

# Juridical Analysis of Divorce Annulment Norms Reviewed from Law Number 23 of 2006 concerning Population Administration (Comparative Study with Australia)

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## KEYWORDS

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## ABSTRACT

Marriage is a physically and mentally binding agreement based on faith, so marriage is living with a man and a woman by fulfilling certain conditions. There are times when disputes are involved in a marriage between husband and wife, which, if not managed properly, can cause divorce. It is regulated regarding the annulment of divorce as contained in Law Number 23 of 2006. However, the mechanism for the annulment of divorce is not further regulated in Indonesian law, so it is necessary to discuss the current arrangement and its comparison with Australia and analyze the existence of divorce annulment arrangements in Indonesia. This type of research is normative research using primary, secondary, and tertiary legal materials, a statutory approach, and a comparative study comparing with other countries, namely Australia, using a conceptual approach and a case approach. Nothing related to the mechanism for annulment of divorce was found in Indonesia except in the KHI, while in Australia, it can be found in the Family Law Act 1975. Therefore, in Indonesia, further arrangements are needed in the form of legislation.

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## 1. Introduction

The 1945 Constitution of the Republic of Indonesia guarantees that every citizen has the right to form a family and continue the offspring through a legal marriage, as stipulated in Article 28B Paragraph (1).

Marriage is a covenant that binds the mind and body based on faith, so marriage is the life of a man and a woman together by fulfilling certain conditions (Prodjodikoro, 1981). Law Number 1 of 1974, as amended by Law Number 16 of 2019 concerning Marriage, states that marriage is a physical and inner bond between a man and a woman as husband and wife to form a happy and eternal family

(household) based on the One Godhead. In terms of the meaning of marriage, marriage is not only a legal act between a man and a woman, but more than that, marriage philosophically is also a great covenant of a human being with God to form a family later. This is at least reaffirmed in Article 2 of the Marriage Law, where it is stated:

- (1) Marriage is valid if it is carried out according to the law of each religion and its beliefs;
- (2) Each marriage is recorded in accordance with the applicable laws and regulations;

However, even though marriage is a legal act and a great covenant of a human being with God, it is undeniable that in its journey, marriage will not always run beautifully and harmoniously. There are times in a marriage between husband and wife involved in small disputes that become complementary spices in fostering family life. However, there are also times when these small disputes cannot be managed properly, and they become the cause of rifts in the household that lead to divorce.

Divorce, as regulated in Law Number 23 of 2006 as amended by Law Number 24 of 2013 concerning Population Administration, is one of the important events, so related to these important events, the consequence is the existence of a population administration record carried out by the State. Regarding the registration of divorce, at least in Chapter V of the Population Administration Law, there are two types of divorce that must be recorded, namely, the recording of the divorce event itself and the recording of the cancellation of the divorce.

The recording of the annulment of the divorce itself is regulated in Article 43 of Law Number 23 of 2006, which says: the annulment of divorce for the Resident must be reported by the Resident to the Implementing Agency no later than 60 (sixty) days after the court decision on the annulment of the divorce has permanent legal force, this is also reaffirmed by the existence of the implementing regulations of the law, including Presidential Regulation Number 96 of 2018 concerning Requirements and Procedures for Population Registration and Civil Registration as well as Regulation of the Minister of Home Affairs Number 108 of 2019 concerning Implementation Regulations of Presidential Regulation Number 96 of 2018 concerning Requirements and Procedures for Population Registration and Civil Registration. However, the recording of the annulment of the divorce triggers various problems, including those related to the aspect of the legal certainty of the divorce event itself and in its implementation where the court grants the annulment of divorce with various legal products, some grant with legal products of the decision with the mechanism of applying, some grant the annulment of the divorce in the form of a lawsuit, and some file after the divorce decision in the form of a review. Of course, this raises the question of what and which mechanism is the most correct to take, in this case, the author will not comment on the content or the substance of the determination or decision that has been handed down by the judge but will rather analyze the norms of divorce annulment as contained in Law Number 23 of 2006, so that it is interesting to discuss this matter [Juridical Analysis of Divorce Annulment Norms Reviewed from Law Number 23 of 2006 concerning Population Administration (Comparative Study in Australia)]. The problems studied in this paper are related to the regulation of divorce annulment in positive law in Indonesia and Australia, as well as an analysis related to the regulation of divorce annulment in Indonesia.

