

CHAPTER III

MARRIAGE CANCELLATION ON INDONESIA AND JOHOR STATE (MALAYSIA) ON *MASLAHAH MURSALAH* PERSPECTIVE

A. The Similarities And Differences Factors Causing Marriage Cancellation

In this subchapter the researcher will explain the factors of marriage cancellation in Indonesia and Malaysia. Before explains it, the researcher will explain how the Act on Marriage cancellation in Indonesia and Malaysia. The explanation not only explains about the factors of marriage cancellation, but also the procedure of 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,⁶²

“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.

The petition of marriage cancellation submitted by the parties whom called in Articles 23, 24, 25, 26 and 27 of marriage Act No. 1 Year 1974, is⁶³

1. The family upper generation from husband or wife.
2. Husband or wife.
3. The official who has power to cancel marriage.
4. Official who has Indicated.
5. The person who have importance law with the marriage.

Meanwhile 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 is⁶⁴ “

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*

⁶²Sudarsono, *Hukum Perkawinan Nasional*. P. 106. Compare with. Hilman Hadikusuma. *Hukum Perkawinan Nasional*, P. 75

⁶³Hilman Hadikusuma, *Hukum Perkawinan Nasional*. P. 75-76

⁶⁴Hilman Hadikusuma, *Hukum Perkawinan Nasional*. P. 76 compare with Sudarsono. *Hukum Perkawinan Nasional*. P. 107

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 court⁶⁵ 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*”.⁶⁶

The procedure of marriage cancellation in Indonesia ruled in Article 20-36 Government Act No. 9 Year 1975. In this Act explain about the procedure to submitting the petition, calling both parties, investigation and deciding the petition. It is,

1. Submitting the petition.

The petition submitted to court which have authorities to decide the petition. That Petition made by writing or oral, the appellant can come to court or appointed by lawyer.

2. Accepting the petition.

The petition must registered in court, after that the appellant must pay the cost. Then the petition processed by court.

3. Calling the parties.

The parties will called by court both the appellant or appelanted. The calling will receive three days before the court meeting.

4. Meeting court session

⁶⁵In Indonesia if the request come from moslem it can submites to religious court and for nonmoslem it submits to state court.

⁶⁶Sudarsono, *Hokum Perkawinan Nasional*, P. 107

After court cancelled the marriage many impact (problem) suffer. Article 28 Act Year 1974 on Marriage ruled the impact of marriage cancellation. Is

1. *Batalnya suatu perkawinan dimulai setelah keputusan pengadilan mempunyai kekuatan hokum 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 dengak iktikad baik.*

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.⁶⁷

According Law Reform (Marriage And Divorce) Act 1976 on Article 4.2⁶⁸

- 4.2.1 *Although there is a legal marriage, you may petition to the Court to annul your marriage in any of the following circumstances:*
- (a) *if the marriage has not been consummated due to incapacity of either you or your spouse to do so;*

⁶⁷Ahmad Shahbari Salamon, *Fiqh dan Perundangan Islam*,(Kuala Lumpur: Dewan Bahasa dan Pustaka: 2001), P. 59

⁶⁸<http://www.lawnet.com.my/lawnetpublic/LegalInformation/LegalAwareness/FamilyLawandYouPart2/tabid/74/Default.aspx>. Accessed on December 05 2014

- (b) *when after the marriage your spouse refuses, without good reason, to consummate the marriage;*
- (c) *when either of you did not consent to the marriage or your consent was obtained as a result of threats, mistake or unsoundness of mind;*
- (d) *when at the time of the marriage, either of you though capable of giving a valid consent, was suffering from mental illness such as to be unfit for marriage;*
- (e) *when at the time of the marriage your spouse was suffering from venereal disease in a communicable form; or*
- (f) *when at the time of the marriage your wife were already pregnant by someone other than by you.*

4.2.2 *If any of the above situations occurs, your marriage is considered a "voidable marriage", i.e., you can petition to Court for a decree of nullity to declare the marriage void.*

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 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” is,⁶⁹

1. *Every Registrar as well as the Chief Registrar shall each maintain a Register of Divorces and Annulments and shall forthwith enter therein the prescribed particulars of all orders of divorce and annulment sent to him*

⁶⁹http://www.jksm.gov.my/jksmv2/index.php?option=com_wrapper&view=wrapper&Itemid=8&lang=bm. Accessed on December 05 2014

under subsection (2) and of all orders of divorce and annulment for the registration of which application is made under subsection (3).

