

IMPLICATIONS OF ANNULMENT OF MARRIAGE ON THE DISTRIBUTION OF JOINT ASSETS ACCORDING TO THE COMPILATION OF ISLAMIC LAW AND NATIONAL LAW

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Abstract: Marriage dissolution due to marriage annulment and joint property must be divided because marriage annulment is one of the things that must be strictly regulated by the state, but in Indonesia is still not regulated concretely, giving rise to a legal vacuum. So, this research aims to analyze how the legal arrangements regarding the settlement of the division of joint assets after the cancellation of marriage and to find out how the implications of the cancellation of marriage on joint assets according to the Compilation of Islamic Law and National Law. The research method used is normative research. The results are that first, the Compilation of Islamic Law and National Law cannot become the norm governing the distribution of joint assets if a marriage is annulled. Second, there are no legal consequences for shared assets after the annulment of the marriage, but the ownership rights to the assets that have been mixed must be divided fairly between the parties. So that there must be codified arrangements so that there is no legal vacuum that can lead to multiple interpretations and in conducting marriages it would be better to make a marriage agreement to separate assets.

Keywords: Marriage Annulment; Distribution of Joint Property; Compilation of Islamic Law, National Law.

Abstrak: Hapusnya perkawinan karena pembatalan perkawinan dan harta bersama yang harus dibagi akibat dari pembatalan perkawinan menjadi salah satu hal yang wajib diatur oleh negara secara tegas, namun di Indonesia masih belum diatur secara konkrit, sehingga menimbulkan kekosongan hukum. Sehingga penelitian ditujukan untuk menganalisis bagaimana pengaturan hukum tentang penyelesaian pembagian harta bersama setelah adanya pembatalan perkawinan dan untuk mengetahui bagaimana implikasi pembatalan perkawinan terhadap harta bersama menurut Kompilasi Hukum Islam dan Hukum Nasional. Metode penelitian yang digunakan adalah penelitian normatif. Hasilnya adalah bahwa *pertama*, Kompilasi Hukum Islam dan Hukum Nasional tidak dapat menjadi norma yang mengatur pembagian harta bersama dalam hal setelah terjadinya pembatalan perkawinan. *Kedua*, Pada harta bersama setelah pembatalan perkawinan tidak ada akibat hukum yang ditimbulkan, namun hak kepemilikan harta yang telah tercampur harus dibagi secara adil kepada para pihak. Sehingga harus ada pengaturan secara kodifikasi agar tidak terjadi kekosongan hukum yang dapat menimbulkan multitafsir dan dalam menjalankan perkawinan akan lebih baik dibuat sebuah perjanjian perkawinan pisah harta.

Kata Kunci: Pembatalan Perkawinan, Pembagian Harta Bersama, Kompilasi Hukum Islam, Hukum Nasional.

INTRODUCTION

One form of relationship between individuals in society is the relationship between a man and a woman by marriage. As one of the interactions between individuals in society in a country, such a relationship must be strictly regulated by the state through positive law.¹

Marriage is an event in a person's life that affects the legal status of the person concerned. According to R. Subekti, "marriage" is a legal relationship between a man and a woman for a long time.² The legal consequences that arise from the existence of legal acts of marriage have a good effect on both parties who carry out the marriage, also to their descendants, and the surrounding community.³

The main problem in the matter of marriage annulment is what is the status of the division of assets because in essence joint property is born from a legal marriage, while the annulment of a marriage has legal consequences that the marriage that was originally valid is considered non-existent or null and void. So, the thing that needs to be solved in this research is how the position or status of joint property when the marriage is canceled or null and void by law.

In Law Number 1 of 1974 concerning marriage (hereinafter referred to as the Marriage Law) as amended by Law Number 16 of 2019, Article 1 states that marriage is

an inner and outer bond between a man and a woman as a wife to form a family. (household) that is happy, and eternal based on Belief in the One and Only God.⁴

In essence, a marriage certainly does not always run without obstacles, so there are only two possibilities, namely the marital relationship that gets a solution so that it can continue peacefully and chooses to end/break the marriage. Marriage can be abolished for 3 (three) reasons, namely because of death; divorce, and court decisions. But there is one more thing, marriage can be annulled,⁵ but some people still don't know about it. Divorce and annulment of marriage are of course two different things.

The difference between annulment of marriage and divorce when viewed from the party making the application, annulment of representation can be submitted either from the husband or from the wife, it can even be submitted by another person, in this case, the parents of one of the spouses. While divorce is carried out by one of the parties, either the wife or the husband. In this case, the divorce carried out by the husband is in the form of talak whereas if it is from the wife's side it is in the form of a divorce suit.

Marriage annulment is an attempt to annul a marriage that does not meet the requirements for marriage. Marriages can be requested for annulment from the court if the marriage takes place not in the presence

¹ Effrida Ayni Fikri, "Pembatalan Perkawinan karena Tipu Muslihat pada Perkawinan yang Telah Ba'da Al Dhukul terhadap Anak yang akan Lahir dan Harta Benda Perkawinan (Studi Putusan Pengadilan Agama Yogyakarta Nomor 408/PDT.G/2018/PA.YK)," *Indonesian Notary* 3, no. 2 (2021): 104–22.

² I Ketut Oka Setiawan, *Hukum Perorangan Dan Kebendaan* (Jakarta: Sinar Grafika, 2016).

³ Albert Lodewyk Sentosa Siahaan and Balwanti, "Akibat Hukum Putusan Pengadilan Terhadap Pembatalan Perkawinan," *Jurnal Gentbee: Penelitian Multidisiplin* 3, no. 3 (2020): 558–70.

⁴ Efrilius Kantriburi, Ketut Sudiatmaka, and Komang Febrinayanti Dantes, "Akibat Hukum Terhadap Pembatalan Pernikahan (Studi Putusan Mahkamah Agung RI Nomor 1644 K/PDT/2020)," *Jurnal Komunitas Yustisia* 5, no. 3 (September 1, 2022): 284–96, doi:10.23887/jatayu.v5i3.51906.

⁵ Sulkhan Zainuri, "Status Perkawinan Suami Istri Pasca Pembatalan Perkawinan Islam Di Indonesia," *Ulumuddin: Jurnal Ilmu-Ilmu Keislaman* 9, no. 1 (November 23, 2019): 23–48, doi:10.47200/ulumuddin.v9i1.285.

of a marriage registration officer or without a legal guardian or the presence of two witnesses.⁶

Marriage annulment can also be caused by a marriage that was held with an element of fraud or misjudgment⁷ regarding the husband or wife as stipulated in Article 27 paragraph (2) of the Marriage Law and Article 72 paragraph (2) of the Compilation of Islamic Law which states that a husband or wife can apply for an annulment of a marriage if a misunderstanding occurs during the marriage. about husband or wife. Thus, an annulled marriage is a marriage that has been deemed to have never existed from the start.⁸

As happened at the Jepara Religious Court, initially Bambang (husband) married a woman named Dian (wife). In this marriage, they were blessed with a child. One day Dian heard the words of the people around her that her husband had been married before her. With this suspicion, Dian ventured to come to the religious affairs office to ask about her husband, who, according to stories from the public, already had a wife. Then the Office of religious affairs confirmed that Bambang already had a wife. Hearing this, Dian felt unwilling and filed a request for an annulment of the marriage.⁹

Another case that occurred at the Jepara Religious Court Case Number: 0007/Pdt.G/2017/PA.Jpr., Initially the Applicant married a woman (Respondent) on July 21, 2016, then on the first night of

intercourse, the Respondent tried to refuse. Then on September 3, 2016, the Applicant migrated. However, on September 3, 2016, the Applicant received news that the Respondent had given birth to a child, at that time the Respondent's mother apologized to the Applicant if her child had been dishonest to the Applicant that her child (Respondent) was already pregnant before marrying the Applicant. Then, the Applicant refused to be the biological father of the baby the Respondent had born. The Applicant filed a lawsuit for annulment of the marriage to the Jepara Religious Court.

