



## CHAPTER I INTRODUCTION

### A. The Background of The Research

Marriage for people is something which very sacred and cannot be separated from provision of religious law. People who married did not merely want to give their lust, but they want to get peace and to implement the Tradition (*sunnah*) of prophet Muhammad. The purpose of marriage is to realize domestic life in *sakinah mawadah warohmah*<sup>1</sup> situation. Allah said<sup>2</sup>

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ  
بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً إِنَّ فِي ذَلِكَ لَآيَاتٍ لِقَوْمٍ يَتَفَكَّرُونَ ﴿٣٠﴾

---

<sup>1</sup>Muhammad Asmawi, *Nikah (Dalam Perbincangan Dan Perdebatan..)* (Yogyakarta: Darussalam 2004), P. 3

<sup>2</sup>QS. Ar-Rumm (30): 21

*"And among His Signs is this, that He created for you mates from among yourselves, that ye may dwell In tranquillity with them, and He has put love and Mercy between your (hearts): Verily In that are Signs for those who reflect".*

During marriage time each couple may have problem in their domestic life. Not only a couple but almost couples felt it. There are couples can pass it, but not all them can pass. In marriage, there are many problem, usually couple in face such as economic, in social and relation affect to law. In addition, the marriage not only ruled in religion but also in state.

Actually the regulation about marriage existed before independent state. It made by custom leaders and the scholars of religions. It develops in societies until a state formed. Leaders of custom and scholars was carried the regulation from their custom and religion make into state regulation.<sup>3</sup>

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. 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. Not each couple can cancel their relation that has legal power in state and religion. Couple can cancel their relation by submitting their proposal to the court. The breakdown of a marriage can be caused by decision of the Court. The breakdown in the marriage on the basis of the Court decision can occur due to a petition for cancel

---

<sup>3</sup>Hilman Hadikusuma, *Hukum Perkawinan Indonesia Menurut Perundangan Hukum Adat Hukum Agama*, (Bandung : Mandar Maju 2007),. P. 1

the marriage were filed by the parties concerned or have been harmed due to the marriage.

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.

The researcher interests to research marriage cancellation in Johor because Johor is a state of Malaysia near Indonesia. The geography of Johor is same with Indonesia there, in addition the researcher have same partner in there. So, researcher decided to make a research about marriage cancellation in Johor.

Both of Indonesia and Malaysia have cases about marriage cancellation. In Indonesia there is public figure an artist who has case about marriage cancellation that was submitted by her father. She is Asmirandah Zentman who have husband Rivanno Watimena have problem in their marriage. The problem on their

marriage happen when Rivanno Watimena change his religion. Actually Rivanno Watimena before marries with Asmirandah Zentman is catholic but he was promise to be moslem when marries with Asmirandah Zentman. After some weeks he changes his religion again to be catholic. This is the factor cause the Asmirandah Zentman's father to submit the petition about marriage cancellation.

Meanwhile in Johor Muhammad Nazirul Azman Nasaruddin and Zanariah Abdullah has directed parted ways after the religious Office confirm their wedding is invalid. Both marriage is invalid because the wedding were under way using guardian jugde while younger brother Zanariah, Mohd Shafiq, who was then 19 years of age are eligible to be guardians. Petition for marriage cancellation the couple that made by religious Department subsequently received by the Court when the Court decided the couple parted by the cancellation of the wedding and can remarriage at any time.

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. For the contract like the contract of house or car, who will continue to pay the credit? For children when their parents was separated, they shall lost attention from parents. The other problem is in inheritance, will they get the inheritance or not?

