

## ABSTRAK

Key Words: Marriage Cancellation, *Maslahah al-Mursalah*, *Iddah*

Marriage cancellation is one of the consequences of any problems that arise in households. In the Islamic view of marriage cancellation it is called as *fasakh*. In practice *fasakh* was divided into two; marriage *fasid* and marriage *bathil*. Each of that has a different factor and effect against the couple husband and wife. In Indonesia the rules about marriage cancellation regulated in Act No. 1 Year 1974 on marriage. Malaysia which is a unitary State composed of 14 States. One that is the State of Johor, that country has its own family laws which also regulate the marriage cancellation, is Islamic Family Law Enactment No.17 Year 2003 Johor State. Both in Johor and Indonesia have various similarities and differences, such as the majority of the citizens are muslims and also has the same race that Malays. So, on the issue of marriage cancellation there are differences causative factor in the marriage cancellation, rising a different legal effects as well.

Based on problems above, the researcher designed object problems as follows: 1) what the similar and different factors that causing the marriage cancellation in Indonesia and Malaysia in view Act No. 1 Year 1974 on marriage and Islamic family law Enactment No. 17 Year 2003, 2) what legal impact of the marriage cancellation in Indonesia and Malaysia in view of *maslahah al-mursalah*.

This research is normative research which uses library material or library research. Approach used in this research is statue approach. Data collecting method done by documentation method, begun from legal material determination, legal material inventory, and legal material observation comprehensively, systematically, and structural analysis.

The conclusions of this study show that the factor causing the marriage cancellation in Indonesia is contained in Article 26 and 27 of Act No. 1 Year 1974 on marriage in the State of Johor contained in Article 53 Islamic family law Enactment No. 17 Year 2003. The absence of *Iddah* in Act No. 1 Year 1974 on marriage makes it a problem for the wife that her marriage ended as a result of marriage cancellation. meanwhile Johor was rule it, For Johor State the wife's right after breakdown marriage remain fulfilled. The lack of *Iddah* period in Indonesia in the event of marriage cancellation gives rise to new problems, especially for children who are still in the fetus.

### **The Background of The Research**

Every marriage reputed legal by religion and state if the marriage has complied with the terms and not breaking the conditions of marriage either inform both religious and State law.<sup>1</sup> If there are prohibitions in a marriage or violated the terms set by law, then the marriage can be terminated or cancelled.

There are many factors which cause marriage cancellation. In general, there are two factors causes the marriage cancellation, *first* it happened before marriage. When the couple was married and after sometime known that the wife or husband are the same family that forbidden to marry. *second*, the factor happens after marriage, it happens when the couple are married, then are of them change their religion, like the wife is being Protestan or Christian. So the husband can submit the petition to court to cancel the marriage.

Every state that the citizens' majority are muslims rules the act that has relation with marriage. For examples Indonesia and Malaysia. Indonesia has specific regulation about marriage namely The Act No. 1 Of 1974 on Marriage. While Malaysia has The Islamic Family law (Federal Territories) Act 1984. However Malaysia is unite state, this states of 14 State and each of them have regulation about marriage. For instance, In Johor State the regulation about marriage ruled in Islamic Family Law Enactment no. 17 Year 2003 of Johor State.

---

<sup>1</sup> Hilman Hadikusuma, *Hukum Perkawinan Indonesia Menurut Perundangan Hukum Adat Hukum Agama*, (Bandung : Mandar Maju 2007),. P. 1

Both of Indonesia and Malaysia have cases about marriage cancellation. Marriage cancellation always make new problem in family. There are some effects. The problem not only for the parties but also for other parties, like for the child and the third party in contract.

Indonesia regulated cancellation of marriage in Marriage Act Of 1974. In this act regulated the method of breakdown a marriage, that chapter IV about Marriage cancellation in Article 22<sup>th</sup>-28<sup>th</sup>. This Article regulates the meaning, the factors and impacts of marriage cancellation. This act explains about the factors and impacts of the marriage cancellation. Meanwhile in Johor marriage cancellation ruled on Islamic Family Law Enactment no. 17 of Johor State Year 2003. It ruled not detail, there is not differences between marriage cancellation and divorce. It regulated on Article 55<sup>2</sup>

In this research the researcher uses *maslahah al-mursalah* as the tool to analyze and interpretation the act of marriage cancellation. As named above the source of law in Indonesia and Malaysia is Syafi'i books.

