

How to Cite:

Yusoff, M., Urus, N. S. T., Yusoff, U., Thahir, M. F. M., Othman, S. N. H., Zainon, M. M., & Samsudin, M. S. bin. (2021). Sustainability of ijthihad and fatwa to respond the issue of indirect contributions in matrimonial property claim: A critical assessment fiqh of property. *Linguistics and Culture Review*, 5(S4), 2232-2250.

<https://doi.org/10.21744/lingcure.v5nS4.1934>

Sustainability of Ijthihad and Fatwa to Respond the Issue of Indirect Contributions in Matrimonial Property Claim: A Critical Assessment Fiqh of Property

Mus'ab Yusoff

International Islamic University Sultan 'Abdul Halim Mu'adzam Shah (UniSHAMS), Kuala Ketil, Kedah Darul Aman, Malaysia

Nur Sarah Tajul Urus

International Islamic University Sultan 'Abdul Halim Mu'adzam Shah (UniSHAMS), Kuala Ketil, Kedah Darul Aman, Malaysia

Umair Yusoff

International Islamic University Sultan 'Abdul Halim Mu'adzam Shah (UniSHAMS), Kuala Ketil, Kedah Darul Aman, Malaysia

Mohamad Fauzi Md Thahir

International Islamic University Sultan 'Abdul Halim Mu'adzam Shah (UniSHAMS), Kuala Ketil, Kedah Darul Aman, Malaysia

Siti Nurul Husna Othman

International Islamic University Sultan 'Abdul Halim Mu'adzam Shah (UniSHAMS), Kuala Ketil, Kedah, Malaysia

Masyitah Mohd Zainon

International Islamic University Sultan 'Abdul Halim Mu'adzam Shah (UniSHAMS), Kuala Ketil, Kedah Darul Aman, Malaysia

Mohd Syahmil bin Samsudin

International Islamic University Sultan 'Abdul Halim Mu'adzam Shah (UniSHAMS), Kuala Ketil, Kedah Darul Aman, Malaysia

Abstract--The issue of sustainability of ijthihad and fatwas to elaborate on polemics of indirect contributions in matrimonial property claims has become an important issue today. The selection of the right ijthihad and fatwa will ensure that critical discussions in this

matter can be photographed to a knowledgeable society. Many findings of jurisprudence writing stated the main methods in ijihad and fatwas used by fuqahak of the past and contemporary to draw interesting discussions on this issue, but in the context of indirect contributions in matrimonial property claims, there is still much to be clarified. The main objective of this study is to find out the method of ijihad and fatwa in the book of fiqh applied by the jurists in this issue. This study is qualitative in which a total of 20 books of turath have been researched and understood descriptively. The main collection methods used were in-depth reading and analysis and narrative evaluation was used to analyze the findings obtained. The results of the analysis prove that the indirect contribution related to housework and outdoor work, can be done Akad al-Ijarah for the wife is eligible to take a certain wage according to the jumbuh view.

Keywords---fatwa, fiqh property, ijihad, indirect contribution, matrimonial property.

Introduction

The definition of property is very wide involving objects, services, moral rights and intellectual property rights. The classical Muslim jurists had discussed the definition of property but restricted to valuable objects and beneficial services only. The nature of property develops through the passage of time and place. As such, the property recognized and accepted by the local custom at present includes the goods that can not be seen by the naked eye can also be considered as property such as intellectual properties and so on. Thus, before enforcing a particular law relating to indirect contribution in the distribution of jointly acquired property, several issues must be taken into consideration:

- Is this indirect contribution included in the definition of property or not?;
- If it is a property, what is the process of changing its ownership between husband and wife?; and
- Is this indirect contribution claim arises based on the consent of the spouses together or without their consent?

Jointly acquired property

Matrimonial property is the property obtained by the spouse throughout the marriage. The wife's contribution allows her to claim the right on the property in the occurrence of divorce, polygamy or death. Wife's contribution directly means the efforts given by her, who contributes to the acquisition of property in marriage, such as home and vehicle ownership. While indirect contributions meant the efforts provided by the wife who contributed to the internal management of the household such as managing the needs of her husband, maintaining homework, preserving the welfare of children and safeguarding trusts on husband's finances. These two types of contributions contribute to the success of the husband in obtaining properties throughout the marriage life ([Frémeaux & Leturcq, 2018](#); [Yeates, 1999](#)).

Indirect contribution

The "indirect contribution" is a contribution that is not related to money for the sake of acquiring certain assets. It may be through ideas, encouragement, advice, inspiration, motivation and so on until their spouses will have the peace of mind in performing their jobs and succeed in obtaining the properties and assets. This definition concludes that the indirect contribution is part of the property formed from "useful service". The scholars had named and debated under the term of "*al-Ijarah Fii al-'Amal*". This service can also occur in collaboration with spouses where part of the legislation places this indirect contribution under the partnership of services debated in the "*al-Abdan Partnership*", namely: Service-based partnerships without involving capital or objects. So, this indirect contribution falls within the purview of tradable property or the entitlement of getting wages. Moreover, it requires a contractual agreement for the eligibility of ownership (Smith, 2007; Ainslie, 2015; Subriani, 2017).

Each contract in Islamic law consists of three main conditions, first: *sighah (ijab and qabul)*, second: contracting parties (two or more or more) and third: consideration (two things being exchanged). In general, a contractual agreement does not run away from the principle of obligatory (*al-luzum*), or the permissible (*al-jawaaz*). The obligatory means: both parties who have entered into an agreement, are obliged to discharge the promised and irrevocable exchange except with mutual consent or defect on goods. Eg; Selling, rental rent, wages hire, book reserving, *khulu'* and others while the meaning of permissible contract is one of the two parties has the right to terminate the agreement after its conclusion even if it is not mutually agreed. For instance, *wakalah*, *wadi'ah*, investment, loan, partnership and so on.

