



## Authority of State Lawyers in Application for Cancellation of a Marriage, Reviewed From Law Number 16 of 2004 Concerning the Attorney General's Office

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### **Abstract**

Cancellation of same-sex marriage is a marriage that violates the conditions for a marriage and based on Article 26 of Law Number 1 of 1974 concerning Marriage, the State Attorney General has the authority to cancel the marriage. It's just that this authority is not clearly regulated in Law Number 1 of 1974 concerning Marriage and other marriage regulations in Indonesia. The cancellation of a marriage does not happen automatically, but must go through a court, which is submitted by the authorized parties to apply for a marriage cancellation as provided for in Articles 23 and 26 paragraph (1) of Law Number 1 of 1974 concerning Marriage. Based on these thoughts, the problems examined are : (1) What is the legal position of same-sex marriage according to the provisions of marriage law in Indonesia, (2) What is the authority of the State Attorney as the applicant for filing the annulment of same-sex marriage according to Indonesian law, and (3) What is the legal consequences? of the cancellation of same-sex marriage according to Indonesian law. This study uses a normative juridical method with a literature approach. The results of the research concluded that : (1) That same-sex marriage does not have a legal position in Indonesia because it is not recognized in the marriage law in Indonesia and is against the law and moral values and religious values and is also against public order because it causes unrest in society. (2) The authority of the State Attorney General in canceling same-sex marriage according to the provisions in Article 26 Paragraph (1) of Law Number 1 of 1974 concerning Marriage and also the authority in the field of public order for the sake of upholding public order in society, (3) That the legal consequences of the cancellation of this type of marriage is the cancellation of the marriage by the Religious Court and Marriage Certificate Number : 0447/062 / VII / 2017, dated July 19, 2017 issued by the Ajung District Religious Affairs Office has no legal force.

**Keywords:** *Authority; State Attorney; Cancellation; Same-sex Marriage*

### **Introduction**

Every human being on this earth wants to get happiness in his life, and to get this happiness can be obtained in various ways. One of them is through a marriage bond which aims to create a happy and eternal family. Humans as creatures created by Allah SWT have a more noble position than other living

creatures, are related to one another, which can cause mutual need and attachment to one another. From this mutual need arises a sense of affection between men and women that leads to the creation of a household which of course begins with a marriage. The rules regarding marriage have been strictly regulated in Law Number 1 of 1974 concerning Marriage. In the legal regulations in Indonesia regulating a legal marriage is a marriage that occurs between a man and a woman which is regulated based on the law of their respective religion which is registered according to the prevailing laws and regulations. The word marriage according to Islamic law is the same as the word "marriage" and the word "zawaj". Marriage according to the language has the meaning "dham" which means pressing, pressing or gathering. Marriage has a figurative meaning, namely "wathaa" which means body. Until now, the marriage law in Indonesia does not recognize same-sex or same-sex marriage. However, along with the development of technology and the increasing prevalence of promiscuity, the emergence of homosexuals or the LGBT (Lesbian, Gay, Bisexual and Transgender) community which is increasingly prevalent in Indonesia.

Same-sex marriages discussed in this article are marriages that occur between men and fellow men or better known as Gay. Homosexual is one of the types of sexual behavior deviations that are known from sexual activity carried out with the same sex.<sup>1</sup> According to Iyus Yosep, homosexual and lesbianism are the conditions of a person showing sexual behavior between people of the same sex which can apply to men or women, where the person has repeatedly demonstrated this behavior so that a homosexual pattern has been formed.<sup>2</sup> The American Psychic Association (APA) states that sexual orientation will continue to develop throughout a person's life. Sexual orientation is divided into 3 (three) based on sexual and emotional urges or desires which are romantic attraction to the same gender. Carol Davis explains that sexual orientation is an attraction that appears in a person of a certain gender and is based on emotional, physical, sexual, and love feelings.<sup>3</sup> The term LGBT itself has a long history dating back to the 1960s, at that time there was no word that explicitly referred to people who were not heterosexual. The closest term used as an orientation identity is "third gender". The term homosexual is literally translated "same gender" which is a combination of the initial Greek affix, homo means "same" and the Latin principle sex means "sex." The term homosexual was first published in print in a German pamphlet published in 1869 by Austrian-born novelist Karl-Maria Kertbeny.<sup>4</sup> Furthermore, data from the Ministry of Health in 2012 showed that there were 1,095,970 men having sex with men (MSM), aka gay, scattered in all regions. West Java is the province with the highest number of MSM. A total of 300,198 people indicated were gay. Of these, 4,895 people were HIV / AIDS sufferers. Meanwhile, Central Java has a total of 218,227 gay sufferers. Of that total, 11,951 people indicated that they were HIV / AIDS sufferers, DKI Jakarta, as many as 27,706 residents of the capital city were gay. Of the tens of thousands of gays in the capital, as many as 5,550 people are suspected of having HIV / AIDS.<sup>5</sup>