#### **A. The Statement of Problem**

From the background of the problem, this research addresses are as follows there following questions:

1. What are similar and different factors causing marriage cancellation in Malaysia and Indonesia on The Act No. 1 Marriage Regulation Of 1974 Indonesia And Islamic Family Law Enactment no. 17 Year 2003 of Johor State perspective?
2. What are impact of marriage cancellation in Malaysia and Indonesia on The Act No. 1 Marriage Regulation Of 1974 Indonesia And Islamic Family Law Enactment no. 17 Year 2003 of Johor State perspective based on *maslahah al-mursalah* view?

#### **B. The Objective of Research**

From the formulation of the problem proposed above, this study aims :

1. To compare the factors causing marriage cancellation in Indonesia and Malaysia on The Act No. 1 Marriage Regulation Of 1974 Indonesia And Islamic Family Law Enactment no. 17 Year 2003 of Johor State perspective.
2. To describe the impact of marriage cancellation in Malaysia and Indonesia on The Act No. 1 Marriage Regulation Of 1974 Indonesia And Islamic Family Law Enactment no. 17 Year 2003 of Johor State perspective according *maslahah al-mursalah* view.

#### **C. Research Method**

This research uses normative research or study on literature (*library research*), so by Amiruddin,<sup>3</sup> this study is also called doctrinal legal research. The type of research is the normative research, and as the consequence of the problems, so an approach that can be used by researcher is comparative approach. In this writing the researcher also use *maslahah al-mursalah* as a tool to explain the theory. *maslahah al-mursalah* is a method in *ushul fiqh* (basics *fiqh*), the scholars use it to solve some problem in this era.

According to Marzuki, the data sources used in the normative research is secondary data, which consists of primary legal materials; secondary legal materials, and tertiary legal materials.<sup>4</sup> Collection data method is systematic procedure and standart to get data that served.<sup>5</sup> The steps in data collection method that will runs the writer is to find and looking for data that have relation with the main problem, pick out the valid data from some source. The writer use literature research, so the data will get from books, journal and another source like website, dictionary and encyclopedia. Data processing method explain the procedure of processing and analyze data accordance with the used approach in this study. This study uses the comparative approach. Therefore, researcher explains the results of comparison data that used in Indonesia and Malaysia to good, logical, and effective sentence for easy of understanding and

<sup>2</sup>[Http://Www.Jksm.Gov.My/Jksmv2/Index.Php?Option=Com\\_Wrapper&View=Wrapper&Itemid=8&Lang=Bm](http://Www.Jksm.Gov.My/Jksmv2/Index.Php?Option=Com_Wrapper&View=Wrapper&Itemid=8&Lang=Bm) In November 29, 2014

<sup>3</sup>Amiruddin, *Pengantar Metode Penelitian Hukum*, (Jakarta: Rajagrafindo Persada, 2004), P. 118.

<sup>4</sup>Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Kencana, 2010) 6<sup>th</sup> Edition. H.118.

<sup>5</sup>Moh Nazir, *Metode Penelitian*, (Bogor: Ghalia Indonesia. 2011), P. 174

interpretation.<sup>6</sup> Data analyzing started by editing, classifying, verifying, analyzing and the last is concluding.

#### D. Previous Research

The function of previous research is to differentiate this research with other researches that have some topics. In this research the researcher take four previous researches. From that research the writer have differences in his research, the research method of writer is comparative research. The writer will compare the marriage cancellation in Indonesia and Malaysia. And this research is normative research meanwhile all of researches above are empirical research.

#### Theories

##### A. Marriage

Marriage is agreement that permit a sex relation and limit right and obligation between man and woman and both of them don't have blood relation. Marriage is a main form in social life. Not only to rules a domestic life and to continue generation, marriage also viewed as a way to get brotherly among ethnics. The brotherly is a way to help among ethnics.<sup>7</sup> Allah Said<sup>8</sup>

وَإِنْ خِفْتُمْ أَلَّا تُقْسِطُوا فِي الْيَتَامَىٰ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَتًى وَثَلَاثَ وَرُبْعَ فَإِنْ خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً أَوْ مَا مَلَكَتْ أَيْمَانُكُمْ ذَٰلِكَ أَدْبَىٰ أَلَّا تَعُولُوا ﴿٦٠﴾

“If ye fear that ye shall not be able to Deal justly with the orphans, marry women of your choice, two or three or four; but if ye fear that ye shall not be able to Deal justly (with them), then only one, or (A captive) that your right hands possess, that will be more suitable, to prevent you from doing injustice.”