2. *Every Court that grants and records an order or divorce or annulment or that permits and records any talaq or any other form of divorce shall forthwith send one certified copy of the record to the appropriate Registrar and to the Chief Registrar for registration.*
3. *Where a marriage that is solemnized in the State of Johor is dissolved or annulled by an order of a Court of competent jurisdiction outside the State of Johor, either of the parties may apply to the appropriate Registrar and to the Chief Registrar for registration of the order, and the appropriate Registrar and the Chief Registrar, on being satisfied that the order is one that should be recognized as valid for the purposes of the law in the State of Johor, shall register the order.*
4. *Where a pronouncement of talaq before the Court or an order of divorce or annulment, wherever granted, has dissolved a marriage that was solemnized in the State of Johor and has been registered under this Enactment or any written law in force before this Enactment, the appropriate Registrar and the Chief Registrar shall, on registering the talaq or order, cause the entry relating to that marriage in the Marriage Register to be marked with the word "Dissolved" and a reference to the proceedings in which the talaq was pronounced or the order was made.*
5. *Upon registering the talaq or order of divorce or annulment and upon payment to him of the prescribed fees, the Chief Registrar shall issue the divorce or annulment certificates in the prescribed form to both parties.*

Petition to cancel a marriage that is not valid may be made by the spouse of either spouse, parents or guardian or the religious Office aware of the mistake or oversight going on. Some things must be submitted during application *Faraq* a marriage in the Syariah Court is:

1. Petition
2. the Affidavit of support
3. Copy of identity card
4. Marriage certificate
5. Letter of confirmation of marriage

The Procedure *Faraq* In Malaysia is same with Indonesia. The petition can submitted to syariah court or syariah high court. Its depend the how high case, the procedure of *Faraq* is⁷⁰,

1. Submit the application form the completed Divorce
2. the plaintiffs claim to register the registration desk by paying out money costs. then the Court gives the date of the hearing
3. The Court submit summons to a husband or wife
4. couples present at the date and time specified (meeting court sessions) bring along the original documents as follows:
 - Marriage certificate or certificate Ruju '
 - Identity card or personal identification document or passport.
5. Then the court give the decision

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.⁷¹

⁷⁰Jabatan Agama Islam Wilayah Persekutuan dan Mahkamah Syariah, *Buku Panduan Nikah, Cerai dan Ruju* , Jabatan Kehakiman Syariah Malaysia. P 17.

⁷¹Ahmad Shahbari Salamon, *Fiqh dan Perundangan Islam*, P. 67

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

Since the arrival of islam in southeast asia brought by traders, they embraced the islam religion in Southeast Asian. They embraced their thought that the thought is *syafi'e* madhaab. So majority of the muslim population in southeast asia was a follower of the *syafi'e* madhhab. Both in Indonesia and Malaysia are the religions citizens are islam. And they are followers of the *syafi'e* madhhab. So in terms of community worship many followed the Shafi madhhab worship.

But in the law of marriage in Indonesia book used by the Government is a compilation of a variety of classic literature. So not all of the current law is derived from the view of *syafi'e*. The government more literature from *maliki* madhhab in marriage law. So too in Malaysia despite muslim majority there follow *syafi'e* idea, in Islamic family law the country is more embraced at the idea of *maliki*.

In principle a new law when digging the priest *syafi'e* greater emphasis on the principle of prudence. *Imam maliki* when finding a problem that is not yet clear the ruling he uses without neglecting the texts, which there may be a connection between the problems that arise with texts.