One of the cases of LGBT is the existence of same-sex marriage that occurred in Jember (East Java) which was widely revealed in the community in October 2017. This kind of marriage was carried out by Muhammad Fadholi, who is male aged 21 (twenty one) year, a resident of Plalangan Hamlet, Glagahwero Village, Panti District, with Ayu Puji Astutik who is also male as his wife and is 23 (twenty three) years old, a resident of Krasak Hamlet, Pancakarya Village, Ajung District. The two of them married in July 2017 at the KUA Ajung District, and 2 (two) months later the Jember KUA found out that

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<sup>1</sup>Dadar Junaidi & Dorce Tanjung, *Mental Anomalies (Easy Ways to Know Mental Deviation and Other Abnormal Behavior)*, Andi Offset, Jakarta, 2012, p. 24-25

<sup>2</sup>Iyus Yosep and Titin Sutini, *Seventh Printing of Mental Nursing and Advance Mental Health Nursing Textbook*, Refika Aditama, Bandung, 2016, p. 200

<sup>3</sup><https://dosenpsikologi.com/pengertian-lgbt-menurut-para-ahli>, last accessed on October 31, 2018, at 14:50 WIB

<sup>4</sup>Komnas Ham, *State Efforts to Ensure the Rights of Minority Groups in Indonesia (A Preliminary Report)*, 2016, p. 107

<sup>5</sup><https://www.republika.co.id/berita/nasional/umum/16/01/23/oleaq5394-ini-provinsi-dengan-jumlah-gay-terbanyak>, accessed on 23 July 2020 at 23.00 WIB

both were male. According to information from the KUA Jember, this type of couple has faked their identity in the marriage book so that legally the marriage is invalid and the marriage can be canceled.<sup>6</sup>

Based on the provisions in Article 22 of Law Number 1 Year 1974 Concerning Marriage, it states that the marriage can be canceled, if the parties do not meet the requirements for a marriage. The parties that can apply for a marriage cancellation are further regulated in Article 23 letter c of Law Number 1 of 1974 concerning Marriage which clearly states that those who can apply for an annulment of marriage are the authorized officials as long as the marriage has not been terminated.

The existence of the Attorney General's Office in the civil sector has been recognized and regulated in Law Number 16 of 2004 concerning the Prosecutor's Office, as regulated in Article 30 paragraph (2) of Law Number 16 of 2004 concerning the Attorney General's Office, which is in full in the civil and state administration sector. with special powers can act both inside and outside the court for and on behalf of the state or government. The duties and authorities can be broadly divided into 5 (five) groups, namely:

- a) Law enforcement,
- b) Legal assistance,
- c) Legal services,
- d) Legal considerations,
- e) Other legal actions.

The duties of the prosecutor in this case the State Attorney General are regulated in the Regulation of the Attorney General of the Republic of Indonesia Number: 040 / A / J.A / 12/2010 dated 13 December 2010 concerning Standard Operating Procedures (SOP) for the Implementation of Duties, Functions and Authorities of Civil and State Administration. One of the duties of the State Attorney General is to file a lawsuit or application to the court in the civil field as stipulated by statutory regulations in the framework of maintaining legal order, legal certainty and protecting the interests of the state and government as well as the civil rights of the people, among others: annulment of marriage, dissolution of a Limited Liability Company (PT) and a statement of bankruptcy.