Another marriage annulment case occurred at the Mungkid Religious Court with Case Number: 807/Pdt.G/2017/PA.Mkd, that a husband filed an annulment of his wife's marriage because the husband was very disappointed in him. The wife is considered to have deceived him because before the marriage was carried out the wife admitted that she was still a virgin and it turned out that after the marriage took place the wife was pregnant. From several studies that raised this case, they only provided arguments related to the legal status of children, there were no rules or legal arguments governing joint assets in the marriage.

Another case occurred at the Wonosobo Religious Court with Case Number: 1175/Pdt.G/2011/PA.Wsb., the applicant applied for annulment because the marriage between the Applicant and the Respondent occurred due to an arranged marriage by the

⁶ Muchtar Anshary Hamid Labetubun and Sabri Fataruba, "Implikasi Hukum Putusan Pengadilan Terhadap Pembatalan Perkawinan," *Batulis Civil Law Review* 1, no. 1 (November 22, 2020): 54–59, doi:10.47268/ballrev.v1i1.430.

⁷ Andi Iswandi, "Review Pembatalan Perkawinan Yang Disebabkan Penipuan Pada Pengadilan Agama: Studi Kasus Pada Pengadilan Agama Bandung," *Qonuni: Jurnal Hukum Dan Pengkajian Islam* 1, no. 02 (December 15, 2021): 76–88.

⁸ Mukmin Mukri, "Pencegahan Dan Pembatalan Perkawinan," *Jurnal Perspektif* 13, no. 2 (2020): 101–10, doi:10.53746/perspektif.v13i2.29.

⁹ Kolilah, "Tinjauan Yuridis Tentang Akibat Hukum Pembatalan Perkawinan Terhadap Status Anak Dan Pembagian Harta Bersama (Studi Analisis Putusan PA Nomor 900/Pdt.G/2016/PA.Jpr)," *Isti'dal: Jurnal Studi Hukum Islam* 6, no. 2 (June 20, 2019): 132–52, doi:10.34001/istidal.v6i2.1643.

Applicant's parents, and was forced to marry immediately. The Applicant stated that he did not know the Respondent well so the Applicant did not love the Respondent. The Applicant wanted to marry the Respondent out of fear and wanted to serve the Applicant's parents. After marriage, the Applicant and the Respondent lived together at the Respondent's parent's house for 2 weeks, then separated until now (at the time of this petition) which has been 1 year. Based on this request, the Judge decided to grant the Applicant's request and cancel the marriage of the Applicant and the Respondent.

The decision of the Religious Court of Arga Makmur Number 0116/Pdt.G/2014/PA.AGM, in which the Applicant submitted a request for annulment of the marriage because the marriage was carried out under coercion and threats from the Respondent's family, in which the Respondent's family threatened to report the Applicant to the police on the allegation that the Applicant had had a husband and wife relationship with the Respondent, even though the Applicant had never committed this allegation. However, based on the testimony of existing witnesses, there was no coercion, so the Judge decided to reject the Applicant's petition.

A marriage that has been lived by a husband and wife for several years does not rule out the possibility of the marriage being canceled because things that are prohibited by Laws and Regulations are only known when the marriage is taking place, as happened in Laweyan District, Surakarta, Decision Number: 0456/Pdt.G/2011/Pa.

Ska. The Applicant and Respondent were married in 2009 and have been blessed with one child. During the marriage period of the households of the Applicant and the Respondent, there were frequent disputes and quarrels since June 2009. Since October 2010 consecutively for 9 months, the Applicant and the Respondent have lived separately, returning to their respective parents. However, it is known that the Applicant still met the Respondent several times to provide maintenance for the Respondent and their children. Because the household did not improve, the Applicant filed a divorce lawsuit against the Respondent because there were continuous disputes between the Applicant and the Respondent and there was no hope of living in harmony in marriage with the Respondent as referred to in Article 116 (f) Compilation of Islamic Law.

As a legal act that gives rise to legal consequences, of course, the cancellation of a marriage has an impact on other legal consequences,¹⁰ one of the legal consequences of a valid marriage is the creation of marital property. Marital assets or assets are needed to meet all the needs needed in family life. Marital property is regulated in the Marriage Law. The Marriage Law divides into two, joint property and self-produced property. The assets produced by both parties in the marriage are assets acquired by the husband and wife during the marriage period. Then, self-generated assets, namely assets obtained by pre-marital couples, both grants and wills.¹¹ In a marriage that provides a living is the husband for the survival of his family, the husband has the right to provide a living to

¹⁰ Ahmad Supandi Patampari, "Konsekuensi Hukum Pembatalan Perkawinan menurut Hukum Islam," *AL-SYAKHSHIYYAH Jurnal Hukum Keluarga Islam dan Kemasyarakatan* 2, no. 2 (August 16, 2020): 86–98, doi:10.35673/as-hki.v2i2.894.

¹¹ "Undang-Undang Nomor 16 Tahun 2019 Tentang Perubahan Atas Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan." (2019). Article 35.

his wife for the needs of the family which is the husband's obligation, because, in this modern era, women also get the same thing to play a role in maintaining family financial stability.¹² This affects marital assets, both during marriage and after the marriage ends. Problems arise related to the distribution of joint assets in the event of an annulment of marriage. In national law as well as in the compilation of Islamic law in Indonesia, it does not clearly and concretely regulate how the issue of annulment of marriage impacts joint assets, giving rise to a legal vacuum,

Regarding the discussion above, the Marriage Law does not elaborate further on the form and scope of joint property. Nonetheless, a legal principle has been instilled that all assets acquired during the marriage period become the jurisdiction of joint property.¹³ Law Number 1 of 1974 concerning Marriage only regulates the position of marital assets in the event of a divorce, then joint assets will be regulated according to their respective laws, this is following Article 37 of the Marriage Law. In the elucidation of Article 37 of the Marriage Law it is said that if a marriage is broken up due to divorce, joint assets will be regulated according to their respective laws, namely based on customary law, religious law, and other legal regulations. Legislation also does not regulate if problems arise, especially the cancellation of marriages that have not been regulated in statutory regulations, in this situation, it means that there is a legal vacuum. There is a need for future regulations or *Ius Constituendum* regarding the distribution of joint assets in the

annulment of marriage as a legal solution in this study.

So that the formulation of the problem and the purpose of this study is to find out how the legal arrangements regarding the settlement of the distribution of joint assets after the annulment of marriage according to the Compilation of Islamic Law and National Law, such as the Law on Marriage which is unified in it from Islamic Law, European Law, and Customary Law in Indonesia. Also, to find out the implications of the annulment of marriage on joint assets.

METHOD

This research uses a type of normative research method, namely research that examines legal issues from the point of view of legal science in depth on the established legal norms.¹⁴ The type of this research is vacuum norm, because there is a legal vacuum that raises issues about how the position of joint property after the marriage is annulled. The nature of this research is theoretical research, which is research that helps outline a more thorough understanding of the conceptual basis of a legal principle and the mixed impact of various rules and procedures related to an activity. This research is also prescriptive, namely providing a prescription about what should or should be done, not proving the truth of the hypothesis. Using the statute approach; conceptual approach; and case approach.

RESULT AND DISCUSSION

¹² Arifah S. Maspeke and Akhmad Khisni, "Kedudukan Harta Bersama Dalam Perkawinan Menurut Fiqih Dan Hukum Positif Indonesia Serta Praktek Putusan Pengadilan Agama," *Jurnal Hukum Khaira Ummah* 12, no. 2 (June 15, 2017): 173–184.

