

## Legal Protection and Principles of Justice for Women Post-Annulment of Marriage in Asset Division

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### Abstract

The conception of marriage law in Indonesia is categorised into three groups, the first being the concept based on the *Burgelijk Wetboek*, the second after the enactment of the Marriage Law, and the third in accordance with Islamic law. A valid marriage gives rise to rights and obligations for both spouses, as well as property and children born during the marriage. However, if the marriage that is carried out does not meet the legal requirements of marriage, implications may arise, as illustrated in a case in South Kalimantan where the ex-wife tried to annul her husband's marriage to another woman. On these issues, this study examines the legal protection and application of the principles of justice for women in the context of the division of common property after the annulment of marriage. The main focus of the research is to analyze the legal impact of marriage annulment on women's rights to joint property and identify gaps in existing regulations. The research method used is normative juridical with a statutory and conceptual approach. The results show that women are often in a vulnerable position after marriage annulment, especially in terms of the division of joint property. Although the Marriage Law and the Compilation of Islamic Law regulate the division of joint property, its implementation in cases of marriage annulment still creates legal uncertainty. The principle of justice has not been fully realized.

## 1. Introduction

Marriage in Indonesia after the enactment of Law Number 1/1974 concerning Marriage (hereinafter referred to as Law Number 1/1974), is defined not only as a legal relationship between a man and a woman in the sense of mere civilization as in Article 26 of the *Burgelijk Wetboek* (hereinafter referred to as BW), but also a relationship with God Almighty as a form of worship of the commands of God Almighty as the purpose of a marriage in Article 1 of Law Number 1/1974 and Article 3 of the Compilation of Islamic Law (hereinafter referred to as KHI), namely to form a family (household) that is *sakinah, mawaddah, rahmah* based on God Almighty.<sup>1</sup>

The existence of the conception of marriage law in Indonesia is spread across various laws and regulations, namely Book 1 BW, Law Number 1/1974, Government Regulations, and KHI for Muslim legal subjects. Marriage in its meaning as a relationship made by legal subjects, namely men and women who want to enter into marriage based on their respective religious laws, as well as the existence of a record to a recording institution for a marriage to be declared valid as in Article 2 of Law Number 1/1974, as well as other requirements in Article 6 to Article 12 of Law Number 1/1974, and in KHI.

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<sup>1</sup>Andi Iswandi, "Review Pembatalan Perkawinan Yang Disebabkan Penipuan Pada Pengadilan Agama: Studi Kasus Pada Pengadilan Agama Bandung," December 15, 2021.

Therefore, due to a marriage conducted legally and meeting the requirements stipulated in Law Number 1/1974 and the Islamic Marriage Law (KHI) specifically for marriages by Muslims, it creates rights and obligations between the husband and wife during and after the marriage. The husband's obligations in marriage are regulated in several articles of Law Number 1/1974, namely the husband's obligations to the wife, including Article 30, Article 31, Article 32, Article 33, and the obligation of maintenance (*nafkah*) from the husband to the wife as stated in Article 34 paragraph (1) and the wife's obligation to manage household affairs in paragraph (2). As for obligations towards children, including the obligation to care for and educate children until they marry or become independent as stated in Article 45, likewise, the child is obliged to respect and obey the wishes of both parents in Articles 46, 47, 48, and 49. Apart from being regulated in Law Number 1/1974, regulations regarding rights and obligations in marriage are also governed in several articles in the KHI very explicitly by making specific divisions regarding the husband's obligations as stated in Article 80 of the KHI which is intended to discuss the husband's obligations in terms of education towards the wife as well as maintenance obligations, clothing, and shelter expenses, household expenses, care and medical expenses for the wife and children, and a specific section also regarding the wife's obligation to be devoted to her husband as stated in Article 83 of the KHI, and sanctions against the wife who neglects her obligations or acts disobediently, then the husband does not have obligations as stated in Article 80 regarding maintenance except for matters concerning the child's welfare.

As mentioned above, the husband's obligations to the wife also continue after marriage resulting from divorce, as stipulated in the Plenary Session of the Religious Chamber in Circular Letter of the Supreme Court Number 1/2017, which essentially addresses the payment of obligations due to divorce, particularly *iddah* maintenance (maintenance during the waiting period), *Mut'ah* (compensation given by the husband to the former wife), and *Madhiyah* maintenance (past maintenance neglected or not fulfilled by the former husband to the former wife during the marriage).<sup>2</sup>

Unlike when a marriage is conducted without fulfilling the requirements of marriage as regulated in Law Number 1/1974 and in the case of the Religious Court Decision of Sidoarjo Number 774/Pdt.G/2006/PA.Sda, where the wife annulled the marriage of the husband with the woman, based on the husband's act of falsifying his identity by claiming to be a divorced widower during his second marriage, during the marriage between the Respondent I, namely the husband, and the Respondent II, namely the woman whose marriage was annulled, the Respondent I still retains the status of a lawful husband of the Applicant for the annulment of the marriage.