## 2. Materials and Methods

In this research method, the author uses a normative type of research. The author uses primary legal materials in the form of applicable laws and regulations such as Number 1 of 1974, as amended by Law Number 16 of 2019, concerning Marriage, Law Number 23 of 2006, as amended by Law Number 24 of 2013, concerning Population Administration and other regulations related to population administration as well as secondary legal materials in the form of books and tertiary in the form of journals. The approach used is a type of legislative approach, a comparative study by comparing it with other countries, namely Australia, in addition to also using a conceptual approach and a case approach.

## 3. Result and Discussion

### Divorce Annulment Arrangements in Indonesia and Australia

#### 1. Divorce Annulment Arrangements in Indonesia.

The meaning of divorce annulment itself in expressive verbis is not found in any laws and regulations in Indonesia, but to understand the meaning of divorce annulment even though it is not found in laws and regulations, it must first be understood related to the definition of divorce itself. Law Number 1 of 1974, as amended by Law Number 16 of 2019 concerning Marriage, especially related to divorce, is regulated in Chapter VIII concerning the Dissolution of Marriage and Its Consequences, namely in Article 38, which states that a marriage can be dissolved due to 3 (three) things, namely due to death, divorce, and by court decision. Regarding divorce in the same chapter, it is also stipulated that divorce can only be done in front of a court session after the court concerned has tried and failed to reconcile the two parties. In order to carry out a divorce, there must be sufficient reason, that between husband and wife will not be able to live in harmony as husband and wife. The reasons that can be used as reasons for divorce as found in the explanation of Article 39 of the Marriage Law and Article 19 of Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974 concerning Marriage, namely:

- a. One of the parties commits adultery or becomes a drunkard, a gambler and so on that is difficult to cure;
- b. one party leaves the other for 2 years without the other party's permission and without a valid reason or for other reasons beyond his or her will.;
- c. One of the parties gets a prison sentence of 5 years or a heavier sentence after the marriage takes place;
- d. one party commits cruelty or serious persecution that endangers the other party;
- e. One of the parties has a physical disability or illness that results in being unable to carry out their obligations as husband/wife;
- f. Between husband and wife, there is constant strife and quarrels, and there is no hope of living in harmony in the household anymore.

Referring to these provisions, the reasons for divorce are limited. Divorce cannot occur only at the will of the parties, so it can also be interpreted that the existing marriage law in Indonesia makes it difficult for divorce to occur.

The definition of divorce, according to some experts is defined as follows:

- a. According to Subekti, divorce is the dissolution of a marriage due to a judge's decision or the demand of one of the parties in the marriage.
- b. According to P.N.H. Simanjuntak (2009), divorce is defined as the termination of a marriage for a reason, with a judge's decision on the demands of one or both parties in the marriage.

Meanwhile, according to the Great Dictionary of the Indonesian Language (KBBI), the definition of cancellation itself is interpreted as a process, method, act of canceling, or statement of cancellation. So, if you refer to the meaning of divorce and the cancellation itself, the annulment of divorce can also be interpreted as an act that cancels the existence of divorce.

Although there is no real or authentic understanding in the laws and regulations regarding what is actually meant by the annulment of divorce, it does not mean that it is related to the annulment of the divorce is not regulated at all in the laws and regulations in Indonesia. There are at least several laws and regulations in Indonesia that mention the annulment of divorce, including:

1. Annulment of divorce in the Compilation of Islamic Law (KHI).

The annulment of divorce in the Compilation of Islamic Law (KHI) is regulated in Chapter XVIII concerning Reference. However, before discussing further, it is necessary first to understand related to the dissolution of marriage. In this Compilation of Islamic Law as stipulated in Article 113, which states that a marriage can be dissolved due to death, divorce, and upon a court decision. Furthermore, Article 114 states that the breakup of marriage caused by divorce can occur due to talaq or based on a divorce lawsuit. Talaq, as Article 117, is the husband's pledge before the religious court session, which is one of the reasons for the dissolution of the marriage, in the manner referred to in Articles 129, 130, and 131. The meaning of talaq itself etymologically is to release and eliminate the bond, so related to this it can also be interpreted that talaq in terminology means eliminating the marriage bond both in the present and in the future by using special speech or that can replace it (Baharuddin & Iman, 2020; Jamhuri & Zuhra, 2020).