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. In Article 22<sup>th</sup> consist

*“Perkawinan dapat dibatalkan, apabila para pihak tidak memenuhi syarat-syarat untuk melangsungkan perkawinan”.*<sup>4</sup>

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>5</sup>

*“Tiap-tiap Pendaftar dan juga Ketua Pendaftar hendaklah menyenggara suatu Daftar Perceraian dan Pembatalan dan hendaklah serta-merta mencatatkan di dalamnya butir-butir yang ditetapkan mengenai semua perintah perceraian dan pembatalan yang dihantar kepadanya di bawah subseksyen dan mengenai semua perintah perceraian dan pembatalan yang dipohon di bawah subseksyen untuk didaftarkan.”*

Both Indonesia and Malaysia adopted *fiqh* the source of National law. They use the classic books as source, like Syafe'e madhhab, Maliki, Hambali and Hanafi books. The Act No 1 of 1974 about Marriage in Indonesia in many Article adopted from Syafi'i books, in the same hands in Malaysia the Federal Family Act No 303 of 1983 that the source of law family in part of states adopted from this act also use syafi'i books.

In this research the researcher uses *masalah 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. Meanwhile the scholars of Syafi'iyah as the followers of Syafi'i do not use *masalah al-mursalah* as way

<sup>4</sup> UU No. 1 of 1974, LN No 1 of 1974

<sup>5</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

to do *ijtihad*. Imam Syafi'i don't touch this way in his book *ar-risalah*. This argument supported by al-Amidi and Ibn al-Hajib in their book *al-Bidâkasyi*.

But some scholar of Syafi'iyah argue that they use the *maslahah al-mursalah* as way to do *ijtihad*. They agreed using the *maslahah al-mursalah* not fully, but with some notation that although this *maslahah* isn't supported by *syâra'* directly or not, at least that *maslahah* close with the principles of *syâra'* law which permanently.<sup>6</sup>

Actually Indonesia and Malaysia have some similarities like same ethnic and islam is the majority religion of citizens. Before Malaysia was colonized by England, Indonesia and Malaysia under a kingdom of Majapahit, therefore, both countries have several same tradition. After Malaysia got the independent, it used law of British and Indonesia used law of Netherland, because Indonesia colonized by Netherland. From the similarities and differences between Malaysia and Indonesia the researcher want to research about “**Comparative Study on Marriage Cancellation on *Maslahah al-Mursalah* (The Act No. 1 Marriage Regulation Of 1974 Indonesia And Islamic Family Law Enactment no. 17 Year 2003 of Johor State)**”

## **B. 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

---

<sup>6</sup> Amir Syarifuddin, *Ushul Fiqh*, (Jakarta: Kencana, 2009), P. 358-359

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?

### **C. 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.

### **D. Significance of Research**

The results of the present study expected to be a useful as reference, both theoretically and practically. Theoretically, this study aims to describe, determine, and analyze the marriage cancellation in Malaysia and Indonesia. Both of them have similarities and differences.

Practically, the results of this research are expected to make a contribution and input for policy makers in the implementation of the Act of marriage. In

addition, it can be useful for the preparation of legislation on marriage law, as well as an improvement to the legislation that has loopholes that may be used. In addition, the results of this research can also be used as reference material for the community in performing and conducting the marriage.

### **E. Operational Definition**

**Marriage** : Legal union of a man and woman as husband and wife.<sup>7</sup>

**Cancellation** : have not law consequences because of have not complete the terms or valid law.<sup>8</sup> Say that already arranged will not be done or happen<sup>9</sup>

**Maslahah** : A something seen good by mind because can import a goodness and evade disrepair for human, and suitable with Islamic law when decide the law.<sup>10</sup>

**Mursalah** : Regardless or free from the explanation that indicate able or not to be done.<sup>11</sup>

### **F. Research Method**

To get a valid result of research from scientific essay the research method have an important duty. This part very influence in research, duty of research method is leading the writing to the goal of research. There are many methods in research that used by researcher. The research methods used in this research are,

<sup>7</sup>Oxford, *Learner's Pocket Dictionary*. (English: Oxford University Press), 2008 4<sup>th</sup> Edition P.270

<sup>8</sup>Dzulkifli Umar, *Kamus Hukum*, (Surabaya: Gramedia Press, 2012). P. 90