¹³ Abdul Manaf, *Aplikasi Asas Equalitas Hak Dan Kedudukan Suami Dalam Penjamin Harta Bersama* (Bandung: Mandar Maju, 2006).

¹⁴ Rahmida Erliyani, *Metode Penelitian Dan Penulisan Hukum* (Yogyakarta: Magnum Pustaka Utama, 2018).

Legal Arrangements regarding the Settlement of the Distribution of Joint Assets

1. The Distribution of Joint Assets after the Annulment of Marriage is Reviewed in the Laws

Marriage is one of the important things in human life, both individually and in groups. Through marriages carried out according to the legal rules governing marriage or according to the respective religious laws so that a marriage can be said to be valid,¹⁵ then the association of men and women occurs in an honorable manner according to the position of humans as creatures of honor.

A household life that is created from marriage will feel more perfect with the presence of a baby or offspring from a valid marriage. The child can decorate family life and at the same time the continuity of human life in a clean and honorable manner.¹⁶ With marriage, it is hoped that the purpose of marriage can be achieved as stipulated in the law or legal regulations and accordance with the teachings of the religion adhered to. Regarding marriage, it is regulated in Law Number 1 of 1974 concerning Marriage.

Before the existence of the Marriage Law in Indonesia, various marriage laws applied to various groups of citizens and various regions. Various marriage laws were in force before the entry into force of Marriage Law for various groups of citizens and various regions, namely:

1. For native Indonesians who are Muslim, religious law applies which has been absorbed into customary law. In general, for native Indonesians who are Muslim when carrying out a marriage,

consent and consent are applied between the groom and the guardian of the bride, as stipulated in Islamic law. This has been a legal culture for Indonesians who are Muslims until now.

2. For other indigenous Indonesians, customary law applies. For example, for Balinese people who are Hindus where customs and religion have merged, the marriage is carried out according to customary law which is a series of ceremonies with the ceremonies of the Hindu-Balinese religion they adhere to.
3. For native Indonesians who are Christians, the *Huwelijks Ordonnantie Christen Indonesia (HOCl) S.1933* number 74 applies. This rule, insofar as it has been regulated in the Marriage Law, is no longer valid.
4. For East Chinese Foreigners and Indonesian citizens of Chinese descent, the provisions of the Civil Code (Code of Civil Code) apply with minor changes. This rule is also no longer valid if it is regulated in the Marriage Law.
5. For other East Timorese and other Indonesian citizens of foreign descent, their customary laws apply. So for descendants of India (Keling), Pakistan, Arab, and others alike, their respective customary laws apply which are usually inseparable from the religion and beliefs they adhere to.
6. For Europeans and Indonesian citizens of European (Indo) descent and those who are equated with them, the Civil Code applies, namely *Burgerlijk Wetboek (BW)*. Included in the group of Japanese people or other people who

¹⁵ Agus Hermanto, Siti Nurjanah, and Mahmudin Bunyamin, "Pembatalan Perkawinan Dalam Tinjauan Sadd Al-Zari'ah," *Muslim Heritage* 6, no. 1 (June 29, 2021): 1–22, doi:10.21154/muslimheritage.v6i1.2787.

¹⁶ Septi Indrawati and Nanda Putri Kartadi, "Akibat Hukum Pembatalan Perkawinan Terhadap Perlindungan Anak," *Eksaminasi: Jurnal Hukum* 2, no. 2 (December 5, 2022): 105–116.

adhere to the same family law principles as the Dutch family law principles.

Marriage according to the Civil Code (BW). Based on the wording of Article 1 of the Marriage Law above "a bond between a man and a woman", means that marriage is the same as an engagement (*verbindtenis*). According to Article 26 of the Civil Code, it is said that the Law views the matter in Article 81 of marriage only in civil relations' and the Civil Code says that 'no religious ceremony may be held before both parties prove before the marriage officials to their religious officials that civil registration has been going on.

Article 81 of the Civil Code is also strengthened by article 530 (1) van Strafrecht of the Criminal Code [Wetboek (WvS)] which states "A religious official performs a marriage ceremony, which can only be held in the presence of a civil registry official. Before it is stated to him that the proceedings before the official have been carried out, he shall be punished by a maximum fine of four thousand five hundred rupiahs". The sentence "which can only be carried out in the presence of a civil registry official" shows that this regulation does not apply to those who apply Islamic law, Hindu-Buddhist law and or customary law, namely people who were previously called natives (*Inlanders*) and Eastern Foreigners (*Vreemde Oosterlingen*), outside the Chinese. In addition to the confusion over the marriage regulations that were in effect during the Dutch East Indies era, according to the legislation expressly stated in the Civil Code (BW), marriage was only seen from a civil perspective and ignored the religious aspect.

Marriage according to the Civil Code is only a 'Civil Agreement' while marriage

according to the Marriage Law is not only a civil bond but also a "Religious Engagement". This is seen from the purpose of marriage stated in the article of the Marriage Law that the marriage aims to form a happy and eternal family (household) based on Belief in One Almighty God. Such a sentence did not exist at all in the Civil Code (BW) which was announced with an edict dated April 30, 1847 and was valid in Indonesia until 1974.

Therefore, to overcome pluralism in the field of marriage law, a law was formed that regulates marriage nationally, which applies to all Indonesian citizens. This is confirmed in Article 66 of the Marriage Law which states, that: "For marriage and everything related to marriage based on this Law", then with the enactment of this Law the provisions stipulated in the Civil Code (*Burgerlijk Wetboek*), Indonesian Christian Marriage Ordinance (*Huwelijks Ordonnantie Christen Indonesiers S.1933 No. 74*), Mixed Marriage Regulations (*Regeling op de gemengde Huwelijken S. 1898 No. 158*), and other regulations governing marriage insofar as they have been regulated in this Law, are declared no longer valid.

Therefore, it can be said that the provisions regarding marriage contained in the Marriage Law are based on religious teachings. So whether a marriage is valid or not is determined according to the laws of each religion. If in carrying out the marriage does not fulfill the requirements for a valid marriage, as stipulated in Article 6 until 12 Marriage Law,¹⁷ then the marriage can be annulled. Annulment of marriage means considering a marriage that has been carried out as an invalid event or is considered to have never existed.

¹⁷ Gusti Gema Mahardika Brata, "Analisis Pertimbangan Hakim dalam Memutus Perkara

Pembatalan Perkawinan," *Notarius* 12, no. 1 (June 7, 2019): 433–51, doi:10.14710/nts.v12i1.28862.

The Marriage Law does not regulate the meaning of marriage annulment, as well as Government Regulation Number 9 of 1975 which is the executor of the said Law, so there is no single regulation that regulates the meaning of marriage annulment. Article 22 of the Marriage Law only states that a marriage can be annulled if the parties do not meet the requirements to enter a marriage. Furthermore, in the explanation, it is stated that the meaning of "can" in this article is interpreted as being able to be canceled or not canceled if the provisions of the respective religious laws do not stipulate otherwise. Thus, according to the article, a marriage that does not meet the requirements for marriage may or may not be void.

According to the Marriage Law, comprehensive arrangements regarding the annulment of a marriage are contained in Articles 22 to 28, and the implementing regulations only determine the annulment of a marriage as stated in Articles 27 and 28. Marriage annulment, apart from being caused by a marriage that does not meet the requirements of marriage, can also be caused by the marriage being carried out using an illegal marriage guardian¹⁸ as stipulated in Article 26 paragraph (1) of the Marriage Law which states that marriages held in the presence of unauthorized marriage registrars, illegal guardians, or those held without the presence of 2 (two) witnesses can be requested for cancellation by the families in the direct line of descent from the husband or wife, the attorney, and the husband or wife.¹⁹ Marriage cancellation

can only be done with a court decision. Even though marriage is deemed to have never existed, it does not necessarily eliminate the legal consequences of a marriage that has been implemented.

