Marital Property in California and Indonesia: Community Property and *Harta Bersama*

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Abstract

One of the more notable features of Indonesian Islamic law is its recognition of the concept of jointly owned marital property. The Indonesian doctrine of joint marital property bears a striking similarity to the community property system in California. In both systems the marital estate consists of property acquired during the marriage through the efforts of either of the spouses. Both systems distinguish marital property from separate property and both define separate property as all property owned by either spouse prior to the marriage or acquired by gift or inheritance afterwards.

Apart from their doctrinal similarity, Indonesian Islamic marital property and California community property are alike in another respect: Both are transplanted elements existing in foreign legal environments. Indonesian marital property is an indigenous Southeast Asian practice in an Islamic conceptual structure, while community property is a continental civil law institution in an Anglo-American common law system. In both cases, moreover, the conception of marriage that underlies the doctrine of joint marital property is out of harmony with the understanding of marriage reflected in the system’s treatment of marriage generally.

This Article compares the process of incorporation of joint marital property in Indonesia and California. The results of this comparison contradict the assumption that sacred legal systems are inherently less capable of change and adaptation than secular systems. Focusing first on California, it is shown that a fully egalitarian system of joint marital property did not emerge until the 1970s, more than 100 years after the civil law doctrine of community property was formally adopted in the state constitution in 1849. In Indonesia, by contrast, the indigenous customary concept of marital property encountered relatively little resistance from Islamic authorities. By analogizing household economic production to a commercial partnership,
Islamic jurists were able to embrace joint marital property by recasting the doctrine as an Islamic institution.

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I. Introduction

One of the more notable features of Indonesian Islamic law is its recognition of the concept of jointly owned marital property. The development of the doctrine of Islamic marital property dates from at least the eighteenth century, and Indonesian Islamic tribunals have applied a doctrine of joint marital property for more than 100 years. The doctrine is currently spelled out in both the National Marriage Law, which is applicable to Indonesians of all religions, and in the Compilation of Islamic Law (Compilation), a code of family, inheritance, and charitable foundation rules that has been formally designated as binding on the Islamic courts. The Compilation provides that marital property, referred to with both the Indonesian term "harta bersama" and the Arabic derived words "syirkah" or "syarikat," is all property that is acquired during the marriage either by the husband and wife individually, or through their joint efforts, regardless of who holds title to the property.

4. See Mawardi, supra note 3, at 127 (defining marital property under the Compilation, which is binding on Islamic courts).
The doctrine of joint marital property as applied by Indonesian Islamic courts bears a striking similarity to community property laws that exist in California, Texas, and a small number of other U.S. jurisdictions. The basic features of U.S. community property and Indonesian Islamic marital property are identical. In both systems the marital estate consists of property acquired during the marriage through the efforts of either of the spouses. Both systems distinguish marital property from separate property belonging to the individual husband or wife, and both define separate property in the same way: Separate property consists of property owned by either spouse prior to the marriage or acquired during the marriage by either gift or inheritance.

The similarity between harta bersama and community property is entirely fortuitous. Property rights within marriage are not treated in standard works of Islamic jurisprudence, and the doctrine of joint marital property is not known in Islamic law outside of Southeast Asia. The Indonesian Islamic doctrine of joint marital property is derived from Southeast Asian custom or adat and was absorbed into Islam by analogy to Islamic principles of business partnership. The doctrine of community property as practiced in the United States has its source in continental European civil law. Louisiana, which follows the French civil law tradition, applied a community property doctrine from the

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5. See Michael J. Vaughn, The Policy of Community Property and Inter-Spousal Transactions, 19 Baylor L. Rev. 20, 20–21 (1967) (discussing the states that follow the community property doctrine in the United States). The eight community property jurisdictions are Louisiana, Texas, New Mexico, Arizona, Nevada, California, Idaho, and Washington. Id. The Texas constitution, approved in 1840, adopts community property even though Texas law is otherwise based on common law. Id. New Mexico operated under the community property laws of Spain until 1901 when it was codified in statute. Id. Arizona adopted community property by statute in 1865 shortly after separating from New Mexico. Id. California recognized community property in its constitution of 1849. Id. at 21. Nevada, Idaho, and Washington adopted community property in statutes passed in 1861, 1867, and 1869 respectively. Id.


7. See Van Vollenhoven, supra note 6, at 86–88 (describing how marital property functions in Indonesia).

8. See Joseph Schacht, An Introduction to Islamic Law 161–68 (Oxford Univ. Press 1984) (1964) (noting the general principles of Islamic marriage law where no mention is made of marital property).

9. See Van Vollenhoven, supra note 6, at 86–88 (explaining how marital property works under adat law).

10. See Vaughn, supra note 5, at 20 (discussing the legal roots of community property statutes).
eighteenth century and preserved it in the civil code it adopted in 1808.\textsuperscript{11} The other community property jurisdictions are all in the western United States, and they trace their marital property systems back to Spain.\textsuperscript{12}

Apart from their doctrinal similarity, Indonesian Islamic marital property and California community property are alike in another respect: Both are transplanted elements existing in foreign legal environments.\textsuperscript{13} Harta bersama is an indigenous Southeast Asian practice in an Islamic conceptual structure, while community property is a continental civil law institution in an Anglo-American common law system.\textsuperscript{14} In both cases, moreover, the conception of marriage that underlies the doctrine of joint marital property is out of harmony with the understanding of marriage reflected in other aspects of the legal systems that have incorporated the doctrine.\textsuperscript{15} The recognition of joint marital property in both Indonesia and the United States is commonly associated with an understanding of marriage as a partnership between the spouses.\textsuperscript{16} That understanding clashes with the vision of marriage embodied in both standard Islamic doctrine and the common law.\textsuperscript{17} Marriage within Islamic law is conceived as a contract in which the rights and obligations of the respective spouses are clearly spelled out.\textsuperscript{18} The husband undertakes to provide his wife

\begin{itemize}
\item \textsuperscript{11} Id.
\item \textsuperscript{12} Id.
\item \textsuperscript{13} See Orrin K. McMurray, The Beginnings of the Community Property System in California and the Adoption of the Common Law, 3 CAL. L. REV. 359, 369–73 (1915) (outlining the debate over adopting the civil or common law during the California constitutional convention of 1851); see also Van Vollenhoven, supra note 6, at 81–82 (describing the interplay between Islamic and adat law).
\item \textsuperscript{14} See Van Vollenhoven, supra note 6, at 86–88 (explaining how Indonesian community property law functions); see also Susan Westerberg Prager, The Persistence of Separate Property Concepts in California’s Community Property System, 1849–1975, 24 UCLA L. REV. 1, 25 (1976) (discussing the adoption of community property in California).
\item \textsuperscript{15} See Van Vollenhoven, supra note 6, at 81–82 (discussing how only the husband can effect a divorce, but both spouses receive property in Indonesia); see also Prager, supra note 14, at 20 (noting the view of many California constitutional convention delegates that the common law perception of marriage was "unfair").
\item \textsuperscript{16} See Van Vollenhoven, supra note 6, at 81–82 (mentioning that neither party can compel the other to perform marital duties, including conjugal intercourse and domestic chores); see also J. Emmett Sebree, Outlines of Community Property, 6 N.Y.U. L. REV. 32, 32–33 (1932) (discussing the evolution of community property as a revolt against the despotism of the husband and the creation of a contract).
\item \textsuperscript{17} Compare Schacht, supra note 8, at 161–68 (discussing the general principles of Islamic marriage law), with Hendrik Hartog, Man and Wife in American History 103–15 (2000) (outlining the traditional common law view of marriage).
\item \textsuperscript{18} Ziba Mir-Hosseini, Marriage on Trial: A Study of Family Law, Iran and Morocco Compared 34–35 (1993).
\end{itemize}
with support, in return for which the wife is obliged to grant her husband sexual access.\textsuperscript{19} But, while marriage in Islamic law is conceptualized in terms of contract, the parties do not contract as equals.\textsuperscript{20} The wife is party to the completed contract, but she does not participate directly in its creation.\textsuperscript{21} The offer and acceptance that brings the marriage into existence is carried out by the prospective husband and the legal guardian of the bride, typically her father.\textsuperscript{22} The Islamic conception of marriage is also reflected in the rules that govern its termination, which grant husbands far greater powers to divorce than are possessed by wives.\textsuperscript{23}

The common law image of marriage is one of union.\textsuperscript{24} Marriage is not a contract but a bond.\textsuperscript{25} This view was embodied in the concept of coverture. William Blackstone famously defined coverture:

By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing and her condition, during her marriage, is called her coverture.\textsuperscript{26}

The arithmetic of marital unity had a number of concrete legal consequences. The law of evidence did not allow wives to testify for or against their husbands, since the former would violate the rule disallowing the testimony of interested witnesses, and the latter runs afool of the privilege...
against compelled self-incrimination. Marital unity explained why women could not vote, because that would involve the casting of two votes by a single person, and the arcane rule prohibiting a widower from marrying his dead wife’s sister, which would be incest. This merging of the wife’s legal personality into that of her husband made the husband the owner of his wife’s property.

This Article examines the assimilation of community property and *harta bersama* into the legal systems of California and Indonesia. Part II focuses on California. That Part recounts the process by which the state’s constitution inscribed the doctrine of community property but then immediately subverted it by implementing legislation passed the following year. For the next century and a quarter, marital property rights in California were little different from other American states, notwithstanding California’s distinction as one of the small number of states categorized as community property jurisdictions. Part III examines the "Islamization" of customary marital property doctrines in Indonesia. Surprisingly, perhaps, Indonesian Islamic authorities embraced a version of joint marital property that grants equal rights to husbands and wives, notwithstanding Islam’s general bias in favor of men. In a brief conclusion, I call attention to the unexpected flexibility of Islamic law as against the secular legal system of California.

### II. California Community Property

In February of 1848, the United States and Mexico signed the Treaty of Guadalupe Hidalgo ending the Mexican American War. In the Treaty, Mexico ceded to the United States all Mexican territory north of the Rio

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27. Hartog, *supra* note 17, at 105–06.
28. *Id.* at 106.
29. *Id.*
30. *Id.*
33. *See id.* at 2 (discussing the historical dominance of separate property concepts during much of California’s history).
34. *See Van Vollenhoven, supra* note 6, at 81–82 (discussing how both spouses receive property in Indonesia upon dissolution of a marriage).
Grande, including the region that now comprises the state of California. Unbeknownst to the officials who signed the treaty, gold had been discovered at a mill in the Sierra Nevada Mountains of northern California just days earlier. News of the discovery was reported in eastern U.S. newspapers in August of 1848, and President Polk announced the discovery in a message to Congress in December. Approximately 75,000 gold seekers arrived in California in 1849, and many tens of thousands more entered in the state in the years that followed.