The annulment of marriage results in a change in the status of the legal relationship that was previously between husband and wife to be lost, as well as the property obtained in

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<sup>2</sup> Murniasih, "Perlindungan Hak-Hak Perempuan Dan Anak Pascaperceraian Menurut Peraturan Perundang-Undangan," Pengadilan Agama Sanggau, 2022, <https://www.Pa-Sanggau.Go.Id/Artikel/Artikel-Perlindungan-Hak-Hak-Perempuan-Dan-Anak-Pascaperceraian-Menurut-Peraturan-Perundang-Undangan>.

marriage if the husband or wife did not act in good faith, or the annulment of marriage based on a previous marriage, as stated in Article 28 paragraph (2) of Law Number 1/1974.

As per the regulation of marriage annulment in Article 22 of Law Number 1/1974, for marriages annulled by the Court that have permanent legal force (refer to Article 28 of Law Number 1/1974), marriage annulment applies after the court's decision has permanent legal force and applies from the time of the marriage.<sup>3</sup> In the Indonesian context, the division of joint property after the annulment of marriage is still a complex and sensitive issue, especially from the perspective of protecting women's rights. Although Law Number 1 Year 1974 on Marriage and the Compilation of Islamic Law have regulated joint property, its implementation in cases of marriage annulment often causes problems. This is due to differences in legal interpretation and a lack of understanding of the principles of gender justice in the division of joint property.

Women, in many cases, are in a more vulnerable position after a marriage annulment. Factors such as economic dependency, traditional roles in the household, and non-financial contributions that are often overlooked, make women potentially experience injustice in the division of joint property. This situation is exacerbated by gender stereotypes and biases in the judicial system that can influence court decisions.

Thus, this is something that for the authors of this article is interesting to analyze in the aspect of justice regarding property obtained during marriage for women who are annulled from marriage as in the case, which occurred in South Kalimantan as revealed by the Head of the KUA of Kertak Hanyar District on the official website of the Regional Office of the Ministry of Religion of South Kalimantan Province, that the legal wife of the marriage first filed a marriage annulment by the previous legal wife or her family due to falsification of status, besides that the wife whose marriage was annulled filed for joint property, this attitude was carried out by the wife who was annulled because the previous wife was known to have been divorced or *talaq*, and when the marriage was carried out with the wife whose marriage was annulled the annulled marriage was known by the previous legal wife.<sup>4</sup>

This research is a development of previously existing research such as Cholidatul Rizky Amalia's thesis entitled, Cancellation of Marriage by Interested Parties, by discussing groups that can cancel a marriage and the ratio decidendi of the judge's decision regarding the party declared as an interested party<sup>5</sup>, and Sarah Hasnanda Putri's thesis, entitled Division of Joint Property Due to Divorce Against Wives Who Have a Double Burden in Marriage, with the main topic of discussion regarding the division of joint property against wives who have a double burden and the ratio decidendi of the judge's decision on the division of joint property based on the principle of justice, It is known in this study that the division of joint property according to the Marriage Law, KHI shows that the division of joint property is divided equally, but in several decisions that have permanent legal force, such as Supreme Court

<sup>3</sup> Tami Rusli, "Pembatalan Perkawinan Berdasarkan Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan," *Pranata Hukum* 8, No. 2 (July 31, 2013): 26758, <https://www.Neliti.Com/Publications/26758/>.

<sup>4</sup> H Saubari, "Status Palsu Dan Pembatalan Nikah," 2021, <https://kassel.kemenag.go.id/Opini/707/Status-Palsu-Dan-Pembatalan-Nikah>.

<sup>5</sup> Cholidatul Rizky Amalia, "Pembatalan Perkawinan Oleh Pihak Yang Berkepentingan" (Universitas Airlangga, 2023).

Decision Number 78 K / AG / 2021 and Supreme Court Decision Number 579K / AG / 2016, the judge decided that the division of joint property did not divide equally but 30% of the joint property was given to the husband, 70% of the joint property was given to the wife because she had a double burden, namely the wife working as well as a housewife as the principle of distributive justice<sup>6</sup>. Article Pricillia Putri and Wirdyaningsih, Analysis of the Effects of Cancellation of Inbreeding on Joint Property and the Position of Children (Case Study of Lubuklinggau Religious Court Decision Number 80/Pdt.G/2017/PA.Llg), this study discusses the analysis of the consequences of canceling inbreeding in relation to joint property and the position of children based on a case study of Lubuklinggau Religious Court Decision Number 80/Pdt. G/2017/PA.Llg, the results of the study reveal that the absence of explicit arrangements regarding joint property after the annulment of marriage causes the arrangement of the division of joint property to be carried out according to the principles of justice and deliberation for consensus<sup>7</sup>.

This research aims to comprehensively analyze the legal protection and application of the principles of justice for women in the context of the division of common property after marriage annulment. The main focus is to identify gaps in existing regulations, examine the implementation of the principles of justice in judicial practice, and formulate recommendations for strengthening legal protection for women.