Furthermore, related to the meaning of refer, referencing means to return or return, which comes from the Arabic language, namely *raja'a - yarji'u - ruju'an*. Therefore, reference according to the term can be understood as restoring the legal status of marriage in full after the occurrence of *thalak raj'i* (the first talaq or the second talaq) carried out by the ex-husband against his ex-wife during his iddah period (waiting time) with certain words (Djamaan, 1993). It means to refer to the return of the wife who has been sentenced to *thalak raj'i* by her husband to the original marriage before the divorce. Article 163, wherein the regulation, it is stated that a husband can refer to his wife who is in the iddah period. Furthermore, in Paragraph (2) it is stated that reference can be made in the following cases:

- a. The breakup of marriage due to talaq, except for talaq that has fallen three times the talaq imposed by *qobla al dukhul* (before having sexual intercourse);
- b. The dissolution of marriage is based on a court decision for reasons or reasons other than zina and *khuluk* (divorce that occurs at the request of the wife by giving a ransom or iwadh to and with the consent of the husband);

The procedure for reference is specifically mentioned in Articles 167 to 169 of the Compilation of Islamic Law.

This means that, based on the Compilation of Islamic Law, it is possible to restore marital status after the loss of the marriage bond, but under certain conditions.

## 2. Annulment of divorce in the Population Administration Law.

Regarding the cancellation of divorce, the next arrangement can be found in Law Number 23 of 2006, as amended by Law Number 24 of 2013 concerning Population Administration, in the law is regulated in Chapter V of the sixth part, which regulates the recording of divorce cancellation. As regulated in Article 43 of the Population Administration Law, which states:

- (1) The annulment of divorce for residents must be reported by the resident to the Implementing Agency no later than 60 (sixty) days after the court's decision on the annulment of the divorce has permanent legal force.
- (2) Based on the report as intended in paragraph (1), the Implementing Agency revokes the Divorce Certificate Citation from the ownership of the subject of the deed and issues a Certificate of Divorce Cancellation.
- (3) Further provisions regarding the requirements and procedures for recording the annulment of divorce are further regulated in the Presidential Regulation.

Then, in the explanation of Article 43 Paragraph (1), it is stated that for adherents of the Islamic religion, there are provisions regarding references regulated in Law Number 32 of 1954 concerning the Registration of Marriage, Talak, and Reference Jo. Law Number 1 of 1974 concerning Marriage and its implementing regulations. The population administration law is only regulated regarding the mechanism for recording the annulment of divorce, which can occur after a decision regarding the annulment of divorce has permanent legal force.

## 3. Cancellation of divorce in Presidential Regulation Number 96 of 2018 concerning Requirements and Procedures for Population Registration and Civil Registration.

This presidential regulation is a continuation of the mandate given by the population administration law. Regarding the arrangement of divorce cancellation in this presidential regulation, it is at least regulated in Article 31, which states that civil registration services consist of several things, one of which, in point f, mentions the annulment of divorce. In addition, the annulment of divorce in this presidential regulation is also found in Article 44, which outlines that the recording of divorce annulment must meet the requirements, including the existence of a copy of a court decision that has permanent legal force, in addition to other conditions must be met such as quotations of divorce certificates, family cards, and electronic identity cards.

## 2. Divorce Annulment Arrangements in Australia,

In this case, the Family Court of Australia and the Federal Circuit Court of Australia share competence. For example, if the Federal Circuit Court of Australia handles divorce applications, then the Family Court of Australia handles applications for marriage ratification and annulment of divorce (Penasthika et al., 2018). The annulment of divorce is regulated in the Family Law Act 1975 Part VI - Divorce and Nullity of Marriage. At least in the Family Law Act 1975, it was found that several things caused the arrangement for the annulment of divorce. Article 57, which regulates the Rescission of divorce order where parties reconciled (annulment of divorce when the parties have reconciled), states:

“Despite anything contained in this Part, if a divorce order has been made in relation to a marriage, the court may, at any time before the order takes effect, upon the application of the

parties to the marriage, rescind the divorce order on the ground that the parties have become reconciled.”