<sup>9</sup>Oxford, *Learner's Pocket Dictionary*,. P. 59

<sup>10</sup> Amir Syarifuddin, *Ushul Fiqh*,. P. 347

<sup>11</sup> Amir Syarifuddin, *Ushul Fiqh*,. P. 254



## 1. Type of Research

Based on the background presented by researcher, this research is study in the field of law. This research uses normative research or study on literature (*library research*), so by Amiruddin,<sup>12</sup> this study is also called doctrinal legal research. Because this study conceptualizes what is written against the norms of society behaves as a standard. So then the data used are secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials. Normative law research is is the method that used in law research. It done by search library materials that use to discuss books that have connection with the title.

## 2. Research Approach

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. The meaning of approach is scientific view that used to understand data. The comparative approach means the approach that performed by reviewing the law for comparing the Islamic legislation of other countries about the similarities and differences thing.<sup>13</sup>

Thus, researcher will identify problems that arise in the community, legislation, document or other literature about the title. This research is intended to understand the problems that arise to marriage cancellation. The researcher

---

<sup>12</sup>Amiruddin, *Pengantar Metode Penelitian Hukum*, (Jakarta: Rajagrafindo Persada, 2004), P. 118.

<sup>13</sup>*Pedoman Penulisan Karya Ilmiah Tahun 2012* (Malang: Fakultas Syariah UIN Maulana Malik Ibrahim, 2012) P. 21

chose this approach because this research is systematic research that used to research an object in literature area without manipulating data.

In this writing the researcher also use *masalah al-mursalah* as a tool to explain the theory. *masalah al-mursalah* is a method in *ushul fiqh* (basics *fiqh*), the scholars use it to solve some problem in this era.

### 3. Source of data

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>14</sup>

Therefore, the research literature, will use the data to help research in the form of secondary data which divided into primary legal materials, secondary legal materials and tertiary legal materials. Primary legal materials which will be used is the Law. The main materials in this research are Act No 1 of 1974 about Marriage and Islamic Family Law Enactment no. 17 Year 2003 Of Johor State.

Secondary legal materials are materials that help in explanation of the primary materials. The form of Secondary legal materials books, literature, regulations and other concepts related to the approach in this study, like Hukum Perkawinan Nasional; Sudarsono, Pokok-Pokok Hukum Perdata: Subekti, Penelitian Hukum: Peter Mahmud Marzuki, Tahir Mahmood: Personal Law in Islamic countries and the websites that have relation with this research like [www.jksm.gov.my](http://www.jksm.gov.my), [www.lwyerment.com](http://www.lwyerment.com).

---

<sup>14</sup>Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Kencana, 2010) 6<sup>th</sup> Edition. H.118.

While the tertiary legal materials in this study are materials that give instructions or additional information to the primary legal materials and secondary legal materials, which form a dictionary or encyclopedia.

#### **4. Data Collection Method**

Collection data method is systematic procedure and standart to get data that served.<sup>15</sup> Both primary legal materials and secondary legal materials collected by topic issues that have been formulated based documentation system<sup>16</sup> that allows researcher to explore the materials obtained and classified according to the source and hierarchy to be studied comprehensively.

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.

#### **5. Data Processing Method**

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 interpretation.<sup>17</sup> Data analyzing started by editing, classifying, verifying, analyzing and the last is concluding. The steps of data processing of research as follows:

---

<sup>15</sup>Moh Nazir, *Metode Penelitian*, (Bogor: Ghalia Indonesia. 2011), P. 174

<sup>16</sup>Jhon W. Creswell, *Research Design: Pendekatan Kualitatif, Kuantitatif, Dan Mixed*, Terj. Achmad Fawaid, (Yogyakarta: Pustaka Pelajar), 2010, P. 269.