The basis of the contractual agreement gives an overview that, normally, every property has its owner, and for the process of exchange of ownership, it requires the fulfillment of the conditions and stipulations. Otherwise, the agreement will be void or *fasid* and this will affect the status of ownership. Thus, it is contrary to the Quranic verse which means:

O believers, you should not usurp unjustly the wealth of each other, but trade by mutual consent; and do not destroy yourselves. God is merciful to you.

The above verse emphasizes on believers not to take the other people's property illegally except by way of mutual consent trade. The consent is intangible unless expressed verbally. Hence, the scholars were of the opinion that the consent is determined by way of *ijab* and *qabul* which is placed as a condition of a valid contract, while consent through the act of surrendering, writing and gesture, the scholars have different views and majority of them recognize it provided that it comply with the custom practiced. The issue is, whether the element of mutual consent has been fulfilled in the case of indirect contribution? In general, love and affection will demolish the element of contractual agreement between husband and wife. The problem occurs when the disputes and claims have been brought to the court in the occurrence of dissatisfaction and divorce. The fatwa and Islamic family law allow the claim (Friedman, 1982 ; Buckle et al., 1996).

Fatwa related to indirect contribution claim

Kedah State Fatwa Committee decided on 1399 A.H. / 1979 A.D. as follows:

According to the custom of the states here, the spouses throughout their marriage have made an effort equally in exploring land and forest or other efforts. Eventually they can possess the property. Therefore, it is considered as jointly acquired property. The Committee unanimously agrees:

- The spouse or husband is entitled to the property of a rate based on a reasonable pace of work according to the usual work or business and;
- Recommend to the Religious Affairs Department to enact the Administration of Islamic law which can guarantee the rights of the wives or beneficiaries, if the husband neglects or challenges their rights over the property, making a claim before the Shariah Court, and the judge at his discretion and arbitration may allow the right of the wife for the jointly acquired property and determine the proper rate of contribution and distribution or the entitlement of the legal heirs if the wife has passed away.
- Since the deal between husband and wife in acquiring the jointly acquired property falls within the *al-abdan* partnership and it is rejected by the Shafi'i school but accepted by Hanafi, regardless of the kind of work, and accepted by Maliki and Hanbali provided that their works are similar, the Fatwa Committee provides an opinion such as (paragraph) (i) and (ii) above with reference to the Hanafi's view. Then, subject to Section 38 (1) of the Administration of Islamic Law No. 9/1962 whereby Shafi'i's views will prevail and enforced by the law except if the opinion is contrary to the public interest at that time, the Council or Fatwa Committee by obtaining a special permission of His Majesty Sultan, adopting any opinion from other three sects. Then, the Fatwa Committee agrees to recommend to the Council for the consent of His Majesty Sultan to adopt the view of Hanafi School who approves the *al-abdan* Partnership (unconditional type of work) that acquiring the jointly acquired property is categorized under *al-abdan* partnership. The results of the fatwa for this property have also been placed in the form of written laws found in the Islamic family law. The uniform law was made by the Technical Committee for *syara'* and Civil Laws of the National Council of Religious Affairs.

Section 122. Power of court to order division of harta sepencarian

- The Court shall have power, when permitting the pronouncement of *talaq* or when making an order of divorce, to order the division between the parties of any assets acquired by them during their marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.
- In exercising the power conferred by subsection (1), the Court shall have regard to-
 - the extent of the contributions made by each party in money, property, or labor towards acquiring of the assets;
 - any debts owing by either party that were contracted for their joint benefit;

- the need of the minor children of the marriage, if any.
- The Court shall have power, when permitting the pronouncement of talaq or when making an order of divorce, to order the division between the parties of any assets acquired during the marriage by the sole efforts of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.
- In exercising the power conferred by subsection (3), the Court shall have regard to-
 - the extent of the contributions made by the party who did not acquire the assets, to the welfare of the family by looking after the home or caring for the family;
 - the need of the minor children of the marriage, if any, and subject to those consideration, the Court may divide the assets or the proceeds of sale in such proportions as the Court deems reasonable, but in any case the party by whose efforts the assets were acquired shall receive a greater proportion.
- For the purposes of this section, references to assets acquired during a marriage by one party include assets owned before the marriage by one party that have been substantially improved during the marriage by the other party or by their joint efforts.

The argument of indirect contribution is placed as a jointly acquired property:

The arguments submitted by those who require the indirect contribution is calculated as jointly acquired property, are as follows:

- The Quranic verse Allah says which means:

And the wives have the same rights as the obligations they borne (against the husband) in a proper way (and not prohibited by syara'), in the meanings of the men (the husbands) have one degree of advantage over the women (his wife). And Allah is Mighty, the Wise.

Sayyid Sabiq's believed that this verse gives the rights to the wife as the rights given to the husband. Hence, anything asked to his wife to do according to her nature like managing a household, making the house full of peace and harmony, the husband also has greater right of claim in doing a heavier work in accordance with his nature. Therefore, each of them has their respective right over the property as long as there is no evidence or confession, proving the absolute rights obtained by way of grant or inheritance. This joint venture also includes direct contributions from husbands who has spent the money and energy whereas the indirect contribution is coming from the wife who carries out her responsibilities at home and so on, then *Syara'* acknowledges every contribution done by the spouse resulting the property to be shared between them. Allah says in the Quran which means:

The men are part of what they are working on, and the women are part of what they are working on.

- *Al-Qiyas*; That is to equate this indirect contribution with *al-abdan* partnership. Where both these matters are equated at the point of service that are sought by two parties or more. Reading to the text in the book of *Qurratul 'Ain Bi Fatawa Ulama Al-Haramain*, based on the Indonesian fatwa, regarding one of the spouse dies in the state of the property that is jointly cultivated not yet divided and indistinguishable. The answer is:

In the Book of *al-I'anaah* written by our Sheikh: "Two people have agreed to divide income from their physical effort like tailoring, whether both works are the same or otherwise, is named as *al-abdan* partnership. The partnership is void because there is no property. So anyone who works alone then the profit is returning to him alone and anyone who shares in the company then profits are divided between the two according to reasonable percentage according to work. It is required to be absolutely by Imam Abu Hanifah. While Imam Malik and Ahmad require work equality. "So it is clear that the results are derived from the efforts of husbands who can not be differentiated to be divided between the two according to reasonable wages with work. Then the heirs of the deceased from both participated in them to divide them according to the provisions of the inheritance law.