There are five pillars and conditions of marriage. If it is not filled, the marriage will be considered illegal. And the pillars and conditions did not correct the married is broken. Are, Guardian, Predilection (like) from wife part, Two fair witnesses, *Ijab* (transfer) and *Qobul* (acceptance), Dowry.

The main purpose of marriage is to legalize the sex relation between husband and wife. Beside that purpose there are other purposes that support the goal of marriage, that are,<sup>9</sup> To get generation, To fully the instinct as human, To keep human from wickedness and damaged, To form and to rule domestic, To make activities in looking for money and increase responsibility.

There are many legal provision. According to scholars the basic law of marriage is tradition (*sunnah*), but if someone is afraid to make wickedness (*zinâ*) and he is able to marriage then it becomes obligatory. The marriage is forbidden for someone whom don't give money for wife, both body and spiritual.<sup>10</sup>

##### 1. Marriage in Indonesian Law Perspective

government make a law that used to all of citizens of Indonesia. It Act No 1 Year 1974 on Marriage this regulation rules about all of marriage problem. And there is additional explanation of the act, it state paper of Republic Indonesia No 3019.<sup>11</sup> And before that regulation made there is a regulation was exist, it *Bergerlijk Wetboek* (BW), this regulation is law of Netherland Regulation Book.

However Indonesia have 2 Act about marriage, both of that used all. The existence BW in this time is rarely, cause the contents of book do not suitable with societies and in BW not only rules about Marriage but also everything about civil relation (*perdata*). So, Indonesian societies use The Act No 1 Year 1974 on Marriage because this Act just explain about Marriage and suitable with period.

<sup>6</sup>Pedoman Penulisan Karya Ilmiah Tahun 2012P. 29.

<sup>7</sup>Sulaiman Rasjid, *Fiqh Islam*, (Bandung: Sinar Baru, 1992), P. 348

<sup>8</sup>QS. An-Nisa (4): 3

<sup>9</sup>Soetojo Prawirohamidjojo, *Pluralism dalam Perundang-Undangan Perkawinan di Indonesia*. (Surabaya: Airlangga University Press. 2006), P. 28-29.

<sup>10</sup>Hilman Hadikusuma, *Hukum Perkawinan...* p. 21-22

<sup>11</sup>Sudarsono, *Hukum Perkawinan Nasional*. (Jakarta: Rineka Cipta, 2005). P.6

Meanwhile the Act No. 1 year 1974 of Indonesia on Marriage said, that the marriage have legal reputed if done by the regulation of every religions and and their trust. Like for muslims the marriage have legal reputed by Islam regulation, just like that for every religion.

## 2. Marriage in Malaysia Law Perspective

Malaysia recognizes 2 law systems in marriage, civil marriage and Islamic marriage.<sup>12</sup> The civil or monogamous opposite sex marriage is being practiced by non-Muslims and non-natives in Malaysia under the Law Reform (Marriage and Divorce) Act 1976. Non-Muslims continue to insist on strictly monogamy marital relationships as an essential of marriage.

Whereas in Islamic marriage, polygamy permitted with certain restrictions. Men can only marry up to four (4) wives at any one time; however, most men have only one. Muslim women are not allowed to practice polyandry in which one woman has more than one husband at the same time.

### B. Marriage Cancellation in Islamic Perspective

There are many reason to broke the marriage according Islam like *thalaq*, *khulu'*, *zihar ila'*, *fasakh* and *lia'an*. All of that ruled on al-Quran and Hadits, every broken marriage have specific cause and effect for spouse. Actually al-Quran and Hadits was regulated completely but by development time there are some problem appears in the societies. Marriage cancellation in Islamic perspective namely *fasakh*. The meaning of *fasakh* is breaking or cancelling the relation between husband and wife. It happen because of when the marriage agreement (*aqad*<sup>13</sup> *nikah*) the pillars and conditions didn't complete or during marriage period there are something come and cancelling the marriage.<sup>14</sup>

In this research the researcher will use the theory of al-Jaziri, Indonesia and Malaysia have same specification in marriage cancellation. Although Indonesia did not acknowledge the *fâsid* and *bathil* marriage, in the regulation there are contents of Article ruled about it. Meanwhile in Malaysia more detail about *fâsid* and *bathil* marriage, in Johor state the regulation about it ruled by detail.