The authority to enforce the law regarding the cancellation of marriage is not yet very popular, even though it has not been clearly defined in the laws in force in Indonesia. So it is necessary to study further regarding the authority to cancel marriage, especially in relation to same-sex marriage which has troubled the community. In other words, a prosecutor with a special power of attorney can become a legal representative of the Republic of Indonesia or the Government of the Republic of Indonesia in the event that the state or government is a party in a civil case or state administration. Based on Staatsblad 1922 No.522 and Article 123 paragraph (2) HIR, the Proxy / Representative of the State / Government in a civil case is based on: (a) State Attorney appointed by the Government; (b) Prosecutors; or (c) Certain people or officials appointed / appointed by the relevant agencies. Thus, civil servants who can become legal attorneys in court are prosecutors who are given special powers to represent the state or government in cases in the civil or state administration sector, or the Government Legal Bureau in the civil sector.

In Law Number 1 of 1974 concerning Marriage, it determines who can apply for a marriage annulment as regulated in Article 23 to Article 27. Article 23 letter (c) explains that those who can apply for a marriage cancellation, one of which is mentioned there are "officials the competent authority" and regarding this competent official there is no further regulation, furthermore Article 26 paragraph (1)

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<sup>6</sup> Same-sex marriage in Jember, <https://news.detik.com/berita-jawa-timur/d-3696034/warga-jember-dihebohkan-kabar-pernikahan-sesama-jenis>, last accessed on October 31, 2018, at 19.00 WIB

specifically explains the ability of the Prosecutor to propose the annulment of the marriage for certain reasons (limitative).

The prosecutor as mentioned in Article 26 Paragraph (1) of Law Number 1 of 1974 concerning Marriage has the position of the Petitioner or the party entitled to request a marriage annulment. The position and role of the prosecutor proposing marriage annulment is also regulated in the Letter of the Junior Attorney General for Civil and State Administration Number: B - 017 / G / 2/1996 dated 29 February 1996 point 2.3 which explains that the Prosecutor's authority to propose a marriage annulment has been expanded, not only limited (limitative) as stated in Article 26 paragraph (1) of Law Number 1 of 1974 concerning Marriage, namely:

- a) Marriage performed in front of an unauthorized marriage registrar;
- b) The legal guardian of marriage or;
- c) Without the presence of two witnesses. However, it has been expanded to include all the conditions for the marriage.

Based on the provisions of Article 23 letter (c) and Article 26 paragraph (1) of Law Number 1 of 1974 concerning Marriage, Article 73 Compilation of Islamic Law letters (c) and (d) and Article 30 paragraph (2) of Law Number 16 year 2004 Regarding the Republic of Indonesia Attorney General's Office and the legal considerations above, the Junior Attorney as the Power of Attorney in this case must be declared to have legal standing and have the position and capacity as a legal subject who has the right to take legal actions in accordance with the attorney on behalf of the power of attorney.

If it is specified that a marriage can be canceled if: <sup>7</sup>

- a) The parties do not meet the requirements to enter into a marriage;
- b) The parties are still bound in a legal marriage;
- c) Marriage is conducted in front of an unauthorized marriage registration employee (PPN);
- d) Marriage with an illegal guardian;
- e) Marriage that is not attended by 2 (two) witnesses;
- f) Marriages which were entered into under threat;
- g) Marriage that is entered into because of fraud or misunderstanding regarding the husband or wife; and
- h) Marriages that violate the age limit of marriage.

In addition to the authority in the civil and state administration sector, the prosecutor's office also has in the field of public order and peace, the prosecutor's office also organizes activities: <sup>8</sup>

- a) Increasing public legal awareness;
- b) Safeguarding law enforcement policies;
- c) Monitoring the circulation of printed materials;

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<sup>7</sup> Law Number 1 of 1974 Concerning Marriage

<sup>8</sup> Law Number 16 of 2004 concerning the Attorney General's Office

- d) Supervision of belief that can endanger society and the state;
- e) Prevention of misuse and / or blasphemy of religion; and
- f) Research and development of law and criminal statistics.