- *Al-'Urf*: Malay customs puts matrimonial property as property acquired by either spouse during the marriage, if the marriage has reached the age of three years and the couple have a child, including the property owned before their marriage. This customary law varies from one state to another. The Islamic legal maxim states:

"العادة محكمة"

which means: *The custom is the determinant of a law.*

The Islamic law has recognized a custom accepted as a source of *syara'*, but conditionally: not contrary to the Quran and al-Sunnah. Therefore, *syara'* only accepts the custom as the determination of jointly acquired property throughout the marriage, not involving the property owned before the marriage or not pursued and developed jointly.

- *Maslahah Mursalah*; Preserving the benefits or interests of both parties in preserving property
- *Istihsan Bii al-'Urf* by Sultan as' certified '*urf* good and proper by the law itself, then it becomes a rule that must be accepted and complied with. As said Abdullah ibn Mas'ud:

• ما رأى المسلمون حسنا فهو عند الله حسن، وما رأى المسلمون سيئا فهو عند الله سيء .

- That means: anything that is well regarded by Muslims is also in the sight of Allah and the things that are seen by them, so is also in the sight of Allah.

The ambiguity of the fatwa and arguments above which need to be revised

The main arguments issued by those who alleged that an indirect contribution claim is based on customary and local *'urf*. They themselves acknowledge that there is no clear text from the Quran or al-Sunnah pertaining to such a matter. Then there is an ambiguity to be explained for each argument submitted;

First: The verses of the Qur'an that are backed up can not be used as the basis of jointly acquired property. This is due to an understanding of Sayyid Sabiq which he does not say. Allah SWT says which means:

"... and the wives have the same rights as the obligations they borne (against the husband) in a proper way (and not prohibited by syara'), in the meantime the men (the husbands) have one degree edge over the women (his wife).

The above verse describes the rights of the wife and the rights of the husband. Sayyid Sabiq in his statement explains that the rights of husbands are getting his wife's services at home like cooking and managing the household. It is the responsibility of the wife who is obliged based on the marriage contract. While the wife's right is to get her husband's services outside the home like a job and financial resources, then added her husband's responsibility to give a maintenance to his wife. It is not desirable that the indirect contribution is used as a joint property based on the Sayyid Sabiq's view which he does not say that. This is because in his view, the division of service assignments at home and outdoors between husband and wife is derived from marriage contract. It differs from the view of majority of *fugaha*, which put the marriage contract as a contract for the occurrence of unique intercourse between husband and wife, while the service of his wife to her husband, at home is not obliged except through a formal agreement which allows the wife to get and claim her service wages (Cusack & Wolfe, 2007; Kelly, 2000; Gede Budasi & Wayan Suryasa, 2021).

In conclusion, considering the opinion of Sayyid Sabiq, the wedding agreement obliges the wife to provide a service to the husband according to her ability and *'urf*, without being eligible for wages because the service is obliged based on the marriage contract, so the indirect contribution is part of the promised service through a marriage contract without needing any payment. That is also the service effort that took place from the husband to his wife, unless the husband was released by *Syara'* by certain factors.. This view is also pledged by part of Maliki. Hanafi also agreed on the said views regarding the wife's services related to home affairs is obligatory based on marriage contract. It is not a contract for service (*al-ijarah*), except for services that occur beyond home affairs such as farming, then this contract can be implemented as it is not a claim from the marriage contract. Whereas, according to the majority view, every wife's service to her husband is not obligatory, which entitled her for wages (Ahmed et al., 2021; Siraji & Halim, 2021).

So when it is understood the difference in view, it can be clearly understood from verse 32 of surah *al-Nisa'*, in the current context, each of the spouse has the right on a particular property based on their respective effort. Allah says which means:

To men is allotted what they earn, and to women what they earn.

Of course, the “effort” and the “right” stated in the said verse is a certified legitimacy by *Syara* '. However, placing a joint venture between spouse as a joint property is inaccurate as this joint venture is too general and wide between husband and wife, while the nature of this property requires a contract to determine its exchange of ownership. Interpretation of the first scholars relating to this general division and effort is related to:

- Reward and sin; and
- Part of the Estate.
While the current interpretation as regard to the phrase of "right" and "effort" dedicated to the spouse is as follows:
- The “right” and “effort” are devoted to its picture on their two right as it is based on the view of Sayyid Sabiq. So, it means the husband’s right is getting his wife's services as a consideration for what the husbands does to provide maintenance and the wife has right of getting the maintenance from what she does to serve her husband. All of these services are sealed through marriage contracts. So the wife's contribution to her husband is an obligation that can not be claimed as a sepencarian property. Specific description issued from *jumhur*'s view: For husbands there is part of what they are working on, and their wives have part of what they are working on. Meaning, the husband has the right as a result of his effort and the wife has the right due to his effort. If he or she wants to share or transfer the ownership and the benefits of their respective divisions, then it requires a formal contract among them, not just through marriage contracts.
- The interpretation released from Hanafi scholars is the mid-view between Sayyid Sabiq's view and *jumhur*. The service of the spouse is based on the marriage contract unlike the commercial transaction and anything outside the marriage contract must be based on clear and formal contractual agreement. So the views of *jumhur* and Hanafi scholars are more suitable to be attributed to the claims of indirect contributions in jointly acquired property, but it must comply with the Shariah especially pertaining to the law making process in order to stay away from abusing the general principle of Islamic law.