It was in the context of this extraordinary social transformation that the military governor of California called a constitutional convention in the fall of 1849 to draft a constitution. The issue of property rights within marriage assumed particular importance at the convention. There were two reasons for this. The first reason had to do with the makeup of California society. Europeans of Spanish descent had lived in California for more than 200 years. The marital property law of these "Californios" was based on the ganancial system of Spanish law. Concerned about the impact of massive immigration on their way of life, the Spanish speaking population saw preservation of existing property doctrines as a bulwark against the forces of change. The more recent immigrants to the region were primarily from the eastern United States, where rights over property within marriage were governed by the

37. Id. at 77–79. On January 24, 1848, James Wilson Marshall, a carpenter hired to construct a sawmill in New Hevetia, discovered gold. Id. The treaty that ceded California to the United States was signed on February 2, 1848. Del Castillo, supra note 35, at 43.
38. Starr, supra note 36, at 80 (describing the beginning of the 1849 California gold rush).
40. Starr, supra note 36, at 80 (mentioning the population boom in California following the 1848 gold rush).
41. Id. at 91 (discussing the history and the rationales behind the calling of the California constitutional convention).
42. Prager, supra note 14, at 8–24 (discussing the importance of property rights during the proceedings of the California constitutional convention).
43. See Starr, supra note 36, at 20–42 (describing Spain’s gradual exploration and colonization of modern-day California).
44. Richard Ballinger, A Treatise on the Property Rights of Husband and Wife, Under the Community or Ganancial System § 9 (1895) (outlining the historical origins of the California legal system pre-1849).
45. Prager, supra note 14, at 13 (discussing the importance of property rights in order to maintain wealth for "Californio" delegates at the California constitutional convention).
46. See McMurray, supra note 39, at 359–60 (noting that 76,000 of the estimated 80,000 migrants to California in 1849 were Americans).
common law. Some of the "Anglo" delegates to the constitutional convention strongly favored adoption of common law marital property doctrine for California.

A second factor contributing to the importance attached to the issue of marital property law at the convention was the attention being given to the subject in the United States generally. By the time the California constitutional convention met in 1849, the common law system of marital property "was in widespread disrepute as an oppressive and "feudal" system." The property law system advocated by early nineteenth century reformers was in several respects similar to the civil law of marital property that found its way to the American southwest by way of Spain. By the time the California constitutional convention met in 1849 a number of eastern states had passed reforms improving the legal rights of women within marriage. The debate over marital property law in California occurred against the background of this larger reform effort.

The choice faced by delegates to the convention was between the common law marital property system that applied in most of the states and the civil law system that had been followed in California while still a part of Mexico. Judging by the record of the debate over marital property, the Anglo delegates may not have fully understood the extent of the difference between the two systems or the full implications of their decision. The difference, however, is substantial. Under the common law doctrine of coverture, a woman relinquished virtually all her rights to property upon marriage, and under the doctrine of marital services the husband acquired the right to his wife’s labor.

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47. See Prager, supra note 14, at 11 (mentioning the original homes of delegates to the California constitutional convention).
48. See infra notes 60–61 and accompanying text.
49. HARTOG, supra note 17, at 14.
50. See Prager, supra note 14, at 24 (mentioning that many delegates to the California constitutional convention did not see major differences between community property and the proposed married woman’s property acts put forth by reformers).
51. BASCH, supra note 24, at 27–28.
52. Prager, supra note 14, at 21.
53. Id. at 24.
54. See id. at 21–24 (summarizing the positions taken by delegates on marital property at the California constitutional convention).
55. See id. at 3–4, 6–7 (summarizing common law and community property systems).
56. Anne Lombard, Coverture, in WOMEN IN AMERICAN HISTORY: AN ENCYCLOPEDIA (forthcoming) (manuscript on file with author).
In return for the protection and support he provided for his wife, the husband became the owner of all personal property belonging to his wife prior to the marriage and his wife’s services during the marriage. A married woman retained title to her real property, but possession and control of the property was the right of her husband.

Some of the Anglo delegates strongly supported adoption of the common law. The record of the debates includes a speech by a delegate identified as Mr. Botts extolling the virtues of common law marital property doctrine as reflecting both natural and divine truth. Botts’s peroration both sets forth the premises of the doctrine and captures the romantic excesses of its nineteenth century defenders. In speaking in opposition to the adoption of language from the Texas constitution that endorsed community property, Botts stated:

In my opinion, there is no provision so beautiful in the common law, so admirable and beneficial, as that which regulates this sacred contract between man and wife. Sir, the God of nature made woman frail, lovely, and dependent; and such the common law pronounces her. Nature did what the common law has done—put her under the protection of man; and it is the object of this clause to withdraw her from that protection, and put her under the protection of the law. I say, sir, the husband will take better care of the wife, provide for her better and protect her better, than the law. He who would not let the winds of heaven too rudely touch her, is her best protector. When she trusts him with her happiness, she may trust him with her gold. You lose the substance in the shadow; by this provision you risk her happiness forever, whilst you protect her property. This proposition, I believe, is calculated to produce dissension and strife in families. The only despotism on earth that I would advocate is the despotism of the husband. There must be a head and there must be a master of every household; and I believe this plan by which you propose to make the wife independent of the husband, is contrary to the laws and provisions of nature—contrary to all the wisdom which we have derived from experience.

The conception of marriage reflected in Botts’s statement derives from the common law, but the common law doctrine was revised and put to new uses in revolutionary America. As Professor Nancy Cott has shown, the weight attached to ideas about marriage and the family in the Anglo-American tradition is related to the connection made between domestic life and the body
In sixteenth and seventeenth century England, the authority exercised by the father and husband within the home was understood as directly analogous to the authority exercised by the king over his people. Just as the monarch ruled by divine right, the father’s authority within the home was God-given.

The principle of divinely ordained rule was not, of course, conducive to the interests of revolutionaries in America who wished to deny the authority of the English king. Colonial Americans did not abandon the family metaphor but adapted it to meet current needs. Drawing on the legacy of the Glorious Revolution of 1688, American revolutionaries of the late seventeenth century sought to establish consent as the basis for legitimate political authority. This new understanding of the foundations of governance did not sever the conceptual connection between legitimate political domination and relations within the family. Rather, the contract logic of political thought was carried over into thinking about the family. The image of marriage as patriarchal hierarchy was replaced by an ideal of conjugal union grounded in consent. While marriage as a "loving partnership" connotes a less hierarchical relationship, the adoption of new theoretical foundations for marriage did not fundamentally alter understandings of the proper relations between husbands and wives. In explaining the relations within marriage, the analogy to the government and the governed was particularly useful. "By consenting, citizens delegated authority to their elected representatives, and the wife gave authority

63. Id.
64. The analogy is clearly evident in a passage from Shakespeare’s The Taming of the Shrew quoted by Professor Cott:

   Such duty as the subject owes the prince
   Even such a woman oweth her husband,
   And when she is forward, peevish, sullen, sour
   And not obedient to his honest will,
   What is she but a foul contending rebel
   And graceless traitor to her loving lord?

Id. at 12 (quoting SHAKESPEARE: THE COMPLETE WORKS 363 (G.B. Harrison ed.,1948)).

65. Id. at 13.
66. Id. at 14–15.
67. Id. at 14–23.
68. Id. at 14–15.
69. Id. at 16–17.
70. Id. at 14–15.
71. Id. at 16–17.
72. Id. at 17.
to her husband. In both instances governance based on consent was no less governance.\textsuperscript{73}

As mentioned above, the premises of the common law’s treatment of women’s property rights within marriage had come under attack from the 1830s, and by the time the California constitutional convention met in 1849, a number of states had enacted changes to the strict common law system.\textsuperscript{74} These statutes, known as Married Women’s Property Acts, granted married women the right to own property.\textsuperscript{75} The delegates were probably aware of these laws and the controversy over the rights of married women to own property under the common law, and several of the Anglo delegates spoke in favor of the principle of separate property.\textsuperscript{76} Notably, however, the debate nowhere reflects an understanding of the concept of jointly owned or common property,\textsuperscript{77} which is the hallmark of the community property system.

The concept of community property that eventually found its way to California is commonly traced to the customary practices of Germanic peoples that were then absorbed into continental civil law.\textsuperscript{78} A late nineteenth century text on the ganancial system of Spanish law described the concept of community property as follows:

\begin{quote}

The property, both real and personal, which any married woman now owns, as her sole and separate property; that which comes to her by descent, devise, bequest, gift or grant; that which she acquires by her trade, business, labor or services, carried on or performed on her sole or separate account; that which a woman married in this state owns at the time of her marriage, and the rents, issues and proceeds of all such property, shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts, except such debts as may have been contracted for the support of herself or her children, by her as his agent.

\textit{1860 N.Y. Sess. Laws 157 (McKinney).}
\end{quote}

\textsuperscript{73} \textit{Id.}
\textsuperscript{74} \textit{BASCH, supra note 24, at 39.} The first such statute was passed by the state of Mississippi in 1839. \textit{Id.} By the time the California constitutional convention met in 1849, married women’s property acts had also been passed in Michigan (1844), Maine (1844), and Massachusetts (1845). \textit{Id.}
\textsuperscript{75} \textit{The New York statute, passed in 1860, provided:}
\textit{\textit{The property, both real and personal, which any married woman now owns, as her sole and separate property; that which comes to her by descent, devise, bequest, gift or grant; that which she acquires by her trade, business, labor or services, carried on or performed on her sole or separate account; that which a woman married in this state owns at the time of her marriage, and the rents, issues and proceeds of all such property, shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts, except such debts as may have been contracted for the support of herself or her children, by her as his agent.}}
\textit{1860 N.Y. Sess. Laws 157 (McKinney).}
\textsuperscript{76} \textit{Prager, supra note 14, at 20–21.}
\textsuperscript{77} \textit{Id. at 22.}
\textsuperscript{78} \textit{Sebree, supra note 6, at 32–33.} The concept of jointly owned marital property grew out of a conception of marriage as essentially an economic partnership. \textit{Id. at 33–34.} As described by Sebree, “The causes which made the wife the partner to the husband are of an economic, rather than a moral nature. It grew out of the natural impulse toward a suitable provision for the wife’s support and a reaction against the husband’s despotic power.” \textit{Id.}
The principle which lies at the foundation of the whole system is, that whatever is acquired by the joint efforts of the husband and wife, shall be their common property; the theory of the law being, that the marriage, in respect to property acquired during its existence, is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after its dissolution, in case one survive the other.79

The direct lineage of California community property runs through Spanish law.80 But as Professor Reva Siegel has shown in a study of the mid-nineteenth century movement for the reform of U.S. marital property law, women’s rights activists developed arguments for a system of jointly owned property similar to the community property system based on a critique of contemporary common law doctrines.81 While these arguments did not result in the adoption of a system of joint property anywhere in the United States, the demands made by joint property activists provide part of the background to the development of a system of community property in California.82 On at least one occasion the arguments of the reformers were presented to the California legislature directly.83

The nineteenth century movement for recognition of joint marital property was grounded in a rejection of the basic assumptions of the common law matrimonial property system.84 Under the common law doctrine of marital services, the contribution of the wife to the functioning of the household belonged to the husband by virtue of the support he gave to his wife.85 The Married Women’s Property Acts granted wives the right to own property but left the doctrine of marital services intact.86 While wives acquired the right to own property derived from work outside the home, the husband retained the right to his wife’s services in the home.87 The essence of the argument for joint

82. Prager, supra note 14, at 21.
83. Siegel, supra note 81, at 1170. In 1872 a special committee of the California legislature used arguments based on the economic value of the wife’s contribution to the household in recommending giving wives a right of survivorship in community property equal to that of her husband. Id. The proposal was never enacted, however. Id.
84. Hartog, supra note 17, at 110–15.
85. Johnston, supra note 57, at 1045.
86. Siegel, supra note 81, at 1076.
87. Id.
property consisted of two contentions: First the household labor typically performed by women has economic value; and, second women are the owners of their labor. The implication the reformers drew from these two propositions was that wives should be entitled to a share of the household wealth. A statement by Frances Gage in 1855 that is quoted by Professor Siegel forcefully expresses the basic argument. Gage’s statement was made in response to a letter written to Elizabeth Cady Stanton by Gerrit Smith, an abolitionist and sympathizer with the women’s rights movement. The comment by Smith that prompted Gage’s response clearly reflects the common assumption that wives do not engage in productive labor: "[T]o concede to her the rights of property would be to benefit her comparatively little unless she shall resolve to break out of her clothes-prison and to undertake right earnestly, as right earnestly as a man, to get property." Gage replied:

But do not women now work right earnestly? Do not German women and our market women labor right earnestly? Do not the wives of our farmers and our mechanics toil? Is not the work of mothers in our land as important as that of the father? "Labor is the foundation of wealth." The reason that our women are "paupers," is not that they do not labor "right earnestly," but that the law gives their earnings into the hands of manhood. Mr. Smith says, "That women are helpless, is no wonder, so long as they are paupers"; he might add, no wonder that the slaves of the cotton plantation are helpless, so long as they are paupers. What reduces both the woman and the slave to this condition? The law which gives the husband and the master entire control of the person and the earnings of each; the law that robs each of the rights and liberties that every "free white male citizen" takes to himself as God-given. . . . Let us assert our right to be free. Let us get out of our prison-house of law. Let us own ourselves, our earnings, our genius; let us have power to control as well as to earn and to own; then will each woman adjust her dress to her relations in life.