In matters related to marriage of this type, the authority of the prosecutor in the field of public order can be exercised but only limited to preventive and / or educational activities in accordance with statutory regulations, which include activities that are assisting, participating and cooperating, and always taking into account coordination with agencies related.<sup>9</sup>

Marriage cancellations that have occurred so far have occurred at the District Court level up to the Supreme Court level, which are carried out by individuals or parties who directly submit marriage annulments through the District Court. Several decisions on cancellation of marriages include Decision Number: 4 / Pid.B / 2018 / PN.Cbi which was carried out at the Cibinong District Court. Furthermore, at the high court level, marriage cancellations were carried out at the Bandung High Court with Decision Number: 0024 / Pdt.G / 2017 / PTA.Bdg, marriage cancellations were also carried out by the Supreme Court with one of the Decisions Number: 678 / Pdt.G / 2015 / PA .Mdn. The entire decision to annul a marriage was not made through the prosecutor's office because the prosecutor's authority to apply for a marriage annulment was not exercised.

A marriage cancellation can be carried out by a prosecutor based on Article 26 of Law Number 1 of 1974 concerning Marriage. The prosecutor referred to in this case is the State Attorney Attorney as stated in Article 26 of Law Number 1 of 1974 concerning Marriage, which is the party entitled to propose a marriage annulment. Meanwhile, in the Supreme Court Decision, the cassation judge in his decision Number: 196 K / AG / 1994 dated 15 November 1995 and the Mataram Religious High Court Decision Number: 15 / Pdt.G / PTA MTR, dated 22 December 1993. The decision was related to the case. request for cancellation of marriage submitted by the Attorney General Cq. NTB High Prosecutor's Office to the Mataram Religious Court. The Supreme Court's cassation ruling states that the subject / prosecutor is not an official who has the authority to apply for a marriage annulment, so as a consequence the prosecutor's request must be declared unacceptable. Marriage is categorized as a private law sector so that involvement in the case also views its status in the relationship of kinship. The interesting thing here is that in some cases, the State Attorney General can be directly involved to cancel the legality of the marriage.<sup>10</sup> In fact, the prosecutor does not have a direct relationship which clearly raises a problem related to deviations from the private sector from the marriage law itself. The appointment of the prosecutor as the official authorized to cancel a marriage on behalf of the government is motivated by the consideration that the cancellation of marriage is based on the interests of the state.<sup>11</sup>

The theory used in this paper is the theory of legal certainty, the theory of authority and the theory of law enforcement. According to Utrecht, legal certainty contains 2 (two) meanings, namely, First, there are general rules that make individuals know what actions are allowed or not to be done, and Second, in the form of legal security for individuals from government abuse due to the existence of general rules. individuals can know what the state may impose or do against individuals.<sup>12</sup> According to Salim HS and Erlies Septiana Nurbani, the theory of authority is a theory that studies and analyzes the power of government organs to exercise authority in both the legal and private law fields.<sup>13</sup> According to

<sup>9</sup> Elucidation of Article 30 Paragraph (3) of Law Number 16 Year 2004 concerning the Attorney General's Office

<sup>10</sup> Evy Lusia Ekawati, 2013, *The Role of State Lawyers Attorney in Civil Case Handling*, Genta Press, Yogyakarta, p. 55

<sup>11</sup> Nanang Fahrudin, 2013, "The Prosecutor's Authority to File a Marriage Cancellation Request According to Law No. 1 of 1974 concerning Marriage", *Journal of Scientific Work, Law Study Program, Faculty of Law, University of Jember* (no volume), (no number), p. 4

<sup>12</sup> Riduan Syahrani, *Summary of the Digest of Legal Studies*, Publisher Cita Aditya Bakti, Bandung, 1999, p. 23

<sup>13</sup> H.P. Panggabean, *Application of Legal Theory in the Indonesian Judicial System*, PT. Alumni, Jakarta, 2014, p. 195

Satjipto Raharjo, law enforcement is defined as a process to realize legal desires, namely the thoughts of lawmaking bodies which are formulated and stipulated in legal regulations which then become reality.<sup>14</sup>

Research on "**Authority of State Lawyers in Application for Cancellation of a Marriage, Reviewed from Law Number 16 of 2004 Concerning the Attorney General's Office**", basically, from the searches carried out, both in the library within the Postgraduate Program of the Faculty of Law, Andalas University and from the website of State / Private Universities others in Indonesia have never done. However, it is possible that the same research has been carried out, both at state and private universities. However, there are differences, especially the problems that have been formulated, the discussion and the theoretical framework used.