The definition of annulment of marriage according to Bakri A. Rahman and Ahmad Sukardja, marriage annulment is a marriage that has occurred and can be annulled, if the parties do not meet the requirements to enter a marriage, and the annulment of a marriage can only be decided by a court.²⁰

The definition of annulment of marriage according to Riduan Syahrani states that annulment of a marriage is that a marriage can be annulled if the marriage is carried out by the parties (husband and wife) or one of the parties (husband and wife) is proven not to fulfill the requirements for the marriage to take place.²¹

Based on several definitions of the annulment of the marriage, it can be concluded that in the annulment of a marriage, the marriage has already taken place; the marriage was carried out without fulfilling the conditions of marriage; Marriage annulment can only be done by a court. Marriage can be null and void, this can be seen from the view of Wibowo Reksopradoto, who stated that in an annulment of marriage, there must always be a court decision declaring that the marriage is considered absent or canceled. So that the cancellation of a marriage must have a decision from the court, not by itself null and void, only in one case, namely a marriage carried out through an attorney if

¹⁸ Mochammad Nasichin, "Akibat Hukum Pembatalan Perkawinan berdasarkan Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan" 7, no. 1 (July 3, 2018): 1–11, doi:10.55129/jph.v7i1.648.

¹⁹ Muhammad Akbar Syawal and Fully Handayani, "Kewenangan Jaksa Dalam Mengajukan Pembatalan Perkawinan Sesama Jenis Dan Akibat Hukumnya

Terhadap Perkawinan," *PALAR (Pakuan Law Review)* 8, no. 1 (January 1, 2022): 48–59.

²⁰ Bakri A. Rahman and Ahmad Sukardja, *Hukum Menurut Islam, UUP Dan Hukum Perdata/BW* (Jakarta: PT. Hidakarya Agung, 1981).

²¹ Riduan Syahrani and Abdurrahman, *Masalah-Masalah Hukum Perkawinan Di Indonesia* (Jakarta: PT. Media Sarana Press, 1986).

before the marriage took place, the party giving the power of attorney was legally married to another person. If by law it is deemed that the marriage never took place, it is null and void by law. Likewise, marriage between a man and a woman or a woman and a woman is considered to have never existed, so it is null and void.²²

The Civil Code regulates marriages that are null and void by law in Article 79 paragraph (2), which reads as follows: "If before the marriage took place, the person who legally gave the power of attorney had married another person, then the marriage that took place with that special representative, is considered as never taking place".

If the annulment is made after having offspring or children, it will also have an impact on children born from an annulled marriage as stipulated in Article 45 paragraph (1) and Article 46 paragraph (1) of the Marriage Law. In terms of deciding, the Religious Court Judge should have had considerations in deciding the marriage annulment case he handled.²³

Article 22 of the Marriage Law states that a marriage can be annulled if the parties do not meet the requirements to enter a marriage. In other words, it can be said that, if the conditions for carrying out a marriage as regulated in the Marriage Law are not met, the marriage can be annulled. The annulment of a marriage or marriage can be said to be annulled starting after the Court Decision has permanent legal force and is effective from the time the marriage took place. This is stated in Article 28 paragraph (1) of Law Number 1 of 1974.²⁴

One of the problems that a divorced husband and wife must face is the distribution of joint assets, such as the divorce that occurred in Tuban, Decision Number 1325/Pdt.G/2019/Pa. Tbn. This case began when the marriage between the plaintiff and the defendant ended in divorce in the Cassation Decision Number 649/K/Ag/2018 dated 26 October 2018. From the results of the marriage, the plaintiff and the defendant owned several plots of land, kiosks, as well as several movable objects in the form of household equipment. The plaintiff filed a lawsuit against the defendant to divide the jointly owned assets fairly. However, the defendant objected to being split in half because the plaintiff had reneged on the agreement which contained that the plaintiff would not bring up mixed assets. The defendant said that during the divorce the plaintiff never provided for and visited his children. From the defendant's statement, the plaintiff submitted a written replica which stated that the plaintiff remained on the arguments for the arbitrary property lawsuit and rejected all the arguments of the defendant's answer and if it could not be divided equally it had to be sold publicly or auctioned. The plaintiff once said that he did not ask for a divorce, but the plaintiff refused when he was asked to sign a statement that had been said. According to the Compilation of Islamic Law, there are two basic considerations for judges in deciding cases regarding the distribution of joint assets, namely the basis of deliberation and justice. The judge's considerations in deciding cases for the distribution of joint assets according

²² Wibowo Reksopradoto, *Hukum Perkawinan Nasional Jilid II Tentang Batal Dan Putusnya Perkawinan* (Jakarta: P'tikad Baik, 1978).

²³ Suwardi, "Tinjauan Yuridis Pelaksanaan Pembatalan Perkawinan di Pengadilan Agama," *Ensiklopedia Social Review* 3, no. 1 (April 22, 2021): 78–84, doi:10.33559/esr.v3i1.685.

²⁴ Dimas Auliya Fikri Bil Fī'li and Titik Soeryati Soekesi, "Wujud Perlindungan Hukum Bagi Wanita Akibat Pembatalan Perkawinan Klandestin," *Jurnal Ilmiah Pendidikan Pancasila dan Kewarganegaraan* 6, no. 1 (June 28, 2021): 26–34, doi:10.17977/um019v6i1p26-34.

to the Civil Code are based on evidence, namely based on statements from witnesses and documentary evidence. Evidence is very important to be able to provide confidence for judges in giving legal considerations and decisions to decide whether an asset is included in the group of joint assets or not.

In completing the implementation of the distribution of joint assets in the marriage, legal practitioners can be guided by the Civil Code as the legal basis for solving the distribution of marital assets. Even though Article 35 of the Marriage Law also contains provisions governing marital assets, bearing in mind that until now there have been no implementing regulations of the Marriage Law governing the distribution of assets in the marriage, the provisions governing assets Marriage in the Civil Code is still valid. This is following Article 37 of the Marriage Law which states that in the event of a divorce, joint assets are regulated according to their respective laws.

Marriage results in a bond of rights and obligations and also causes a form of life together of the individuals who carry out the marriage relationship, namely forming a family or somah (*gezjn* or household).²⁵ One of the legal consequences of a valid marriage is the creation of marital property. Marital assets or assets are needed to meet all the needs needed in family life.

The position of marital assets in the event of a divorce, the joint assets will be regulated according to their respective laws and this is following Article 37 of the Marriage Law. In the elucidation of Article 37 of the Marriage Law it is said that if a marriage is broken up due to divorce, joint assets will be regulated according to their respective laws, namely based on customary

law, religious law, and other legal regulations. The Marriage Law does not elaborate further on the form and scope of the joint property, but even so, a legal rule has been embedded that all assets acquired during the marriage period become the jurisdiction of joint property.²⁶

Certain assets or items obtained by a husband or wife for free due to testamentary inheritance and as gifts cannot be considered joint property. This is regulated in Article 120 of the Civil Code which states that regarding the matter of profit, the joint property includes movable and immovable property of the husband and wife, both existing and future, as well as the goods they acquire. free of charge, unless in this last case, the bequeathed stipulates otherwise. Joint property in a marriage is the joint property that is bound, namely joint property that occurs because of a bond between the owners. This bound joint property right is different from free shared property right, which is a form of property right, but between the owners, there is no legal relationship unless they are joint owners. Husband and wife have the right to their respective assets, they cannot make mistakes or irregularities on their part.²⁷

2. The Distribution of Joint Assets after Marriage is Reviewed in the Compilation of Islamic Law

Islamic teachings state that marriage is not merely a relationship or an ordinary civil contract but has religious value. According to Zahry Hamid, marriage is "Aqad (consent) between the guardian of the prospective wife and the groom with certain sayings and fulfilling the pillars and

²⁵ Soekanto Soerjono, *Hukum Adat Indonesia* (Jakarta: PT. Raja Grafindo Persada, 2002).