Therefore the result between *fasakh* and *thalaq* (divorce) have same result is broke the marriage but the effects are different. The effect of divorce doesn't broke the marriage directly, there is waiting period (*iddâh*) for wife to waiting the status of herself. But in *fasakh* no waiting period, when *fasakh* done the marriage directly.

In addition, divorce give opportunity for husband to take his wife, because there is waiting period for wife. The goal of waiting period is to give sometime to husband to rethink by take the wife back or release her. When the husband takes his wife back, he doesn't need new agreement. Different with *fasakh* when the husband wishes to take his wife back, he must renew agreement of marriage (*aqad*).

### C. Al-Maslahah Al-Mursalah

The scholars of *ushul* give some definitions about *maslahah al-mursalah* by "Give a legal law to some case noticeably in Al-Quran and Tradition or consensus, on the basis of maintaining the benefit". Al-Ghazaly formulate *mursalah al-maslahah* as follows

ما لم يشهد له من الشرع بالبطلان ولا بالاعتبار نص معين

"anything that there was no evidence of *syariah* for her in the form of nash in particular that invalidate it, and no one will do"<sup>15</sup>

Meanwhile, according to al-Syathibi, as quoted by Imam al-Saukani, *maslahah al-mursalah* Affairs that is in line with the actions/type of action the *syara'* are not indicated by a specific proposition. There are many definition defined by scholars but them agreed that the definition of *maslahah al mursalah* suitable with this,<sup>16</sup>

1. *Maslahah al-mursalah* is something have good reputed by consideration can create goodness or evade disrepute for human.
2. Something have good reputed by mind, also in line and suitable by the goals of *syariah* in decide law.

<sup>12</sup><http://www.lawyerment.com/library/kb/Families/Marriage/1019.htm>. On December 2, 2014

<sup>13</sup>Marital agreement between man and woman to make a family

<sup>14</sup>Abd. Rhaman Ghazaly, *Fiqh Munakahat*, (Jakarta: Kencana, 2006), P. 141-142

<sup>15</sup>Amir Syarifuddin, *Ushul Fiqh*,. p. 355

<sup>16</sup>Amir Syarifuddin, *Ushul Fiqh*,. p. 356

3. Something have good reputed by mind, also in line and suitable by the goals of *syariah* have not specially instruction in *syariah* that push and acknowledge it.

In applying a law or on the basis of *maslahah* certainly shouldn't be perfunctory, must comply with the specified requirements. To stronger the arguments in use *maslahah al-mursalah*, scholars use argumentation which the form of argument is rational argumentation. In this case difficult enough to use *nash* argument directly, cause *maslahah al-mursalah* used when the case haven't texts basis legality.

In *maslahah al-mursalah* no comparison as in *qiyas and istihsan*, but merely looked at the benefit of the people. Way of *ijtihad maslahah al-mursalah* cause Islamic law will be able to accommodate the new things but still will not lose its identity as an Islamic law. In addition to proven theorems also that the values of Islamic law would be appropriate for any time and place. In other words Islamic law will direct people's lives to the General principles on the one hand and on the other hand will absorb the realities and the changes that the conditional nature continues to happen all the time.<sup>17</sup>.

## The Result

### A. The Similarities And Differences Factors Causing Marriage Cancellation

#### 1. Marriage Cancellation in Act No 1 on Marriage Year 1974 Indonesia

Indonesia was regulated marriage cancellation on Act of Marriage Act No. 1 Year 1974 on Article 22-28. Article 22 said,<sup>18</sup>

*“Perkawinan dapat dibatalkan, apabila para pihak tidak memenuhi syarat-syarat untuk melangsungkan perkawinan”.*

The meaning of this Article is a marriage can cancelled if the spouses cannot fulfill the condition/ requirement and the pillar of marriage. The pillars and conditions are the most important thing in marriage. Every marriage reputed legal if it meet the pillars and conditions.