There is no evidence that the delegates to the California constitutional convention were familiar with the advocacy for joint marital property. The early efforts of the reformers focused on eastern states that followed the

88. *Id.*
89. *Id.*
90. *Id.* at 1101.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 1102.
95. See Prager, *supra* note 14, at 20 (mentioning the primary motivation for community property to be the wish for a "progressive constitution").
common law.96 The majority of the delegates to the constitutional convention were Anglos,97 who presumably could have overridden the Californians and adopted the common law had they so desired. One of the reasons they chose not to was because of a desire to enlist the support of the Californians so as to present a better case for admission to the union as a state.98 Comments by Anglo delegates during the debate indicate that some of them favored granting property rights to married women, and adoption of community property was apparently perceived as one means to accomplish that goal.99 But community property was not even mentioned during the debates,100 and the delegates may have understood the question before the convention to be simply whether wives should be entitled to separate property. The language that was adopted in the constitution was taken from the Texas constitution.101 While the text makes reference to common property, the principal focus of the language is on separate property.102 Article XI, Section 14 of the California Constitution of 1849 states:

96. Siegel, supra note 81, at 1169–70. In the period after the Civil War the campaign for joint property developed a strong presence in the northwest. Id. One of the leading proponents of the principle that wives were entitled to a share of the wealth generated through a marriage in the 1870s was Marietta Stow, a California woman. Id. Stow, who was delivered from wealth into poverty when her husband died, focused her efforts on inheritance reform. Id. An inheritance law bill presented to the California legislature in 1872 took the reformers arguments about the legal expropriation of women’s labor as its explicit point of departure. Id. at 1170. In its report on a bill to give wives a right of survivorship in community property, a special committee of the legislature wrote:

Being familiar with business, the husband assumes the control of out-of-door matters; the wife, educated to indoor labors, takes charge of the house, the home, and family. While the husband may prosper in business and accumulate wealth, the wife may at the same time perform equally well her duties in a more narrow, but not less important, sphere. . . . Unless money is more valuable than the mind of man, and coin than character, the business qualifications of the husband may be fairly and equally offset by the home duties of the wife. . . . If either partner of the matrimonial firm fails to perform a full share of the labor assumed or assigned that is misfortune, but it should not be allowed to vitiate the personal property rights of either spouse.

Id.

97. McMurray, supra note 39, at 373.

98. Prager, supra note 14, at 16.

99. Id. at 16–17.

100. Id. at 22.

101. See id. at 8 n.39, 21 n.109 ("The California and Texas provisions were identical."). For the language of the Texas provision, see TEX. CONST. of 1845, art. VII, § 19.

102. See Prager, supra note 14, at 21–24 (discussing the emphasis on separate property in the debates and the adopted language of the California constitution).
All property, both real and personal, of the wife, owned or claimed by marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property, as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife’s separate property.103

In 1850, the first California legislature passed implementing legislation for Article XI, Section 14.104 If there was any uncertainty about the type of marital property system adopted by this provision beforehand, that uncertainty was put to rest by the legislation. The legislation defined separate and community property in accordance with standard Spanish doctrine.105 Separate property was defined as "property owned before the marriage or acquired . . . by gift or inheritance" after the marriage.106 "Common" or "community"107 property was defined as "property acquired . . . by either husband or wife" during the marriage.108

The implementing statute confirmed that the constitution adopted the Spanish law of community property.109 However, other parts of the statute seemed to be inspired by common law attitudes. While the statute recognized the wife’s ownership of separate property, it vested management and control over the wife’s property in the husband.110 The limitations on the husband’s power over his wife’s property were very narrow. The law required that the wife consent to any transfer or encumbrance of her property.111 The statute also provided for the appointment of a trustee upon a showing by the wife that her

103. CAL. CONST. of 1849, art. XI, § 14.
105. See Prager, supra note 14, at 25–26 (discussing the features of Spanish civil law that were incorporated into the California marital property system).
106. Id. at 25; see also Act of April 17, 1850, ch. 103, § 1 (defining the separate property of the husband and the wife).
107. Prager, supra note 14, at 25 n.125 (explaining that the terms "common property" and "community property" are used interchangeably).
108. Act of April 17, 1850, ch. 103, § 2.
109. See Prager, supra note 14, at 25–26 ("[T]he 1850 statute reinforces the view that the convention’s action was an attempt to assure the continued life of the Spanish marital community of property.").
111. See id. ("[N]o sale or alienation of any part of [the wife’s separate] property can be made, nor any lien or encumbrance [sic] created thereon, unless by an instrument in writing, signed by the husband and wife . . . ."); see also Prager, supra note 14, at 26 (discussing the consent requirement).
property was being wasted or mismanaged by her husband.\textsuperscript{112} Even in those circumstances, however, the managerial authority was not given to the wife, but her private property was placed under the control of a trustee.\textsuperscript{113}

In addition to powers over the wife’s separate property, the 1850 law also gave the husband management authority over the community property.\textsuperscript{114} Here the husband’s power was complete. The consent of the wife was not required for any transaction involving community property and there was no provision for depriving the husband of his management powers if he abused them.\textsuperscript{115} The statute stated, "The husband shall have the entire management and control of the common property, with the like absolute power of disposition as to his own separate estate."\textsuperscript{116}

Community property was enshrined in California’s fundamental law, but for decades after the adoption of the constitution, the property rights of married women in California differed very little from the rights of women under the common law.\textsuperscript{117} During the marriage the husband’s rights with respect to community property were, for practical purposes, indistinguishable from full ownership.\textsuperscript{118} In a decision construing the 1850 statute ten years after its enactment, the interest of the wife was described as "a mere expectancy, like the interest which an heir may possess in the property of his ancestor."\textsuperscript{119} This expectancy ripened into rights of ownership only if the wife "survived the

\textsuperscript{112} See Act of April 17, 1850, ch. 103, § 8 ("If the wife has just cause to apprehend that her husband has mismanaged or wasted, or will mismanage or waste, her separate property, she . . . may apply . . . for the appointment of a trustee, to take charge of and manage her separate estate . . ."); Prager, \textit{supra} note 14, at 26 (discussing the ability of the wife to transfer control of her separate property to a trustee).

\textsuperscript{113} See Prager, \textit{supra} note 14, at 26 ("It is note-worthy that the remedy for mismanagement or waste was not a transfer of power to the wife, who, after all, owned the property.").

\textsuperscript{114} See Act of April 17, 1850, ch. 103, § 9 (establishing the husband’s control over community property); Prager, \textit{supra} note 14, at 26–27 (discussing the management of the community property).

\textsuperscript{115} See Prager, \textit{supra} note 14, at 27 (noting the "unchecked" power of the husband over community property).


\textsuperscript{117} See Prager, \textit{supra} note 14, at 28 (observing that the structure of the California community property system did not provide married women with "property rights substantially greater than those embodied in the common law").

\textsuperscript{118} See Act of April 17, 1850, ch. 103, § 9 (providing the husband with "absolute power" over community property); Van Maren v. Johnson, 15 Cal. 308, 311 (1860) (stating that the title to common property "rests in the husband").

\textsuperscript{119} Van Maren, 15 Cal. at 311.
termination of the marriage."\footnote{120} If the marriage ended as a result of the death of the wife, the expectancy was never realized.\footnote{121}

Professor Prager divided the subsequent developments in California marital property law into three phases.\footnote{122} During the latter half of the nineteenth century the husband’s control over community property was further consolidated, while the rights of the wife with respect to her separate property were gradually expanded.\footnote{123} Under the 1850 legislation wives had no rights over any part of the community property unless the marriage ended in divorce or in the death of the husband.\footnote{124} A statute passed in 1861 stripped wives of the power to dispose of their share of the community property by will.\footnote{125} If the marriage ended with the death of the wife, the entire community property passed to the husband.\footnote{126} Husbands, however, had full testamentary authority over their share of the community property.\footnote{127}

Under the "mere expectancy" theory of community property, wives were made heirs to a share of common property.\footnote{128} To compensate for their

\footnote{120. Prager, \textit{supra} note 14, at 35; see also Act of April 17, 1850, ch. 103, §§ 11–12 (providing the wife with half of the common property upon divorce and half of the common property upon the death of the husband unless he has no descendants, in which case the wife gets all of the common property).}

\footnote{121. \textit{See} Act of April 17, 1850, ch. 103, § 11 (establishing that, upon the death of the wife, half of the common property is given to her descendants, but if none exists the entire estate remains with the husband).}

\footnote{122. \textit{See} Prager, \textit{supra} note 14, at 2 (identifying the phases of development as: the expansion of separate property rights prior to 1890, the growth of community property principles between 1891 and 1927, and the reformation of the marital property system during the 1970s).}

\footnote{123. \textit{See id.} at 34–47 (reviewing the balance created between the husband’s control of common property and the wife’s control of her separate property).}

\footnote{124. \textit{See} Act of April 17, 1850, ch. 103, §§ 9, 11–12, 1849–1850 Cal. Stat. 254, 254–55 (establishing that common property was controlled by the husband during marriage and divided equally between the husband and wife when the marriage dissolved); Prager, \textit{supra} note 14, at 35–36 (describing the wife’s interest in community property as a "mere expectancy," which was realized when the marriage ended).}

\footnote{125. \textit{See} Act of May 8, 1861, ch. 323, § 1, 1861 Cal. Stat. 310–11 (amending Section 11 of the 1850 statute to give the husband sole rights to the entire community estate when the wife dies); Prager, \textit{supra} note 14, at 37 ("[T]he law gave the wife no testamentary power over the community, making her husband her only potential heir with respect to that property.")}

\footnote{126. \textit{See} Act of May 8, 1861, ch. 323, § 1 ("[U]pon the dissolution of the community by the death of the wife, the entire common property shall go to the surviving husband."); Prager, \textit{supra} note 14, at 37–38 ("The husband was certain to lose none of the community property by his wife’s death.").}

\footnote{127. \textit{See} Act of May 8, 1861, ch. 323, § 1 ("In case of the death of the husband, if there be no descendants of the husband, one-half of the common property may be subject to his testamentary disposition . . . .")}

\footnote{128. \textit{See} Van Maren v. Johnson, 15 Cal. 308, 311 (1860) (establishing the "mere
The complete lack of any rights over community assets, the California legislature expanded the rights of wives over their own separate property. The effect of these changes was to mirror the law in common law jurisdictions that had passed a married women's property act. The wife gained full control of all the property she owned prior to the marriage or that she acquired by gift or inheritance after marriage. A wife also owned her earnings, but the earnings of the husband were, for practical purposes, his alone.