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 in those country don't follow the national regulation, they marry according to 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 Marriage⁷² “*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)⁷³ “*No man shall marry a non-Muslim, except a Kitabiyah.*”

Later in that Article explanations that there is not marriage outside their respective religions and beliefs. This is according to the commandments of God as mentioned in *surah al-Baqoroh 221*

⁷²UU No. 1 Year 1974, LNRI No 1 Year 1974

⁷³http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng_enactment_Ori_lib.nsf/f831ccddd195843f48256fc600141e84/8a3accb491fc77c7482576c10031ed2b?OpenDocument 15
apri 2015

وَلَا تَنْكِحُوا الْمُشْرِكَةَ حَتَّىٰ تُؤْمِنَ ۚ وَلَا مَآءَةً مُّؤْمِنَةً خَيْرٌ مِّنْ مُّشْرِكَةٍ وَلَا
 أَعْجَبَتْكُمْ ۗ وَلَا تُنكِحُوا الْمُشْرِكِينَ حَتَّىٰ يُؤْمِنُوا ۚ وَلَعَبْدٌ مُّؤْمِنٌ خَيْرٌ مِّنْ
 مُّشْرِكٍ ۚ وَلَا أَعْجَبَكُمْ ۗ أُولَٰئِكَ يَدْعُونَ إِلَى النَّارِ ۖ وَاللَّهُ يَدْعُو إِلَى الْجَنَّةِ
 وَالْمَغْفِرَةِ بِإِذْنِهِ ۖ وَيُبَيِّنُ آيَاتِهِ ۖ لِلنَّاسِ لَعَلَّهُمْ يَتَذَكَّرُونَ ﴿٣١﴾

Do not marry unbelieving women (idolaters), until They believe: a slave woman who believes is better than an unbelieving woman, Even though she allures you. Nor marry (your girls) to unbelievers until They believe: a man slave who believes is better than an unbeliever, Even though He allures you. Unbelievers do (but) beckon you to the Fire. But Allah beckons by His Grace to the Garden (of bliss) and forgiveness, and makes His Signs Clear to mankind: that They may celebrate His praise.

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 marriage⁷⁴ "*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

⁷⁴ UU No. 1 Year 1974, LNRI No 1 Year 1974

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 Johor⁷⁵ " *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 in marriage are the pillars of marriage, if the pillars are violated then the marriage husband and wife will be null and void. As was said to the Prophet Muhammad

عن عائشة أن رسول الله صلى الله عليه وسلم قال: "لا نكاح إلا بولي وشاهدي عدل

From Aisha that the Prophet said, "no valid marriage unless the guardian and two witnesses who are fair."

3.4. The Marriage Under Threat

Other factors which cancel the marriage because marriage is under threat as Article 27⁷⁶ "*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 G⁷⁷ "*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 " *That she (wife) did not*

⁷⁵http://www2.esyariah.gov.my/esyariah/mal/portaltv1/enakmen2011/Eng_enactment_Ori_lib.nsf/f831ccddd195843f48256fc600141e84/8a3accb491fc77c7482576c10031ed2b?OpenDocument 15
apri 2015

⁷⁶UU No. 1 Year 1974, LNRI No 1 Year 1974

⁷⁷http://www2.esyariah.gov.my/esyariah/mal/portaltv1/enakmen2011/Eng_enactment_Ori_lib.nsf/f831ccddd195843f48256fc600141e84/8a3accb491fc77c7482576c10031ed2b?OpenDocument 15
apri 2015

consent to the marriage or her consent was not valid, whether in consequence of duress, mistake, unsoundness of mind, or any other circumstance recognized by Hukum Syarak". 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.

There are many reason for cancel the marriage, like the religion as above, the guardian and the others. Both Indonesia and Malaysia have similarities and differences. And not all the factors of marriage cancellation regulated on the Act. More details look at the table below.

