

# JUSTICE AND LEGAL SETTING ASIDE OF MARITAL PROPERTY: FULFILLMENT OF SUBSTANTIVE JUSTICE IN THE SETTLEMENT OF MARITAL PROPERTY DISPUTES THROUGH A PEACE AGREEMENT (*AS-SULHU*)

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**Abstract:** This paper discusses efforts to fulfill substantive justice by setting aside the applicable marital property law. The focus of the research lies on the practice of resolving disputes over the division of marital property by related parties (spouses or ex-spouses, and judges) who set aside the applicable marital property law through a peace agreement (*As-Sulhu*). This research has important significance because it raises issues that are quite sensitive in society, especially couples or ex-husbands and wives who experience disputes related to marital property. Optimizing dispute resolution through *As-Sulhu* is a step by judges in realizing substantive justice when deciding marital property disputes. The socio-legal legal research method is applied by deeply analyzing legal materials and explaining the legal context. Empirical data needed for a holistic picture is obtained through observation, interviews, and other methods according to research needs. Qualitative analysis with theoretical and juridical interpretation techniques was used. The results showed that the applicable regulations related to the division of marital property have not met the criteria of substantive justice. Therefore, the practice involves related parties (spouses or ex-spouses and judges) resolving marital property disputes by overriding existing legal provisions, seeking alternatives through *As-Sulhu*, and strengthening them with court decisions.

**Keywords:** Marital Property Dispute, Peace Agreement (*As-Sulhu*), Substantive Justice.

## Introduction

Humans, inherently social beings, are intrinsically tied to interdependence on others (Santoso, 2017, p. 106). This reliance extends to interpersonal connections, viewed reciprocally in sustaining life and fulfilling individual needs (Santoso, 2017, p. 106). Marriage, recognized as an official institution by both legal and societal standards, plays a pivotal role in these relationships (Amiri, 2021, pp. 52-58). In the Indonesian context, the marital bond is not merely a civil agreement but a sacred union, holding profound significance in individuals' lives (Hutabarat et al., 2022, p. 322), denoted as a strong and meaningful covenant (*miitzaaqan ghaliidhan*). Article 1 of

Law Number 1 of 1974 on Marriage articulates marriage as a physical and mental connection between a man and a woman, aiming to establish a joyous and enduring family (household) under the guidance of God Almighty.

In fulfilling the objective outlined in the Marriage Law, striving to establish a joyful and enduring family grounded in God Almighty, marriage transcends mere emotional affection, necessitating adequate understanding, psychological and physical maturity, and financial resources for household needs (Djamilah & Kartikawati, 2014, p. 89). Key components for a successful marriage encompass comprehensive knowledge, love and affection, reproductive and physical health, and material resources.

The legal bond of marriage entails the imposition of rights and responsibilities for both spouses. Designated by the Marriage Law, the husband assumes the role of the household head, while the wife becomes the homemaker. Nevertheless, the wife's rights and position are balanced against those of the husband in both domestic and societal spheres (Mamahit, 2013, pp. 18-19). In practice, the roles of husband and wife may deviate from the stipulations of the Marriage Law, reflecting evolving societal norms and contributing to ongoing social change.

In the age of Society 5.0, characterized by pervasive technological integration (Haqqi & Wijayati, 2019), opportunities for men and women to assume diverse social roles have expanded, with many women shouldering dual responsibilities as both breadwinners and housewives (Telaumbanua & Nugraheni, 2018, p. 432). This shift, particularly when household roles become imbalanced, can precipitate disputes, conflicts, and even divorce, leading to contentious battles over child custody and marital property. Although various factors contribute to marital conflicts—from economic pressures to differing child-rearing philosophies, miscommunication, and conflicting life principles—the focus of this research centers on the practice of sidelining marital property laws in resolving disputes.

Research on marital property law is crucial due to the sensitivity of property division issues, especially for married or divorcing couples. A fair distribution of marital assets is vital to prevent ongoing conflicts over property. Norms governing marital property are intricate, displaying both unified aspects, per Articles 35 and 36 of the Marriage Law, and pluralistic elements under Article 37 (Saragih & Yunanto, 2017, p. 9). The sole relevant implementing regulation, Government Regulation No. 9/1975, lacks specific provisions on marital property. Although Islamic law provides regulations for Muslim couples in the Compilation of Islamic Law (KHI), its legitimacy is questioned according to the hierarchy of norms outlined in Law Number 12 of 2011 regarding the Formation of Legislation (Asril, 2015, pp. 28-45). This legal ambiguity can result in difficulties interpreting and applying norms, fostering uncertainty and potential deviations from legal objectives, leading to injustice.