Then the next arrangement is found in Article 58, which regulates the Rescission of a divorce order on the ground of miscarriage of justice, where in the article it is stated:

“If a divorce order has been made in proceedings but has not taken effect, the court by which the divorce order was made may, on the application of a party to the proceedings, or on the intervention of the Attorney-General, if it is satisfied that there has been a miscarriage of justice by reason of fraud, perjury, suppression of evidence or any other circumstance, rescind the divorce order and, if it thinks fit, order that the proceedings be re-heard.”

However, Article 59, which regulates Re-marriage, states:

“If a divorce order under this Act in relation to a marriage has taken effect, a party to the marriage may marry again.”

Thus, looking at some of the arrangements related to divorce annulment in Australia, in essence, that the annulment of divorce is possible for several reasons, namely:

1. because there is peace between the parties;
2. Because of the existence of a misguided judiciary, especially related to a misguided judiciary, if there is a belief in it, namely the occurrence of fraud, perjury, loss of evidence, and other circumstances, one of the parties to the marriage or with the intervention of the Attorney General, the court can annul the occurrence of the divorce or even order a retrial to be conducted;

Based on the two reasons mentioned above, the annulment of the divorce can be carried out with the note that the decision related to the existence of the divorce does not have permanent legal force. In contrast, if the decision on divorce has permanent legal force, then the annulment of the divorce can no longer be carried out, but one of the parties can remarry.

### **Analysis of Divorce Annulment Arrangements in Indonesia.**

What needs to be considered in the formation of a norm is the achievement of legal goals that include 3 (three) things, as stated by Gustav Radbruch. Gustav Radbruch stated that in order to realize the purpose of the law, it is necessary to use the principle of priority of what is the basic value of the purpose of the law. This certainly cannot be separated from the actual situation that the three legal objectives of justice, utility, and legal certainty often clash with each other. So, with the clash of the three values of the legal purpose, something must be sacrificed. Gustav Radbruch himself said that related to the use of the principle of priority, it must be carried out in the following order: (Erwin, 2021)

1. Legal Justice;
2. legal utility;
3. Legal certainty;

With the order of priority as mentioned above, the legal system built can avoid internal conflicts that lead to losses to the community. Justice is the glue of the order of civilized society. The law was created so that every individual as a member of society and the administrator of the State takes an action necessary in order to maintain social bonds and achieve the goal of living together or interpreted otherwise so that the individual and the administrator of the State do not commit an

action or act that can damage the value of justice. In order to obtain or restore an orderly order of community life, justice must be upheld. Every violation must be sanctioned according to the violation he has committed (Fanani, 2011).

For Radbruch, these three aspects are relative and changeable. At the same time, it can highlight justice and urge usefulness and legal certainty in the areas that are at the edge. At other times, certainty or usefulness can be highlighted. This relative and variable relationship is not satisfactory. Meuwissen chose freedom as the foundation and heart of the law. The freedom in question is not arbitrary because freedom is not related to what we want, however, with regard to wanting what we want. With freedom, we can associate certainty, justice, equality, and so on rather than following Radbruch (Sidharta, 2007).

Aristotle, in his book entitled *Rhetorica*, initiated a theory that states that the purpose of law is solely to want justice, and the content of law is determined by ethical awareness related to what is said to be fair and unjust. The law must give justice to every person, which is his right, which requires separate regulations for each case so that the law must make *Algemene regels* (general regulations/provisions) (Soeroso, 2009).

Teguh Prastyo (2015), in his hypothesis, has put forward the concept of stately equity. Stately equity sees the improvement of a lawful framework that's commonplace of Indonesia. How does the positive legitimate framework give its character within the middle of the exceptionally solid impact of the world's lawful frameworks that exist nowadays, exceptionally brutally as on the off chance that it is done into the legitimate way of the Indonesian country?