²⁶ Manaf, *Aplikasi Asas Equalitas Hak Dan Kedudukan Suami Dalam Penjamin Harta Bersama*.

²⁷ Soetojo Prawirohamidjojo and Martalena Pohan, *Hukum Orang Dan Keluarga* (Surabaya: Airlangga University Press, 1991).

conditions".²⁸ For Muslims, marriage is valid if it is carried out according to Islamic marriage law. A marriage contract is considered valid if it fulfills the pillars and conditions, so that the condition of the marriage contract is recognized by syara' law.²⁹

Marriage is an award or agreement to bind oneself between a man and a woman to justify sexual relations between the two parties, voluntarily and for the pleasure of both parties to realize a happy family life filled with love and tranquility in ways that are blessed by Allah SWT.³⁰

Marriage according to Article 2 of the Compilation of Islamic Law (KHI) Presidential Decree No. 1 of 1991 is as follows: "Marriage according to Islamic law is a marriage, namely a very strong contract or *mitsaqan ghalidzan* to obey Allah's commands and carry them out is worship." According to Islamic Law, what is meant by marriage is a contract that justifies association and limits rights and obligations as well as mutual assistance between a man and a woman who is not a muhrim. When reviewed in detail, marriage or marriage is a contract that is noble and holy between a man and a woman which is the reason why husband and wife are legal and sexual relations are halal to achieve a family that is full of love, virtue, and mutual support.³¹

Marriage is carried out to obey Allah's commands and carrying it out is worship. By understanding the sentence in the formulation of Article 2 above, it appears that marriage is worship. Worship that is general and there is special, general is all the

practices that are permitted by Allah; What is special is what Allah has ordained in its specific details, levels, and ways.³²

Article 2 of the Compilation of Islamic Law states that marriage aims to create a household that is *sakinah, mawaddah, and rahmah*. Commenting on the substance of the Compilation of Islamic Law, Yahya Harahap writes that the Compilation of Islamic Law emphasizes the philosophical foundation of Islamic marriage, without reducing the philosophy of the Marriage Law. This foundation is emphasized and expanded in Article 2 above the Law which contains the essence that marriage is merely obeying God's commandments; carrying out marriage is a form of worship; marriage bond is "*mitsaqan ghalidzan*".³³

But this goal is sometimes hindered by circumstances that were not thought of before, for example after the marriage took place, it was later discovered that there was a relationship between them. Since this was known, the marriage became null and void by law. Likewise, if the husband and wife were originally non-Muslim, suddenly the wife converts to Islam and the husband refuses to convert to Islam, then their marriage can be annulled.³⁴

In Islamic law, only valid and invalid marriages are recognized. An illegitimate marriage is considered to have never existed, while a valid marriage can only be broken up due to death, divorce, *kehulu'* violation of *taklik talak*, and *fasakh*. The term *fasakh* in language, in the opinion of Ibn Mundzir in *Lisanul 'Arabic*, states the annulment of marriage with the term *fasakh*

²⁸ Zahri Hamid, *Pokok-Pokok Hukum Perkawinan Islam Dan Undang-Undang Perkawinan Di Indonesia* (Bandung: Binacipta, 1978).

²⁹ Ibid.

³⁰ Soemiyati, *Hukum Perkawinan Islam Dan Undang-Undang Perkawinan* (Yogyakarta: Liberty, 1986).

³¹ Sudarsono, *Hukum Perkawinan Nasional* (Jakarta: Rineka Cipta, 1991).

³² Abdul Shomad, *Hukum Islam Penormaan Prinsip Syariah Dalam Hukum Indonesia* (Jakarta: Kencana, 2012).

³³ Ibid.

³⁴ Ahmad Azhar Basyir, *Hukum Perkawinan Islam Cetakan IX* (Yogyakarta: UII Press, 1999).

which means canceled or dissolved.³⁵ In terms of annulment of marriage or *fasakh* is the release or annulment of the marriage bond between husband and wife, sometimes it is due to future circumstances that cause the marriage contract to not be continued. Annulment of marriage is the annulment of husband-and-wife relations after the marriage contract has been held.³⁶

In Fiqh, there are two different terms, although the law is the same, namely al-fasid marriage and al-batil marriage. Al-Jaziry stated that a fasid marriage is a marriage that does not fulfill one of the conditions, while al-batil marriage is if the pillars are not fulfilled. Fasid and vanity marriage laws are invalid. In the terminology of the Marriage Law, both fasid and vanity marriages can be used for annulment and not for prevention.³⁷

In Islamic law, marriage annulment can occur for two reasons, namely: first, some things cancel the marriage contract that has been carried out. The madzhab priests namely, Imam Malik, Syafi'i Hanafi, and Hanbali, agree that if there is a marriage with a woman (mahram) mentioned in the Qur'an, then the law is haram and the marriage must be *fasakh*,³⁸ and shows an eternal prohibition for people who are married, so when these things are known, the *aqad* is declared damaged immediately without the need for a court decision.³⁹ Second, there are new things that are experienced after the marriage ceremony takes place and the temporary marriage

relationship takes place. As in the case of marriage carried out by fraud mode,⁴⁰ that is, a husband who was originally a non-Muslim religion then converted to Islam only to marry a Muslim woman (formally), and after the marriage occurs the husband returns to his original religion, then such marriages can be annulled. The Imams of the Madzhab added several reasons for the permissibility of annulment of the marriage In the Hanafi and Maliki schools it is permissible for the annulment of marriage because: because the husband and wife have apostatized; divorce due to the breakdown of the marriage; disbanded due to lack of equal status (*kufu*).⁴¹ Likewise, in the Syafi'i and Hambali schools of thought, it is permissible for an annulment of marriage with additional reasons: because of the disability of one of the partners; due to various difficulties of the husband (*I'sar*); and no equal status or (not equal).⁴²

According to the Compilation of Islamic Law in Chapter XI Article 70, marriage is declared void (null and void) if: The husband enters into a marriage, while he is not entitled to perform *aqad nikah* because he already has four wives, even if one of the four wives is in the *iddah talak raj'i*; Someone married his ex-wife who he had a *li'*; A person marries an ex-wife who has been divorced three times, except if the former wife has remarried to another man and then divorced again *Ba'da dukhul* from that man and the *iddah* period has expired.

³⁵ Muhammad Baqir Al-Habsyi, *Fiqh Praktis (Menurut al-Sunnah Dan Pendapat Para Ulama)* (Bandung: Mizan, 2002).

³⁶ Ali Zainuddin, *Hukum Perdata Islam Di Indonesia* (Jakarta: Sinar Grafika, 2007).

³⁷ Martiman P., *Hukum Perkawinan Indonesia* (Jakarta: Center Publishing, 2002).

³⁸ Muhammad Rifa'i, *Terjemah Kbulasbab Kijayatul Abyar* (Semarang: Toha Putra, 1978).

³⁹ Muhammad Anwar, *Dasar-Dasar Hukum Islam Dalam Menetapkan Keputusan Di Pengadilan Agama*. (Bandung: Diponegoro, 1991).