Such uncertainties may justify the practice of setting aside marital property laws by spouses or even judges in resolving disputes. This is exemplified in a divorce case (Case Number: 143/Pdt.G/PA.Bjb) where the husband filed for divorce, child custody, and marital property

division. While the husband did not dispute marital property, the wife counterclaimed, demanding a share of the assets. The evidence presented included a pre-existing Property Sharing Agreement (evidence code P-12), which the judge considered as the basis for property division in the court's ruling.

Another case (Case Number 632/Pdt.G/2023/PA.Bjb) involved a plaintiff (ex-wife) questioning joint property controlled by the defendant (ex-husband). The judge, acting as a mediator, facilitated a peace agreement where the defendant compensated the plaintiff, and the joint property was divided accordingly. The judge subsequently regarded this agreement as the basis for decision, demonstrating a departure from legal provisions.

The intriguing aspect to explore is the judges, serving as mediators, setting aside legal provisions governing joint property (Article 97 KHI). Additionally, understanding the factors influencing judges to override established laws and regulations in the division of joint property is essential for a comprehensive analysis of the practice of resolving marital property disputes.

## Literature Review

Several prior studies have explored topics relevant to the current research. In the study by Kurniawan (2018), the division of marital property based on principles of justice and the roles of spouses in seeking property during marriage were examined. This research also delved into the double burden faced by wives and its impact on joint property division, analyzing court decisions. What sets the present study apart is its emphasis on the Civil Law concept of joint property, a detail not extensively explored in the earlier Islamic law-focused research.

Another study by Purnomo et al. (2020) compared joint property in Islamic law, customary law, and Indonesian Civil Law (BW). It highlighted similarities and differences between these legal frameworks, discussing how joint property is defined and regulated in each. Unlike this research, the previous study focused solely on legal comparisons without a detailed exploration of normative and practical issues in applying marital property law to resolve disputes.

Rahman et al. (2020) investigated factors influencing the effectiveness of common property division after divorce, specifically in polygamous marriages at the Makassar Religious Court. Their study identified legal, law enforcement, facilities, community, and cultural factors affecting property division. However, it did not delve into the problematic legal norms of marital property nor engage in discussions of justice.

Jayusman et al. (2022) explored the division of joint property, emphasizing the wife's role in earning a living within the framework of positive and Islamic law in Indonesia. While addressing the division of property and the obligation to earn a living, this research did not employ case analysis to provide a concrete understanding and focused more on theoretical discussions about justice.

The study by Utami & Dalimunthe (2023) explained considerations and methods for dividing joint property by prioritizing justice theory when a wife serves as both a housewife and breadwinner. It evaluated how marital property division, guided by substantive justice, could override positive law applications in Indonesia. Unlike earlier research, this study places a significant emphasis on in-depth analyses of legal norms governing marital property, detailing the process of resolving disputes, understanding the main thoughts of disputing parties, and evaluating the judge's decisions based on peace agreements (As-Sulhu) that set aside laws and regulations.

In conclusion, this current research contributes by providing a comprehensive and in-depth analysis of legal norms governing marital property, describing the resolution process of marital property disputes, and exploring the main thoughts of disputing parties in formulating peace agreements (As-Sulhu). It also evaluates judges' considerations in deciding marital property disputes, focusing on the substantive justice perspective within the context of peace agreements.

## **Methods**

The method used in this research is the socio-legal legal research method (Creutzfeldt et al., 2019) conducted by deeply analyzing primary, secondary and tertiary legal materials and trying to explain the context in which the law is located (Wheeler, 2020). Several approaches are used, namely a statutory approach that examines and analyzes current legal regulations and understands the content and substance of these regulations, a conceptual approach, a case approach as it contains a description and analysis of the case in case Number: 143/Pdt.G/2021/PA.Bjb and case Number 632/Pdt.G/2023/PA.Bjb. To get a holistic picture, empirical data is needed which is obtained through observation, interviews, and other techniques according to research needs. The nature of the research is descriptive analytical with qualitative analysis with theoretical and juridical interpretation techniques.

## **Results and Discussion**

### **Problems in the Law of Marital Property in Indonesia**

The enactment of the Marriage Law in Indonesia was a significant initiative aimed at unifying marriage laws in the country. However, upon closer examination, legal norms within the Marriage Law, particularly those related to marital property, still allow for legal pluralism in society (Hikmi, 2021). Article 37 of the Marriage Law, in particular, states that when a marriage ends in divorce, joint property is regulated according to "their respective laws," explicitly allowing for the application of religious law, customary law, and other laws (Risky, 2020).