From the research described above, research with case studies that will be presented later is the latest research and development of existing research, especially in the aspect of the purpose of this research, namely Legal Protection and aspects of justice for women after marriage cancellation in the division of joint property considering that in the applicable law in Indonesia there are several concepts of marriage law that apply so that there is a blurring of norms on the protection of women whose marriages are cancelled which when a marriage is cancelled, based on the Marriage Law it applies retroactively unless otherwise regulated in the Marriage Law.

Through critical analysis of legislation, judicial practice, and social reality, this research is expected to make a significant contribution to efforts to strengthen legal protection and realize substantive justice for women in the context of the division of common property after marriage annulment. The results of this study are also expected to be taken into consideration by policy makers, legal practitioners, and gender activists in formulating more effective strategies to protect women's rights in the realm of marriage law.

## 2. Methods

The type of research used is legal research, or, in other words, normative juridical research.<sup>8</sup> The approach used in this research is a statutory approach (Statute Approach),

<sup>6</sup> Sarah Hasnanda Putri, "Pembagian Harta Bersama Akibat Perceraian Terhadap Istri Yang Mempunyai Beban Ganda Dalam Perkawinan" (Universitas Airlangga, 2022).

<sup>7</sup> Pricillia Putri, "Analisis Akibat Pembatalan Perkawinan Sedarah Terhadap Harta Bersama Dan Kedudukan Anak (Studi Kasus Putusan Pengadilan Agama Lubuklinggau Nomor 80/Pdt.G/2017/Pa.Llg)," *Indonesian Notary* 4, No. 1 (March 31, 2022), <https://Scholarhub.Ui.Ac.Id/Notary/Vol4/Iss1/41>.

<sup>8</sup> Peter Mahmud Marzuki, *Pengantar Ilmu Hukum, Cetakan Ke-6* (Jakarta: Kencana Prenadia Group, 2014), <https://Inlis.Kemennppa.Go.Id/Opac/Detail-Opac?Id=2360>.

namely an approach to see and analyze regulations related to marriage and the impact of marriage annulment; a conceptual approach (Conceptual Approach), namely an approach to be able to know the concept of marriage and the concept of marriage annulment that can occur, which is found in doctrines and views of positive law figures and Islamic law; and finally, the case study approach, namely the approach that we obtain in cases of marriage annulment that have not yet had a judge's decision with permanent legal force.

### **3. Results and Discussion**

#### **3.1. Marriage annulment**

Cancellation of marriage is a court action in the form of a decision declaring a marriage invalid (has no legal force or is declared void) so that the marriage is considered never to have existed.<sup>9</sup> The purpose of marriage annulment is so that the marriage that has been carried out breaks up not because of divorce but because the marriage that has been carried out is invalid because there are conditions that are not fulfilled or there are errors in its implementation, so that in practice for the marriage to be annulled, it is necessary to go through a Court decision as in Article 38 of Law Number 1/1974, the necessity of going through the Court is none other than because marriage is a bond that is born not only to humans but also to God, not done rashly and unreasonably, with the role of the state in the dissolution of marriage providing legal certainty and protection for the parties to the cancellation or third parties affected by the cancellation of marriage.<sup>10</sup>

The plaintiffs of marriage cancellation are regulated in Article 23 of Law Number 1/1974, which can consist of families in a straight line of descent upwards from husband or wife, husband or wife, authorised officials only as long as the marriage has not been decided, or appointed officials who in this case are Officials of the Religious Affairs Office (KUA) as official officers who handle marriage issues and everyone who has a direct legal interest in the marriage, but only after the marriage is broken.

The meaning of the plaintiff is interpreted not cumulatively so that one of the positions as stipulated in Article 23 of Law Number 1/1974 can file a lawsuit for marriage cancellation, as in the consideration of the Sidoarjo Religious Court Decision Number 774/Pdt.G/2006/PA.G/2006/PA.Sda, who filed the plaintiff for marriage cancellation was the wife of the respondent, and as in the consideration of the Decision of the Palu Religious Court Number 142/Pdt.G/2016/PA.Pal, who filed the plaintiff for marriage cancellation was the parent of the defendant/respondent who filed for marriage cancellation because the defendant falsified his identity who was still married to another person.

Cancellation of marriage can be carried out in court in accordance with the domicile of the marriage as in the consideration of the Sidoarjo Religious Court Decision Number

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<sup>9</sup> Siti Hanifah, "Pembatalan Perkawinan Menurut Bw Dan Uu Nomor 1 Tahun 1974," 2018, <https://www.pa-wamena.go.id/webtes/Berita-Seputar-Peradilan/137-Artikel/154-Pembatalan-Perkawinan-Menurut-Bw-Dan-Uu-Nomor-1-Tahun-1974-I-Oleh-Siti-Hanifah-S-Ag-M-H>.