The second phase of development dated from 1891 to 1927. During this period the rights of wives with respect to community property gradually expanded. The first step in this direction was the enactment in 1891 of a law "requiring the written consent of the wife before any gift of community property could be made." This was followed in 1901 and 1917 by statutes limiting the husband's power to sell or convey home furnishings and the family's "wearing apparel" and requiring the participation of the wife in transactions involving community real property. In 1923, for the first time, wives were given testamentary power over their share of the community property. Finally, a statute passed in 1927 provided that the respective interests of husband and wife in community property during the continuance of the marriage relation "are 'present, existing and equal' interests [under] the management and control of the husband."

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129. See Prager, supra note 14, at 39 (explaining the increased rights of the wife over her separate property as a legislative attempt to balance the husband’s extensive control over the community property).

130. See id. at 46–47 (noting the similarities between the California system and the separate property systems created by married women’s property acts).

131. See id. at 39–40 ("[I]t was not until the adoption of the civil code in 1872 that full managerial power over the wife’s separate property was established in the wife . . . .” (citing 1 CODES AND STATUTES OF CALIFORNIA § 5162, at 595 (T. Hittel ed., 1876))).

132. See id. at 45–46 (noting that because of an 1870 statute, "the wife’s earnings constituted a special class of community property which was treated as her separate property").

133. See id. at 47 (describing the period from 1891 to 1927 as a legislative shift from "the expansion of married women’s separate property rights" to the modification of community property principles).

134. See id. at 47–63 (discussing the reforms that reduced the husband’s ability to manage community property and altered his "status as exclusive owner").

135. Id. at 49.

136. See id. at 52–55 (discussing the two pieces of legislation and the judicial interpretation of the laws).

137. See id. at 56 (recognizing that the 1923 legislation gave wives the testamentary power enjoyed by husbands since 1861).

138. Id. at 63 (quoting the 1927 California Legislature).
The growing legal recognition of the authority of married women to own and manage property coincided with the erosion and eventual rejection of the legal doctrine of coverture and the emergence of a new ideal for marriage. Symbolically at least, the final step in this process was achieved with the passage of the Nineteenth Amendment. As Professor Cott has written, "The marital model in which the individuality and citizenship of the wife disappeared into her husband’s legal persona had to go, logically, once women gained the vote in 1920."

Female suffrage and the repudiation of coverture signaled a turning point in the conceptualization of marriage in American society. The family ideology based on principles of authority and governance developed at a time when the technologies of modern governance were still relatively undeveloped. In this situation, "[m]onogamous marriages that distinguished citizen-heads of households had enormous instrumental value for governance, because orderly families, able to accumulate and transmit private property and to sustain an American people, descended from them. With the recognition of the independent legal personality of married women, marriage was no longer understood in terms drawn from the vocabulary of politics. As Professor Cott explains, the new marriage ideology was articulated in the language of economics. Specifically, marital unity was defined in terms of "husband-provider" and "wife-dependent. While this change was superficially related to the demise of the legal concept on which the earlier model was based, the more important factor was the changing needs of the state. While the "economic substructure of marriage" had always been

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139. See COTT, supra note 62, at 157 ("This public policy emphasis emerged . . . while the doctrine of coverture was being unseated in social thought and substantially defeated in the law.").
140. See id. at 157, 164, 166 (identifying the prohibition of "sex discrimination in voting" as the catalyst for changes in the "legal and political status of wives").
141. Id. at 157.
142. See id. (describing marriage as an instrument "to monitor and control" a scattered population).
143. Id.
144. See id. (explaining the departure from understanding marriage "as a form of direct political governance").
145. See id. ("[M]arital unity was rewritten economically in the provider/dependent Model . . . ").
146. Id. at 157–58 (describing the economic formulation as one "in which the husband carried more weight").
147. See id. at 158 (discussing the efforts of the federal government to restructure economic and social relationships during the Great Depression).
considered essential, it emerged as the dominant vision when the governance function of marriage receded in importance with the consolidation of state power in the period between the Civil War and World War I.\textsuperscript{148}

The final step in the transition to a true system of community property occurred in the mid-1970s.\textsuperscript{149} Notwithstanding the 1927 statute’s elimination of the "mere expectancy" doctrine, as a practical matter the statute did not alter the system of managerial control that existed under prior law because the husband retained control over community property. Wives were granted control over their own separate earnings in 1951.\textsuperscript{150} The changes that occurred in the 1970s finally gave managerial power to both spouses over property acquired during the marriage "without regard [for] which of them [was] directly responsible for earning the property."\textsuperscript{151} With the exception of the property of a business operated by one spouse alone,\textsuperscript{152} community personal property can be managed by either spouse acting alone.\textsuperscript{153} Either spouse can manage community real property\textsuperscript{154} subject to the long-standing requirement of consent of both parties in the case of transfer or lease.\textsuperscript{155}

The 1970s reforms, by which a genuine system of community property was finally put into place, coincided with the rise of yet another understanding of the relationship between the family and the state. Borrowing a concept from the law of church-state relations, Cott describes this latest shift as involving the "disestablishment" by the state of a single model of the marital relationship.\textsuperscript{156} Just as state governments had at one time favored and supported particular churches, since the early nineteenth century family law policy in the United States promoted or established a particular form of family life.\textsuperscript{157} In the latter part of the twentieth century, the state backed away from aggressive promotion of its chosen vision of family life.\textsuperscript{158} This new approach was manifested in,

\begin{itemize}
\item \textsuperscript{148} Id. at 157.
\item \textsuperscript{149} See Prager, supra note 14, at 73–81 (discussing the elimination of various separate property concepts from California law during the 1970s).
\item \textsuperscript{150} See Prager, supra note 14, at 79 (noting that the 1951 law increased the importance of "the earnings-management philosophy").
\item \textsuperscript{151} Id. at 73–74.
\item \textsuperscript{152} CAL. CIV. CODE § 5125(d) (West Supp. 1983).
\item \textsuperscript{153} Id. § 5125(a).
\item \textsuperscript{154} Id. § 5127.
\item \textsuperscript{155} Id.
\item \textsuperscript{156} See Cott, supra note 62, at 12 (comparing the emerging diversity in family relationship and the end of a single, state enforced model to religious disestablishment). An "'established' religion or 'religious establishment'" is one that is supported by the state. Id.
\item \textsuperscript{157} See id.
\item \textsuperscript{158} See id. at 210–12 (reviewing the judicial and legislative developments that relaxed
among other changes, the replacement of adversarial fault-based divorce with no-fault divorce, elimination of the marital rape exemption, and a general willingness to treat de facto families in the same way as formal marriages.159

Public understandings of marriage that dominated American thinking from the early nineteenth century through the latter part of the twentieth century inhibited recognition of jointly owned marital property in which both spouses have equal rights. There is a basic inconsistency between a system of marital property that grants both spouses rights in all property acquired during the marriage and the premises of both the marriage-as-unity and the provider/dependent models of the marriage. The disestablishment of a state-sponsored family has significance for the emergence of marital property because it removed a major barrier to acceptance of the doctrine.

III. Harta Bersama in Indonesia160

Community property emerged in California after a century-long struggle between competing conceptions of the economic foundations of marriage. The debates surrounding the development of a law of joint marital property in Indonesia focused on a different set of issues. That some form of jointly owned marital property would be recognized and enforced was hardly in doubt.161 The debate in Indonesia was concerned primarily with specifying the principle by which jointly owned marital property would be legitimized.

The defining feature of marital property under current Indonesian law is the recognition of a marital estate that is owned jointly by husband and wife.162 This joint property is distinguished from the separate property that belongs to the spouses individually.163 The marital estate begins with the commencement of the marriage and includes all property acquired during the marriage through

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159. See id. at 212 (identifying various examples of changes in national and state policies indicating that the government had released its "grip on the institution of marriage along with [its] previous understanding of it").

160. Due to the unavailability of foreign sources, the Washington and Lee Law Review was unable to verify the accuracy of foreign language sources and translations in this Part.

161. See B. Ter Haar, Adat Law in Indonesia 1, 7–10 (E. Adamson Hoebel & A. Arthur Schiller eds. & trans., Bhratara 1962) (1948) (recognizing the prevalence of "[t]he rule that property acquired during marriage is held jointly by husband and wife" and further noting that "[i]t is a great exception if there is no provision at all for such joint property").

162. See, e.g., infra note 179 and accompanying text.

163. See infra note 182 and accompanying text.
the efforts of either of the spouses. 164 Property owned by either of the spouses prior to the marriage or acquired during the marriage by gift or inheritance is not included in the marital estate but remains the separate property of the owner. 165

The Indonesian doctrine of marital property is now rationalized in terms of Islamic legal categories and applied by Islamic courts, but the origin of the doctrine is universally attributed to indigenous customary practice or "adat." 166 The word adat—an Arabic-derived term that exists in local cognate forms throughout much of island Southeast Asia 167—is a protean concept whose usage covers a range of meanings not fully captured in the word "custom." 168 According to one modern authority, adat encompasses "the whole body of teachings and their observance, which governs the way of life of the Indonesian people and which has emerged from the people’s conceptions of man and world." 169 This definition refers to the concept of adat, which is recognized


165. See id. art. 35(2), translated in DEP’T OF INFO., REPUBLIC OF INDON., THE INDONESIAN MARRIAGE LAW 20 (1975) ("Property brought in by the husband or the wife respectively and property acquired by either one of them as a gift or an inheritance shall be under the respective control of either one of them, provided the parties have not decided otherwise.").

166. See JOHN BALL, INDONESIAN LEGAL HISTORY, 1602–1848, at 65–66 (1982) (discussing the interaction between Islamic rules and institutions and local adat in the laws of the archipelago). The characterization of marital property as custom is both a description of its history or genealogy and a claim about the source and nature of its normative authority; ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 49 (1976) (describing the normative dimension of customary law as "the sentiment of obligation and entitlement, or the tendency to identify established forms of conduct with the idea of a right order in society and in the world at large").

167. See Jan Prins, Adatlaw and Muslim Religious Law in Modern Indonesia: An Introduction, 1 DIE WELT DES ISLAMS 283, 284 (1951) (discussing the Arabic origin of the word adat and its definition).

168. Clifford Geertz, for example, argues that the concept of adat embodies a characteristic Southeast Asian "legal sensibility" in which justice is identified with "social consonance." Clifford Geertz, Local Knowledge: Law and Fact in Comparative Perspective, in LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 208–09 (1983). He notes that discourse about everyday life utilizes a range of "near-synonyms," including "proper," "suitable," "seemly," "fitting," "normal," "harmonious," "apt," "smooth," "supple," and "pleasant." Id. at 210. Adat, however, is an entire "outlook" not fully captured by any of these. Id. at 210.

across the archipelago. It should be emphasized, however, that there is not one adat observed in island Southeast Asia, but many.170 In its most common usage, adat refers to the particular beliefs and practices that define and differentiate the region’s many ethnic groups.171 Thus, possession of—or possession by—Javanese adat is what makes a person Javanese, and also what distinguishes the Javanese, who occupy the eastern two thirds of the island of Java, from the Sundanese to the west. The total number of adat communities across the Indonesian archipelago depends on the purpose and refinement of the classificatory scheme and cannot, of course, be specified with precision. Estimates of the number of distinct adat communities that exist in Indonesia range from 19—the number of adat groups identified by the Dutch172—to more than 300.173

Thus, while the modern doctrine of marital property is commonly said to be based on adat, it might be more accurate to speak of the doctrine’s origin in the region’s adats, because its roots are traced to the many and varied distinct understandings of the property relations within marriage. Moreover, not all ethnic communities within Indonesia recognize the concept of jointly owned marital property.174 Groups that trace descent exclusively through male blood lines generally do not have a concept of jointly owned marital property,175 though a form of marital property is recognized among the patrilineal Balinese.176 The doctrine is most strongly associated with ethnic groups that trace descent bilaterally and therefore lack any sort of corporate descent group. Because most ethnic groups within Indonesia are bilateral,177 including the

170. See Prins, supra note 167, at 286–89 (describing the diversity of "the field of ethnological jurisprudence and adatlaw" in the archipelago).