There are many factors cause marriage cancellation in Indonesia. This problem do not rules on marriage regulation completely, but the regulation about it regulate completely in BW. The marriage cancellation in Marriage Act No. 1 Year 1974 Article 26-27 is<sup>19</sup> “

1. *Perkawinan yang dilakukan di hadapan pegawai pencatatan perkawinan yang tidak berwenang.*
2. *Wali nikah yang melakukan perkawinan itu tidak sah.*
3. *Perkawinan dilangsungkan tanpa dihadiri oleh 2 orang saksi*
4. *Perkawinan dilangsungkan dibawah ancaman yang melanggar hukum.*
5. *Ketika perkawinan berlangsung terjadi salah sangka mengenai diri suami atau istri.”*

Marriage cancellation request submitted to court which has power in law. The court<sup>20</sup> have power to decide the request is the court where the marriage done or the spouse live. It ruled on Article 25 *“permohonan pembatalan perkawinan diajukan kepada pengadilan dalam daerah hokum dimana perkawinan dilangsungkan atau ditempat tinggal kedua suami istri, suami atau istri”.*<sup>21</sup>

#### 2. Marriage Cancellation in Malaysia

In its implementation of Malaysia's wedding cancellation referred to by the name *Faraq*. *Faraq* in have meaning as the dissolution of the wedding without going through divorce. *Faraq* differences from divorce is common in view of the dissolution of marriage through divorce is due because there are no problems in the family, whereas *Faraq* due to the pillars of marriage itself is not valid. In the case of a court only *Faraq* can determine the validity of a marriage. *Faraq* command can only be issued by a court when proven to be a marriage is not valid. What is an invalid marriage is no/missing one condition or does not meet the valid requirements of marriage.<sup>22</sup>

Through the provisions of Article 11 Administrative Law Enactment no. 17 Islamic family Johor 2003 provides that” *A marriage shall be void unless all conditions necessary, according to Hukum Syarak*

<sup>17</sup> Amir Syarifuddin... p. 357-362

<sup>18</sup>Sudarsono, *Hukum Perkawinan Nasional*. P. 106. Compare with. Hilman Hadikusuma. *Hukum Perkawinan Nasional*, P. 75

<sup>19</sup>Hilman Hadikusuma, *Hukum Perkawinan Nasional*. P. 76 compare with Sudarsono. *Hukum Perkawinan Nasional*. P. 107

<sup>20</sup>In Indonesia if the request come from moslem it can submites to religious court and for nonmoslem it submits to state court.

<sup>21</sup>Sudarsono, *Hukum Perkawinan Nasional*, P. 107

<sup>22</sup>Ahmad Shahbari Salamon, *Fiqh dan Perundangan Islam*,(Kuala Lumpur: Dewan Bahasa dan Pustaka: 2001), P. 59

for the validity thereof are satisfied". If a wedding that turns out broke or cancel as erroneously guardian, does not fulfill the marriage pillars or the conditions then a marriage could be applied to dissolved and the husband and wife cancelled

Meanwhile in Johor state marriage cancellation still have one explanation in act. That is ruled on Islamic Family Law Enactment no. 17 Year 2003 of Johor State. In this act there is not differences between divorce and marriage cancellation. Both of that ruled on Article 55 about "Maintenance of Register of Divorces and Annulments."<sup>23</sup>

*Faraq* case is different from the divorce. in the divorce, women who divorce have to wait until the end of the waiting period (*iddâh* (three times holy)) before being allowed to marry other people. In the dissolution of marriage, the couple *Faraq* of may by the wedding process without having to wait three times Holy. However, if the bride choose to marry someone else, they have to wait until finished her *iddâh* . The time taken to get married again, depending on the process of marriage that is done.<sup>24</sup>

### **3. The Similarities Factor Causing Marriage Cancellation In Indonesia And Malaysia**

National legal factors to cancel the marriage in Indonesia and Malaysia (Johor State) is set out in national legislation. In Indonesia the annulment of marriage are regulated in Article 26-27 of Act No. 1 Year 1974 on Marriage in this legislation the factor marriage cancelation not mentioned in detail because there are other reasons that could render the marriage null and void but not provided for in this Article. But Malaysia's Johor state specifically Act concerning factor cause cancellation of the marriage are regulated in detail and only regulated in Article that is all, the Article about cause marriage cancellation mentioned on Article 53 Islamic Family Law Enactment no. 17 Year 2003 of Johor State.

