

Legal Protection of Women's Rights in the Division of Joint Assets Due to Divorce

Watiah ¹⁾ & Jawade Hafidz ²⁾

¹⁾ Faculty of Law, Universitas Islam Sultan Agung (UNISSULA) Semarang, Indonesia, E-mail: watiah221o@gmail.com

²⁾ Faculty of Law, Universitas Islam Sultan Agung (UNISSULA) Semarang, Indonesia, E-mail: jawadehafidz@unissula.ac.id

Abstract. *This study aims to analyze: 1) The status of joint property between husband and wife after divorce. 2) Forms of legal protection for women's rights in the division of joint property after divorce. This type of research is normative legal research. The approach method in this research is a statute approach. The type of data in this study is secondary data sourced from primary, secondary, and tertiary legal materials. The data collection method uses library techniques (document study). The analysis in this study is prescriptive. The results of the study conclude: 1) The status of joint assets between husband and wife after divorce remains legally recognized as joint property until a legal division is carried out according to statutory provisions. This division is basically carried out in a balanced manner (½:½) as stipulated in Article 97 of the Compilation of Islamic Law and Article 128 of the Civil Code, but the judge has the authority to assess substantive justice based on the contribution of each party. Theoretically, this principle is in line with Gustav Radbruch's Theory of Justice which places justice as the highest legal value, and is in line with the values of Pancasila justice and Islamic justice which emphasize balance, welfare, and humanity. 2) Forms of legal protection for women's rights in the division of joint assets after divorce include preventive protection and repressive protection. Preventive protection is realized through a marriage agreement, the obligation of joint agreement in the management of joint assets, as well as recording and monitoring assets to prevent unilateral control. Repressive protection is provided through the woman's right to file a lawsuit for the division of joint property, demand the annulment of unilateral legal acts, and acknowledge the wife's non-material contributions, as stipulated in PERMA Number 3 of 2017 and affirmed in several Supreme Court decisions. Support from various regulations such as Law Number 7 of 1984 concerning the Ratification of*

CEDAW, Law Number 23 of 2004 concerning the Elimination of Domestic Violence, and Law Number 12 of 2022 concerning Criminal Acts of Sexual Violence further strengthens the guarantee of women's economic rights after divorce.

Keywords: *Joint Property; Post-Divorce; Protection of Women's Rights.*

1. Introduction

Marriage is a sacred spiritual and physical bond between a man and a woman, founded on mutual love and affection. Marriage is a basic human need for building a harmonious life together. Generally, every individual intends to marry only once in a lifetime, without any desire or thought of later separation, remarriage, or choice of living alone.¹ In the perspective of Law Number 1 of 1974 concerning Marriage, marriage is understood as a physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the One Almighty God. This formulation reflects that the main purpose of marriage is to achieve physical and spiritual happiness in a sustainable manner, not a temporary one, so that the ideal marriage is a lasting marriage and is expected to only occur once in a lifetime.²

According to Article 1 of Law Number 1 of 1974 concerning Marriage, the definition of marriage is a physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the One Almighty God. From the definition of marriage, it shows that marriage is not only a physical bond, but also an inner bond, and basically marriage adheres to the principle of monogamy. Meanwhile, a marriage in Article 26 of the Civil Code is valid if it is carried out in accordance with the procedures and conditions determined by the Law. The consequences of this regulation can be seen in Article 81 of the Civil Code which states that no religious ceremony can be carried out before both parties register their marriage before a Civil Registry officer which is then proven to a Religious Official so that both parties can carry out a religious ceremony. Based on this regulation, it can be seen that the Civil Code only views a marriage from the perspective of its civil relationship, but does not see it from the perspective of religious law.³

¹Budi Susilo, 2008, Divorce Lawsuit Procedure, Third Edition, Pustaka Yustisia, Yogyakarta, p. 11.