When it is related to what Bentham expressed within the law, at that point the great or terrible of the law must be measured by the great and terrible results created by the application of the law. A modern lawful arrangement can be considered great on the off chance that the results coming about from its application are goodness, greatest bliss, and diminished enduring. On the other hand, it is considered awful in case its application produces unfair results and misfortunes and as it were amplifies enduring. So, it isn't off-base that no experts state that this hypothesis of utility is the financial premise for lawful thought. The most rule of this hypothesis is almost the reason and assessment of the law. The reason of the law is the most prominent welfare for the larger part of the individuals or for all the individuals, and the assessment of the law is carried out based on the results coming about from the method of applying the law. Based on this introduction, the content of the law could be a arrangement for the regulation of the creation of state welfare (Rasjidi & Putra, 1993).

Within the setting of the arrangement of laws and controls, legitimate certainty as one of the lawful destinations can be said to be portion of endeavors to realize equity since, with legitimate certainty, everybody can gauge what will be experienced on the off chance that they take certain legitimate activities.

Lawful certainty will ensure that a individual performs behavior in agreement with the pertinent lawful arrangements, on the other hand, without lawful certainty, a individual does not have standard arrangements in carrying out behavior. In this way, it isn't off-base for Gustav Radbruch to put forward certainty as one of the purposes of the law. Within the framework of people's lives, it is closely related to certainty within the law. Lawful certainty is in understanding with regulating conditions, both arrangements and judges' decisions. Legal certainty alludes to the usage of a life

framework that's clear, efficient, steady, and considerable in its usage and cannot be affected by subjective circumstances in people's lives (Susanto, 2014).

Normative legal certainty is when a control has been made and declared authoritatively since it controls clearly and consistently. It is apparent within the sense that it does not cause question or, indeed, equivocalness so that it causes numerous elucidations and is coherent within the reason that the direction gets to be a framework of standards with other standards so that it does not clash or cause standard clashes.

Mochtar Kusumaatmaja stated that the law's main purpose is reduced to just one thing, in order, which is used as a basic condition for an orderly society. Legal certainty in human relations in society is necessary to achieve order. Without legal certainty and order, human beings cannot optimally develop the talents and abilities that God has given them. One characteristic that cannot be separated from the law, especially written legal norms, is legal certainty because the law will lose its meaning and cannot be used as a behavioral guide if it lacks certainty value (Kansil, 2009).

Looking at the formulation of existing laws and regulations, namely in Article 43 of the Population Administration Law, which allows the annulment of divorce, however, it is not regulated regarding in what cases and how the annulment of divorce can occur.

In this context, legal certainty can be interpreted as a protection for *the judiciary* against arbitrary actions (Wijayanta, 2014).

The Judge's decision, as one of the efforts to realize legal certainty, is a statement that the Judge, as a state official who is authorized to do so, is spoken at the trial and aims to end or resolve a case or problem between the parties. Not only is what is said called a verdict, but it is also a statement that is written and then spoken by the judge at the trial. A concept of a decision (written) does not have the force of a decision before it is pronounced at the trial by the Judge (Mertokusumo, 2006). Court decisions are said to have permanent legal force *in case* civil court decisions, namely:

1. The decision of the court of first instance that is not appealed within 14 (fourteen) days after the judgment is handed down or after the decision is notified for the absent party;
2. The decision of the appellate court that is not filed by the cassation legal remedy within a period of 14 (fourteen) days from the date of notification;
3. Cassation decision;

Regarding divorce cases in Article 40 of the Population Administration Law, the person concerned must report to the Implementing Agency no later than 60 (sixty) days from the court decision on divorce that has obtained permanent legal force. Based on the report, the Civil Registration Officer records the Divorce Certificate Register and issues a Divorce Certificate Citation. This means that by referring to these things, a person cannot have a divorce certificate citation without a court decision that has permanent legal force.

Suppose this is associated with the provisions of Article 43 and the meaning of a decision with permanent legal force above. In that case, it can also be interpreted as long as the decision on divorce has not yet had permanent legal force. Every person who has decided to divorce can cancel his divorce by filing a legal remedy. The next question is whether a divorce that has been decided by a court decision and has legal force can still be filed for cancellation with a court determination/decision that has permanent legal force.