Most Muslims in Indonesia and Malaysia are still there who cling to the traditional Fiqh perspective. Which, according to the people's understanding that the marriage was valid if made on the basis of classical fiqh terms because it is set at the time of the Prophet. Many citizens is those country don't follows the national regulation, they marry according fiqh perspective only and ignore the National Regulation.

#### **3.1 Religion**

Main factors in marriage is religion, both Indonesia and Malaysia regulated the religion in their Act. According Article 2 verse (1) Act No. 1 Year 1974 On Marriage "*bahwa perkawinai. adalah sah apabila dilakukan menurut hukum masing-masing agama dan kepercayaan.*" Meanwhile in Johor Malaysia mentioned the religion of spouses in Article 10 verse (1) "*No man shall marry a non-Muslim, except a Kitabiyah.*"

#### **3.2 The Registration of Marriage**

Then in the Article 2 (2) of Act No. 1 Year 1974 On Marriage "*tiap-tiap perkawinan harus dicatat menurut peraturan yang berlaku.*" The regulation is law number 22 (1946) and Act No. 32 of 1954, in Johor the register on Marriage ruled on Article 25 Islamic Family Law Enactment No 17 Year 2003 State Of Johor. "*The marriage after the appointed date of every person resident in the State of Johor and the marriage of every person living abroad who is resident in the State of Johor shall be registered in accordance with this Enactment.*"

#### **3.3 The Guardian of Marriage**

Next in Act No. 1 On Marriage 1974 in Indonesia on Article 26 a something that cancel the marriage is invalid guardian of marriage "*Wali nikah yang melakukan perkawinan itu tidak sah.*" The means guardian of marriage is not legal guardians were not fulfill terms as guardian. The terms of guardian is have blood relation, if not be represented the guardian of woman, she can asks to the judge as a guardian. Whereas in Johor rules on the presence of a guardian in marriage must be present in marriage according to Article 7 Islamic Family Law Enactment No. 17 Year 2003 state of Johor "*A marriage in the State of Johor shall be in accordance with the provisions of this Enactment and shall be solemnized in accordance with Hukum Syarak by the wali in the presence of the Registrar*". The guardian of marriage

<sup>23</sup>[http://www.jksm.gov.my/jksmv2/index.php?option=com\\_wrapper&view=wrapper&Itemid=8&lang=bm](http://www.jksm.gov.my/jksmv2/index.php?option=com_wrapper&view=wrapper&Itemid=8&lang=bm). Accessed on December 05 2014

<sup>24</sup>Ahmad Shahbari Salamon, *Fiqh dan Perundangan Islam*, P. 67

in marriage are the pillars of marriage, if the pillars are violated then the marriage husband and wife will be null and void.

### 3.4 The Marriage Under Threat

Other factors which cancel the marriage because marriage is under threat as Article 27 "*Seorang suami atau isteri dapat mengajukan permohonan pembatalan perkawinan apabila perkawinan dilangsungkan di bawah ancaman yang melanggar hukum.*" And in Johor on Article 53 verse G "*That she (wife), having been given in marriage by her wali Mujbir before she attained the age of baligh repudiated the marriage I before attaining the age of eighteen years, the marriage not having been consummated*" and in verse J. In marriage should be based on mutual affection without any threat. Another case with threat of parents who wanted her son to get married for the sake of her happiness. The intent under threat or duress because it can cause hazard for husband or wife.

### 3.5 Breaking the Prohibiting of Marriage

Although in Act No. 1 Year 1974 On Marriage, the Article that discusses about the factors that cancel the marriage mentioned in Articles 26 and 27 and there were only 5 points. However, in practice there are various factors that cause the marriage cancelled. In Indonesia there are other factors that can cancel the marriage but the Article mentioned in the section the terms of marriage in Article 8 of Act No. 1 Year 1974 On Marriage.

## 4. The Differences Factor Causing Marriage Cancellation In Indonesia And Malaysia

### 4.1 Indonesian Context

Abdul Manan in his book civil law problems of islam in Indonesia explain in detail the factors that led to the cancellation of marriage in Indonesia. He explained by taking a base of Compilation of Islamic Law (KHI). In KHI mentioned in more detail the reasons for cancellation of marriage in Indonesia. According to him though in Indonesia use the term cancellation in legislation, but in practice Indonesia also recognizes marriage *bathil* and marry *fasid*.