The formulation of the problem in this paper, namely:

- (1) What is the legal position of same-sex marriage according to the provisions of marriage in Indonesia;
- (2) What is the authority of the State Attorney General as an applicant for filing a request for cancellation of same-sex marriage according to Indonesian law; and
- (3) What are the legal consequences arising from the cancellation of same-sex marriage according to Indonesian law?

### ***Research Methods***

The type of research carried out is normative legal research, namely the process of finding legal rules, legal principles, and legal doctrines in order to answer legal issues that are the problem in this research. To be able to obtain information from various aspects regarding legal issues, there are several approaches. The approaches used are the statute approach, the case approach, the historical approach, the comparative approach, and the conceptual approach.<sup>15</sup> In accordance with the type of normative legal research and the issues under study, this research uses a statutory approach, which is to use a statutory and regulatory approach that is related to the one being studied. Data collection techniques in this study using data collection or extracting techniques by means of library research.

### ***Results and Discussion***

#### **1. The legal status of same-sex marriage according to the provisions of marriage in Indonesia**

In Islamic law, marriage is an engagement between a female guardian (future wife) and a female husband candidate. Whereas in Catholic Christian law, marriage is intercourse between a man and a woman on the basis of a total bond of love with the irrevocable free consent of both.<sup>16</sup> According to Sirman Dahwal, marriage, seen from customary law, is seen as an important event in social life, because marriage does not only involve women and men but also related to the parents of both parties, their siblings and even their respective families. Furthermore, Sirman Dahwal explained that marriage is a legal relationship between a man and a woman and their respective families.<sup>17</sup>

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<sup>14</sup> Satjipto Raharjo, *Law Enforcement Problems a Sociological Overview*, Sinar Baru, Bandung, 1993, p. 15

<sup>15</sup> Peter Mahmud Marzuki, *Legal Research*, Kencana Prenada Media Group, Jakarta, 2011, p. 93

<sup>16</sup> Hilman Hadikusuma, *Indonesian Marriage Law According to: Legislation Customary Law, Religious Law*, CV. Mandar Maju, Third Edition, Bandung, 2007, p. 11

<sup>17</sup> Sirman Dahwal, *Comparative Marriage Law*, Mandar Maju, Bandung, 2017, p. 4

The conditions for conducting a marriage are regulated in Article 6 through Article 7 of Law Number 1 Year 1974. In these provisions 2 (two) conditions are stipulated to be able to enter into a marriage, namely material requirements and formal requirements. Material conditions are conditions that are inherent in the parties to a marriage, and are also called subjective conditions. Formal requirements are the procedures or procedures for conducting a marriage according to religion and law, which are also called objective requirements. Formal requirements related to marriage procedures, such as: a) Notification of getting married; b) Announcement to get married; c) A husband and wife candidate must show a birth certificate; d) Deed containing permission to enter into marriage from those who have to give permission or deed where there has been a decision from the court; e) If the marriage is for the second time, must show a divorce certificate, death certificate or in this case show a power of attorney legalized by the Marriage Registry Officer; f) Evidence that the marriage announcement has taken place without prevention; g) Dispensation for marriage, in case a dispensation is required.

The material requirements for marriage that must be fulfilled based on the provisions of Law Number 1 Year 1974 as stipulated in Articles 6 to 12 are as follows:

- 1) There is an agreement between the two prospective brides

The conditions for the approval of the two prospective brides are regulated in Article 6 Paragraph (1) of Law Number 1 of 1974 concerning Marriage. Marriage has the aim so that husband and wife can form an eternal and happy family, and in accordance with human rights, marriage must be approved by both parties without coercion from any party.<sup>18</sup>

- 2) There is permission from both parents or guardians for the prospective bride who is not yet 21 years old (Article 6 paragraph 2)
- 3) The prospective groom is already 19 years old and the prospective bride is 16 years old, unless there is dispensation from the court (Article 7);
- 4) Between the prospective groom and the prospective bride are not related to the family or blood that may not be married (Article 8);
- 5) The prospective bride is not married to another party and the prospective groom is also not married to another party, unless permission from the court for polygamy has been obtained (Article 9);
- 6) For husband and wife who have divorced, then remarried, their religion and belief does not prohibit remarriage (for the third time) (Article 10);
- 7) Not within the waiting time for the prospective bride who is a widow (Article 11);

