital property.	This method is more in line with the <i>al-kharaj bi al-dhaman</i> principle, as this principle dictates that the party contributing more also bears more risk. Consequently, the party bearing more risk should receive more benefits.

This table shows that the division of rights to marital property upon divorce should consider the contribution of each spouse. Using the *al-kharaj bi al-dhaman* principle, the fairer method of property division is the one practiced in Malaysia. However, if related to the concept of *shirkah*, the percentage division should be determined from the outset before the *shirkah* occurs. Therefore, the most prudent division rule is as follows:

- a. Determine the default percentage share of 50 percent if no agreement is made before the marriage contract.
- b. Before the marriage contract, it is advisable to agree on the percentage share of marital property.
- c. If no agreement is made, and it turns out that during the marriage one party contributes more and a divorce occurs, it should be resolved through mutual consultation in a good manner.
- d. If no resolution is found, the disadvantaged party may bring the matter to the authorities for a fair decision.

Conclusion

This study concludes that the division of marital property in Indonesia, which follows a civil law system, tends to divide marital property equally. In contrast, Malaysia, which follows a common law system, considers the contributions made by the husband or wife. Through the analysis of the *al-kharaj bi al-dhaman* principle, the provision of post-divorce marital property division considering the contributions of the husband or wife is more relevant to this principle. However, if related to the concept of *shirkah*, the percentage division should be determined from the outset before the *shirkah* occurs. Therefore, the most prudent division rule is as follows: Determine the default percentage share of 50 percent if no agreement is made before the marriage contract. Before the marriage contract, it is advisable to agree on the percentage share of marital property. If no agreement is made, and it turns out that during the marriage one party contributes more and a divorce occurs, it

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