While this formulation broadens the scope of legal pluralism, it simultaneously creates legal uncertainty in regulating marital property (Risky, 2020). Article 35 of the Marriage Law attempts to establish clarity by defining marital property as anything acquired during marriage, with exceptions outlined in paragraph (2). However, the ambiguity arises when considering the

explanations in Article 35 and Article 37, both of which contribute to legal pluralism in dealing with marital property issues.

The elucidation of Article 35 further perpetuates legal pluralism by stating that if a marriage ends, joint property will be regulated according to "their respective laws," echoing the sentiments expressed in Article 37. This lack of specificity regarding the distribution of joint property contributes to normative vagueness and introduces legal uncertainty into society (Risky, 2020). Notably, the Marriage Law does not explicitly regulate the portion or share of rights for husbands and wives concerning joint property, leaving this aspect to the Civil Code and Compilation of Islamic Law (KHI), where equal distribution is prescribed (Utami & Dalimunthe, 2023).

The presence of legal pluralism within the Marriage Law indicates that its goal of fully unifying national marriage laws, especially concerning marital property, has not been realized (Rifqi et al., 2020). This legal pluralism results in normative vagueness and, consequently, legal uncertainty. It is noteworthy that the Amendments to the Marriage Law in 2019 did not address the legal norms of marital property, focusing primarily on changing the minimum age of marriage (Law No. 16 of 2019). Furthermore, the implementing regulations, specifically Government Regulation No. 9/1975, provide no specific articles addressing marital property.

The Compilation of Islamic Law (KHI), established by Presidential Instruction No. 1 of 1991, incorporates the concept of joint property in line with the Marriage Law. However, Article 85 of the KHI acknowledges the possibility of separate property for each spouse. Despite strict regulations in Article 97 of the KHI regarding the division of joint property in the event of divorce, judges sometimes deviate from these norms based on their own calculations of fairness (Kurniawan, 2018).

In conclusion, the unification of marriage laws in Indonesia, as envisioned by the Marriage Law, remains incomplete. The legal norms related to marital property contribute to legal pluralism, creating vagueness and uncertainty. To address these challenges, there is a need for clear and responsive legal norms that embody the spirit of unification. Judges, as custodians of justice, play a crucial role in filling gaps and clarifying legal norms to ensure justice, order, and public trust in the legal system. Achieving a comprehensive and unified marriage law will contribute to a more just and equitable legal framework for all parties involved in marital disputes.

### **The Practice of Legal Settlement of Marital Property through a Peace Agreement (*As-Sulhu*) as a Form of Fulfillment of Substantive Justice**

The illustration of dispute resolution practices, particularly in divorce cases involving joint property, sheds light on the complex dynamics within the legal system. This complexity is evident in two cases presented from the Banjarbaru Religious Court, emphasizing the significance of *As-Sulhu* (peace agreement) in the resolution of marital property disputes.

In the first case (Case Number: 143/Pdt.G/PA.Bjb), a husband filed for divorce, child custody, and division of marital property. The wife, in response, filed a counterclaim demanding specific marital assets. Amid mutual refutation, it surfaced that the parties had a Property Sharing Agreement (exhibit P-12) agreed upon before filing for divorce. The judge utilized this agreement as a basis for consideration, turning it into a legal instrument guiding the court's ruling. This approach deviates from traditional legal norms and signals the court's openness to alternative dispute resolution mechanisms.

The second case (Case Number 632/Pdt.G/2023/PA.Bjb) involved a plaintiff (ex-wife) questioning joint property held by the defendant (ex-husband). The plaintiff sought a division of assets according to applicable law, with each party receiving half. Remarkably, the judge, acting as a mediator, facilitated a peace agreement. This agreement involved the defendant compensating the plaintiff, and the judge incorporated it into the court decision (*acta van dading*). Significantly, the judge did not rely on the Marriage Law or Article 97 KHI in guiding the property division but optimized the mediation institution to reach a resolution.

As-Sulhu, deeply rooted in Islamic teachings, plays a crucial role in peacekeeping and conflict resolution. Derived from the principles of Islam, As-Sulhu prioritizes values such as peace, tolerance, and justice, making it a religiously recognized method for resolving disputes and restoring harmony within Muslim societies. In this process, parties engage in mediation or negotiation to reach an agreement that alleviates tensions and reinstates harmonious relations.