⁴⁰ Feni Dewi Novitta, "Tinjauan Yuridis Tentang Pembatalan Perkawinan Karena Penipuan Pihak Laki-Laki," *Journal Justice* 4, no. 1 (2022): 61–76.

⁴¹ Abdullah Nashih Ulwan, *Adab Al-Khitbah Wa al-Zafaf (Etika Memilih Jodoh) Terjemahan Abdul Halim Hamid* (Jakarta: Cahaya Press, 2012).

⁴² Anwar, *Dasar-Dasar Hukum Islam Dalam Menetapkan Keputusan Di Pengadilan Agama*.

Islamic Law and the Compilation of Islamic Law regulate marital property. Marital assets in Islamic law are called *syirkah*, which is a way of uniting or merging one's assets with other people's assets. Al-Qur'an and hadith do not explicitly discuss joint assets, but in fiqh books there is a discussion that can be interpreted as a discussion of joint assets, namely what is called *syirkah* or *syarikah*.

The word *syarikah* or *syirkah* comes from Arabic. Because of the problem of the joint property of the husband and wife, this includes a partnership or *syarikah*. Imam 4 (four) Madzhab has an opinion about this partnership, Imam Hanafi stated that *syarikah* is divided into 2 (two) parts, *syarikah* belong and *uqud*. Imam Maliki believes that *Syarikah* is divided into 6 (six) parts, namely *syarikah mufawadhah* (unlimited partnership), *inaan syarikah* (limited partnership), *charitable syarikah* (power sharing), *dziman syarikah* (trust partnership), *jabar syarikah* (partnership for being present), and *syarikah mudharabah* (profit sharing). Imam Syafi'i believes that there are 4 (four) parts of *syarikah*, namely *inaa syarikah* (limited partnership), *abdaan syarikah* (power sharing), *mufawadhah syarikah* (unlimited partnership) and *wujuub syarikah* (trust partnership). Imam Hambali believes that there are 2 (two) parts of *syarikah*, namely *syarikah fil mall* (wealth sharing, and *syarikah fil uqud* (partnership based on agreement).⁴³

Basically, according to Islamic law, the husband's property and the wife's property are separate. So, each has the right to spend or use his property to the fullest without being disturbed by other parties. Assets that

are the full rights of each party are assets that each party inherited before the marriage took place or assets obtained by each on their own business, including assets received by the husband or wife because of grants, inheritance, or gifts after they were married.⁴⁴

In the event of a *syirkah* (mixing) of the assets of the husband and wife, it can be carried out by entering into a written agreement; can also be stipulated by law or statutory regulation; can also occur with the reality of the life of the husband and wife.⁴⁵

Customary law also regulates the assets of a husband and wife according to their sources. It can be described as grants and inheritance assets obtained by one of the husband and wife, whether received before or after marriage, the status is the same, that is, they remain as the property of each of the husband and wife; assets resulting from their efforts before the husband and wife enter into marriage are original assets; assets acquired at the time of marriage or because of marriage, some belong to the wife, and some belong to the husband.⁴⁶

The term *gono-gini* is a legal term that is already popular in society. In the Big Indonesian Dictionary, the term *gana-gini* is used, which legally means assets that have been accumulated during a household so that they become the rights of both husband and wife. In the General Indonesian Dictionary, the meaning of *gono-gini* is joint property acquired during the marriage.⁴⁷ Property acquired before the marriage and inheritance acquired during the marriage

⁴³ H.A. Damanhuri, *Segi-Segi Hukum Perjanjian Perkawinan Harta Bersama* (Bandung: Mandar Maju, 2007).

⁴⁴ Neng Djubaedah, Hj. Sulaikin Lubis, and Farida Prihatni, *Perkawinan Islam Di Indonesia* (Jakarta: Hecca Publishing, 2005).

⁴⁵ Sajuti Thalib, *Hukum Kewarisan Islam Di Indonesia*, Keempat (Jakarta: Sinar Grafika, 1993).

⁴⁶ Rumonda Nasution, *Harta Kekayaan Suami-Istri Dan Kewarisannya* (Jakarta: BPHN, 1992).

⁴⁷ Sonny Dewi Judiasih, *Harta Benda Perkawinan* (Bandung: Refika Aditama, 2015).

period are owned by each husband and wife.⁴⁸

This statement illustrates that the treatment of arbitrary assets in Indonesian society is still based on customary law provisions. If this is maintained, discrimination will be created, both for women and men, therefore, it is necessary to think that the provisions for the division of assets must be following the legal provisions outlined in the written law.⁴⁹

3. Legal Arrangements regarding the Distribution of Joint Assets after an Annulment of Marriage for the Future

The urgency of a codified rule related to a legal issue that has not been regulated in a rule, such as the distribution of joint assets after the annulment of a marriage, is important to anticipate legal conflicts that may arise in the future due to a legal vacuum. In terms of sharing joint assets after an annulment of a marriage, the Civil Code, the Marriage Law, the Compilation of Islamic Law, and customary law do not regulate how shared assets are divided in an annulment of a marriage.

In Indonesia, the so-called progressive law emerged around 2002 with the initiator Satjipto Rahardjo. Progressive law was born because so far the teachings of positive law (analytical jurisprudence) that have been practiced in empirical reality in Indonesia have been unsatisfactory. The idea of

Progressive Law arose out of concern for the quality of law enforcement in Indonesia, especially since the reformation took place in mid-1997. If the function of law is meant to ideally participate in solving societal problems, then what Indonesia is currently experiencing and happening is very much the opposite of this ideal.⁵⁰

Progressive Law starts from the basic nature of law for humans. The law does not exist for itself as proposed by positive legal science but for humans to achieve human welfare and happiness. Such a position leads to a predisposition that the law is always in the status of "law in the making" (the law that is always in the process of becoming).⁵¹ Progressive law actors can make changes by making creative interpretations of existing regulations without having to wait for regulatory changes. In short, progressive legal theory requires the law to develop rapidly according to the needs of society.⁵²

In the statutory regulations, the difference can be seen, namely the definition of joint assets and the reasons for annulment of marriage. Article 35 of the Marriage Law explains that joint property is property acquired during the marriage, not property each received as a gift or inheritance, known as innate property. Whereas Article 119 of the Civil Code explains that from the time the marriage took place, the law applies to joint property between husband and wife if there are no other provisions in the marriage agreement.

The rules regarding joint property in the Compilation of Islamic Law are in line with the Marriage Law and are different from the

⁴⁸ Happy Susanto, *Pembagian Harta Gono-Gini Saat Terjadi Perceraian* (Jakarta: Visi Media, 2008).

⁴⁹ Sution Usman Adji, *Kawin Lari Dan Kawin Agama* (Yogyakarta: Liberty, 1989).

⁵⁰ Satjipto Rahardjo, "Hukum Progresif: Hukum Yang Membebaskan," *Jurnal Hukum Progresif* 1, no. 1 (July 16, 2011): 1–24, doi:10.14710/hp.1.1.1-24.

⁵¹ Ibid.

⁵² Rahmida Erliyani and Siti Rosidah Hamdan, *Akta Notaris Dalam Pembuktian Perkara Perdata Perkembangan Cyber Notary* (Yogyakarta: Dialektika, 2020).

meaning of joint property in the Civil Code. The Compilation of Islamic Law distinguishes assets acquired during a marriage which are shared property with innate assets which are not included in joint property. This is explained in Article 85 of the Compilation of Islamic Law, the existence of joint property in a marriage does not rule out the possibility of having property owned by each husband or wife.