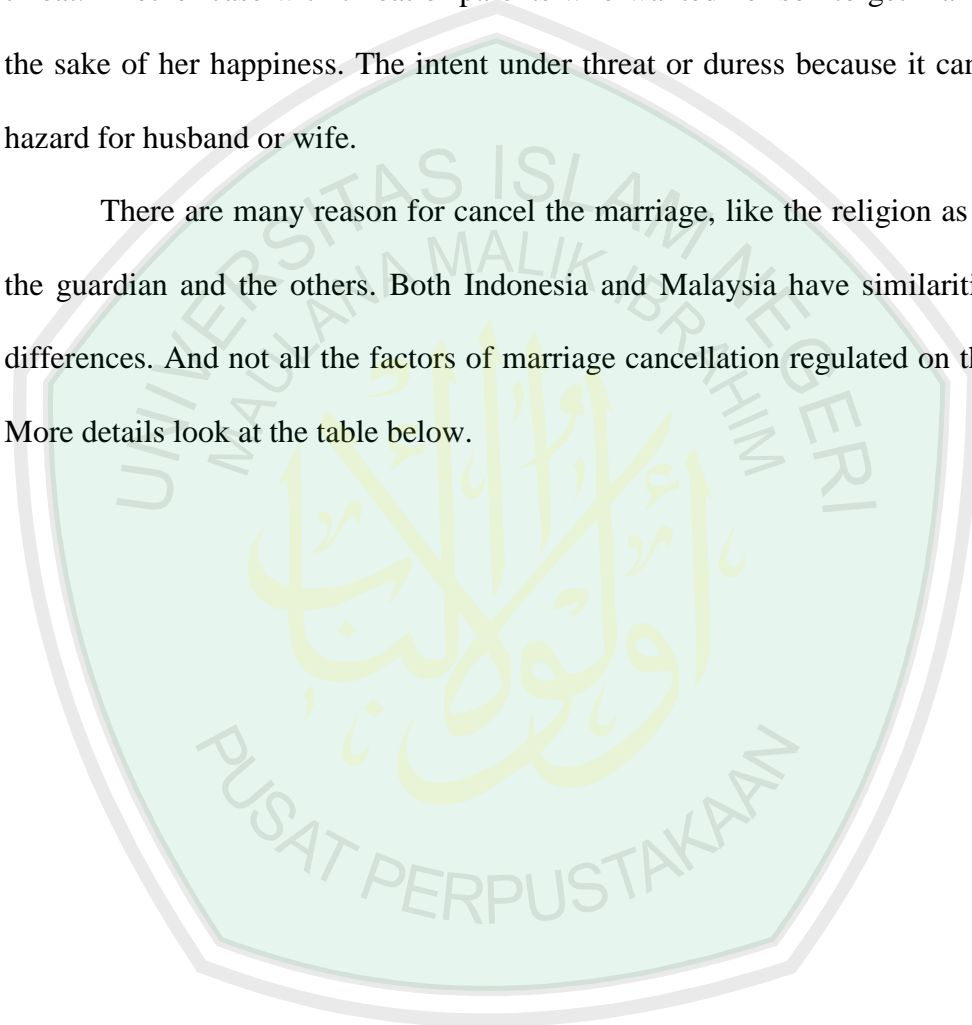


Table the factors causes marriage cancellation according Act No. 1 Year 1974 of Indonesia On Marriage and Islamic Family Law