As-Sulhu goes beyond being a formal agreement; it encompasses a commitment to maintaining peace and preventing future conflicts. This commitment may involve elements such as fair compensation, forgiveness, and proportional conflict resolution. With its foundation in Islamic ethics, As-Sulhu not only achieves physical peace but also seeks spiritual renewal and reconciliation between conflicting parties. The ideology behind As-Sulhu asserts that conflict resolution should not merely end disputes but also establish a groundwork for sustainable harmony and justice.

The Indonesian legal system mandates mediation before delving into the examination of cases, aligning with Article 4 of the Regulation of the Supreme Court of the Republic of Indonesia Number 1 of 2016 concerning Mediation Procedures in Court. Courts, including the Banjarbaru Religious Court, have been encouraged to prioritize mediation, leading to recognition and awards for outstanding mediators. Dr. Martina Purnanisa, Lc., M.Sy., from Banjarbaru Religious Court, received recognition as the 6th ranked outstanding mediator nationally.

Optimizing the mediation institution not only contributes to resolving cases swiftly but also reduces the caseload on the Supreme Court of Indonesia. As of November 2023, the Supreme Court's case minutes totaled 24,046, highlighting the efficacy of mediation in achieving fast, simple, and low-cost justice. Disputing parties benefit from a win-win solution through the peace agreements they collaboratively create. These agreements, reflecting the parties' wills, are not bound by the legal provisions of the Marriage Law and KHI, granting the parties greater autonomy.

In mediation, judges take on the role of mediators, requiring them to set aside their conventional role as case breakers and legal experts. Interpersonal competence, rather than legal expertise, becomes crucial for mediators. The mediation process shifts the focus from legal arguments and proof of events to building thoughts that prioritize the parties' interests. The mediator assists in framing these interests into a peace agreement, allowing parties to express their will freely.

For disputing parties, the resolution through mediation and a peace agreement provides a sense of justice compared to lengthy court trials with potential winners and losers. Court decisions, while ensuring procedural justice, primarily adhere to the application of law to legal events, emphasizing formal justice. In contrast, mediation aims for substantive justice by addressing the root causes of conflict and considering the specific needs and context of each case.

Substantive justice, a central aspect of dispute resolution, goes beyond mechanical application of the law. It advocates for decisions that reflect true justice, taking into account the real impact on the parties involved. This approach emphasizes fair and meaningful outcomes, promoting a more just and equal society. Substantive justice encourages a holistic approach to dispute resolution that considers not only immediate settlement but also structural improvement and conflict prevention.

Despite its positive values, substantive justice faces criticism for its subjectivity in determining fairness. The diversity of perspectives and values among individuals or groups involved in the dispute resolution process can lead to varying interpretations of substantive justice, potentially compromising the integrity and certainty of the law. Additionally, the contextual consideration in substantive justice may introduce objectivity in decision-making, creating room for potential bias or abuse of power.

In conclusion, the cases presented from the Banjarbaru Religious Court exemplify the evolving landscape of dispute resolution, with a growing emphasis on mediation and peace agreements. *As-Sulhu*, rooted in Islamic teachings, provides a culturally relevant and ethically grounded framework for resolving conflicts. The optimization of mediation institutions by judges reflects a commitment to achieving fast, simple, and low-cost justice while prioritizing substantive justice. However, challenges such as subjectivity and potential bias in determining fairness highlight the need for careful consideration and ongoing refinement of dispute resolution approaches within the legal system.

## **Conclusion**

An examination of marital property law issues in Indonesia reveals a notable degree of uncertainty in legal norms, particularly concerning legal pluralism within the realm of marital property. Despite the Marriage Law aiming for unification, it allows for pluralism, notably in

Article 37, granting freedom to regulate joint property "according to their respective laws," encompassing religious, customary, and other legal frameworks. This introduces ambiguity in handling marital property, particularly evident in divorce cases with property disputes.

Additionally, an analysis of Article 35 reveals a disconnect between legal norms and court practices. While the article declares property acquired during marriage as joint property, in practice, judges often advocate mediation and encourage peace agreements (*As-Sulhu*) to resolve property disputes. This raises concerns about the consistency and clarity of legal norms established by The Marriage Act.

The prominence of mediation, especially through *As-Sulhu*, underscores its potential as a widely accepted alternative for resolving marital property conflicts. However, it's crucial to recognize that, in this context, *As-Sulhu* may be viewed as a method of bypassing legal norms governing marital property division. While offering flexibility and freedom for disputing parties, *As-Sulhu* prompts questions about legal clarity, certainty, and alignment with applicable legal norms. Hence, it is essential to scrutinize whether practices like *As-Sulhu* are conducive to the goal of unifying national marriage laws or if they contribute to legal uncertainty in managing marital property disputes in Indonesia.

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