Customary law also states that not all property owned by a husband and wife is a unit of wealth or gono-gini. Included in gono-gini assets are only assets that have been jointly acquired since the marriage bond was formed. Property acquired before the marriage and inheritance acquired during the marriage period are owned by each husband and wife.⁵³

Legal Consequences of Marriage Annulment on Joint Property

1. Consequences of Annulment of Marriage in a Husband-and-Wife Relationship

Every legal action will have legal consequences. Likewise, with marriage, marriage is a physical and spiritual agreement between a man and a woman as husband and wife to form a happy and eternal family based on Belief in the One and Only God, with the condition that the marriage is legally valid in the sense that the marriage is carried out in perfect fulfillment the conditions for marriage as regulated in Law Number 1 of 1974 concerning Marriage and Indonesian Law because only a valid marriage will bring good legal consequences in the eyes of the law and society.

The legal consequences of annulment of marriage on husband-and-wife relations are

the abolition of said husband-and-wife relationship, because after a court decision has permanent legal force, the marriage is annulled from the time the marriage took place, thus the marriage is deemed to have never existed. This is following Article 28 paragraph (1) of Law Number 1 of 1974 concerning Marriage which confirms that the annulment of marriage begins after a court decision has permanent legal force and takes effect from the time the marriage takes place.

The legal consequences of annulment of a marriage are regulated in Article 28 of Law Number 1 of 1974 concerning Marriage and Articles 95-98 of the Civil Code which are divided into: first, the presence of good faith from husband and wife, second, only one of the parties who good faith, third, the absence of good faith from husband and wife. The assets acquired during the marriage until the decision to cancel the marriage will be divided in half if the parties to the marriage do not make a marriage agreement. If the marriage is based on the good faith of the husband and wife, then the marriage still has legal consequences for the husband and wife, as well as for their children.⁵⁴

The decision regarding the annulment of the marriage is seen as the dissolution of the marriage due to divorce or the dissolution of the marriage after the tables and beds are separated.⁵⁵ If only one of the parties has good intentions, the marriage will only have legal and beneficial consequences for the parties with good intentions and the children. If a marriage takes place without the good faith of the husband and wife, there will be no legal consequences for the marriage. The judge's

⁵³ Judiasih, *Harta Benda Perkawinan*.

⁵⁴ Prawirohamidjojo and Pohan, *Hukum Orang Dan Keluarga*.

⁵⁵ Ibid.

decision will be retroactive until the time the marriage takes place.

In Islamic Law, the abolition of a husband-and-wife relationship in the annulment of marriage (*fasakh*) has different from divorce, in that divorces of husband-and-wife break up gradually, in other words, the phases in the abolition of a husband-and-wife relationship, namely the first and second divorces, may still be reconciled without a new marriage contract (*talak raj'i*). Then the third divorce does not allow reconciliation except with a new marriage contract (*talak ba'in*), whereas in the annulment of marriage (*fasakh*) the husband-and-wife relationship is broken immediately. Besides that, in an annulment of a marriage, it is not possible to reconcile, but if they want to return, they must use a new marriage contract. It is permissible to re-marry based on 3 things, the first is seen from the point of view of the cause of the annulment of the marriage, if the marriage is annulled because it violates the conditions of marriage in the form of a ban on getting married forever then they cannot re-marry even if they wish.

Second, a party whose marriage is declared null, and void can remarry, of course, must legally fulfill the marriage requirements both according to Law Number 1 of 1974 concerning Marriage and according to Islamic Law. If the conditions of marriage that are violated relate to the ban on marriage which is temporary and both wishes. Third, even though they can remarry because it only involves a temporary ban on marriage if both or one of them do not wish, they cannot remarry. For those who remarry, the annulment of the marriage does not bring any consequences.

2. Consequences of Annulment of Marriage in the Distribution of Joint Assets

The legal consequences regarding assets that existed at and before the marriage and after the annulment of the marriage are issues that need to be understood because this concerns the protection of the rights and obligations of the parties. The legal consequences regarding assets that existed at and before the marriage and after the annulment of the marriage are issues that need to be understood because this concerns the protection of the rights and obligations of the parties.

Talking about legal protection, this is one of the most important elements of a rule of law state. It is considered important because, in the formation of a country, laws will also be formed that govern each of its citizens. It is common to know that a country will have a reciprocal relationship with its citizens. In this case, it will give birth to a right and obligation to each other. Legal protection will be the right of every citizen. But on the other hand, it can also be felt that legal protection is an obligation for the state itself, therefore the state is obliged to provide legal protection to its citizens.⁵⁶

According to Satjipto Raharjo, legal protection is an effort to organize various interests in society so that there are no collisions between interests and one can enjoy all the rights granted by law. Organizing is done by limiting certain interests and giving power to others in a measurable manner. The theory of legal protection from Satjipto Raharjo was inspired by Fitzgerald's opinion about the purpose of the law, namely, to integrate and coordinate various interests in society by

⁵⁶ Ferdy Yanuarifyan Bantara, Suhadi, and Johan's Kadir Putra, "Tinajauan Yuridis terhadap Perlindungan Hukum bagi Istri yang dicerai oleh

Suami terkait Pembagian Harta Bersama" 2, no. 1 (2020): 870–886.

regulating the protection and limitations of these various interests.⁵⁷ From that concept, Rahardjo interprets legal protection as an effort to protect someone's interests by allocating a human right of power to him to act within the framework of that interest.

Legal protection is divided into two, namely preventive and repressive legal protection. Preventive legal protection, namely legal protection that aims to prevent disputes, directs government actions to be careful in making decisions based on discretion, while repressive legal protection, namely legal protection aims to resolve disputes.⁵⁸ The legal protection to be discussed in this study is the legal protection for the distribution of joint assets after the annulment of marriage. Legal protection for the division of joint assets after the annulment of a marriage is considered important, because both the wife, husband, and children have their respective rights in the mixing of assets that occurred before the annulment of the marriage. The urgency of the rules that should be applied to this topic is necessary so that there is no arbitrariness by one party or other parties outside of it.

Assets obtained after they are in a marital relationship due to the efforts of both and the efforts of one of them are called search assets. Joint assets exist when the marriage takes place, but in families in Indonesia, many joint assets are not recorded. In new marriages, the separation of inheritance and joint assets is still visible, however, at an old age of marriage, the inheritance and joint assets are difficult to explain in detail one by one.⁵⁹ Determining the ownership status of assets during

marriage is important, to obtain clarity on what the position of the assets will be in the event of the death of one of the parties, the husband or wife. Assets are inherited assets to be inherited by their respective heirs; if there is a divorce, there must be clarity on which is the right of the wife and which is the right of the husband.⁶⁰

According to Law Number 1 of 1974 concerning Marriage regarding joint property, the husband or wife can act with the consent of both parties. As for the property, each husband and wife have the full right to carry out legal actions regarding their property. Meanwhile, Article 85 of the Compilation of Islamic Law outlines that there is no mixing of the husband's and wife's assets because of marriage, the existence of joint property does not rule out the possibility of having the property of each husband and wife. The wife's property remains the right of the wife and is fully controlled by her, as well as the husband's property remains the right of the husband and is fully controlled by him.

Based on Article 28 paragraph (2) letter b of the Marriage Law. From Article 28 paragraph (2) letter b of the Marriage Law due to legal consequences for the joint property after a court decision that can cancel the marriage can be interpreted against a husband and wife who act with good intentions in the sense that between husband and wife there is no element of previous intention to enter into a marriage by violating the applicable law so that even though the marriage has been annulled by the court because it does not fulfill the marriage requirements, there is still a

⁵⁷ Satjipto Rahardjo, *Ilmu Hukum* (Bandung: Citra Aditya Bakti, 2000).

⁵⁸ Philipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat Di Indonesia: Sebuah Studi Tentang Prinsip-Prinsipnya, Penanganannya Oleh Pengadilan Dalam Lingkungan Peradilan Umum Dan Pembentukan*

Peradilan Administrasi Negara (Surabaya: PT. Bina Ilmu, 1987).