KHI basically is a Presidential Instruction No. 1 of 1991. In the hierarchy of legislation in Indonesia the position of KHI only as a Presidential Instruction that have no power of law or comparable legislation. So in its application often KHI defeated when biting with the other laws such as Act No. 1 Year 1974 on Marriage.

In KHI there are two reasons that could cancel the marriage. First, the Marriage is annulled by law and a second, the marriage is annulled. The notion of Marriage is annulled by law when the marriage has violated the conditions and pillars of marriage, so that the marriage has no validity. While the intent of marriage can be cancelled is because the marriage has fulfilled the conditions and pillars of marriage but there are violations in the marriage.

### 4.2 Johor Context

Article 50 of IFLA provides that upon the application of the wife for a *Faraq* divorce, the judge will send a notice to the husband informing him of the wife's intention. He will then proceed to record the sworn statement of the wife and of at least two witnesses. If the judge is satisfied that the provisions of Muslim law have been complied with, he will make an order or decree as is lawful for *Faraq* divorce and he will register and issue the certificate for divorce.

The procedure for a *Faraq* in other states is very similar, although it is further provided in Perlis that if the husband is not in the state or it is impossible to serve the notice on him, then such notice shall be served on the nearest relative of the husband. No decree of *Faraq* shall be pronounced by the judge save in accordance with Muslim law and in pursuance of the evidence of the married woman and at least two witnesses. Upon pronouncing a decree for the dissolution of marriage, the judge must register it as a divorce and issue a certificate thereof in a prescribed form to the wife.<sup>84</sup>

### **B. The Impact of Marriage Cancellation Based on *Maslahah***

Everything has been decided by a court has legal consequences for either the applicant or the respondent. Consequences arising from marriage cancellation in Indonesia is regulated in Article 28 Act No. 1 Year 1974.

---

<sup>84</sup>Zaleha Bt Kamarudi, *A Comparative Study of Divorce Among Muslims and Non-Muslims in Malaysia with Special References to The Federal Territory of Kuala Lumpur*, (London: University College of London, 1992), P. 223-224

1. *Batalnya suatu perkawinan dimulai setelah keputusan pengadilan mempunyai kekuatan hukum yang tetap dan berlaku sejak saat berlangsungnya perkawinan.*
2. *Keputusan tidak berlaku surut terhadap:*
  - a. *Anak-anak yang dilahirkan dari perkawinan tersebut.*
  - b. *Suami atau istri yang bertindak dengan I'tikad baik.*
  - c. *Orang-orang ketiga lainnya yang tidak termasuk dalam a dan b sepanjang mereka memperoleh hak-hak dengan iktikad baik.*

#### 1. The Status of Marriage

The meaning of the first verse is the first result of the marriage cancellation is a marriage null and void by Court decision. This Article is a result of the marriage has been annulled and the couple were considered never did marriage. So, in practice judges cannot never disconnect the matter if the lawsuit in excess of the second 28's Article.

#### 2. The Status of Children

For children born in a marriage that is valid in spite of the cancellation of the child marriage remains recognized as children of married couple who filed for annulment of marriage. The child still has the right as a child of the husband and wife as rights get a living and heir.

Whereas, in the second Article explained that the Court ruling could not reach in three issues that arise when a marriage happened. Due to the marriage cancellation verdict came after it is done by married couples. Essentially the Court can't break things that have happened while the law of the case there after the incident.

#### 3. The Third Parties

The purpose of a third party in this Article is the one that is present in marriage however did not have marital relations with couple, for example in the case of business, contracts or credit. As for third parties in marriage on the decision of the judge on Marriage cancellation is not retroactive towards third parties who acquired his rights in good faith before the decision has force of law anyway.

#### 4. *Iddâh*

Meanwhile in Johor state for marriage cancellation case have same impact for husband and wife like the impact of divorce. The wife after decision of marriage cancellation by Judge she have right for *iddâh* period. And also she have right money given during *iddâh* period. This was ruled on Article 60 of Islamic Family Law Enactment No. 17 Year 2003 of Johor State "*The court may, subject to Hukum Syarak, order a man to pay maintenance to his wife or former wife.*"

However, in this study the researcher further examined in case *iddâh* a wife in marriage cancellation case. If cancellation of the marriage in Johor there are *iddâh* period and also a living cost for his wife, this is happens if after the decision of the judge of annulment of marriage the husband did not renew his marriage. So, that the marriage was never considered. However, if the aqad of wedding updated then the wife is have not *iddâh* period, because the wife marries to the same man.