<sup>10</sup> Fakhir Tashin Baaj, "Perspektif Perceraian Sebagai Sebuah Solusi Dan Bukan Hanya Gagalnya Sebuah Perkawinan," 2022, <https://badilag.mahkamahagung.go.id/artikel/publikasi/artikel/fakhir-t-baaj>.

774/Pdt.G/2006/ PA.G/2006/PA.Sda, and consideration of the Palu Religious Court Decision Number 142/Pdt.G/2016/PA.Pal, and can be filed where the husband or wife resides.<sup>11</sup>

The concept of breaking up a marriage not due to divorce requires a court decision as above is different from the breakup of marriage in Islamic law with the term *talaq* or divorce, which is a word from the husband to the wife to break the bond of marriage at that time with words that can be understood as a separation of the husband-wife bond, the separation is without a court decision and is also different from the concept of *fasakh* caused by the husband or wife apostatising in marriage.<sup>12</sup> Thus, the two concepts of *talaq* and *fasakh* do not occur because the valid conditions of marriage are not fulfilled. The root of the emergence of the first Marriage Cancellation is the existence of additional requirements other than those regulated by religion or belief in the pillars and conditions for the validity of marriage, as in Islamic law related to the terms and pillars of marriage, according to Imam Zakaria al-Anshari, there are five: First, there is a groom. Second, the bride. Third, there is a marriage guardian from the woman; fourth, there are two witnesses; and fifth, there is a *sighat* or *ijab qobul* between the woman's guardian and the bridegroom.<sup>13</sup> If the pillars of marriage are not fulfilled, the marriage is not valid.

Secondly, there is a requirement for marriage registration for Muslim couples to record marriages at the Office of Religious Affairs (KUA) whose document is called a Marriage Book while non-Muslims record marriages at the Population and Civil Registration Office for (*Dukcapil*) whose document is a Marriage Certificate, the existence of this second requirement opens up opportunities for marriage cancellation as in Law Number 1/1974 or KHI, when a couple commits prohibited polygamy, namely polygamy that is not through a court decision, as stipulated in Law Number 1/1974, which in the event of a marriage committed by the husband can be filed for cancellation of the marriage as in Law Number 1/1974 or KHI, when a couple commits polygamy which is prohibited, namely polygamy that is not through a court decision, as stipulated in Law Number 1/1974, which in the event of a marriage committed by the husband can be filed for cancellation of the marriage, although in Islamic law the regulation of polygamy is related to restrictions on the number of wives and the husband's ability to be fair to his wife based on *Surah An-Nisa'* [4] verse 3. However, Islam in its *fiqh* does not explain the procedures for polygamy, such as the need for permission from the court.<sup>14</sup>

Third, there are differences in the principles of marriage law, as mentioned above, Law Number 1/1974 or KHI adheres to monogamy, while Islamic law adheres to polygamy, so for

<sup>11</sup> Sri Turatmiyah, M. Syaifuddin, And Arfianna Novera, "Akibat Hukum Pembatalan Perkawinan Dalam Perspektif Hukum Perlindungan Anak Dan Perempuan Di Pengadilan Agama Sumatera Selatan," *Jurnal Hukum Ius Quia Iustum* 22, No. 1 (January 2015): 163-79, <https://doi.org/10.20885/Iustum.Vol22.Iss1.Art8>.

<sup>12</sup> Rifqi Qowiyul Iman, "Talak Raj'i, Dan Talak Ba'in Dalam Kajian Fiqih," 2022, <https://www.pakudus.go.id/artikel/549-talak-raj-i-dan-talak-ba-in-dalam-kajian-fiqih>.

<sup>13</sup> Kholil Syu'aib, "Fiqh Imam Zakariya Al-Anshari Analisis Kontekstual Terhadap Kitab Fath Al-Wahhâb Bi Syarh Manhaj Al-Thullâb," *Al-Fikra : Jurnal Ilmiah Keislaman* 10, No. 2 (August 1, 2017): 216-39, <https://doi.org/10.24014/Af.V10i2.3842>.

<sup>14</sup> Suud Sarim Karimullah, "Poligami Perspektif Fikih Dan Hukum Keluarga Negara Muslim | Karimullah |," *Maddika : Journal Of Islamic Family Law* 02, No. 01 (2021): 7-20, <https://ejournal.iainpalopo.ac.id/index.php/maddika/article/view/2118>.

this difference, prospective couples who perform polygamous marriages to be able to marry usually marry through *nikah sirri*, namely the practice of marriage which is carried out secretly in front of local religious or traditional leaders and the closest family without registering registration or recording as regulated. This kind of marriage is religiously valid but not legally valid.<sup>15</sup> So marriage in *sirri*, because one of the spouses is bound by a previous marriage, cannot be cancelled.