171. See JOHN R. BOWEN, ISLAM, LAW AND EQUALITY IN INDONESIA: AN ANTHROPOLOGY OF PUBLIC REASONING 51 (2003) ("Each corpus of adat law pretended to exhaustively characterize the norms and behavior to be found in a particular place in the Indies, and it only characterized norms and behavior found there."). An example of this common usage is found in the title of a book by one of Indonesia’s prominent scholars of adat, R. SOEPOMO, HET ADATPRIVAATRECHT VAN WEST JAVA (1933).

172. See E. Adamson Hoebel & A. Arthur Schiller, Introduction to Ter Haar, supra note 161, at 7–10 (listing the nineteen adat groups).

173. See Bowen, supra note 171, at 4 (estimating the number of adat groups based on conventional calculations).


175. See Ter Haar, supra note 161, at 209 ("It is only among patrilineal local groups that the kin group property of the husband (in case of a bride-price marriage) or of the wife (in case of an adoptive marriage) leaves no room for building a joint estate.").

176. SOEKANTO, supra note 174, at 249.

177. HAZAIRIN, HUKUM KEWARISAN BILATERAL MENURUT QUR’AN DAN HADITH [BILATERAL
region’s largest and politically dominant group—the Javanese—the typical marital property scheme in island Southeast Asia includes joint ownership by husband and wife. A form of marital property is also found among the Minangkabau, a large matrilineal group in west Sumatra.

While some form of jointly owned marital property is recognized by most inhabitants of island Southeast Asia the practice differs from one region to another, sometimes substantially. The differences concern such matters as whether property acquired through the efforts of one spouse constitutes joint or separate property; whether income derived from separate property is categorized as joint or separate; the allocation of authority between the spouses over joint and separate property; and the division of joint and separate property when the marriage ends. Such issues are often treated differently in villages within the same district, as illustrated by a 1974 study of customs relating to family and inheritance in the district of Pandegelang in West Java. The study found, for example, that in some villages separate property was not included within the marital estate, while in other villages it was included. It was also found that, within a single district, there were multiple approaches to the issue of the wife’s authority to sell her separate property. There is a requirement throughout the district that the wife may sell her separate property only if her

Inheritance Law According to the Qur’ān and Hadith 74 (1958).

178. Van Vollenhoven, supra note 6, at 166.
180. Id.
181. See Van Vollenhoven, supra note 6, at 87, 135–36, 175–76 (discussing the marital property systems in Aceh, among the Minangkabau of west Sumatra, and central and east Java).
182. Differences also arise from the existence within a particular group of property that belongs to the community as a whole. Among the Minahasa in northern Celebes (Sulawesi), for example, “[t]he common estate, the harta pendapatan, comprised only the property gained by labour of both partners during their marriage,” and both parties retained their own personal possessions or pasini. Sita van Bemmelen, The Marriage of Minahasa Women in the Period 1861–1993, in Indonesian Women in Focus: Past and Present Notions 181, 190 (Elisbeth Locher-Scholten & Anke Niehof eds., 1987). Minahasa adat also recognized a third category of family property or kelakaran, and “[b]oth the husband and the wife had the right of allotment . . . of kelakaran land for their use.” Id.
184. Id. at 23. At the time of the study there were four different terms for separate property—harta sampakan, harta sulur, harta pusaka/turunan, and barang asal—and four different terms for common property—harta campur kaya, harta guna kaya, harta gono gini, and hartaya reujeung. Id. at 31.
husband is aware of the sale. In two of the villages, there is a further requirement that the wife’s heirs be aware of the sale, and in five other villages the sale must be with the knowledge of the wife’s family.

The customary arrangements governing property within marriage are naturally related to ideas about the marriage relationship and to the role of women in the economy and society. A relatively strong and autonomous role for women seems to be a consistent and long-standing feature of Southeast Asian life. Mention has been made of the fact that the predominant method for reckoning kinship and inheritance is bilateral—through both parents. In addition, gender tends to be conceptualized in complementary rather than oppositional terms and is not as important as age and rank in the definition of social hierarchy. A particularly striking manifestation of the comparatively strong position of Southeast Asian women is the practice, once common in many parts of the region, of men undergoing sometimes painful surgeries on their penises to enhance the sexual pleasure of women. Reid describes one procedure as involving "the insertion of a metal pin [near the head of the penis], complemented by a variety of wheels, spurs, or studs." Professor Reid also

185. Id. The reason given for the rule is to protect the husband from being required to indemnify his wife’s creditors out of his separate property. Id.

186. Id.

187. See Penny van Estrick, Introduction to Women of Southeast Asia 1, 1 (Penny van Estrick ed., 1996) ("Southeast Asia has long been identified as an area where women enjoy high status.").

188. See Shelly Errington, Recasting Sex, Gender, and Power: A Theoretical and Regional Overview, in Power and Difference: Gender in Island Southeast Asia 1, 48 (Jane Monnig Atkinson & Shelly Errington eds., 1990) (summarizing that seniority and generational layers play a greater role in society than do sex differences).

189. See 1 Anthony Reid, Southeast Asia in the Age of Commerce, 1450–1680: The Lands Below the Winds 148 (1988) (describing the details of the painful surgeries men underwent to increase the erotic pleasure of women).

190. Id. at 149. Professor Reid quotes the following:

The males, large and small, have their penis pierced from one side to the other near the head with a gold or tin bolt as large as a goose quill. In both ends of the same bolt some have what resembles a spur, with points upon the ends; others are like the head of a cart nail. I very often asked many, both old and young, to see their penis, because I could not credit it. In the middle of the bolt is a hole, through which they urinate . . . . They say their women wish it so, and that if they did otherwise they would not have communication with them. When the men wish to have communication with their women, the latter themselves take the penis not in the regular way and commence very gently to introduce it, with the spur on top first, and then the other part. When it is inside it takes its regular position; and thus the penis always stays inside until it gets soft, for otherwise they could not pull it out.

Id. (quoting Antonio Pigafetta, First Voyage Around the World 43 (J.A. Robertson trans., 1969)).
notes that, in contrast to China, India, and the Middle East, the value of daughters was never questioned in Southeast Asia; "on the contrary, 'the more daughters a man has, the richer he is.'"191

The right of women to a share of household production is also clearly related to the fact that women have consistently played an important role in the region’s predominantly agricultural economy. Javanese custom assigned certain farming tasks exclusively to men and other tasks exclusively to women.192 Men were responsible for plowing, repairing dikes and ditches, and preparing seed beds, but planting and harvesting was performed by women.193 Women have also long dominated small-scale trade.194 Both in Java and elsewhere women participate in, and in some areas control, household management and decision-making.195 Among several of the region’s cultural groups, women manage their husbands’ incomes.196

191. Id. at 146 (quoting ANTONIO GALVÃO, A TREATISE ON THE MOLUCCAS, PROBABLY THE PRELIMINARY VERSION OF ANTIONION GALVÃO’S LOST HISTÓRIA DAS MOLUCAS 89 (Hubert Jacobs trans., 1971)).

192. See KOENTJARANINGRAT, JAVANESE CULTURE 167 (1985) (providing a table depicting the average number of hours men and women spent at various farming tasks).

193. See id. (providing data that, in 1958, women spent an average of 205 hours transplanting, 2 hours sowing seeds, and 300 hours harvesting the irrigated rice fields in Bagelen). Rice was traditionally harvested head-by-head with a small hand-held blade (anti-anti). Id. at 169.


195. See HILDRED GEERTZ, THE JAVANESE FAMILY: A STUDY OF KINSHIP AND SOCIALIZATION 45–46 (1961) (explaining how men voluntarily withdraw from household affairs, leaving family finances and domestic decisions to women); LINDA B. WILLIAMS, DEVELOPMENT, DEMOGRAPHY, AND FAMILY DECISION-MAKING: THE STATUS OF WOMEN IN RURAL JAVA 87–89 (1990) (presenting data demonstrating that men and women in rural Java have an equal voice in most major household decisions related to contraception, personal income, and the discontinuation of childbearing).

196. See Suzanne A. Brenner, Why Women Rule the Roost: Rethinking Javanese Ideologies of Gender and Self-Control, in BEWITCHING WOMEN, PIOUS MEN: GENDER AND BODY POLITICS IN SOUTHEAST ASIA 19, 23 (Aihwa Ong & Michael G. Peletz eds., 1995) (discussing female control over household finances); Hanna Papanek & Laurel Schwede, Women are Good with Money: Earning and Managing in an Indonesian City, in A HOME DIVIDED: WOMEN AND INCOME IN THE THIRD WORLD 71, 88–95 (Daisy Dwyer & Judith Bruce eds., 1988) (describing the role of women in managing all aspects of domestic finances from the allotment of pocket money to determining family saving strategies). In her lively ethnography of home life in 1940s Kelanten in northwest peninsular Malaysia, Rosemary Firth reports:

The real influence of the woman, however, comes from her control over the purse strings. All money earned by the fisherman is given to the woman both to spend and to save. The peasants say that this is natural, "for who should guard the money while we are away all day, if not the woman?" A friend of ours once remarked,
Among at least some ethnic groups, economic cooperation is fundamental to popular understandings of marriage. In her landmark study of the Javanese family in the 1950s, Hildred Geertz found that marriage was understood as fundamentally an economic partnership.\textsuperscript{197} Geertz found that the doctrine of marital property was directly related to this conception of marriage: "Since husband and wife are an economic unity, even though the wife may not participate directly in the acquisition of income, her performance of household tasks is considered part of the productive economic enterprise."\textsuperscript{198} Working in a very different social and cultural setting, Jane Atkinson identified a similar attitude toward marriage among the mountain Wana of Sulawesi who live in small, unstratified settlements with a subsistence economy based on shifting cultivation, hunting, and foraging.\textsuperscript{199} As Atkinson described:

The conjugal relationship is about work. Both young and old, male and female, stressed industriousness and a capacity for hard labor as attributes of an ideal spouse. The emphasis on industry goes for both sexes. In explaining why a wife would be jealous of her husband’s lover, one woman explained that to seduce an unmarried woman, a married man disparages his own wife. He tells his lover that his wife is lazy, weak, and will not work for his mother. He proceeds to praise his would-be lover for her strength and industry. In this way, a man’s adultery is an insult to his wife’s worth as a producer and as a considerate daughter-in-law. Similarly, women will divorce men who are shiftless workers. Wana talk about marriage brings out the point that both spouses are expected to be hard-working contributors to their productive units.\textsuperscript{200}

\begin{flushright}
ROSEMARY FIRTH, HOUSEKEEPING AMONG MALAY PEASANTS 26–27 (2d ed. 1966).
\end{flushright}

\textsuperscript{197} See Geertz, supra note 195, at 50 (stating that husband and wife function as an indivisible economic unit accumulating both personal and community property).

\textsuperscript{198} Id. at 49.

\textsuperscript{199} See Jane Monnig Atkinson, How Gender Makes a Difference in Wana Society, in POWER AND DIFFERENCE: GENDER IN ISLAND SOUTHEAST ASIA 59, 59–93 (Jane Monnig Atkinson & Shelly Errington eds., 1990) (exploring the cultural expressions of gender in the Wana population—where expressions of sameness are more dominant than expressions of gender difference).

\textsuperscript{200} Id. at 68.
A spouse’s contribution to the marital property was a contribution to the strength of the marriage.