²Dahlan Hasyim, 2007, Theoretical Review of the Principle of Monogamy is Not Absolute in Marriage, Mimbar Journal of Social and Development, Vol 23 Number 2, p. 300

³Wahyono Darmabrata and Surini Ahlan Sjarif, 2015, Marriage Law and Family Law in Indonesia, Publishing House of the Faculty of Law, University of Indonesia, Jakarta, p. 3

If a married couple marries without a marriage agreement, Article 35 paragraph (1) of the Marriage Law applies, namely that property acquired during the marriage becomes joint property.⁴ Divorce is essentially a relationship between husband and wife that no longer shares a common goal. The marriage law does not explicitly regulate divorce, but rather stipulates that divorce is only one cause of marital dissolution. Other causes include death and court decisions. Divorce is the termination of a marriage by a judge's decision or by the demands of one of the parties.⁵

No couple generally wants to divorce. Divorce is the end of the marital relationship between husband and wife, which is why many people consider it a failed marriage.⁶ With marriage, joint assets arise. Regarding these assets, Law Number 1 of 1974 concerning Marriage has regulated Article 35, namely that assets obtained during the marriage are joint assets and assets obtained through gifts or inheritance under the control of each party, as long as the parties do not specify otherwise, are assets brought in.⁷

Marital property belongs to both husband and wife, even if only the husband or wife works. Marital property is formed during marriage happen, determined according to each party's sense of justice, but in general it is determined according to fairness, not time.⁸ The Civil Code also regulates the issue of joint property in marriage. Article 119 of the Civil Code states that from the moment a marriage occurs, the husband's assets are automatically combined with those of the wife. This combination of assets is valid and cannot be disputed as long as the marriage does not end due to divorce or death. However, if a husband and wife agree not to combine their assets, they can make an agreement before a notary before the marriage takes place, as stated in Articles 139-154 of the Civil Code. Regarding the division of joint property, Article 128 of the Civil Code stipulates that their joint assets are divided equally between the husband and wife or between their heirs, regardless of the origin of the assets.⁹

Joint property in marriage will continue to bind the husband and wife as long as they are still in the marriage bond because the husband and wife have rights to the property, so that if the husband or wife wants to transfer joint property, they must ask for the consent of their partner as regulated in Article 36 paragraph (1)

⁴J. Satrio, 1991, *Marital Property Law*, 1st ed., Citra Aditya Bakti, Bandung, p. 189.

⁵Subekti, 1985, *Principles of Civil Law*, Intermasa, Jakarta, p. 23.

⁶Aditya Minang, *The Role and Responsibilities of Notaries in the Distribution of Joint Assets*, *Jurnal Selisik* - Volume 7, Number 2, December 2021, p. 18

⁷J. Andy Hartanto, 2012, *Marital Property Law*, 2nd Edition, Laksbang Grafika, Yogyakarta, p. 15.

⁸Dominikus Rato, 2015, *Customary Marriage and Inheritance Law in Indonesia (Kinship, Marriage and Inheritance System According to Customary Law)*, Laksbang Pressindo, Yogyakarta, p. 85.

⁹Abdul Manan, 2006, *Various Problems of Islamic Civil Procedure Law in Indonesia*, Kencana Prenada Media Jakarta, p. 104

of the Marriage Law which states that regarding joint property, the husband or wife can act with the consent of both parties. Consent is an absolute requirement in all actions regarding legal acts such as selling, pawning, and pledging joint property, if the husband or wife carries out a legal act without the consent of the partner, the act is null and void by law.¹⁰ The dissolution of a marriage due to divorce will impact joint assets acquired during the marriage.¹¹ Married couples usually only question the division of joint assets (joint property) after there is a divorce decision from the court.¹²

Every citizen has the right to receive legal protection as mandated in the 1945 Constitution of the Republic of Indonesia. Article 28 I of the 1945 Constitution states that: everyone has the right and freedom from discriminatory behavior on any basis and has the right to receive protection against discriminatory treatment. When a marriage ends in divorce, the division of joint assets often becomes a complex and disputed issue. One of the parties who is often disadvantaged in this process is women. Therefore, women should not be treated discriminatorily by anyone, including their own husbands. When a marriage breaks down due to divorce, women as ex-wives still have the right to receive a share of joint assets from their ex-husbands.