In Indonesia in case of marriage cancellation caused an aborted of marriage due to terms and pillars that are not valid or is incomplete, and is due to the wedding that is prohibited. For the annulment of marriage due to an invalid terms the couple can file updates to marriage. As for the marriage cancellation due to the prohibition to marry should be terminated his marriage.

According to Islamic law the impact of the breakdown in the marriage is *iddâh* for wife, both *iddâh* period as well as a living cost. In case of marriage cancellation for Indonesia does not have *iddâh* for the wife. According to the opinion of the judge the meaning of cancel is not acknowledging the existence of a thing that has happened. So in the case of cancellation of marriage as a result of this matter does not admit the existence of marriage and other things that arise as a result of marriage. However this is not in accordance with the intentions of Islamic law, which aims to safeguard the right of every people to Islam.

As mentioned in Act No. 1 Year 1974 on Marriage, a wife has no *iddâh*, it also not mentioned the existence *iddâh* in KHI. The absence of *iddâh* for wife in Indonesian Act this could make excuses a husband for break the marriage by marriage cancellation, because the husband does not have to give his wife a living cost when *iddâh*

### **Conclusion**



Marriage cancellation in Indonesia and Malaysia basically have the same legal basis, i.e. based on the classic book of *fiqh*. But in laws development Malaysia more accommodate the rights of each of its citizens. In terms of the factor that caused the cancellation of marriage is more detailed in comparison to Malaysia in Indonesia. Researcher concluded that any amendment of existing laws in Malaysia (Johor) the enactment of the family law of Johor state Year 2003 which led to the marriage cancellation in Malaysia factor in more detail.

The presence of the *iddah* for wife in the regulations in the State of Johor makes the wife fulfilled the right to justice. Inversely proportional to in Indonesia, where after the judge's decision on the marriage cancellation the wife have not *iddah* period, so she can just after the Court decision directly married to someone else. This will pose a new problem if the wife pregnant the baby of husband and wife who have been divorced. So the need for rules governing these matters which must be in accordance with the benefit of the husband or wife is good for them.

## BIBLIOGRAPHY

### Al-Qur'an

Alimin Dan Euis Nurlaelawati, Potret Administrasi Islam Di Indonesia, Tangerang: Orbit Publishing, 2013.

Amin Summa Muhammad, Hukum Keluarga Islam Di Dunia Islam, Jakarta: Raja Grafindo Persada, 2005.

Amiruddin, Pengantar Metode Penelitian Hukum, Jakarta: RajaGrafindo Persada, 2004

Asmawi Muhammad. Nikah dalam perbincangan dan perdebatan. Yogyakarta Darussalam 2004.

Djazuli A., Kaidah-Kaidah Fikih: Kaidah-Kaidah Hukum Islam Dalam Menyelesaikan Masalah-Masalah Yang Praktis, Jakarta: Kencana, 2010

Djubaidah Neng, Pencatatan Perkawinan dan Perkawinan Tidak Dicata, Jakarta: Sinar Grafika, 2010

Fakultas Syariah UIN Maulana Malik Ibrahim Malang, Pedoman Penulisan Karya Ilmiah Tahun 2012. Malang. 2012

Ghazaly Abd. Rahman, Fiqh Munakahat, Jakarta: Kencana, 2006

Hadikusuma Hilman, Hukum Perkawinan Indonesia Menurut Perundangan Hukum Adat Hukum Agama, Bandung: Mandar Maju, 2007.

### Articles

Ayu Sofyana Putri Nabella Artha, Pembatalan Perkawinan Dan Akibat Hukumnya Di Pengadilan Agama Karanganyar,

Garis Panduan bagi Prosedur Pentadbiran Perkahwinan Perceraian dan Ruju'.

Halimatus Sa'diyah Nur, Ultra Petitem Partium Dalam Putusan Pengadilan Agama Tentang Pembatalan Perkawinan (Studi Putusan No. 394/Pdt.G/2008/PA/Pasuruan.), Uin Malang, 2011,

### Regulation

Regulation No.1 Of 1974 About Marriage, LNRI No. 1 of 1974

Islamic Law Compilation, Presiden Instruction No. 1 of 1991

Islamic Family law (Federal Territories) Act No. 303 of 1984

Enactment no. 17 family law of Johor State of 2003