In addition to using the *sirri* marriage method, couples who are bound by a previous marriage and want to commit polygamy usually falsify their identity with the status of virgin or widower, as in the reason for the lawsuit and legal considerations of the Sidoarjo Religious Court Decision Number 774/Pdt.G/2006/ PA.G/2006/PA.Sda, Palu Religious Court Decision Number 142/Pdt.G/2016/PA.Pal, to be able to register the second marriage and so on, this is because the polygamy arrangement as stipulated in the existence of the willingness of the prospective wife as outlined in the court decision as required in Law Number 1/1974 so that for this action the marriage by falsifying the identity as in the two court decisions was filed a lawsuit for marriage cancellation. The difference between marriage in polygamy and Islamic *fiqh* law, where it is not a condition of marriage except for women who are widowed but still underage. In *fiqh* there are differences, such as the opinion of Imam Malik and Imam Abu Hanifah, the father of the woman can force the will to marry, while Imam Syafi'i believes that it cannot be forced.<sup>16</sup>

The concept of Islamic law as mentioned above is very much different from the provisions of Law Number 1/1974, because the permissibility of *nikah sirri* does not provide women who are married with legal protection as stipulated in Law Number 1/1974 or KHI. On the other hand, women who are married in *sirri* because of a previous marriage can be categorised as adultery, although according to Mudzakir, a criminal law observer and formulator of the Criminal Code Bill, the act of *nikah sirri* is not included in the category of adultery because the marriage is religiously valid but not recorded.<sup>17</sup>

It should be underlined that in the development of Islamic law or what is also known as contemporary Islam, the addition of requirements for the validity of marriage requires forced marriages that are no longer televised, as described in Yusuf Hanafi's research.<sup>18</sup> In addition, there are more requirements than those determined by Islamic law, to provide protection for married couples by presenting benefits (*maslahat*) as the objectives of sharia (*Maqashid al-Syari'ah*) and avoiding damage (*mafsadat*) in marriage.

<sup>15</sup> Hazar Kusmayanti And Nindya Tien Ramadhanty, "Legitimacy Of A Sirri Marriages (Second And So On) By The Pair Of Civil Servants," *Dih: Jurnal Ilmu Hukum* 17, No. 1 (January 30, 2021), <https://doi.org/10.30996/Dih.V17i1.4512>.

<sup>16</sup> Hafid Stis And Miftahul Ulum Lumajang, "Analisis Konsep Mahar Berupa Hafalan Ayat Al-Qur'an Dalam Perspektif Madzahibul Arba'ah," *Sirajuddin : Jurnal Penelitian Dan Kajian Pendidikan Islam* 1, No. 1 (January 4, 2021): 19-37, <https://doi.org/10.55120/Sirajuddin.V1i1.379>.

<sup>17</sup> Prianter Jaya Hairi, "Kriminalisasi Tindak Pidana Perzinaan Dalam R UU Kuhp," *Info Singkat* 11, No. 17 (2019): 1-6.

<sup>18</sup> Yusuf Hanafi, "Kontroversi Usia Kawin Aisyah Ra Dan Kaitannya Dengan Legalitas Perkawinan Anak Di Bawah Umur Dalam Islam," *Istinbath: Jurnal Hukum Islam lain Mataram* 15, No. 2 (2016): 296-319, <https://www.neliti.com/publications/70424/>.

The principles of justice regulated in Law Number 1/1974 in relation to polygamy are First, husbands who want to marry need court permission with the consent of the previous wife, as stipulated in Article 3 paragraph (2) of Law Number 1/1974, with the reasons that have been regulated in Law Number 1/1974. Based on so that the desire for polygamy is not present on biological desire alone, but is also accompanied by considerations of rational awareness which is also based on religious principles, Second, some reasons are allowed as three reasons stipulated in Article 4 paragraph (2) of Law Number 1/1974, namely because the wife cannot carry out her obligations as a wife the wife has a disability or illness that cannot be cured; c. the wife cannot produce offspring as stipulated in Article 4 paragraph (2) of Law Number 1/1974. c. the wife cannot bear offspring as in the principle of *Maqashid al-Syari'ah*, namely maintaining offspring (*hifz al-Nasl*),<sup>19</sup> Third, the ability of the husband who carries out polygamy to present fair treatment in providing physical and mental sustenance for his wives and children later as stipulated in Article 5 paragraph (1) and directly proportional to what is stated in the *Qur'an surah an-nisa'* paragraph (3) that if it is feared that the husband cannot be fair then do not do polygamy.

In addition to marriage being linked to religion, marriage also needs to pay attention to the beliefs held by the couple who are marrying, such as what happened to the Mirah and Golan indigenous communities in Ponorogo Regency, where the two indigenous communities in the area are prohibited from marrying between the two regions, because the indigenous community believes that if a marriage occurs, it will cause negative sanctions in the form of mystical events.<sup>20</sup> The prohibition of marriage by customary law also occurs in Batak customary law against marriages conducted by one clan, known as *dongan samudar* or another term for inbreeding conducted by men with women of the same clan. The reason for the prohibition of marriage within the same clan is because it is considered to marry one's own mother, damage the partituran or kinship known as *Dalihan Na Tolu*, and damage the value of cultural traditions.<sup>21</sup> However, marriages with the same clan sometimes occur, such as for Mandailing Batak people who immigrated to Yogyakarta. As in Muslim Pohan's research, surname marriages can occur in overseas places because there are influencing factors, namely love factors, religious factors, economic factors, educational factors, and cultural factors.<sup>22</sup> It is known that the concept of marriage cancellation can occur firstly because of the nonfulfilment of the conditions for marriage as stipulated in the laws and regulations, and secondly, because of the provisions that prohibit marriage, both regulated through laws and regulations and outside the laws and regulations, as in Article 8 letter f of Law Number 1/1974, which reads