A. Adatrecht: Custom as Law

The evolution of the doctrine of joint marital property and its incorporation into the formal legal system is due in large part to the role assigned to adat by the Dutch. Dutch legal policy was based on the principle that each group within the population should be subject to its own law.201 This policy resulted in the division of the population into three “law groups”: “Europeans,” “foreign Orientals,” and “Natives.”202 The most favored group was Europeans, which included Netherlanders and other Europeans, but also Japanese and nationals of other countries whose family law was similar to that of the Netherlands.203 Indigenous Indonesians comprised the vast majority.204 A residual category of “foreign Orientals” was comprised principally of Chinese, Arabs, and British Indians.205

Family law for those categorized as Europeans was based on the Dutch Civil Code.206 Parts of the Civil Code were also made applicable to some within the group of foreign Orientals,207 and a statute passed in 1933 created a special law of marriage for Indonesian Christians in Java and parts of eastern Indonesia.208 For the rest of the non-European population, the law of marriage and inheritance was based on the custom or adat of the parties.209

Dutch policy assigned no formal role to Islamic doctrine in marriage or any other area of law. Arabs resident in the Indies were subject to Islamic marriage and inheritance rules, but the binding character of Islamic doctrine was not related to its religious authority. Rather, the law for Arabs was based

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201. This policy received its first formal recognition in Section 75 of the Constitution of the Indies (Regeringsreglement) of 1854. That section provided that native courts were to apply "the religious laws, institutions and customs of the natives, insofar as they are not in conflict with generally recognized principles of fairness and justice." H.W.J. Sonius, Introduction to Van Vollenhoven, supra note 6, at LVIII (internal citations omitted).
203. Id. at 150.
204. Id.
205. Id.
206. Id. at 151.
207. Id. at 154.
208. Id. at 153.
209. Id. at 155.
on Islamic doctrine because Islamic law was the customary law of Arabs. Under what is known as the "reception theory," the same principle was applied to indigenous Indonesian Muslims; Muslims in the Indies were subject to Islamic rules insofar as those rules had been received into the local custom or adat.

Under the reception theory the scope of the applicability of Islamic doctrine was ostensibly an empirical question: Which Islamic rules had achieved the status of custom? Although the question by its nature does not lend itself to clear-cut resolution, a determination was made that Islamic rules of marriage and divorce had become customary, but other aspects of Islamic doctrine had not. Thus, the rules for Indonesian Muslims regarding the formation of marriage and the requirements and mechanisms for divorce were based on Islamic doctrine, whereas the law of inheritance was based on adat.

Indonesia declared its independence and promulgated a national constitution in 1945. That constitution declared that colonial era laws were to remain in effect pending the enactment of national law, preserving both the role of adat as a principal source of law and the subordinate status of

210. Id.
211. LEV, supra note 1, at 196–97.
212. See HARRY J. BENDA, THE CRESCENT AND THE RISING SUN: INDONESIAN ISLAM UNDER THE JAPANESE OCCUPATION 1942–1945, at 22 (1958) ("[W]hile Koranic law had gained acceptance in the realm of marital and family law, in almost all other matters, the Indonesian adat had prevailed."). Dutch assessments of the influence of Islamic legal doctrines on Indonesian practice changed significantly over the course of Dutch rule. Dutch administrators initially assumed that because the people were Muslim they followed Islamic law. See Azyumardi Azra, The Indonesian Marriage Law of 1974: An Institutionalization of the Shari‘a for Social Changes, in SHARIA AND POLITICS IN MODERN INDONESIA 76, 79 (Arskal Salim & Azyumardi Azra eds., 2003) (explaining the realization by the Dutch of the difference between Indonesian adat law and Islamic law and the subsequent Dutch adoption of adat law as a way to curb the progress of Islamic law). When the Dutch later began to attend to legal practice, it quickly became apparent that the situation was more complicated than had previously been believed. Research on indigenous legal practice led the Dutch to conclude that Islamic legal institutions had a relatively minor impact on indigenous practice. See H. Westra, Custom and Muslim Law in the Netherlands East Indies, 25 TRANSACTIONS OF THE GROTIUS SOCIETY 151, 165 (1939) (discussing in detail the regulations and customary law of the indigenous population).
213. See Prins, supra note 167, at 290–91 (describing the creation and dissolution of marriages as solely concerned with Islamic standards and the distribution of property centered around the principals of adat).
215. See INDON. CONST. Transitional Provisions, cl. II ("All existing state institutions and regulations shall continue to function as long as new ones have not been established or introduced in accordance with the Constitution.").
Islamic legal institutions. Thus, on matters governed by adat the Indonesian courts, like the predecessor colonial courts, were obliged to discover and enforce the customary rules applicable to the parties or the transaction.\(^{216}\) Although the courts were able to cut through some of the complexity of this scheme by relying on the Dutch construct of nineteen adat groups sharing fundamentally similar rules, the system was nonetheless cumbersome and, in the view of some, ill-suited to the needs of a modern national state.\(^{217}\) One perceived advantage of adat for the Dutch was that the particularity of its local manifestations was regarded as a hindrance to the development of a common political consciousness.\(^{218}\) After independence the disintegrative potential of adat was no longer a benefit but a problem. The solution was to retain the concept of adat but not its specific rules.\(^{219}\) This not only alleviated the threat of adat as a disintegrative force, but also transformed the concept into a basis for national self-definition and unification.\(^{220}\)

The transformation of adat was the accomplishment of the Indonesian Supreme Court.\(^{221}\) Over the period of about a decade, beginning in the mid-1950s, the Court issued a number of decisions announcing changes to specific doctrines for particular adat groups.\(^{222}\) These decisions brought about a gradual convergence of adat doctrines around a single standard that eventually resulted in the declaration of a single "Indonesian" adat. In the process the concept of adat itself was fundamentally altered.

\(^{216}\) See Lev, supra note 214, at 69–70 (arguing that without new statutory direction, the courts invoked previously applicable principles of adat creating conflicts between existing codes and customs).

\(^{217}\) S. TAKDIR ALISJAHBANA, INDONESIA: SOCIAL AND CULTURAL REVOLUTION 70–71 (1966); see S. TAKDIR ALISJAHBANA, INDONESIA: IN THE MODERN WORLD 100–09 (Benedict R. Anderson trans., 1961) (noting defenders of the Dutch system, which applied different laws to different residents, argued it showed respect for cultural attitudes and produced law that was the evolutionary product of a nation’s growth while critics labeled it backwards and impractical in a complex, modern world).

\(^{218}\) See Lev, supra note 214, at 66 (noting that Dutch researchers understood adat law as persisting best in closed communities causing the researchers to treat local communities as if they were closed).


\(^{221}\) See generally Daniel S. Lev, The Supreme Court and Adat Inheritance Law in Indonesia, 11 AM. J. COMP. L. 205 (1962) (providing a full development of the Supreme Court’s transformation of adat).

\(^{222}\) See id. at 215–22 (describing the changes to inheritance law made by the courts).
The Supreme Court’s first major pronouncement on adat rules relating to family life was in 1956.223 That case declared a seemingly uniform rule with respect to two important issues. First, the Court rejected the argument that a spouse who does not contribute financially to the household is not entitled to marital property.224 Technically the issue before the Court was limited to the question of Javanese adat.225 But the Court framed its decision in unqualified terms, stating that under adat law all property acquired during the marriage is marital property, even if the property is derived from the efforts of the husband alone.226 The second issue concerned the question of misconduct as a bar to marital property. Citing Islamic rather than adat principles, the husband in the case argued that his wife forfeit her right to marital property because she had abandoned the marital home.227 The Court dismissed the argument, stating first that the wife’s entitlement to marital property is governed by adat rather than Islam, and second, that under adat the alleged misconduct does not affect marital property rights.228

The Supreme Court addressed another important aspect of marital property doctrine in a 1959 decision dealing with size of the spouses’ share of marital property under Javanese adat.229 The lower courts had decided the case in line with the predominant view that a surviving husband is entitled to a two-thirds share of the marital property.230 The Supreme Court reversed, ruling that changing social conditions and evolving notions of justice require that the spouses receive an equal share of the marital property.231

Marital property issues made up only one segment of the Supreme Court’s adat law docket, and the movement toward establishment of a national adat encompassed other matters as well.232 The important point for present purposes is that the Supreme Court gradually constructed a body of basic marital property principles that were eventually extended to all Indonesians regardless

224. Id. at 49.
225. Id.
226. Id.
227. Id.
228. Id.
230. Id. at 52.
231. Id. at 57–58.
232. See Lev, supra note 221, at 215–22 (analyzing this process focusing on the law of inheritance).
of ethnic identity. The impact of the Court’s decisions on popular practice is uncertain. Certainly, the Court did not completely eliminate diversity of local practice with respect to marital property. What the Court achieved, rather, was the creation of the idea of a uniform national marital property doctrine.

B. The Islamic Concept of Marital Property

The adat doctrine of joint marital property continues to be applied by Indonesian civil courts. But the concept of marital property has also long been rationalized in terms of Islamic legal categories and enforced by Islamic tribunals. The content of Islamic marital property law has tended to follow developments of the doctrine within adat. Indeed, the Islamic authorities appear to have simply absorbed changes made to the adat doctrine, and the addition of an Islamic rationale added nothing substantive to the existing customary law. The significance of the Indonesian Islamic concept of marital property consists not in the details of the doctrine but in the fact that it exists at all.

The canon of received doctrine within Islamic law is contained in a vast scholarly literature referred to as fiqh. While the rights and obligations of spouses are addressed in some detail in the Islamic law of marriage, standard works of Islamic jurisprudence do not include a doctrine of marital property. Women may own property under Islamic law, and the right of women to inherit is expressly recognized within the law of inheritance. But property

233. In 1971 the High Court for Medan upheld a wife’s claim for harta bersama, even though the couple were from South Tapanuli—an area that did not recognize a doctrine of marital property. Decision of the High Court for Medan No. 389/1971 (Dec. 30, 1971). In its decision the court stated that, in accordance with the legal development in Indonesia, only the property acquired during marriage is partnership property (harta syarikat) that must be divided equally upon divorce. Id. at 169. This decision was later approved by the Supreme Court. Supreme Court K/Sip/1972 (May 23, 1973).


235. For a concise statement of established marriage doctrine in one of the four major schools of thought, see AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELLER: THE CLASSIC MANUAL OF ISLAMIC SACRED LAW 508–53 (Nuh Ha Mim Keller trans., 1994).

236. See SCHACHT, supra note 8, at 126–27 (noting that men and women enjoy equal rights under Islamic property laws).

237. The right of female relatives to a share of the inheritance is expressly stated in the Qurʾān. With respect to daughters the Qurʾān states:

As for the children, God decrees that the share of the male is equivalent to that of two females. If they consist of women only, and of them more than two, they will
rights within marriage are not treated as a separate subject of analysis, and there is no concept of jointly owned marital property.\textsuperscript{238} The doctrine of marital property was incorporated into Indonesian Islamic law by conceptualizing property within marriage in terms of Islamic commercial law doctrines. Specifically, marriage was construed as a form of partnership, and property acquired during marriage as partnership assets.\textsuperscript{239}

The doctrinal discussion of marital property as a form of Islamic partnership has been going on for at least a century, and the issue has been addressed by a variety of Islamic authorities in a range of different contexts.\textsuperscript{240} Professor Michael Feener and I have addressed the subject at greater length elsewhere.\textsuperscript{241} In this Article I do no more than summarize some of the main points made there.