Second: *Al-qiyas* or equalize this indirect contribution with the *al-abdan* partnership which is accepted by totally by Hanafi Scholars. It is seen as appropriate to be equated in both of these, if suffices four elements of *al-qiyas*:

- *AL-ASL* (Original Case): *Al-abdan* partnership;
- *HUKM AL-ASL* (Ruling of the Original Case): validity of *al-abdan* partnership;
- *AL-FAR’U* (New Case): Indirect contribution; and
- *AL-’ILLAH* (Reasonable Cause): *Al-bara’ah al-asliyyah*: The original condition of an *akad* is valid, unless there is an argument showing the contrary .The clearer evidence of *’illah* here is; *akad* itself can bring profit without capital.

The ruling of *al-abdan* partnership is valid as long as no argument indicating the occurrence of *fasad*. So regarding the indirect contribution, there are two perspectives:

The first decision: *al-qiyas* is void because; *al-asl* and *al-far'u* are not the same as regard to the 'illah in the *al-abdan* partnership whereby it has the basis of *akad* which no indication opposes it, in contrast to the indirect contribution that occurred without any *akad*. So the result of its indefinite contribution has no need for the share to be claimed in the future as there is no contract and no 'illah.

The second decision; *al-qiyas* is valid because of; *al-asl* and *al-far'u* share the same in 'illah and there is no indication which invalidates the contract. So the result is that this indirect contribution should happen and can its profits can also be claimed because of its 'illah exists, through *akad*.

The Islamic legal maxim states:

الحكم يدر مع إلهه، وجودا وعدمًا

Meaning: A ruling is co-exist with its 'illah. Every time there is 'illah, there is a ruling, and the absence of 'illah causes the absence of the ruling.

The above process of *al-qiyas* is so clearly indicating the need for a contract to legitimate this contribution partnership and be followed by future demands. It should also be emphasized that the efforts and contributions made by the wife have nothing to do with the affairs of the household because in the view of the Hanafi; household affairs service is the responsibility of the wife demanded by *Syara'* 'due to marriage contract and maintenance given. The Book of *Qurrah al-'Aain* also clearly demonstrates a fatwa gazetted that there is a partnership between husband and wife, but the profit obtained is *fasad* according to Hanafi school because of the uncertain profit and there is a mixture which can not be distinguished in the event of death. Therefore, the wife is entitled for reasonable wages but not the profit .

Third: custom and 'urf are recognized by *Syara'* through the Islamic legal maxis:

العادة محكمة

This should be further examined whether a particular custom is consistent with *Syara'*. Many things related to custom, have been set aside by *Syara'* , among them

- The custom that determines the property of the husband and wife before the marriage to be included once in the marriage has reached the age of three years.
According to *Syara'* where the property owned before marriage remains under the ownership of his master as long as there is no indication that changes it, then this custom is not accepted regardless of the age of the marriage whether 3 years or otherwise.

- The custom of the husband who divorces without any mistakes of his wife must provide a maintenance for 3 months and all property should be divided.
Syara' does not recognize the livelihoods only need to be given in the event of perfection without mistake on the part of the wife, but the right to get maintenance is untouchable even with default on the part of the wife. While the property that needs to be divided in general is also not accepted by Syara' because each property has its own owners except for the actions of property sharing.
- Custom on any property obtained when married should be divided between the spouse. If they have no children and husband passed away, then the property will be the property of the wife. The same principle applies if the wife passed away. But if they have children, then the division to be done on the property should be discussed first with all the beneficiaries. This custom is rejected since that particular property is subject to distribution based on *faraid* which is prescribed in Islam.
- The custom of the wife who contributes any effort to cultivate the land belonging to her husband is entitled to the half acquired during marriage. Meanwhile, if she does not give any contribution, she will still get 1/3 of the property. This principle also applies in the event of death.

The said custom is very closely related to the indirect contribution associated with this study. Pertaining to this, two questions need to be addressed on whether this custom is certified or not:

First:- The contribution through the wife's efforts. Whether the effort is solely based on volunteer job or requires any return?

Second:- In the event of this service with the willingness of the wife as a help without any wages, is there any right that she can claim wages when the service has passed?

If there is a formal contractual agreement between spouses, the *al-abdan* partnership applies, which enables the indirect contribution to produce jointly acquired property and be claimed in the future whether there is a dissolution of marriage or otherwise. This partnership also needs to meet its terms and conditions. Among the key conditions is the provision of profit between two parties, it should be known by both parties either $\frac{1}{2}$ or $\frac{1}{3}$ of the profit. Without this condition, it will lead to *fasad* contract and the wife is eligible for a reasonable wages (Karjono et al., 2017; Filladsen & Jordenzen, 2020).

While the wife who serves voluntarily without any contract, generally, it is a contribution and benefit that cannot be owned and handed over. In addition, it cannot be counted as debt that can be claimed. Besides, it is impossible to re-establish the *akad* whether through *al-ijarah* (contract for service) or *al-abdan* partnership, since the service of the wife is considered as past consideration. It is in contrast to the contribution of money or housing appliance, as the object can be owned and surrendered, then the gift to the husband without any contract maintains the possession of the wife and calculated as debts to be borne by the husband with the passing of time, unless the acknowledgment of *al-ibra'* (rebate) by the wife, expressly or impliedly. It is in line with the Islamic legal maxim:

العبرة ني الغرود للمزاد والمعاري، ل لل لداظ والمباري.

Which means : *The essence of a contract is based on the intention and internal factor, not the verbal communication and external factor.*

So, one of the conditions of valid *akad* has not been fulfilled when she wants to do with an indirect contribution that has passed, even it can be interpreted as a voluntary contribution. Hence, the contract is void because of incomplete conditions. The condition which is lacking: The benefits that can not be implemented when the agreement concluded as it is gone with the passage of time. It is like buying non-existing goods (معدوم) at a certain price. From the logical reasoning point of view, it is rejected as well because a valid contract will not concluded and enforceable upon non-existing goods *Akad* is associated with the will of two parties on a matter. It is necessary to ensure that the pleasure takes place between both parties. So, if the custom ignores this contract, it may lead to the open space for the taking of other people's rights without consent. This is where the contradiction of custom and *Syara'* arose, even the harm will be openly wider if each claim is brought before the judge without any evidence to prove it. Looking at the customs that set aside the *akad* prescribed by *Syara'*, then the *Maslahah Mursalah* and *Istihsan Bii al -Urf* are also not accepted because both of these arguments are pledged to *'urf* that contrary to the Islamic law (González & Viitanen, 2009; Hetherington et al., 1985).