<sup>19</sup> Abdul Rasyid As'ad, "Konsep Maqahid Al-Syari'ah Dalam Perkawinan," Mahkamah Agung Republik Indonesia Direktorat Jenderal Badan Peradilan Agama, January 22, 2013.

<sup>20</sup> Ferry Irawan Febriansyah And Anwar Sanusi, "Analisis Yuridis Terhadap Larangan Perkawinan Masyarakat Adat," *Dih: Jurnal Ilmu Hukum* 16, No. 2 (July 14, 2020): 247-58, <https://doi.org/10.30996/Dih.V16i2.3605>.

<sup>21</sup> Rosita Manalu, Isjoni, And . Yanuar, "Perkawinan Satu Marga (Perkawinan Adat Batak Angkola Di Kecamatan Sipirok Kabupaten Tapanuli Selatan Sumatera Utara)," *Jurnal Ilmiah Wahana Pendidikan* 9, No. 13 (July 18, 2023): 561-70, <https://doi.org/10.5281/Zenodo.8157413>.

<sup>22</sup> Muslim Pohan, "Perkawinan Semarga Masyarakat Migran Batak Mandailing Di Yogyakarta," *Al-Ahwal: Jurnal Hukum Keluarga Islam* 10, No. 2 (January 7, 2018): 134-47, <https://doi.org/10.14421/Ahwal.2017.10202>.



"who have a relationship that by their religion or other applicable regulations is prohibited from marrying." Law Number 1/1974, which reads "who have a relationship that their religion or other applicable regulations prohibit them from marrying." Other regulations can also be understood broadly, namely, the beliefs that grow in society, which if the couple has entered into a marriage or continues to enter into marriage even though it has been prohibited, then the marriage can be cancelled, the marriage can be cancelled because marriage must be understood as a grand agreement made by the prospective husband and wife who not only relate to the parties but relate to God Almighty as a form of devotion to the commands of God Almighty, to the family of each partner, and to the community in the environment where the marriage occurs.

Parties applying to the court for marriage annulment must have sufficient grounds, and there are two grounds for annulment. Firstly, the annulment of a marriage that was not permissible from the beginning according to religion or belief as a condition for the validity of marriage, such as marriage between mahram couples, which is defined as a marriage that is prohibited to be carried out, such as marriage between brothers, marriage between fathers and sons, and the like, the *madzhab imams*, namely, Imam Malik, Shafi'i, Hanafi, and Hanbali, agree that if a marriage occurs with a *mahram* woman mentioned in the Qur'an, then the law is forbidden and the marriage that has been carried out must be registered, and is a perpetual prohibition for the person who is married.<sup>23</sup> Apart from the prohibition of polygamy with more than four wives as in *Surah An-Nisa* verse 3, all of the above examples are marriages that if performed can be cancelled without the need for a court decision.

Second, the cancellation of marriage that does not fulfil the conditions of marriage and is only known after the marriage has taken place and the marriage relationship is temporary, this is usually related to the laws in force in Indonesia, because positive law requires more things than those regulated in Islamic law for parties who are Muslim, such as the Sidoarjo Religious Court Decision Number 774/Pdt.G/2006/PA.G/2006/PA.Sda, that the husband of the woman whose marriage was annulled falsified his identity, while at the time the marriage between Respondent I and Respondent II took place, party II was still the husband/wife of the Marriage Cancellation Applicant and in the case of Palu Religious Court Number 142/Pdt.G/2016/PA.Pal, the plaintiff for marriage cancellation was the parent of the respondent/respondent, the reason for the cancellation of the marriage was because the position of the respondent at that time was still bound by the previous marriage and the respondent falsified his identity so that he could remarry another woman. As in the case in South Kalimantan, as stated by the Head of the Kertak Hanyar Religious Affairs Office in the official website of the Regional Office of the Ministry of Religious Affairs of South Kalimantan Province, the marriage was cancelled by the previous wife and or her family because the father's marriage to his second wife was carried out without obtaining permission from the Religious Court, and in the implementation of the marriage there was falsification of the status of the couple to be unmarried.

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<sup>23</sup> M. Moch; Anwar, *Dasar-Dasar Hukum Islami Dalam Menetapkan Keputusan Di Pengadilan Agama* (Cv. Diponegoro, 1991), //Unida.Ac.Id/Elibrary/Index.Php?P=Show\_Detail&Id=19148&Keywords=.