Enactment no. 17 Year 2003 of Johor state

Indonesia	Malaysia
Article 26 and 27	Article 53
Marriages are performed in the presence of officers of the registry of marriage that is not authorized.	The whereabouts of the husband or wife have not been known for a period of more than one year
Guardians of marriage that did the marriage was not valid.	The husband has neglected or failed to provide for her maintenance for a period of three months
Marriage held without attended by 2 witnesses	The husband or wife has been sentenced to imprisonment for a period of three years or more
The marriage took place under an unlawful threat.	The husband or wife has failed to perform, without reasonable cause, his marital obligations (nafkah batin) for a period of one year
When a marriage goes wrong about going myself husband or wife	The husband was impotent at the time of marriage and remains so and she was not aware at the time of the marriage that he was impotent
	The husband or wife has been insane for a period of two years or is suffering from leprosy or vitiligo or is suffering from a venereal diseases in a communicable form
	That she, 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
	the husband or wife treats her or him with cruelty
	even after the lapse of four months the marriage has still not been consummated owing to the wilful refusal of the husband or wife to consummate it
	she did not consent to the marriage or her consent was not valid, whether in consequence of duress, mistake, unsoundness of mind, or any other circumstance recognized by Hukum Syarak
	at the time of the marriage she, though capable of giving a valid consent, was whether continuously or intermittently, a mentally disordered person within the meaning of the Mental Disorders Ordinance 1952 [Ord. 31/52], or the mental disorder was of such a kind or to such an extent as to render the unfit for marriage
	any other ground that is recognised as valid for dissolution of marriages or fasakh under Hukum Syarak.

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.

In Article 8 Act No. 1 Year 1974 on Marriage ruled about prohibited marriage. If this Article broken the marriage will be cancelled by law. In this Article there are 6 points where the terms between the man and the woman (spouse) must be fully if not their marriage null and void. the points of this Article, namely⁸³

- a. *Berhubungan darah dalam garis keturunan lurus ke bawah ataupun ke atas;*
- b. *Berhubungan darah, dalam garis keturunan menyamping yaitu antar saudara, antara seorang dengan saudara orang tua dan antara seorang dengan saudara neneknya;*
- c. *Sehubungan semenda, yaitu mertua, anak tiri, menantu dan bapak tiri*
- d. *Sehubungan susunan, yaitu orang tua susuan, anak susuan, saudara susuan dan bibi/paman susuan;*
- e. *sehubungan saudara dengan isteri atau sebagai bibi atau ke-menekan dari isteri, dalam hal seorang suami beristeri lebih dari seorang;*
- f. *mempunyai hubungan yang oleh agamanya atau peraturan yang berlaku, dilarang kawin.*

⁸³ UU No. 1 Year 1974, LNRI No 1 Year 1974

So do in Johor the prohibiting marriage ruled on Article 9 Islamic Family Law Enactment no. 17 Year 2003 of Johor State,⁸⁴

- (1) *No man or woman, as the case may be, shall, on the ground of consanguinity, marry*
- (a) *his mother or her father;*
 - (b) *his grandmother or her grandfather upwards whether on the side of his or her father or mother;*
 - (c) *his daughter or her son and his granddaughter or her grandson and his other descendants;*
 - (d) *his sister or her brother of the same parents, his sister or her brother of the same father, and his sister or her brother of the same mother;*
 - (e) *the daughter of his brother or sister, or the son of her brother or sister and the descendants of the brother or sister;*
 - (f) *his aunt or her uncle on his or her father's side and her or his ascendants; and*
 - (g) *his aunt or her uncle on his or her mother's side and her or his ascendants.*
- (2) *No man or woman, as the case may be, shall, on the ground of affinity, marry*
- (a) *his mother-in-law or her father-in-law and his or her ascendants of his wife;*
 - (b) *his stepmother or her stepfather, being his father's wife or her mother's husband;*
 - (c) *his step grandmother or her step grandfather, being the wife of his grandfather or the husband of her grandmother, whether on the side of the father or the mother;*
 - (d) *his daughter-in-law or her son-in-law; and*
 - (e) *his stepdaughter or her stepson and the descendants of a wife or a husband with whom the marriage has been consummated.*
- (3) *No man or woman, as the case may be, shall, on the ground of fosterage, marry any woman or any man connected with him or her through some act of suckling where, if it had been instead an act of procreation, the woman or man would have been within the prohibited degrees of consanguinity or affinity.*

⁸⁴http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng_enactment_Ori_lib.nsf/f831ccddd195843f48256fc600141e84/8a3accb491fc77c7482576c10031ed2b?OpenDocument 15 apri 2015

(4) *No man shall have two wives at anyone time who are so related to each other by consanguinity, affinity, or fosterage which a marriage between them would have been illegal in Hukum Syarak.*

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.