The first formal articulation of an Islamic rationale for marital property is commonly attributed to a late eighteenth century scholar from south Borneo (Kalimantan) named Arshad al-Banjari.\textsuperscript{242} Al-Banjari is reputed to have advanced the theory of marital property as a form of partnership in a text on inheritance entitled \textit{al-Farā'īd}.\textsuperscript{243} While other works by al-Banjari are in wide

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\item get two-thirds of the inheritance; but in case there is one, she will inherit one half.
\item One important piece of evidence for the widespread assimilation of marital property to Islamic legal concepts is the use throughout Muslim Southeast Asia of an Arabic term for joint marital property. Each of the region’s many ethnic communities has its own terminology for jointly owned marital property. In addition to the various vernacular labels, however, one also finds region-wide use of a term for marital property that is based on the Arabic word \textit{sharīka}, which is the technical term used within Islamic law for commercial partnership. See, e.g., AHMAD IBRAHIM, FAMILY LAW IN MALAYSIA 311 (3d ed. 1997) (discussing Malaysian cases in which wives claimed “\textit{harta sharikat}”); 29 ADATRECHTBUNDELS 191–92 (1928) (reporting a decision of the Islamic court for Ternate granting “\textit{sarikat}” to wife of deceased); VAN VOLLENHOVEN, supra note 6, at 87 (discussing \textit{adat} practice in Aceh categorizing common property as “\textit{laba mocarikat}”).
\item \textit{Id}.
\item ENSIKLOPEDI HUKUM ISLAM [ENCYCLOPEDIA OF ISLAMIC LAW] 191 (1996).
\item Published references to al-Banjari’s theory of marital property are all apparently based on an article by Abdurrahman Wahid published in the journal \textit{Pesantren} in 1985. Abdurrahman Wahid, \textit{Pengembangan Fiqh yang Kontekstual [Creating an Islamic Jurisprudence that is Contextual]}, II:2 PESANTREN 3 (1983). According to Wahid, al-Banjari based his recognition of marital property on his observations of the social and economic conditions in which he lived and the contrast between the roles of women in Southeast Asia and the Middle East. After his
circulation, efforts to locate the *al-Farāʿīdh*, or even to confirm its existence, have so far proven unsuccessful.

The usual method for obtaining answers to novel or unresolved legal issues within the Islamic tradition is to request a legal opinion or *fatwa* from a scholar. There is no central authority within Islam, and the Islamic legal tradition has always been characterized by significant doctrinal diversity. Historically, individual scholars who were consulted because of their reputation for knowledge of the law, performed the role of *mufti*. While the practice of seeking *fatwa* from individual *mufti* is still common, in many countries Muslim organizations, and often the state, issue more or less official *fatwa* for the benefit of their members or citizens.

In Indonesia there are a number of prominent Muslim organizations that issue *fatwa*. The largest and probably most influential such organization, the Nahdlatul Ulama (NU), addressed the doctrine of joint marital property in its very first congress in 1926. The question posed to the *fatwa* committee framed the issue in narrow terms. It asked:

> return from a long period of study in Mecca, al-Banjari took note of the fact that the economic circumstances in his home region of south Borneo demanded the participation of both men and women in fishing, trade, and agriculture. *Id. at 4.* In recognition of this social reality in which economic production was a collaborative endeavor of both spouses, al-Banjari determined that wives were entitled to a share of any wealth generated during the marriage upon termination of the marriage through death or inheritance. *Id.*

244. Al-Banjari is best known for his *Sabil al-muhtahdin*, a work of standard Islamic jurisprudence or *fiqh* on legal doctrines relating to ritual practice. This text, which was commissioned in 1779, is still available in Indonesian book stores.

245. See generally Muhammad Khalid Masud et al., *Muftis, Fatwas, and Islamic Legal Interpretation, in Islamic Legal Interpretation: Muftis and Their Fatwas* 3 (Muhammad Khalid Masud et al. eds., 1996) (providing a general introduction to the role of *fatwas* in Islamic law).

246. See SCHACHT, supra note 8, at 3 (describing Islamic law’s reliance on both narrowly focused Islamic materials such as the Qur’ān and modern legislation that interferes with traditional norms).

247. See Masud et al., supra note 245, at 15–20 (describing the qualifications of a candidate for the *mufti*ship).


249. See generally Rifyal Ka’bah, *Islamic Law in Court Decisions and Fatwa Institutions in Indonesia, in Islamic Law in Contemporary Indonesia, supra* note 248, at 83 (providing a discussion of the major *fatwa* bodies in Indonesia).

Is it permissible to award marital property (gono-gini), the [fruits of the] efforts of husband and wife both [in cases where] each [spouse] possesses capital and in cases where they do not, but the profits [from their joint efforts] cannot be differentiated in terms of who is responsible (they have combined to become one).\(^{251}\)

The committee’s answer stated simply that gono gini is permissible on the authority of a text entitled Hashiya ‘ala sharh al-tahrir written by Abdallah al-Sharqawi (d. 1812).\(^{252}\) The Committee then quotes the passage referenced in its pronouncement.\(^{253}\) Significantly, the quotation is taken from the chapter of the text on partnership, not the chapter on the law of marriage. The passage discusses that when profits from a partnership cannot be attributed to the efforts of a particular individual they may be shared but, to the extent the source of the profits is known, they belong to the party who earned them.\(^{254}\)

The 1926 pronouncem ent reflects a qualified acceptance of marital property on the basis of principles from the law of partnership. A second pronouncement on the issue released the following year limits the doctrine even further.\(^{255}\) The question this time was whether, in the absence of an agreement between the spouses, a wife who performs domestic duties in her husband’s home is thereby entitled to either compensation or marital property.\(^{256}\) Without explanation, the Committee states simply that under the stipulated conditions a right to marital property does not arise.\(^{257}\)

The NU issued its third fatwa on marital property in 1960.\(^{258}\) The pronouncement was made in response to a request submitted by an NU branch that the Committee reconsider its original 1926 ruling. In its response the committee stated that, upon reconsideration, it found gono gini permissible based on agreement of the heirs rather than on the basis of God’s law.\(^{259}\) When the heirs agree to permit an award of marital property, the division should be carried out in accordance with the principles stated in the 1926 ruling.

\(^{251}\) Id.

\(^{252}\) The Hashiya ‘ala sharh al-tahrir, popularly known as Syarqawi ala Tahrir, is a review of the work by Zakariya’ al-Ansari, which is itself based on another text by al-Mahamili, the Lubab al-fiqh.

\(^{253}\) Masyhuri, supra note 250, at 6.

\(^{254}\) Id.

\(^{255}\) Id. at 14.

\(^{256}\) Id.

\(^{257}\) Id.

\(^{258}\) Id. at 230.

\(^{259}\) Id.
The fullest discussion of marital property as a form of Islamic partnership is contained in the writings of contemporary Islamic legal scholars. The Indonesian jurist, Ismail Muhammad Syah, has made an exhaustive analysis of the compatibility of Indonesian marital property with Islamic partnership doctrine. Syah, popularly known by the acronym "Ismuha," begins by laying out the key features of Indonesian marital property. To keep this discussion within manageable limits, he confines the discussion to the customary practices among the Javanese and among the inhabitants of the Aceh region of Sumatra. He then surveys the Islamic law of partnership, describing the terms and requirements of the various types and sub-types of commercial partnerships approved in the classical literature. Ismuha then compares the results to determine whether any of the approved partnership forms match up with marital property practice.

Ismuha concludes that Islamic law sanctions the institution of harta bersama because it coincides with a form of partnership called sharikat al-'abdān muśāwadha or "unlimited partnership of labor." The distinctive features of a sharikat al-'abdān muśāwadha are that the contribution of the parties to the venture is in the form of labor rather than capital, and that each of the partners has the authority to act on behalf of the others and assume the undertakings of other partners. Marriage qualifies as sharikat al-'abdān muśāwadha, according to Ismuha, because "both husband and wife both exert themselves to the utmost to provide for the daily needs of the family," and because everything gained during the marriage constitutes joint property except for that which is inherited or received by gift.
Ismuha’s analysis has garnered wide but not universal acceptance. Ibrahim Hosen, another prominent Indonesian scholar of Islamic law, has questioned the conclusion that any single form of partnership can encompass all the various domestic arrangements found in Indonesia. Endorsing the enforcement of marital property under Islamic law, Hosen argues that in order to justify this practice, Islamic Law should recognize a broader array of partnership forms. He argues that the concept of *sharikat al-‘abdān* cannot justify marital property in marriages in which only one of the spouses is economically productive. However, joint marital property is permissible in such marriages under a form of partnership known as *Qirād or mudhāraba*, in which one of the parties to the joint effort contributes capital and the other contributes labor.

For at least a century and possibly much longer, Indonesian Islamic tribunals have routinely enforced the doctrine that property acquired during marriage is owned by the spouses jointly during the marriage and is divided between them when the marriage ends by death or divorce. The earliest judicial treatment of marital property that I have been able to find is an 1884 inheritance judgment by the Islamic court (the *Raad Agama*) for Blitar, a city in east Java. The case involved the division of the estate of a man named Singotruno. The written judgment consists of just three short paragraphs and does not explicitly mention marital property. Marsidin, son of the deceased, Maniah, daughter of the deceased, and Kadimah, widow of the deceased, requested the court to divide the estate valued at Rp.102. The decision names two witnesses as having confirmed the basic facts. Without explanation, the court declares the result: The daughter takes a residual...
(asabah) share of Rp.19.8; the son takes a residual share of Rp.39.6; and the wife takes a combined portion of Rp.42.5. Two works of Islamic jurisprudence are mentioned—the Fath al-wahhab and the Muharrar—but the decision does not cite specific passages from these texts, and the relevance of the cited works to the decision is unclear.

Even though the court does not explain its reasoning, one can reconstruct the decision by working backwards from the result. Standard interpretations of Islamic inheritance law assign specified fractional shares of the estate to the deceased’s relatives. The size of the share and the entitlement to inherit depend on who among the potential heirs is alive when the deceased dies. In the case of a man survived by his wife, a son, and a daughter—the situation presented in the case of Singotruno—the wife receives one-eighth of the inheritance and the children divide the remainder according to the ratio of two parts to the son to one part to the daughter. In Java, where the Singotruno case arose, the wife typically received a one-third share of the marital property. Assuming the usual 2:1 division of the marital property, the property belonging to Singotruno when he died that was subject to inheritance was two-thirds of Rp.102 or Rp.68 (2/3 x 102). As her husband’s heir, the wife takes a one-eighth share of this amount or Rp.8.5. Of the Rp.59.5 that remains, the son receives a two-thirds portion or Rp.39.6, and the daughter receives one-third or Rp.19.8. The wife’s inheritance share of Rp.8.5 is added to her share of the marital property (which she owns by virtue of the marriage and not as her husband’s heir) to give her a sum total of Rp.42.5.