The legal consequences of the cancellation of marriage decided by the court, the decision applies from the time of the marriage but does not apply retroactively to children born in the marriage, as regulated in Article 28 paragraph 2 letter a of Law Number 1/1974. So that children born are children who have a legal relationship with parents whose marriages are annulled, then the parents who are annulled have the rights and obligations of alimony, namely a reciprocal relationship between children and parents as stipulated in CHAPTER X Rights and Obligations Between parents and children such as the obligation to maintain, educate and provide for children, as well as the obligation of children to respect and obey the will of their parents,<sup>24</sup> because of their position as children, they also have the right to inherit between parents whose marriages are annulled and children born.

It does not apply retroactively to third parties as long as the third parties obtained their rights in good faith Article 28 paragraph 2 letter c of Law Number 1/1974, before the Decree on the cancellation of marriage which has permanent legal force, such as the transfer of buying and selling rights carried out before the cancellation of marriage is considered valid and has legal force, and for third parties their rights are protected as long as they are in good faith.

### **3.2. Common Property Status After Annulment of Marriage**

As in Article 38 of Law Number 1/1974, the breakdown of marriage occurs due to 1) death, 2) divorce, 3) court decisions. In the event of a breakup of marriage due to death, the wife or husband left behind, in addition to being entitled to joint property obtained in marriage, is also entitled to inheritance property that needs to be divided with other living heirs.<sup>25</sup> For the breakup of marriage due to the other two causes, each party, namely the husband or wife, is entitled to joint property obtained during the marriage according to religious law, customary law or other laws as explained in Article 37 of Law Number 1/1974.

Joint property, as in Law Number 1/1974, is property obtained by each husband or wife during marriage. The concept of joint property in Law Number 1/1974 is different from the concept of joint property in BW. Article 119 BW determines that from the time of marriage, legally there is a complete unity between the assets of husband and wife, only regarding that with a marriage agreement not held with other provisions. BW does not recognize the separation of property in contrast to Law Number 1/1974, which distinguishes joint property from inherited property as stated in Article 35 of Law Number 1/1974. KHI also has the concept of separation of property as in Law Number 1/1974.

Interestingly, the division of joint property in the case of a married couple whose marriage is terminated due to marriage annulment as stipulated in Law Number 1/1974, or KHI, in Article 28 paragraph 2 letter b of Law Number 1/1974 states that marriage annulment does not apply retroactively to husbands or wives who are in good faith, except for joint property. According to Siti Ismijati Jenie's view in her Inaugural Speech as Professor of Faculty of Law, Universitas Gajah Madah (UGM) on 10 September 2007 at the UGM Senate Hall, the principle of good faith comes from Roman law known as Bonafides. In his view, there are two

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<sup>24</sup> Waspiyah Et Al., "Peningkatan Pemahaman Hak Alimentasi Terhadap Kelompok Lanjut Usia Melalui Legal Counseling Approach," *Jurnal Pengabdian Hukum Indonesia (Indonesian Journal Of Legal Community Engagement)* 4, No. 1 (2021): 112-22.

<sup>25</sup> Abd Shomad And Prawitra Thalib, *Hukum Waris Islam Di Indonesia* (Surabaya: Program Magister Kenotariatan Fakultas Hukum Universitas Airlangga Dan Luftansah Mediatama , 2013).

kinds of good faith, namely subjective good faith. Good faith in a subjective sense is called honesty. This is found in Article 530 of the Civil Code onwards, which regulates the position of power (*bezit*). Good faith in this subjective sense is an inner attitude or state of mind. Second, objective good faith or what is known as propriety. This is formulated in paragraph Article 1338 (3) BW, good faith here is interpreted not to lie in the state of the human soul but lies in the actions taken by both parties in carrying out the promise, so honesty here is dynamic.<sup>26</sup>

The application of this article creates confusion in the division of joint property for women whose marriages are cancelled by previous wives or their families who are not in good faith in an objective sense. A case that occurred in South Kalimantan revealed by the Head of the KUA of Kertak Hanyar District in the official website of the Regional Office of the Ministry of Religious Affairs of South Kalimantan Province, a legal case where the second wife or wife whose marriage was annulled tried to defend her rights by filing a lawsuit with the object of joint property obtained during the marriage against the first wife and her heirs because both of them filed a marriage annulment so that the wife who was annulled by Law Number 1/1974 did not get the right to joint property and the inheritance of the husband whose marriage was annulled. Whereas in Islamic *fiqh* law, the position of a wife who has been *talaq* has no legal relationship with her husband.

Looking at the case, based on the theory of legal positivism which upholds the rules of written law as the highest law in a country by separating legal and moral aspects, women whose marriages are annulled based on the existence of a previous marriage, women whose marriages are annulled are not entitled to joint property, if so the wife whose marriage was annulled by the previous wife whose position had been divorced religiously without a court decision and had known for a long time that her husband's marriage with his wife was annulled by annulling the marriage after the husband died did not violate the law, But from the point of view of morality and good faith in an objective sense, such actions are not appropriate, with the aim of controlling all joint property arising from the annulled marriage, because the annulment of the marriage was carried out after the husband died and the annulled wife and her children already knew about the marriage of her husband or father.