The basis for marriage law in Indonesia is:

1. The 1945 Constitution Article 28B Paragraph (1), which regulates the right of a person to marry and continue offspring. The sound of Article 28B Paragraph (1) states that everyone has the right to form a family and continue their offspring through a legal marriage. " ;
2. Book I of the Civil Code, namely Chapter IV to Chapter XI;
3. Law Number 7 of 1989 concerning Religious Courts;

<sup>18</sup> Elucidation of Law Number 1 of 1974 concerning Marriage

4. Law Number 1 of 1974 concerning Marriage which was promulgated on January 2, 1974, which became effective from October 1, 1975, is a form of unification and codification of law in Indonesia regarding Marriage and its legal consequences;
5. Compilation of Islamic Law through Presidential Instruction (Inpres) No. 1 of 1991 dated 10 June 1991 and anticipated organically by the Decree of the Minister of Religion No. 154 of 1991 dated 22 July 1991. There are Islamic legal values in the field of marriage, grants, wills, waqf, and inheritance. Those relating to marriage are contained in book I which consists of 19 chapters and 170 articles (Articles 1 to 170);
6. Government Regulation of the Republic of Indonesia Number 9 of 1975 concerning Implementation of Law Number 1 of 1974 concerning Marriage;
7. Government Regulation Number 45 of 1990 concerning amendments and additions to Government Regulation Number 10 of 1983 concerning Marriage and Divorce Permits for Civil Servants.

In Article 1 of Law Number 1 Year 1974 concerning Marriage, it is stated that marriage is a physical and spiritual bond between a man and a woman which aims to form a happy and eternal family based on the One Godhead. From the definition of marriage, we can conclude that marriage is a sacred bond between the prospective husband and the future wife which has been explicitly regulated in the provisions of marriage, including Law Number 1 of 1974 concerning Marriage. The Marriage Law clearly states that marriage is a bond between a man and a woman.

However, along with the times and human development, marriage does not only occur between men and women but also same-sex marriages, namely those carried out between men (Homo) or marriage among women (Lesbian). For this reason, it is necessary to examine the position of same-sex marriages in the provisions of marriage in Indonesia. Some of the provisions of the marriage are : Article 28 letter B Paragraph 1 of the 1945 Constitution, which regulates the right of a person to marry and continue offspring. The sound of Article 28 B Paragraph 1 is: *"Everyone has the right to form a family and continue their offspring through a legal marriage."* From the contents of Article 28 Paragraph (1) of the 1945 Constitution, we can conclude that every person or citizen of Indonesia has the right to have offspring through a legal marriage. If we look at the rules of the Marriage Law, it is clear that a legal marriage is a marriage that is carried out according to the law of each religion and belief. From this understanding, it can be seen that the state gives freedom and recognizes all types of marriages that are carried out in the jurisdiction of Indonesia in accordance with the laws of each religion and belief.

The 1945 Law does not explain whether same-sex marriage or same-sex marriage can be carried out, but as long as it is in accordance with respective beliefs and religions, a marriage bond is considered valid. Apart from being based on their respective religious beliefs and teachings, a marriage is considered valid if it has been recorded according to the applicable laws and regulations. This marriage registration is carried out by the authorized official.

Until now, same-sex marriages cannot or cannot be recorded if they are carried out normally like other marriages because the conditions of marriage are not implemented or are not fulfilled.

The 1945 Constitution as the basis for the state not to recognize the existence of same-sex marriage, this can be seen from the moral values contained in the 1945 Constitution. Same-sex marriage carried out in Jember cannot be justified because it is not in accordance with religious values. , morals and public order are contrary to Article 28 letter J of the 1945 Constitution. In Article 10 paragraph (1) of Law Number 39 of 1999 concerning Human Rights, it is stated that every person has the right to form a family and continue offspring through a legal marriage. A legal marriage can only take place on the free will of



the prospective husband and wife, in accordance with the provisions of statutory regulations. {Article 10 paragraph (2)}.

Based on this article, it can be seen that marriage is carried out between a man (prospective husband) and a woman (prospective wife) without coercion. Same-sex marriage is a marriage that is not valid and is not in accordance with the marriage regulations.