2. Research Methods

This research is normative legal research. The approach used is a statute approach. The data used is secondary data sourced from primary, secondary, and tertiary legal materials. The data collection method uses library research (document study). The analysis used is prescriptive.

3. Results and Discussion

3.1. Position of Joint Assets Between Husband and Wife Post Divorce

Marital assets are assets that can be used by a husband or wife to meet their daily needs as well as the needs of the children in their family.¹³ Joint property is property acquired by a husband and wife during the marriage, from the beginning of the marriage until the marriage ends due to divorce, death, or a

¹⁰Elva Monica, *Transfer of Land Rights from Joint Property Without the Consent of the Husband and Wife*, Indonesia Notary, Volume 3, Article 19, p. 287

¹¹Abdul Manan, "Problems of Divorce Due to Adultery in the Case Settlement Process in the Religious Courts," *Jurnal Mimbar Hukum*, al-Hikmah & DITBINBAPER, Jakarta. No. 52 Year XII 2007. p. 7

¹²Bernadus Nagara, 2016, *Division of Joint Assets or Joint Property After Divorce According to Law Number 1 of 1974*, Lex Crimen, Vol. V/No. 7, p. 51

¹³Melia, Muzakkir Abubakar, and Darmawan, 2019, *Division of Joint Assets After Divorce: A Study of Supreme Court Decision Number 597K/AG/2016*, *IuS Journal*, Volume VII Number 3, p. 507

court decision.¹⁴ Joint property, also known as joint property, is based on the principle that if a man and woman are bound in marriage as husband and wife, then all property and children they produce are jointly owned by both of them.¹⁵

Legally, joint property after a divorce is a legal object that must be divided between the former husband and wife, because the right to joint ownership of the property remains until it is divided according to applicable law. With the termination of the marriage bond, the joint ownership status is not automatically terminated, but changes to an undivided state of ownership (in *gemeenschap*), awaiting legal resolution through an agreement or court decision.

According to the provisions of Article 119 of the Civil Code (KUH Perdata), since the marriage is legally conducted, a total unity of property automatically arises between husband and wife, unless otherwise stipulated in the marriage agreement. This unity of property cannot be removed or changed during the marriage through any agreement between husband and wife. This provision regulates the existence of joint property, which based on Article 121 of the Civil Code not only includes all the assets of the husband and wife, but also includes their respective debt obligations. In addition, as regulated in Article 122 of the Civil Code, income earned by both parties during the marriage, including profits and losses, also becomes part of the joint property. In terms of managing joint property according to the Civil Code, there is the principle of *Marital Macht* which refers to the husband's authority to manage the household and joint property.¹⁶

Based on Article 124 of the Civil Code, the husband is the one who can manage joint assets. Furthermore, according to Article 125 of the Civil Code, it is stipulated that if the husband is in a state of absence or is unable to express his will, and immediate action is required, the wife is permitted to encumber or transfer items that are part of the joint assets, after obtaining authorization from the district court to do so. In other words, it is clear that in the Civil Code, the husband's position has an advantage or higher position than the wife's position. From this provision, in the rules regarding joint assets in the Civil Code, the mixing of assets between husband and wife begins from the time the marriage takes place. Thus, all assets brought by each party into the marriage are legally considered joint assets.¹⁷ Under civil law, divorce only ends the marital relationship but does not automatically terminate joint ownership of property.

¹⁴Wahjono Darmabrata and Surini Ahlan Sjarif, 2016, *Marriage and Family Law in Indonesia*, University of Indonesia, Jakarta, p. 96.

¹⁵M. Idris Ramulyo, 2006, *Marriage Law, Inheritance Law, Religious Court Procedure and Zakat According to Islamic Law*, Sinar Grafika, Jakarta, p. 34.

¹⁶Akhmad Budi Cahyono and Surini Ahlan Sjarif, *Op.cit.*, p. 60.