***Mu'amalat* akad which is compatible with an indirect contribution to be used in jointly acquired property**

To what extent the truth of the indirect contribution is considered as jointly acquired property? Indirect contribution should be initiated with a contract before being initiated any business service by a person. It is to meet the condition of a contract in order to avoid a dispute and disagreement in the future. Hence, this contribution should be preceded by *mu'amalat's* contracts such as *al-abdan*, *al-ijarah*, *al-ju'alah* and other contracts .

Sighah (offer and acceptance) of the the *al-abdan* partnership in the Hanafi sect is easy, just stating the purpose such as "Let's work together" and profits divided together and agreed by the parties. Then, the contract is concluded. If the said terms are not fulfilled, then the partnership is *fasad*. As a result, the parties are eligible for wages only, not the profit . The conditions that can be void and *fasad* also need to be explained to the spouse because both terms are different in the Hanafi sect. The void indicates that there is no transfer of ownership, whereby *fasad* allows an exchange of ownership but it is a sinful act, which requires the property to be returned to the original owner or sold. Even *fugaha* of Hanafi categorize the property that is derived from *fasad* akad is similar with obtaining a property through illegal forfeiture (الغصب). Therefore, it should be avoided from the occurrence of *fasad*, in order to seek the pleasure of Allah and happiness among the mankind.

Akad al-ijarah is also suitable for indirect contributions. It is because this contract is closely related to benefits. Only wages given by *al-ijarah* are certain amounts of contracts that can not be expanded and claimed beyond its rates. It

differs from the *al-abdan* company, concept of business that can expand its profits, then determined its share of profit either $\frac{1}{2}$, $\frac{1}{3}$ or more. On the sides of the Hanafi sect, *akad al-ijarah* to paid wages to the wife can happen with the condition of the wife's services not related to the internal affairs of the house, if it relates to home affairs such as cooking, housekeeping, nursing children and living it, it is a *fasid* contract. There is no need to happen and ineligible that the wife receives wages as it is included in his maintenance payment. Similarly, the *al-abdan* Company *akad* can be *fasid* because of the service of household affairs. But in the chapter of glorifying fellow family members, the husband can give reasonable wages with the willingness of his heart. And can not force the wife to serve himself.

Akad al-qard (loans) and *al-mudharabah* (profit sharing) are also important for being learned and known to their spouses to determine direct contributions or indirect contributions to produce jointly acquired property or not. Examples of direct contributions from the wife like the husband asks a sum of money from his wife then made the money capital. This request is not explained whether the loan or investment, then this grant is a debt that the husband must be repaid at the rate given. This is because the surrender is solely from the wife without any purpose of conversion of its ownership to maintain its ownership that the husband needs to bear.

When it is known by the wife that her husband uses her money to do business and is found to be a huge profit, the wife puts the terms of this gift to be returned with a more amount or other benefit, then it should be a loan of the *al-qard*. that was banned by *Syara'*. If the wife only silences, then the profit will surely be enjoyed by the husband, without being denied some courtesy expenditure channeled to his family members. So here, *akad al-mudharabah* is playing an important role in removing from the problem of usury, and is fair to each other. With the occurrence of *akad al-mudharabah*, the money given by the wife as a qualifying capital for the wife receives profits, while the husband's business is its entitlement to receive wages. So this agreement needs to be sealed between husband and wife with clear profits such as $\frac{1}{2}$, $\frac{1}{3}$ and so on, so that there is no dispute between husband and wife. That is the opposite, the husband issues capital to his wife to be undertaken and profits divided together, so the effort (indirect contribution) from the wife is accepted by *Syara'* 'to claim his wages (jointly acquired property) in the event of a dispute between them.

The findings of this study distinguish the limitations of indirect contributions calculated as a jointly acquired property at the legal point of view. This is due to the practices of the Muslim families, who sometimes contradicts with *Syara'* ', and there is time when it is acceptable to *Syara'*. This is because the jointly acquired property issues that have been discussed and explained by the jurists are not structured in chapters *mu'amalat* and marriage, is not a new problem involving indigenous Malays and require new fatwa.

Here is the summary of an indirect contributions that are contrary to *Syara'* 'and acknowledged by *Syara'*;

- Indirect contribution that conflicts with *Syara'* and can not be considered as a jointly acquired property to be claimed;
 - Contributions that occur without *akad al-ijarah*, without the rules and conditions.
 - Contributions that occur without the *al-abdan* partnership contract, without the pillars and conditions.
 - Contributions that occur without *akad al-mudharabah*, without the pillars and conditions.
 - In conclusion, any benefit that passes without any contract is calculated *tabrru'* (contribution without any consideration) that cannot be rejected and
 - cannot be recovered eventhough its effects may result in the expansion of profits.
- Indirect contributions are calculated by jointly acquired property and accepted by *Syara'* to be claimed:

Based on a contract;

- Contributions that occur with *akad al-ijarah*, complies the terms and conditions. Given the promised wages are just a work done without the result of a growing profit.
- Contributions that occur with *al-abdan* partnership contracts, complies the conditions, among the main conditions placed by the *fuqaha* of Hanafi; The wife's contribution is not on household affairs. Given profit either 1/2, 1/3, 1/4 or more as promised. The *akad* and the division of profits can also be continued despite divorce. It is because the contract has be determined from both sides.
- Contribution to *akad al-mudharabah*, with sufficient rule and its terms. The husband issues capital and wife runs the business or vice versa. Given profit either 1/2, 1/3, 1/4 or more as promised.
- Contribution that occurs with the *fasid al-ijarah akad*, there is a defect on its terms, then given reasonable wages as a result, not the promised wages for the *fasad akad*. Contributions that occur with the *akad* of the *fasid al-abdan* partnership, since there is a defect on its terms, the party will be given reasonable wages as a result of the efforts, no profit as promised because of the *fasid akad*.
- Contribution that occurs with the *fasid al-mudharabah akad*, if there is a defect on its terms, then given reasonable wages as a result of the efforts.
- All this *fasid* property, should not be accepted and not taken except by the willingness of each party based on *akad al-ibra'* (rebate) or *al-sulh* (reconciliation). As such, the promised wages and profits need to be avoided, except reasonable wages because the service has taken place by expecting wages from the *fasid akad*.