While the court that decided the Singotruno case did not expressly recognize the doctrine of joint marital property, other inheritance decisions from Islamic courts during the pre-independence period do endorse this
doctrine. Typical of inheritance decisions from this era is the case of the estate of Haji Mohammad Saleh decided by the Islamic court for Semarang in central Java in 1922.\textsuperscript{284} The suit was filed by the deceased’s wife, who stated that her husband had died some thirteen years previous but the inheritance had not yet been divided.\textsuperscript{285} Before dividing the estate, the court first stated that the marital property the deceased owned jointly with his wife was to be divided equally.\textsuperscript{286} The property subject to inheritance (\textit{tirkah}), therefore, consisted of half of the marital property plus the deceased’s separate property.\textsuperscript{287} In addition to her half share of the marital property, the wife also received a one-eighth share of the inheritance—the portion prescribed in the Qur’an for a wife when the deceased was also survived by children.\textsuperscript{288}

In addition to applying marital property doctrine in inheritance cases, the Islamic courts in the pre-independence period also applied the doctrine in suits by divorced wives seeking their share of joint property.\textsuperscript{289} At the time these cases were decided, a husband could divorce his wife unilaterally by simply uttering the repudiation or \textit{talak}, and all of the suits for division of marital property were filed by women against their former husbands who had repudiated them.\textsuperscript{290} In all of the cases the wife’s request was granted, at least in part.\textsuperscript{291} Although the cases never clearly spell out the legal or conceptual basis for the doctrine of joint marital property, neither the existence of marital property nor the wife’s entitlement to a share of the marital estate were seriously contested.\textsuperscript{292} It is apparent from the tenor of the decisions that the

\begin{itemize}
\item \textsuperscript{284} Decision of the \textit{Raad Agama} for Semarang No. 161/1922 (Sept. 26, 1922), \textit{reprinted in} \textit{HIMPUNAN PUTUSAN/PENETAPAN}, \textit{supra} note 273, at 281.
\item \textsuperscript{285} \textit{Id.} at 282.
\item \textsuperscript{286} \textit{Id.} at 283.
\item \textsuperscript{287} \textit{Id.} at 283.
\item \textsuperscript{288} \textit{Id.} at 283. In addition to his wife, the deceased was also survived by three children—two sons, and a daughter. At the time the suit was filed, however, all three children had died, and the estate was divided among the deceased’s grandchildren. \textit{Id.} at 284.
\item \textsuperscript{289} \textit{See, e.g.}, Decision of the \textit{Raad Agama} for Kraksaan No. 23/1907 (Dec. 8, 1907), \textit{reprinted in} \textit{HIMPUNAN PUTUSAN/PENETAPAN}, \textit{supra} note 273, at 199 (granting a wife’s suit for division of marital property).
\item \textsuperscript{290} \textit{See, e.g.}, Decision of the \textit{Raad Agama} for Jember No. 241/1935 (July 21, 1935), \textit{reprinted in} \textit{HIMPUNAN PUTUSAN/PENETAPAN}, \textit{supra} note 273, at 216 (noting the wife’s testimony that she had been repudiated by her husband seven months earlier).
\item \textsuperscript{291} In some of the cases I have reviewed, the couples negotiated a settlement to the wife’s claim that was then approved by the court. \textit{See, e.g.}, Decision of the \textit{Raad Agama} for Tuban No. 62/1921 (June 26, 1921), \textit{reprinted in} \textit{HIMPUNAN PUTUSAN/PENETAPAN}, \textit{supra} note 273, at 201 (noting the wife’s agreement to drop her claim for marital property in exchange for receipt of gold ring).
\item \textsuperscript{292} The decisions occasionally include the wife’s representation that she and her husband had both worked the fields and that she was therefore entitled to a share of the marital property.
\end{itemize}
courts feel no need to justify the law of joint marital property because the doctrine is settled beyond dispute. As far as I have been able to determine, the only legal authority cited by the courts that discusses the doctrine of joint marital property is a text titled *Kitāb qawānīn al-sharʿiyā*, a late eighteenth century work by an Indonesian scholar from Hadramaut named Sayyid Uthman. In referring to marital property, the courts use both *adat* terminology (*gono gini; guna kaya*) and also local derivations of the Arabic word *sharika*. A number of the decisions use a verbal form of the word *syarikat* (*disyarikat*) to refer to the act of dividing joint property, a construction never found for *adat* terms. In one case the plaintiff requested the court to divide the marital property (*gono gini*) according to the "religious law" (*hukum agama*).

Indonesian independence brought few changes to Islamic legal institutions or the application of Islamic legal doctrines. The Indonesian Islamic courts continued to apply the doctrine of joint marital property much as the colonial era courts had done. Beginning almost immediately after independence, however, the new nationalist leaders began working toward a codification of the law of marriage. Reaching agreement on marriage law proved difficult, and it was not until 1974 that substantive marriage legislation was passed.

See, e.g., Decision of the *Raad Agama* for Jepara No. 1/1935 (Mar. 3, 1935), reprinted in *HIMPUNAN PUTUSAN/PENETAPAN*, supra note 273, at 211 (including the wife’s statement to the court that she and her husband had worked together as rice farmers).

293. *Kitāb qawānīn al-sharʿiyā* is an Arab-scripted Malay text that was written as a reference for manual colonial-era Islamic judges. The book is still in print, and copies can be found in Islamic book shops in Jakarta and possibly elsewhere. See Van Bruinessen, supra note 279, at n.8.

294. See, e.g., Decision of the *Raad Agama* for Majalengka No. 58/1930 (July 12, 1930), reprinted in *HIMPUNAN PUTUSAN/PENETAPAN*, supra note 273, at 207 (discussing a situation in which the wife requests division of "sarikat").

295. See, e.g., Decision of the *Raad Agama* for Berbes No. 40/1922 (Feb. 19, 1922), reprinted in *HIMPUNAN PUTUSAN/PENETAPAN*, supra note 273, at 203 (noting an instance in which the wife claims before the court that the property has not yet been "disirkat" and the court announces in its order that the property is to be "disirkat"—two parts for the husband and one part for the wife).


297. See generally *LEV*, supra note 1.

298. See id. at 30 (noting that the changes that occurred to the Islamic Judiciary during the colonial era remained following independence).


300. See Mark E. Cammack, Islamic Law in Indonesia’s New Order, 38 INT’L & COMP. L.Q. 53, 53 (1989) (describing Muslim resistance to Indonesia’s proposed national marriage
The doctrine of joint marital property was not a significant point of contention, however. All of the marriage law proposals that were debated in the 1950s and the 1960s provided for joint marital property, and the doctrine of jointly owned marital property is recognized in the 1974 Marriage Act.\footnote{Marriage Act, Law No. 1, art. 35(1) (1974) (Indon.).}

The Marriage Act provisions dealing with marital property contain only the barest outlines of the doctrine. Article 35 defines marital property, or harta bersama, as "property that is acquired during the marriage."\footnote{Id. art. 35(2).} Property owned by either spouse prior to the marriage or acquired by means of gift or inheritance during the marriage is declared to be under the control of the respective owner except insofar as the parties agree otherwise.\footnote{Id. art. 36(1) & 36(2).} The next article states that management of marital property is based on the agreement of the parties but that both husband and wife have complete legal authority with respect to their own separate property.\footnote{Id. art. 37.} The final provision regarding marital property states simply that when marriage ends in divorce, harta bersama is to be dealt with based on the law of the parties.\footnote{This language was added during the revisions of the bill in the legislature; the original proposal would have specified an equal division of marital property. Draft Marriage Act, art. 39 (Indon.).} The official comment to this article clarifies that the "law of the parties" refers to "religious, adat, or other law."\footnote{See Mawardi, supra note 3, at 127 (describing the background and promulgation of the Compilation).}

The so-called Compilation of Islamic Law contains a fuller treatment of the doctrine of marital property as it applies to Indonesian Muslims. The Compilation is a code of marriage and inheritance rules that representatives of the Ministry of Religion and of the Indonesian Supreme Court drafted for use by the Islamic courts.\footnote{Id. at 131.} The code was never submitted to the legislature, but was promulgated in 1991 through a presidential instruction.\footnote{Id. at 125.} As the title suggests, the Compilation purports to represent a mere restatement of existing Indonesian Islamic legal principles.\footnote{M. Yahya Harahap, Informasi Materi Kompilasi Hukum Islam: Mempositifkan
The marital property provisions of the Compilation appear to resolve disagreements over the doctrine and bring the Islamic rules into line with the *adat* doctrine. The marital estate arises by virtue of the marriage, and unless the parties specify otherwise, all property acquired during the marriage qualifies as marital property regardless of which party earned it and irrespective of which spouse formally holds title to the property.\(^{311}\) Each spouse retains ownership over his or her separate property after marriage, and property acquired during the marriage as a result of inheritance or gift is the separate property of the recipient.\(^{312}\) Neither the husband nor the wife may sell or transfer marital property without the consent of the other spouse.\(^{313}\) The Compilation prescribes an equal division of marital property when the marriage ends by death or divorce.\(^{314}\)

Indonesian Islamic court decisions are not generally published, and my information on the work of the courts is based primarily on compilations of selected court decisions published by the Supreme Court and the Department of Religion. Judging by decisions in those compilations, the Islamic courts appear to have fully embraced the marital property provisions of the Compilation of Islamic Law—courts have rejected claims that property derived from the efforts of one spouse alone is excluded from the marital estate.\(^{315}\) In one case, the court invalidated a pre-nuptial agreement purporting to bar joint ownership of property acquired during the marriage on the ground that the agreement was contrary to Islamic law.\(^{316}\) While this decision benefited the husband because the agreement sought to limit his rights,\(^{317}\) the decisions do not reflect a systematic preference for men. A number of decisions have refused to give effect to an agreement by the wife to relinquish her marital property rights in return for her husband’s agreement to divorce.\(^{318}\)

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\(^{311}\) *Compilation, supra* note 3, art. 1(f).

\(^{312}\) *Id.* arts. 86–87.

\(^{313}\) *Id.* art. 92.

\(^{314}\) *Id.* arts. 96–97.


\(^{317}\) *Id.* at 72.

determine, all of the decisions since the promulgation of the Compilation have ordered an equal division of marital property. In one case involving a polygamous marriage, the property was divided in three equal parts—one-third each for the husband and the two wives.319

IV. Conclusion

This Article has presented a broadly drawn historical sketch of the reception of joint marital property into Indonesian and Californian law. This cursory treatment of long and complicated historical processes does not permit fine-tuned conclusions about the reasons why Indonesia and California responded differently to the concept of joint marital property. It would be a mistake, however, to seek to draw lessons about the essential character of Islamic or common law from their treatment of marital property, unless it is the lesson that such essentializing is misguided. Common assumptions about the nature of Islamic law—that it is rigid, idealistic and largely incapable of adapting to changing demands and circumstances—suggest that Islam would be less rather than more receptive than the common law to the incorporation of a system of marital property at odds with the law’s basic conception of marriage.

An explanation for the different responses to the concept of marital property in Indonesia and California focusing on the supposed imperatives of legal ideology is clearly overly simplistic. That does not mean that prevailing ideas about marriage and gender are irrelevant, however. The notable difference between the Indonesian case and California is the source from which those ideas were drawn. For most of American history, the state has played a major role in shaping ideas about marriage and the family. Ideas about marriage in Indonesia have been more closely linked to the perceived conditions of daily existence.

It may also be significant that industrialization occurred later in Indonesia than in the United States. The transformation to an industrial economy involves a separation of the sources of household support from the home itself.320 The spread of industrialization in North America may have impeded receptivity to the principle of the economic value of household labor. When wives were eventually afforded meaningful rights in wealth generated by the

320. See Harriet Bradley, Changing Social Structures: Class and Gender, in MODERNITY: AN INTRODUCTION TO MODERN SOCIETIES 122, 122–48 (Stuart Hall et al. eds., 1996) (tracing the evolution of class and gender divisions in the United States during the pre-industrial and modern eras).
household it was not generally based on the idea of marriage as a partnership in which the success of the enterprise results from the contribution of both spouses. Marital property in the United States appears to be based not so much on a recognition of the economic value of household labor as it is on an acknowledgment that women who do not enter the marketplace deserve to be compensated for the cost of the lost opportunity. Industrialization occurred later in Indonesia, and the partnership theory of marital property developed in the context of a subsistence agricultural economy in which the household is the basic unit of economic production.

Finally, mention should be made by way of postscript of on-going controversy in both the United States and Indonesia over issues related to gender, marriage, and family as well as over the question of the extent to which intimate behavior should be the subject of public regulation. While the specific subjects of the debates in the two countries differ, an important point of similarity exists: Conservative religious movements that make gender issues the centerpiece of their agenda have emerged in both Indonesia and the United States. At the very least, these movements should serve as a reminder that questions regarding marriage and the family will likely remain unsettled.