¹⁷Amanda Lauza, 2024, *Post-Divorce Joint Property Disputes Reviewed from Western Civil Law*, *Journal of Humanities and Political Law (JIHHP)*, Volume 4 Number 5, p. 1389

Therefore, until division occurs, joint property remains jointly owned, subject to the principle of *gemeinschaftliches Eigentum*, or undivided joint ownership.

The status of joint property between husband and wife after divorce has a strong legal basis in the national legal system. Based on the provisions of Article 35 paragraph (1) of Law Number 1 of 1974 concerning Marriage, joint property is property acquired during the marriage. Furthermore, Article 36 paragraph (1) emphasizes that with regard to joint property, both husband and wife can take legal action based on mutual agreement. This provision reflects the principle of equal rights between husband and wife, both in the household and in social life. Meanwhile, Article 37 states that if a marriage ends due to divorce, then joint property is regulated according to their respective laws. This means that after a divorce, the legal status of joint property remains, only the marital relationship as the basis of togetherness has ended. Thus, husband and wife no longer have the right to joint control, but each has the right to a proportional share of the property. Before the division is carried out, joint property is still considered temporary communal property that cannot be transferred or controlled unilaterally by either party.¹⁸

Meanwhile, from an Islamic legal perspective as stipulated in Article 97 of the Compilation of Islamic Law (KHI), it is stated that a divorced widow or widower is each entitled to half of the joint property unless otherwise specified in the marriage agreement. This provision confirms that after a divorce, joint property remains recognized as joint property that must be divided fairly between both parties ($\frac{1}{2}$: $\frac{1}{2}$). The provisions in Article 97 of the KHI are in line with the provisions in Article 128 of the Civil Code which states that after the dissolution of joint property, the property will be divided equally between the husband and wife or their heirs, without questioning the origin of the goods. This provision applies if there is no marriage agreement that stipulates otherwise.

In practice, Supreme Court jurisprudence also reinforces this legal position. Supreme Court Decision No. 137 K/AG/2007 stated that a wife retains the right to half of the joint assets even if she does not play a direct role in earning a living. Non-material contributions, such as household chores, are recognized as an integral part of the formation of joint assets. Therefore, divorce does not terminate a wife's rights to joint assets, but rather transforms them into individual rights after the division process is complete.

Thus, it can be concluded that the status of joint property between husband and wife after divorce remains recognized as joint property until there is a legal division. The property may not be controlled or transferred unilaterally without the consent of the former spouse. After the division is carried out, its status

¹⁸Hilman Hadikusuma, 2014, *Indonesian Marriage Law According to: Constitution, Customary Law, Religious Law*, Mandar Maju, Bandung, p. 115.

changes to the personal property of each party. Based on the provisions in Article 97 of the Compilation of Islamic Law and the provisions in Article 128 of the Civil Code, the division is usually carried out equally ($\frac{1}{2}:\frac{1}{2}$), but the judge still has the authority to consider factors of contribution, fairness, and agreement of the parties in his decision.

An analysis of the status of joint property after divorce can be linked to Gustav Radbruch's Theory of Justice. Radbruch stated that good law must contain three basic values: justice (*gerechtigkeit*), utility (*zweckmäßigkeit*), and legal certainty (*rechtssicherheit*). These three values are referred to as the three pillars of legal ideas, which are interconnected and often create tension with each other (*Spannungsverhältnis*). However, when conflicts arise between them, Radbruch asserts that justice must be placed as the highest goal of law.¹⁹

The division of joint assets after divorce as regulated in Article 97 of the Compilation of Islamic Law (KHI) and Article 128 of the Civil Code guarantees legal certainty through an equal division between husband and wife ($\frac{1}{2} : \frac{1}{2}$). However, the judge has the authority to assess substantive justice by considering the real contributions of each party, both material and non-material. Based on Gustav Radbruch's Theory of Justice, justice is not only measured by legal texts, but also by the law's ability to present justice that is alive and beneficial to society. Thus, the division of joint assets is not merely formal, but must reflect distributive justice, social benefits, and legal certainty in a balanced manner.