However, legally the annulment of marriage filed by the first wife and her heirs is valid because it has a legal basis, and the annulment of the marriage that occurred is considered never to have occurred except for children born from the annulled marriage, retroactively so that children have rights and parents have obligations towards children as previously mentioned regarding the obligations of parents towards children, namely maintaining and educating children until the child is married or independent as stipulated in Article 45, then also applies to children to respect and obey the will of both parents. And children also have the right to inherit property if their parents die. As for the joint property that returns to the wife who submits the cancellation, unless the judge is of another opinion as in the Bandung Religious Court Decision Number: 3664/Pdt.G/2014/PA.Bdg, where the judge is of the opinion that the cancellation of marriage is submitted within a period of 6 (six) months from

<sup>26</sup> Saubari, "Status Palsu Dan Pembatalan Nikah"; Teguh Puji, "Penguatan Prof Ismijati Jenie: Itikad Baik Sebagai Asas Hukum - Universitas Gadjah Mada," 2007, <https://Ugm.Ac.Id/Id/Berita/2066-Penguatan-Prof-Ismijati-Jenie-Itikad-Baik-Sebagai-Asas-Hukum/>.

the time the first wife finds out about the husband's marriage with the second wife, but the cancellation of marriage is submitted after more than two years the first wife finds out, this decision is reinforced by the Bandung Religious High Court Decision case Number: 0227/Pdt.G/2015/PA.G/2015/PTA.Bdg, but at the Supreme Court level the decision Number: 345K/Ag/2016, with the consideration that in essence the Supreme Court granted the marriage cancellation lawsuit with the legal reasoning that the lower court decision in this case examining and adjudicating the aquo case *judex facti* did not consider Article 4 and Article 5 of Law Number 1/1974, as well as Article 40 and Article 41 so it is appropriate that the reasons for the objections of the Cassation Petitioner can be accepted and granted.

The problems of the position case that occurred in South Kalimantan above with the current aspects of marriage law, namely First, the wife who cancelled the marriage had divorced religiously, even though Law No. 1 of 1974 requires divorce through the Court. Second, there is no element of good faith from the wife who cancelled the marriage because she cancelled the marriage after the husband's marriage with the woman who was cancelled lasted long enough, namely in 1995, and was only cancelled after the husband died. So to bring justice between the parties, namely the wife and or family who cancelled the marriage with the wife whose marriage was cancelled in the case of joint property obtained during the second marriage to be resolved by arbitration and alternative dispute resolution institutions, namely out-of-court settlements as dispute resolution by means of consultation, negotiation, mediation, conciliation, or expert judgment. Potent settlement brings justice to the parties with a family approach and willingness,<sup>27</sup> by not harming or eliminating the rights of others.

#### 4. Conclusions

A marriage that is legally performed as stipulated in the laws and regulations has legal consequences, not only at the time of marriage, but also after the marriage ends due to divorce. Women are often in a vulnerable position after marriage annulment, especially in terms of the division of joint property. Although the Marriage Law and the Compilation of Islamic Law regulate the division of joint property, its implementation in cases of marriage annulment still creates legal uncertainty. The principle of justice has not been fully realized. In the case that occurred in South Kalimantan, the divorce was carried out religiously then when the husband married next, the ex-wife carried out the process of cancelling the husband's marriage so that the cancellation of the children born as a result of the cancellation of the marriage was considered valid but the wife did not get the right to property obtained during the marriage and the right to inheritance from the deceased husband, on the concept of normative marriage law that only gave birth to legal certainty did not provide justice to the wife who was cancelled in that case, On the other hand, the true marriage law is born from belief or religion, so that the actions of a former wife who has been divorced religiously should not be allowed to apply for annulment, especially the actions taken by the former wife are actions that harm the rights of others so that the wife who is cancelled does not get the right to property obtained during

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<sup>27</sup> Rahmat Hidayat, Mohammad Muhibbin, And Mohammad Afifullah, "Pembagian Harta Warisan Menurut Hukum Islam Dan Adat Melayu (Studi Kasus Desa Sungai Muntik Sanggau)," *Dih: Jurnal Ilmu Hukum*, August 29, 2022, 223–33, <https://doi.org/10.30996/Dih.V0i0.6558>; Puji, "Pengukuhan Prof Ismijati Jenie: Itikad Baik Sebagai Asas Hukum - Universitas Gadjah Mada"; Saubari, "Status Palsu Dan Pembatalan Nikah."

the marriage and to the inheritance of the deceased husband, while the loss is one of the elements of a tort. There is a need to revise regulations and strengthen legal protection mechanisms to guarantee women's rights in the division of common property after marriage annulment. The proposed recommendations include improving laws and regulations, increasing gender sensitivity in the judicial system, and empowering women's economy as a preventive measure.

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