<sup>17</sup>Pedoman Penulisan Karya Ilmiah Tahun 2012P. 29.

a. Editing

The data is a number of used information that obtained from documents or related books on law in Indonesia and Malaysia. Primarily on it is completeness, clarity of meaning, appropriateness and relevance of a data with any other data. this step the researcher will review the result of data to know the complete data.

b. Classifying

The researcher studies the acquired data, so it can be classified or grouped on focus problems. This is done to ease in analyzing data. Thus, the researcher analyzes the data by classifying the multiple categories.<sup>18</sup> The goal of this step is to take easy the researcher or the reader to understand this research, caused there are many data got when research happen.

The step in classifying is the researcher will classify the the regulation about marriage cancellation in Indonesia and Johor state. There are many regulation about it, in Indonesia there are BW (*Burgerlijk Wetbook*) and the Act No. 1 of 1974 on Marriage meanwhile in Johor is Islamic Family Law Enactment no. 17 Year 2003 Of Johor State.

c. Verifying

Checking data is through on understanding from the acquired data. So, the next step done after the classification step is verification step, i.e. researcher step to restart or repeat the correctness of the data and has been classified, so there are no errors or mistake.

---

<sup>18</sup>Amirudin and Zainal Asikin, *Pengantar Metode Penelitian Hukum*, (Jakarta : Rajawali Pers, 2006), P. 168.

The researcher will verify the data from the source, which data will use in this research. There are many data got from the source like Regulation, Journal and article. In this step the he will verify the data.

d. Analyzing

Data analysis is a very critical step in research. analyzing the data, shall ensure that the analysis patterns will be used. In analyzing the data, there are two analysis i.e. analysis of statistical and non-statistical.<sup>19</sup> This study uses the analysis of non-statistical where this data is appropriate with descriptive or textual data. And descriptive data only analyses the data according to the contents. Therefore, this kind of analysis is often called the analysis of the content (content analysis).<sup>20</sup> In this step the researcher will analyzing the textual data from the source of data. The analyzing will analyze the Regulation, Journal and article. This step will explain by detail in chapter 3.

e. Concluding

After the end of analyzing, the last step is concluding. The last step is intended to concluding any information of acquired data. in this step the researcher hopes finding the answers of the result of research, and get the true and accurate conclusion. This step will conclude the research in chapter, which the concluding is the last step of this research. He will get the result of this research in this step.

---

<sup>19</sup>Sumadi Suryabrata, *Metodologi Penelitian*, (Jakarta, Rajawali Pers, 2012), P. 40.

<sup>20</sup>Sumadi, *Metodologi* P. 40.

## G. Previous Research

The function of previous research is to differentiate this research with other researches that have some topics. The first thesis writing by Yusnidar Rachman<sup>21</sup> by title “*Pembatalan Perkawinan Serta Akibat Hukumnya Di Pengadilan Agama Slawi*”. This research is empirical research, the research done in religion Court of Slawi. The result of this thesis is this research is study case in religion court. It explains about marriage cancellation caused by false identity. This marriage cancelled because the husband before marriage with his wife he was married and he married again with another identity. This thesis also explains about the division of property that got during marriage.

Next, Nabella Artha Ayu Sofyana Putri<sup>22</sup> by title “*Pembatalan Perkawinan Dan Akibat Hukumnya Di Pengadilan Agama Karanganyar*”. This research is case research the number case is 59/Pdt.G/2005/PA.Slw. The result, at this thesis is about the impact of marriage cancellation for children. For them marriage cancellation cannot take the rights of children, like inheritance and living cost. And this thesis says about the impact to third party like in rent agreement, in selling and buying. If there are third parties in marriage, so the agreement must be done by the agreement.