Radbruch's views are in line with the values of Pancasila, especially the second and fifth principles, as well as with the principles of the rule of law and the right to fair legal certainty as regulated in the 1945 Constitution. In this context, judges are obliged to explore and interpret the law in accordance with the values of justice that exist in society (Article 5 paragraph (1) of Law No. 48 of 2009). Therefore, the distribution of joint assets after divorce must be carried out proportionally, civilized, and humanely, not only upholding positive law, but also realizing humane social justice as idealized by Radbruch and the values of Pancasila.

Furthermore, justice in Islam provides an ethical and spiritual foundation that strengthens the Pancasila's view of justice. Islam views justice (*'adl*) as a primary principle in all aspects of life, including family law. The Qur'an, Surah An-Nisa, verse 58, affirms:

﴿ إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ إِنَّ اللَّهَ نِعِمَّا يَعِظُكُمْ بِهِ إِنَّ اللَّهَ كَانَ سَمِيعًا بَصِيرًا ۝٥٨ ﴾

¹⁹Satjipto Rahardjo, 2000, Legal Science, PT Citra Aditya Bakti, Bandung, pp. 53–55,

Latin:

innallâha ya'murukum an tu'addul-amânâti ilâ Ahlihâ wa idzâ hâkamtum bainan-nâsi an taḥkumû bil-'adl, innallâha ni'immâ ya'id Hukum bih, innallâha kâna samî'am bashîrâ.

It means:

"Indeed, Allah commands you to convey the mandate to those who are entitled to receive it, and (orders you) when you determine a law between people, so that you determine it fairly."

In Indonesian positive law, the principle of Islamic justice is adopted in the Compilation of Islamic Law (KHI). Article 97 of the KHI states that "Widows or widowers who are living are each entitled to half of the joint property, as long as it is not stipulated otherwise in the marriage agreement." This provision reflects proportional justice, not merely nominal equality. Judges can consider the wife's non-material contributions, such as her role in the household and childcare, as part of the formation of joint property. Furthermore, Article 229 of the KHI emphasizes that judges in resolving cases must consider the Islamic legal values that exist in society and prioritize peace. This provision reinforces that justice in Islamic family law is not merely formal, but also aims to realize the benefit (*maslahah*) and balance the rights of the parties. Thus, when Gustav Radbruch's Theory of Justice, which emphasizes the balance between justice, benefit, and legal certainty, is linked to Pancasila justice and Islamic justice, the distribution of joint property after divorce gains comprehensive legal legitimacy. Positive law guarantees certainty, Pancasila embodies humanitarian and social values, while Islam provides moral and spiritual dimensions. The three combine to form a legal framework that is not only normatively just, but also substantively just and humane.

3.2. Forms of Legal Protection for Women's Rights in the Division of Joint Assets After Divorce

In principle, the division of marital property must be carried out fairly. The procedure for obtaining marital property is as follows:²⁰

1. The division of marital property can be submitted simultaneously with the divorce suit by mentioning the joint property and evidence that the property was acquired during the marriage in the *posita* (reason for filing the suit). The request for division of property is stated in the *petitum* (lawsuit). Because this suit has a legal basis, namely Article 86 paragraph (1) of the Religious Courts Law which

²⁰Seri Mughni, 2024, Protection of Women in the Division of Gono Gini Assets as a Result of the Dissolution of Marriage Due to Divorce, *Sejahtera: Journal of Inspiration to Serve the Country* Vol. 3, No. 1, p. 62

states that a suit regarding control of children, child support, wife support and joint property of husband and wife can be submitted together with the divorce suit or after the divorce decision has obtained permanent legal force.

2. The division of marital property is proposed after a divorce decree, meaning a lawsuit is filed for joint assets. Article 97 of the Compilation of Islamic Law (KHI) states, "Widows or widowers who are divorced are each entitled to half of the joint assets, unless otherwise stipulated in the marriage agreement."

Women are often in a legally and socially vulnerable position after divorce, particularly regarding the division of joint property due to the prevailing patriarchal social structure. Therefore, the state is obliged to guarantee effective legal protection to ensure women receive substantive justice. This protection can be divided into preventive and repressive measures.