As explained above, a decision with permanent legal force in Indonesia is a first-instance decision that is not appealed, an appeal decision that is not filed by cassation or is a cassation decision, so it is doctrinal impossible if a divorce decision with permanent legal force is filed for cancellation by filing an application/lawsuit for annulment of the divorce through ordinary legal remedies (appeal or cassation). This departs from the basic knowledge that the judge's decision aims to resolve a case so that it becomes legally uncertain (there is no end) if the court has decided a divorce case and has permanent legal force but then is filed again to annul the divorce. It is not impossible that even if the parties have canceled the divorce, there will also be no more divorce.

In practice, there are not a few courts that annul divorces with different legal products and legal mechanisms. There are several courts that cancel divorces through the mechanism of hearing applications so that the legal products issued are in the form of determinations, on the one hand there are courts that grant the cancellation of divorce with the mechanism of filing a lawsuit as a legal product issued in the form of a judgment, and the next is through the filing mechanism review after the decision on divorce is declared to have permanent legal force. In this case, the author will not comment on the substance of the determination or judgment that has been handed down, but as the following illustration material, the author conveys some examples of the mechanism for filing for divorce annulment that has been handed down by the court:

Case number	Mechanism	Legal products
624/PK/Pdt/2015	Submission of legal remedy for review	Granted the annulment of his divorce with a review decision
672/Pdt.P/2019/PN Tng jo 3563 K/PDT/2020	Submission of application	Rejected the annulment of the divorce by determination and strengthened by the determination of cassation
748/Pdt.G/2020/PN Sby	Filing a lawsuit	The annulment of his divorce was granted with a verdict
24/Pdt.P/2022/PN Sdk	Submission of application	The annulment of his divorce was granted with a verdict
10/Pdt.P/2022/PN Pal	Submission of application	Dikabulkan pembatalan perceraianya dengan penetapan

Source: Directory of Supreme Court Decisions

From some examples of decisions or determinations above, at least there is an illustration that related to the mechanism for filing for divorce annulment and legal products issued with the annulment of divorce by the court, there is no legal unity, so it causes differences between one and another, this will of course confuse the community and can further harm the community. In relation to this, by looking at the existing phenomenon and comparing it with the existing divorce annulment arrangements in Australia, it is necessary to further regulate it in the existing legislation, one of which is by reformulating regulations related to divorce annulment.

Regulations regarding the annulment of divorce that are prepared in the future must also be associated with the role and function of the judiciary in Indonesia in examining, adjudicating, and deciding a case so that legal certainty regarding divorce cases is achieved. With this, the sacredness

of the meaning of marriage can be well maintained so that everyone appreciates the meaning of marriage more and does not arbitrarily divorce.

Theoretically, the efforts that can be taken by the parties in their efforts to annul divorces that have permanent legal force in Indonesia are to remarry as long as they are not prohibited by their religious teachings and beliefs (*vide* Article 2 of the Marriage Law) or to submit extraordinary legal remedies in the form of a review to the Supreme Court. It should be understood that a review can only be carried out on certain grounds against a court decision of the first instance, the appellate level, or the cassation level that has permanent legal force.

#### 4. Conclusion

The meaning of divorce cancellation itself in expressive verbis is not found in any laws and regulations in Indonesia. However, related to the regulation of divorce cancellation in Indonesia can be found in the Compilation of Islamic Law (KHI), Law Number 23 of 2006 as amended by Law Number 24 of 2013 concerning Population Administration, Presidential Regulation Number 96 of 2018 concerning Requirements and Procedures for Population Registration and Civil Registration, but other than in the KHI related to the mechanism and conditions for canceling divorce are not regulated further continued. Meanwhile, in Australia, the annulment of divorce can be found in the Family Law Act 1975 Part VI-Divorce and nullity of marriage. The annulment of a divorce in Australia is possible for several reasons, namely due to the existence of peace between the parties and due to the existence of a misguided judiciary, specifically related to misguided justice due to fraud, perjury, loss of evidence and other circumstances, one of the parties to the marriage or with the intervention of the Attorney General, the court may annul the occurrence of the divorce or even order a retrial. However, based on these two reasons, it can be annulled with the note that the decision related to the existence of the marriage does not have permanent legal force, while if the decision on divorce has permanent legal force, then the divorce can no longer be annulled but one of the parties can marry again.

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