Dispute;

- Disputes between husband and wife on a property raised by the evidence that ownership of the property is still owned by them alone or together

has been discussed by *fuqaha*. It is also a practice adopted in Malaysia in jointly acquired property. This dispute is resolved based on Syafi'i sect, by requesting from both of them to swear and divided equally. This method of division is agreed by the Hanbali, although there is little difference⁵⁰. This happens if the dispute between them continues without the end, whether this dispute occurs at the point of direct contribution or indirect contribution.

Views of the schools of thought

On the other hand, there are variety of views from the scholars regarding indirect contribution by the wife as a basis in the claim of jointly acquired property. Is the indirect contribution considered as an obligation on the part of the wife in a marriage? The *fuqaha* have different views in the issue of indirect contribution from the wife pertaining to the household duties. The views are as follows:

- According to the views of the Hanafi sect, the wife is obliged to contribute indirectly in the household according to *Syara'* and is not obligatory in accordance with the law. They submitted the argument based on the actions of the Prophet Muhammad himself who had divided the home affair duties between Saidina Ali and Fatimah. He has determined that household management is the responsibility of the wife, while the external management of the household is the responsibility of the husband. According to them, this argument is a basis for the rejection of asking for wages and salaries on this indirect contribution.
- According to the Maliki sect, the wife is obliged to the household management based on custom practice that it is the responsibility of a wife. The same argument was presented where the Prophet Muhammad had given Ali and Fatimah their respective responsibilities in the household. The Prophet once sent his wife A'isyah serving food and drink to guests who attended their house. The difference is the views of the Hanafi is fiqh oriented whereas the law is consistent with the view of Maliki.
- According to jumhur *fuqaha* represented by the Syafi'i, Hanbali and part of Maliki, the wife is not obliged to contribute indirectly in the household, but recommended as it has become a custom practice in society. They also add that a marriage agreement is merely giving the right and permission to establish sexual intercourse. It is not to be used to make any profit and benefits. The hadith submitted by the Hanafi and Maliki showing that it is recommended and praiseworthy, but not obligatory.

Conclusion

Marriage requires good tolerance especially pertaining to service and contribution between spouses. The basis in the contribution of the spouse is each party provides the best service to the spouse wholeheartedly. This is the *Sunnah* of the Prophet and the companions with their wives. It is heavily emphasized by *fuqaha* and who loves *Sunnah*. But it does not reach the level of obligatory, In fact, the *Syara'* opens a vast space for the spouse to enter into a formal contractual agreement which entitled both parties to claim wages based on that particular *akad*. This facilitates the public who may not be able to fully practice the

Sunnah of the Prophet. They can claim wages and gain together based on contributions and efforts. Hence, in the event of divorce, these assets can be claimed on the basis of debt. Imam al-Shabramallisiyy al-Shafi'i was asked regarding a husband who hires his wife, is it obligatory for the husband to inform his wife that he is not obliged to serve his husband such as cooking, sweeping and so on? Or the notification is not mandatory?

The answer given is the clear view makes it as mandatory upon the husband to inform the matter, because the wife when not knowing that she is not obliged to serve, she may understand that it is obligatory and consider herself is not entitled to receive maintenance if she does not serve her husband, it seems that the wife is forced to serve her husband by expecting the maintenance, while the maintenance is obligatory with the rights of sexual intercourse. Even so, if the wife has served without the notification of this matter from the husband, it is her own default by not seeking information and knowledge about that.

From the question of the above fatwa answer, every couple must know their rights, especially knowing the wages and other contractual agreement. It is very important to complement the rights and duties of the spouse, so that the property belonging to them is based on the concept of mutual consent.

- The basis of the contractual agreement in respect of property should be known to the spouse, among others:
 - The marriage contract requires the association of husband and wife pertaining to sexuality, not a contract of property exchange. *Akad* is not necessary in the case of maintenance. These feature shows that *Syara'* 'gives a right for a wife to get maintenance from her husband which does not happen on the others. Maintenance is given on daily basis and becomes compulsory with the ability to have the right of *istimta'* by the husband. Without that right, *nusyuz* may occur and waive the right of maintenance. If delayed, then what is obliged to be served such as money, clothing and home appliances, is still a husband's debt despite long-term passage. While the maintenance in the form of accommodation like living with in-law family, if it has passed then it will not be considered as debt and the wife does not have the right to claim.
 - *Mu'amalat* contract such as *al-Bai'*, *Il-Ijarah*, *Al-Ju'alah*, *Al-Abdan* partnership, *Al-Mudharabah*, *Al-Musaqat*, *Al-Muzara'ah*, *Al-Hibah* and others. It should require a contract for the exchange of ownership and the development of profits that can be claimed in court, whether the claim occurred during the marriage or after divorce and death. Anything given by the husband to the wife except maintenance, such as jewellery and others without any contract or with unknown purpose of the gift, will not transfer the ownership according to the strong view of *Syafi'i*.
 - The estate is also subject to the division that has been decided by *Syara'* and must be divided according to *Syara'*.
- Authorities such as the religious department should also take the initiative to spread the fundamental knowledge of *mu'amalat* to the community such as adding *mu'amalat* content during the marriage course before the marriage

solemnization. The material is based only such as a sale and purchase, rental, wages and *al-abdan* partnership that can be attributed to jointly acquired property. Indirect contribution associated with the affairs of the house and its outside, can be done by *akad al-ijarah* for the wife to be eligible to take certain wages according to *jumhur's* view. It relates to a limited amount that is still delayed by its payment and is included in the jointly acquired property.