Preventive protection is carried out before violations occur, through mechanisms such as prenuptial agreements (Article 29 of the Marriage Law), which allow for the separation of personal assets and prevent unilateral control; joint agreement on joint assets (Article 36 paragraph (1) of the Marriage Law) which prevents sales without the wife's permission; the right to legal assistance for women who are unable to afford it (Law No. 16 of 2011); and recording assets during the marriage to strengthen the proof of the wife's economic rights.

Meanwhile, repressive protection is provided when women's rights are violated. This includes the right to sue for the division of joint assets (Article 37 of the Marriage Law and Article 97 of the Compilation of Islamic Law), the right to cancel the unilateral transfer of joint assets, recognition of the wife's non-material contribution in decisions such as Supreme Court No. 137 K/AG/2007 and Supreme Court No. 266 K/AG/2010, as well as gender-just judges' decisions in accordance with Article 5 paragraph (1) of the Judicial Power Law. This protection is strengthened through Law No. 7 of 1984 (CEDAW), Law No. 23 of 2004 (PKDRT), Law No. 12 of 2022 (TPKS), and PERMA No. 3 of 2017 which emphasizes the obligation of judges to pay attention to gender equality and the socio-economic conditions of women.

The application of legal protection for women's rights in the division of joint property after divorce reflects the implementation of Philipus M. Hadjon's legal protection theory, which asserts that a state governed by the rule of law is obligated to protect the rights of its citizens, particularly vulnerable groups such as women. This protection is manifested not only in written norms but also through judicial mechanisms that allow for substantive rights restoration.

Preventively, Indonesian law provides an adequate framework through the Marriage Law, the Compilation of Islamic Law (KHI), and other implementing regulations. Instruments such as prenuptial agreements, joint property agreements, free legal aid, and property registration serve to prevent violations

of women's rights. However, their effectiveness remains hampered by low legal awareness and the limited capacity of officials to implement the principle of gender equality.

While repressive, there has been a positive shift in judicial practice toward substantive justice, with judges beginning to recognize wives' non-material contributions and adopting a gender-just approach as stipulated in Supreme Court Regulation No. 3 of 2017. However, inconsistencies in decisions between courts indicate that repressive protection has not fully provided legal certainty. Thus, legal protection for women in the division of joint property in Indonesia is progressive but not yet fully effective. Strengthening is needed through:

- a. Increasing the capacity of judges and judicial officials in understanding gender-based justice;
- b. Legal education and expanding access to legal aid for women;
- c. Establishment of permanent Supreme Court jurisprudence recognizing the wife's non-material contribution.

These steps will make the Indonesian legal system more in line with the principles of the rule of law according to Hadjon, namely law as a tool to protect people's rights, not merely an instrument of power, and ensure social justice and equality for women in accordance with Pancasila and the 1945 Constitution.

4. Conclusion

Joint assets after divorce remain recognized as joint property until legally divided. The division is generally carried out in a balanced manner ($\frac{1}{2}:\frac{1}{2}$) in accordance with Article 97 of the Compilation of Islamic Law (KHI) and Article 128 of the Civil Code (KUHPdata), but judges can adjust based on substantive justice and the contributions of each party. This principle reflects Gustav Radbruch's Theory of Justice, the values of Pancasila justice, and Islamic justice, which emphasize balance and welfare, so that the law functions to realize moral and social justice. Legal protection for women in the division of joint assets includes preventive protection through marriage agreements, asset supervision, and mutual agreement, as well as repressive protection through the right to sue for distribution, cancellation of unilateral actions, and recognition of the wife's non-material contributions, as stipulated in PERMA No. 3 of 2017 and various Supreme Court decisions. Regulations such as Law No. 7 of 1984 (CEDAW), Law No. 23 of 2004, and Law No. 12 of 2022 strengthen women's economic rights. Based on Philipus M. Hadjon's theory, legal protection for women is increasingly progressive, but still requires consistent enforcement and a gender justice perspective to be more effective.

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