KHI was set aside for Muslims in Indonesia and became the second referral after Act No. 1 Year 1974 On Marriage for religious court judge in deciding a case. One might say KHI is the refinement of Act No. 1 Year 1974 On Marriage. Inside the rules about the Affairs of marriage, inheritance and endowments.

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.

The factors causes marriage cancellation in KHI ruled on Article no 70 and 71. In Article 70 ruled about annulled by law, namely

- a. *Suami melakukan perkawinan, sedangkan ia tidak berhak melakukan akad nikah karena sudah empat istrinya, sekalipun salah satu dari empat istrinya itu dalam iddâh talak raj'i.*
- b. *Seorang suami yang menikahi istrinya yang telah di li'an-nya,*
- c. *Seorang suami yang menikahi bekas istrinya yang pernah dijatuhi talak tiga kali, kecuali bekas istrinya tersebut pernah menikah dengan pria yang lain kemudian bercerai lagi setelah dicampuri pria tersebut dan telah masaiddâh -nya.*
- d. *Perkawinan dilakukan antara dua orang yang mempunyai hubungan darah dalam garis keturunan lurus ke bawah dan ke atas.*
- e. *Perkawinan dilakukan antara dua orang yang mempunyai hubungan darah dalam garis keturunan menyimpang, yaitu antara saudara, antara saudara orang tua, dan antara seorang dengan saudara neneknya.*
- f. *Perkawinan dilakukan antara dua orang yang mempunyai hubungan semenda, yaitu mertua, anak tiri, menantu dan ibu atau ayah tiri.*
- g. *Berhubungan susuan.*
- h. *Perkawinan dilakukan dengan saudara kandung dari istri atau sebagai bibi atau kemenakan dari istri.*

And in Article 71 ruled on Marriage can cancel, if

- a. *seorang melakukan poligami tanpa izin Pengadilan Agama.*
- b. *perempuan yang dikawini ternyata kemudian diketahui masih menjadi istri pria lain secara sah.*
- c. *perkawinan yang dilangsungkan melanggar batas umur perkawinan sebagaimana yang telah ditentukan dalam Pasal 78 Undang-Undang Nomor 1 Tahun 1974.*
- d. *perkawinan di langsunngkan di muka pegawai pencatat perkawinan yang tidak berwenang, wali nikah yang tidak sah atau perkawanan dilangsungkan tanpa dihadiri oleh dua orang saksi.*

- e. perkawinan dilaksanakan dengan paksaan.
- f. perkawinan dilaksanakan dengan ancaman melanggar hukum.
- g. perkawinan dilaksanakan dengan penipuan, penipuan di sini seperti seorang pria yang mengaku sebagai jejaka, padahal telah mempunyai seorang istri ketika pernikahan dilangsungkan, sedangkan ia melanggar karena poligami tanpa izin Pengadilan Agama atau penipuan atas identitas diri.

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.⁸⁴

From that explanation the researcher can make a conclusion, the factors cause marriage cancellation in Indonesia is same. But the Act is different,

⁸⁴Zaleha 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

according Act No. 1 Year 1974 On Marriage the factors cause marriage cancellation is not detail meanwhile in Islamic Family Law Enactment no. 17 Year 2003 of Johor State mentioned by detail. In Indonesia the Act No. 1 Year 1974 On Marriage is not for muslims only, it for all citizens in Indonesia like BW.

As explanation above there are KHI as supporting Regulation of Act No. Year 1974 On Marriage, but the hierarchy both of that is different, so do in power of regulation. If the KHI made into Act and have power like Act No. 1 Year 1974 On Marriage maybe the factors of marriage in Indonesia same with Malaysia.

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 1974.⁸⁵

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 dengak 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

⁸⁵UU No. 1 Year 1974, LNRI No 1 Year 1974

marriage. So, in practice judges cannot never disconnect the matter if the lawsuit in excess of the second 28's Article.