- While indirect contributions associated with outdoor work can also be done by *al-abdan* partnership *akad* according to the views of Hanafi. Where it can be attributed to the growing amount of profits and included in the jointly acquired property.
- To further strengthen the instrument of claim based on indirect contribution in the jointly acquired property, supposedly the spouse should come out with proper contractual agreement by observing the terms and conditions. It can be done after a marriage contract so that the basis of the property sharing does exist between the spouses. In the event of divorce or death, the court may divide the property based on the *al-abdan* partnership. The example of *akad* for the above proposals can be prepared with a written document and it lasts after the marriage contract. The sample of the agreement is as follows:

"We are both spouses will share what we work together with things that we have nothing to do with the affairs of households, with profits being divided according to the workload and risks incurred. If I (the husband) commits a betrayal or violate the terms as below (stated as appropriate), or doing injustice, or disregard the responsibility of this joint venture with unreasonable reasons, the wife is entitled to seek justice from the court. And if the wife complains and claims in any shariah court with clear evidence, the court is eligible to divide the property as jointly acquired property. The hard-working parties and more risky will be given 2/3, while the less job and less risk will be given 1/3. "

Then the wife agreed upon it and both of them sign the agreement.

This is also necessary to make a comprehensive study before its implementation to see the angle of benefits, harm, the conditions that need to be satisfied and its validity. This is because the partnership is a permissible contract, which may be revoked by any party whether a husband or wife at any time.

- Provisions of jointly acquired property also need to be reviewed and examined until it is acknowledged by Syara' in order to determine such contributions whether it is valid or not, including by giving clarification by the following levels:
 - Indirect contribution is calculated as charity that cannot be claimed as jointly acquired property in the event of any expansion of profits, except with the grant from fellow husbands;
 - Jointly acquired property must be based on proper agreement for the purpose of proof;
 - If there is no evidence of a contract or the occurrence of ambiguity, then the property remains belongs to the husband;
 - The plaintiff must prove the claim; and

- If the evidence from both parties are equally strong, they must take an oath. As a result, the property will be divided equally among them.
- The Islamic Family Law Enactment must specify the terms and conditions which comply with the Islamic teaching, so that the property can be divided accordingly. This will avoid the mal practice of certain lawyers who try to mislead the judge by abusing the general provision of section 122 to obtain judgment in favour of their client. Eventually, the harm would be greater than the benefit.

References

- Abd Allah Ibn Ahmad Ibn Qudamah, *al-Mughni*, Maktabah al-Kaherah, 1968.
- Abd Rahman Ibn Ali al-Jauzi, *Zaad al-Masir fi 'Ilm al-Tafsir*, Beirut: al-Maktab al-Islamiyy & Dar Ibn Hazm, 2002.
- Abd Rahman Ibn Muhammad Ba'lawiy, *Bughyah al-Mustarshidin*, Jeddah: Dar al-Minhaj, 2018.
- Abdul Walid Abu Hasan, Hak-Hak Wanita Menurut Undang-Undang Keluarga Islam Di Malaysia, Kuala Lumpur: UIM, 2016.
- Abu Bakr Ibn Mas'ud al-Kasani, *Badai' al-Sanai'*, Beirut: Dar al-Kutub al-Ilmiyyah, 1986.
- Ahmed, A. R. M., Zaghoul, S. G. G., & Bakar, M. A. (2021). Matrimonial property disputes: Rules and effects. *Linguistics and Culture Review*, 5(S4), 2154-2160. <https://doi.org/10.21744/lingcure.v5nS4.1915>
- Ainslie, M. J. (2015, September). The 2009 Malaysian female circumcision fatwa: state ownership of Islam and the current impasse. In *Women's Studies International Forum* (Vol. 52, pp. 1-9). Pergamon. <https://doi.org/10.1016/j.wsif.2015.06.015>
- Ali Ibn 'Ali al-Shabramallisiyy, *Hashiah Nihayah al-Muhtaj*, Beirut: Dar al-Fikr, 1984.
- Al-Mausu'ah al-Fiqhiyyah*. Al-Kuwait; Wazarah al-Auqaf wa al-Shu'un al-Islamiyyah, 2007.
- Buckle, L., Gallup Jr, G. G., & Rodd, Z. A. (1996). Marriage as a reproductive contract: Patterns of marriage, divorce, and remarriage. *Ethology and Sociobiology*, 17(6), 363-377. [https://doi.org/10.1016/S0162-3095\(96\)00075-1](https://doi.org/10.1016/S0162-3095(96)00075-1)
- Cusack, B. P., & Wolfe, K. H. (2007). When gene marriages don't work out: divorce by subfunctionalization. *Trends in genetics*, 23(6), 270-272. <https://doi.org/10.1016/j.tig.2007.03.010>
- Enakmen Undang-Undang Keluarga Islam, Kedah Darul Aman, 2008.
- Filladsen, J., & Jordanzen, P. (2020). Translation based on cultural aspect: a study regarding how translating text different traditional in two countries. *Applied Translation*, 14(1), 16-22. Retrieved from <https://appliedtranslation.nyc/index.php/journal/article/view/1064>
- Frémeaux, N., & Leturcq, M. (2018). Prenuptial agreements and matrimonial property regimes in France, 1855-2010. *Explorations in Economic History*, 68, 132-142. <https://doi.org/10.1016/j.eeh.2017.10.004>
- Friedman, H. J. (1982). The challenge of divorce to adequate fathering: The peripheral father in marriage and divorce. *Psychiatric Clinics of North America*, 5(3), 565-580. [https://doi.org/10.1016/S0193-953X\(18\)30859-1](https://doi.org/10.1016/S0193-953X(18)30859-1)