⁵⁹ Hilman Hadikusuma, *Hukum Perkawinan Adat* (Bandung: Citra Aditya Bakti, 1990).

⁶⁰ A. Hamid Sarong, *Hukum Perkawinan Islam Di Indonesia, Ketiga* (Banda Aceh: Yayasan Pena, 2004).

distribution of joint assets between the husband and wife. Because court decisions are not retroactive, in the sense that a court decision that cancels a marriage is valid when the court decision has permanent legal force, the same as when a divorce decision comes into effect.

There are similarities in the legal consequences that arise after the annulment of marriage and divorce, namely joint assets which must be divided fairly based on applicable legal provisions. Different from the arrangement for sharing joint assets after divorce, in terms of sharing joint assets after an annulment of a marriage there are no codified rules either in the Marriage Law, the Civil Code, or the Islamic Law Compilation. In the absence of a law that clearly states the existence of joint assets in a marriage that is broken up due to annulment, a regulation or legal provision is made based on a sense of justice, but in this provision, full justice has not been fulfilled.

The concept of justice comes from the word "fair" which means impartial, impartial, on the side of what is right, proper, not arbitrary. Justice according to Aristotle describes that justice is equality, and injustice is inequality, injustice occurs when one person gets more than others in a relationship that is made on an equal basis. Meanwhile, according to John Rawls, what causes injustice is the social situation, so it needs to be re-examined which principles of justice can be used to form a good social situation.⁶¹

Regarding justice, it can be equated with basic social values, complete justice is not only achieving happiness for oneself, but also the happiness of others, justice which is

interpreted as an act of fulfilling the happiness of oneself and others, is justice as a value, justice and values in this case are the same but have a different essence, as a person's relationship with others is justice, but as a special attitude without qualification is a value, injustice in social relations is closely related to greed as the main characteristic of unfair actions.⁶²

When it is linked to the lawsuit for the distribution of joint assets, it also considers the element of justice for the parties. The distribution of joint assets after divorce has been regulated in the Marriage Law, making it easier for the Panel of Judges to make decisions. As is the case with the divorce case whose background was explained in the previous chapter, the legal consequence arising in the case of dividing joint assets in decision number 1325/Pdt.G/2019/PA.Tbn is that the defendant (S) must surrender ½ of the joint property that has been owned by him to the plaintiff (K) even though at first K promised S verbally that he would not bring up the distribution of joint assets when they divorced. The joint assets that must be divided into 2 (two) are a piece of land with SHM No. 75 with an area of 314 m² A.n. Sulika; a parcel of rice field land 37 No. C 902 with an area of 13,602 m² A.n Sarpian; the plot of land and shop buildings, wooden houses, and brick houses with SHM No. 00136 with an area of 1092 m² A.n Sumarmi.

Thus the legal justice aspect of the division of joint assets focuses on equal rights before the law, the finality aspect refers to the goal of justice, namely advancing goodness in human life, this aspect determines the content of the law,

⁶¹ Dyah Ochterina Susanti and A'an Efendi, *Penelitian Hukum* (Jakarta: Sinar Grafika, 2014).

⁶² John Rawls, *A Theory of Justice Teori Keadilan: Dasar-Dasar Filsafat Politik Untuk Menwujudkan Kesejahteraan*

Sosial Dalam Negara (Yogyakarta: Pustaka Pelajar, 2011).

while certainty refers to the guarantee that the law contains justice and the norms that promote good function as rules to be obeyed and such justice and finality constitute the ideal framework of the law.

Based on the elucidation of Article 37 of Law Number 1 of 1974 concerning Marriage, what is meant by "the law" respectively is religious law, customary law, and other laws. Considering that the Religious Courts handle cases for people who are Muslim, the arrangement of joint assets because of the annulment of marriage uses Islamic Law. Meanwhile, according to Islamic Law, the husband's assets and the wife's assets will be separated from one another, both their respective assets/assets obtained by a husband and wife on his own business or assets obtained by one of them as a gift or grant/inheritance. after they are bound in a marriage relationship.

The separation of the husband's property and the wife's property gives equal rights to husband and wife to manage their property according to their respective policies, but because according to Islamic law, when a marriage occurs, the wife becomes a partnership partner of the husband in navigating the household ship, the husband and wife there was a sharing of energy (*syarikah abelas*) and an unlimited partnership (*syarikah mufawwadab*). Separate assets consist of each other's innate assets/assets obtained by one of them as a gift/grant/inheritance after they were bound in marriage, while inseparable assets are assets that were not obtained from the business of the husband and wife during the marriage.

Regarding the division of joint assets after the decision to annul the marriage, it

turns out that there is no definite determination so to fulfill a sense of justice for the assets that have been obtained after the annulment of the marriage there is then the problem of dividing joint assets is resolved by deliberation between ex-husband and ex-wife or can follow the law prevailing custom.⁶³ Therefore the court has no authority to interfere except at the will of the parties to the case if no agreement is reached. From the description, the Marriage Law provides an exception for husbands and wives whose marriages are annulled by the Religious Courts because in carrying out the marriage there is no good faith, namely by dividing joint assets. However, from the continuation of the contents of Article 28 of the Marriage Law, for a marriage that is annulled because there was a previous marriage, there will be no distribution of joint assets.

The difference between the annulment of marriage and divorce is the legal consequences. The legal consequence of divorce is the possibility of a dispute over the division of assets back and forth. The reason is, divorce does not necessarily cancel the marriage, so that the marriage that has taken place is still recognized. Meanwhile, in an annulment of a marriage, the marriage will be considered as having never happened from the start once the court decision has obtained permanent legal force. As a result, it will be difficult for one of the parties to file a claim for the distribution of arbitrary assets. The above can be used to fulfill a sense of justice for husbands and wives whose marriages have been broken up due to annulment.

It is understandable that if there are no rules for implementing marriage annulment,

⁶³ Yulianti Maulidya and Imelda Martinelli, "Akibat Hukum Pembatalan Perkawinan Karena Wali Nikah Yang Tidak Berhak Terhadap Kedudukan Anak

Dan Harta Bersama Menurut Hukum Islam," *Jurnal Hukum Adigama* 1, no. 2 (December 17, 2018): 26–48, doi:10.24912/adigama.v1i2.2736.

then there is no special regulation regarding the legal consequences, other than what has been stipulated in Government Regulation Number 9 of 1975 and Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law. The cancellation of a marriage means that the marriage is deemed to have never happened so that there are no legal consequences arising from the annulment. The existence of a marriage annulment decision has an impact if the husband and wife decide to cancel their marriage, then their legal status will be considered as never having happened; children born from annulled marriages are still legitimate children of both parents; assets acquired during the marriage are joint assets for the husband and wife concerned.

CLOSING/CONCLUSION

Regarding legal arrangements or positive law governing the settlement of the distribution of joint assets after an annulment of marriage, there is no specific regulation on how to resolve the problem, because based on practice in the field, it explains that the solution is by way of deliberation to reach a consensus. So that it can be concluded that there is a legal vacuum related to the problem of dividing joint assets after the cancellation of a marriage.

Whereas in essence, joint assets arise when the marriage takes place until the end of the marriage, so that the implication of canceling the marriage to joint assets remains in its status, that joint assets must be divided equally and fairly among the parties based on the closest reference to the article, namely Article 37 of the Marriage Law. Thus, to avoid legal issues in the future, it is necessary to regulate codification so that there is no legal vacuum that can lead to multiple interpretations. In carrying out a

marriage, it would be better to make a marriage agreement to separate assets so that life during the marriage becomes calmer and more secure without harming any party.

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