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.

The intent of the void because legal or annulled by law (*nietigheid van rechtswege*) result in an act for part or all of the law is considered to have never existed (deleted) without required a judge's decision or the decision of a Government Agency an aborted due to the provision of part or all of it.

To be cancelled (*vernietigbaar*) means by law that the acts done and consequently considered to be there until the time of cancellation by the judge or by any other competent government bodies (the cancellation was being held because the deed contains something deficient). For such deeds are legal until the time of cancellation and that, therefore, any result incurred between the time host it, until the time of cancellation, be valid (except in terms of law mentioned some part of it is invalid). After the cancellation of the deed that doesn't exist and where possible so that the result sought has happened it all or in part to remove.

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.

If the marriage is based on the goodwill of the husband and wife, then the marriage remain legitimate legal consequence for the husband and wife, as well as to their children. So the decision the judge about an aborted marriage only has legal consequences after the marriage. Whereas prior to the cancellation, the marriage was considered a valid marriage. The decision of an marriage cancellation is seen as a dissolution of marriage.

For property acquired during the marriage to the decision of marriage cancellation will be divided in two in before scrambled the parties have not made a marriage Covenant marriage. Whereas against children born of the marriage is considered as a legitimate child.

If the marriage took place without the good faith of the husband and wife, then it is due to the wedding of the law simply does not exist. Even the decision retroactive to judge at the time the marriage took place. On the marriage there is no unity and the children born of the marriage is considered a child outside marriage.

1. 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.

For the party he still get their right due corresponding agreements made between the spouses who filed the marriage cancellation. It aims to protect the rights of a third party in order to remain successful. So despite the decision of the marriage law has remained husband and wife remain obliged to fulfill its obligations on third parties.

3. *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.*"

Whereas the children that have been born of the marriage cancellation in Johor have the same impact like in Indonesia. A child retains the relationship remains as before an aborted marriage. This is regulated in Article 120 Islamic Family Law Enactment No. 17 Year 2003 of Johor State "*Once an acknowledgment or confirmation has been made in respect of the relationship or worked, acknowledgment or confirmation shall become irrevocable.*"

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. As described by Ahmad Shahbari Salamon.

“Dalam perkahwinan yang dibubarkan secara faraq pula, pasangan boleh melalui proses pernikahan semula tanpa perlu menunggu tiga kali suci. Bagaimanapun jika pengantin perempuan memilih untuk mengahwini orang lain, mereka perlu menunggu hingga habis eddahnya. Tempoh yang diambil untuk berkahwin semula pula bergantung kepada proses perkahwinan yang dilakukan.”

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 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*

This problem certainly will be detrimental to the wife because after the decision of the Court the wife should be able to make a living cost on their own. Unlike the case in Johor where a husband remains obligated to give a living cost when *iddâh* through by marriage cancellation. Whereas the existence of a law aiming to protect the rights of every citizen, but in Indonesia the rights of a wife not being met due to legislation that does not give the right.

The researcher interested in researching the issue by using the method of *maslahah al-mursalah*. According to researchers of *maslahah* is for the benefit of the people. With the marriage cancellation is supposed to be able to provide the same rights for husband and wife, however in Indonesia is not the case. Only the husband can get its due while the wife was damaged. A husband after the judge's decision on the marriage cancellation he doesn't have to endure a living for his wife. Because Act No. 1 Year 1974 on Marriage did not arrange the *iddâh* marriage cancellation.

When viewed in terms of the benefit (*maslahah*) of the Act No. 1 Year 1974 on Marriage in the case of marriage cancellation does not have a goal to protect the rights of the wife, especially in the legal consequences of the the marriage cancellation. The absence of his wife she could pose a new problem in

lawsuits, such as the status of a child who is still a fetus. Because the purpose of is to know she still does the fetus a baby in the belly of the wife. In addition to not providing wife, she also has to endure the child born of a legitimate marriage with a husband.