- Gede Budasi, I. & Wayan Suryasa, I. (2021). The cultural view of North Bali community towards Ngidih marriage reflected from its lexicons. *Journal of Language and Linguistic Studies*, 17(3), 1484–1497
- González, L., & Viitanen, T. K. (2009). The effect of divorce laws on divorce rates in Europe. *European Economic Review*, 53(2), 127-138. <https://doi.org/10.1016/j.euroecorev.2008.05.005>
- Hetherington, E. M., Cox, M., & Cox, R. (1985). Long-term effects of divorce and remarriage on the adjustment of children. *Journal of the American Academy of Child Psychiatry*, 24(5), 518-530. [https://doi.org/10.1016/S0002-7138\(09\)60052-2](https://doi.org/10.1016/S0002-7138(09)60052-2)
- Husain Ibrahim al-Maghribi, *Qurratul 'Ain bifatawa Ulama al-Haramain*, Mesir: Matba'ah Moustafa Muhammad, 1937.
- Jabatan Bantuan Guaman, Hal Ehwal Undang-Undang. Harta Sepencarian.
- Jabatan Mufti Negeri Kedah Darul Aman dan Majlis Agama Islam Negeri Kedah, Himpunan Fatwa Dua (2) Negeri Kedah.
- Karjono, M., Bakta, I. M., Karmaya, I. N. M., Pradnyaparamita, D., & Murtianingsih, .-. (2017). Force, support, and endorsing factors of early marriage in adolescent Sasak (Sasak Ethnic) in Central Lombok. *International Research Journal of Engineering, IT & Scientific Research*, 3(2), 171-178. Retrieved from <https://sloap.org/journals/index.php/irjeis/article/view/545>
- Kelly, J. B. (2000). Children's adjustment in conflicted marriage and divorce: A decade review of research. *Journal of the American Academy of Child & Adolescent Psychiatry*, 39(8), 963-973. <https://doi.org/10.1097/00004583-200008000-00007>
- Mahkamah Tinggi Syariah Terengganu, Dalam Perkara Tuntutan Harta Sepencarian.
- Muhammad Amin Ibn Umar Ibn 'Abd 'Aziz'Abidin, *Hashiah Ibn'Abidin*, Beirut: Dar al-Fikr, 1992.
- Muhammad Ibn 'Abd Allah al-Hakim, *al-Mustadrak*, Kaherah: Dar al-Tasil, 2014.
- Muhammad Ibn 'Abd al-Wahid (Ibn al-Humam), *Sharh Fath al-Qadir 'Ala al-Hidayah*. Beirut; Dar al-Kutub al-'Ilmiyyah, 2003.
- Muhammad Ibn Abi al-'Abbas al-Ramliy, *Nihayah al-Muhtaj*, Beirut: Dar al-Fikr, 1984.
- Muhammad Ibn Ahmad al-Qurtubiy, *Tafsir al-Qurtubiy*, Kaherah: Dar al-Hadith, 2007.
- Muhammad Ibn Ahmad al-Samarqandi, *Tuhfah al-Fuqaha*. Beirut; Dar al-Fikr, 2002.
- Muhammad Ibn Idris al-Syafi'i, *Al-Umm*, Beirut: Dar al-Ma'rifah, 1990.
- Mustafa Ahmad al-Zarqa, *Sharh al-Qawa'id al-Fiqhiyyah*, Dimashq: Daral-Qalam, 1989.
- Norazlina Abd Aziz, Iринi Ibrahim dan Mohd Norhusairi Mat Hussin, Harta Sepencarian/Aset Perkahwinan Bagi Pembubaran Perkahwinan Di Bawah Seksyen 51 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 Serta Akta Undang-Undang Keluarga Islam (Wilayah-Wilayah Persekutuan) 1984. *Journal Of Shariah Law Research*, 2019.
- Sayyid Sabiq, *Fiqh al-Sunnah*, Beirut: Dar al-Kitab al-'Arabiyy, 1977.
- Siraji, A. H. A. S., & Halim, M. M. A. (2021). Matrimonial property: Concept and ruling. *Linguistics and Culture Review*, 5(S4), 2139-2145. <https://doi.org/10.21744/lingcure.v5nS4.1912>
- Smith, I. (2007). Property division on divorce with inequity aversion. *International*

- Review of Law and Economics*, 27(2), 111-128.
<https://doi.org/10.1016/j.irl.2007.06.006>
- Subriani, E. (2017). Form, functions, and meaning Lawas Nyorong at the wedding ceremony customary Sumbawa in Jereweh district. *International Journal of Linguistics, Literature and Culture*, 3(1), 93-104. Retrieved from <https://sloap.org/journals/index.php/ijllc/article/view/195>
- Sunan Ibn Majah, Beirut: Dar al-Fikr.
- Taufiq Musaddad Bin Hj Ahmad, Harta Sepencarian Menurut Perspektif Islam. E-muamalat, Kertas Ilmiah (JAKIM).
- Uthman Ibn Muhammad Shatta Al-Bakriyy, *Hashiah Panah al-Talibin*. Dimashq; Dar al-Faiha & Dar al-Manhal, 2006.
- Wahbah Mustafa al-Zuhailiyy, *al-Fiqh al-Islamiy wa Adillatuh*, Dimashq: Dar al-Fikr.
- Yahya Ibn Abi Khair al-Imrani, *al-Bayan Fi Mazhab al-Imam al-Syafi'i*; Dar al-Minhaj, 2000.
- Yeates, N. (1999, November). Gender, familism and housing: matrimonial property rights in Ireland. In *Women's studies international forum* (Vol. 22, No. 6, pp. 607-618). Pergamon. [https://doi.org/10.1016/S0277-5395\(99\)00071-0](https://doi.org/10.1016/S0277-5395(99)00071-0)