---

<sup>21</sup>Yusnidar Rachman, *Pembatalan Perkawinan Serta Akibat Hukumnya Di Pengadilan Agama Slawi*. Universitas Diponegoro, Semarang. 2006

<sup>22</sup>Nabella Artha Ayu Sofyana Putri, *Pembatalan Perkawinan Dan Akibat Hukumnya Di Pengadilan Agama Karanganyar*,

The third research is by Sikun<sup>23</sup> he wrote “*Tinjauan hokum islam terhadap pembatalan perkawinan karena pemalsuan identitas dan pengaruhnya atas hak warisan anak*”. This thesis explains about a case in religius court of Bantul. The result of thesis is marriage cancellation caused by fault identity by husband. He was married and marry again by another woman by debase identity. And the child whom born from married get inheritance from her parents. Meanwhile for marriage cancellation. However, the child still have relation with the parents although the marriage was cancelled by court. According the court view the child was born in legal situation he can get inheritance from parents.

And the last research is by Nur halimatus sa'diyah the title is “*Ultra Petitem Partium Dalam Putusan Pengadilan Agama Tentang Pembatalan Perkawinan*” ( Verdict Study no. 394/Pdt.g/2008/PA/Pasuruan) 2011 uin malang. This author discusses research about an award that exceeds the principal of petition. In case the applicant had committed polygamy marriages where such marriages in the applicant collecting two marriages which still exists between the two families. Thus one of the marriage should be annulled and deemed the marriage never existed. However, in this study the applicant filed suit as a divorced, although divorcees on the award judges break the matter as a cancellation of the marriage. The judge ruled the marriage cancellation due to weigh up the evidence and witnesses that have been presented in the petition.<sup>24</sup>

---

<sup>23</sup>Sikun, *Tinjauan Hukum Islam Terhadap Pembatalan Perkawinan Karena Pemalsuan Identitas Dan Pengaruhnya Ata Hak Waisan Anak*. UIN Sunan Kalijaga, Yogyakarta, 2009

<sup>24</sup>Nur Halimatus Sa'diyah, *Ultra Petitem Partium Dalam Putusan Pengadilan Agama Tentang Pembatalan Perkawinan (Studi Putusan No. 394/Pdt.G/2008/PA/Pasuruan.)* 2011, Uin Malang.

From research above 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.

## **H. Structure of Discussion**

In order the research directed and the explanation structured, this thesis will be made with a systematic procedure and organized in four chapters. Each chapters have their focused discussion as described as follows:

**Chapter I** is introduction. This chapter contains: background of research that provide a foundation to think of the matter of research, statement of problem, objective of problem, significance of research , research method aims the discussion research can be directional and systematic, previous research, and the last is the structure of discussion. It is intended that the reader has a global picture of the research. In this chapter explain about originality the research.

**Chapter II**, to get valid result, the writer will import some theories as comparative source in research. From the theories wished can give a picture or problem formulation that found in research object that used in analyzing process. This chapter is to review the concepts and theoretical basis for research analysis. It will be revealed the concept of: Marriage in Islamic law, Indonesia Marriage Law No 1 of 1974 Indonesia , and Islamic Family Law Enactment no. 17 Year 2003 of Johor State view, definition of marriage and marriage cancellation in Islam, Indonesia and Malaysia. This chapter will explain about marriage and marriage cancellation, including the factors, impacts and the parties whom have



role in marriage cancellation. Chapter two is intended to use as the basis of analysis of the research.

**Chapter III** is a research and discussion results. This chapter will describe the legal materials that have been obtained from the research literature. It is the data that has been obtained from reading and studying literature which is then edited, classified, verified, and analyzed. This chapter is the main chapter in this research, it will explain the solving of the problem formulation in first chapter. This chapter is also a part that will be used as a foothold to provide conclusions on the fourth chapter.

In first and second chapter was explained the goal of the research, so in this chapter will solves the problem by method research that was explain before. This chapter will answers the problem of marriage cancellation in Indonesia and Malaysia especially in Johor. The problem in two states will responded by this chapter, both differences and similarities factor cause marriage cancellation and the impact of marriage cancellation.

**Chapter IV** is the conclusion chapter. This last chapter presented conclusion of the discussion of the research as the answer of the statement of problem and stated some suggestions as a contribution of scientific ideas. This chapter is made with the expectation, the reader can understand about the research.