One of the same-sex marriages that occur is same-sex marriages that occur in Jember. Same-sex marriages that took place in Jember (*East Java*) occurred because the same-sex couples faked their identities as a man and a woman so that the KUA Ajung, Ajung District, East Java, so that the marriage was recorded and considered valid. This same-sex couple got married in the presence of an illegitimate marriage guardian because Syaiful Bahri Alias Ayu Puji Astuti Binti Marjuki brought a guardian who was not a legal guardian who was a paid person who was told to become a guardian in their marriage. However, the same kind of couple has forged all the documents to complete the marriage so that they can deceive the KUA where they are married.

The marriage between this type of couple began around 2016 Muhammad Fadholi knew Syaiful Bahri al. Ayu Puji Astutik Binti Marjuki on a trip to the IAIN Mangli Campus area in Jember, where at that time Syaiful Bahri al. Ayu Puji Astutik Binti Marjuki so that from the meeting the defendant was interested in dating / having an affair that lasted 1 (one) year and finally married Siri around May 2016. Furthermore, in April 2017, Muhammad Fadholi learned that the woman / woman who claimed to be named Ayu Puji Astutik is actually a man / man named Syaiful Bahri and because he wants to cover up the shame and shame of the family so that it does not spread in the village of Muhammad Fadholi and Ayu Puji Astutik plans to formalize their marriage at the Ajung District Religious Affairs Office. Then on Wednesday, July 5 2017 Muhammad Fadholi together with Ayu Puji Astutik came to the Village Office and met Mukhlis Efendi with the need to arrange a letter for their marriage.

Then 2 (two) months after the marriage between Muhammad Fadholi and Ayu Puji Astutik on 19 September 2017, Muhammad Erfan, SH as the Head of the KUA Ajung District has received a complaint from the White Horse NGO (*An. Chairperson Slamet Riyadi, S.Sos*) with the core of the complaint about the alleged same-sex marriage between Muhammad Fadholi (male) and Ayu Puji Astutik (*admitted to being a woman but suspected to be a man*) then the witness checked the data related to marriage requirements, then the KUA Ajung called the husband and wife with Summons dated 25 September 2017, but the person concerned was not present and only a statement from the Bride of Husband Muhammad Fadholi and Wife Ayu Puji Astutik was sent, confessing his actions regarding the identity forgery and document falsification he had done. Furthermore, the Head of KUA reported the incident to the Jember Police for further legal action.

Every marriage is recorded according to the prevailing laws and regulations {Article 2 paragraph (2)}. This means that in addition to the state only recognizing marriage between women and men, the state also returns to their respective religions. Same-sex marriages that occur in Jember are not in accordance with religious teachings and values adhered to by the Indonesian people and the values of Pancasila sacred and part of worship, therefore religious values cannot be separated.

Indonesia is a country that highly upholds the values and norms that exist in society. Same-sex marriages cannot be registered administratively either at the Office of Religious Affairs (KUA) or the civil registry, and have no legal basis. In exercising human rights and freedoms there are restrictions stipulated in Article 28J of the 1945 Constitution, it is stated that "everyone is obliged respecting the human rights of others in an orderly life in society, nation and state and in exercising their rights and freedoms, everyone is obliged to comply with the restrictions established by law with the sole purpose of guaranteeing recognition and respect for the rights of freedom of others and to fulfill just demands in accordance with considerations of moral, religious values, security and public order in a democratic society. Freedom in human rights is not absolute but is limited in use.

However, the Constitutional Court has a different view regarding the submission of a judicial review regarding the legal norms of adultery, rape and homosexual / lesbian as contained in the provisions of Article 284 of the Criminal Code, 285 Criminal Code, and 292 Criminal Code, which was submitted by Prof. Dr. Ir. Euis Sunarti., MS and 11 (eleven) others as applicants in this Judicial Review on April 21, 2016 with application number Number : 94 / PAN.MK / 2016, with the conclusion that the Constitutional Court has rejected the petition because it is not authorized in its capacity as law annulers (*negative legislators*) but this is the domain of the Government and the DPR as legislators (*positive legislators*), however 4 (four) of the judges of the Constitutional Court have disagreed with the conclusion that the Judicial Review petition submitted is acceptable on the grounds of norms. in these laws are clearly contrary to religious values, Pancasila and living law which are guaranteed by the constitution but hampered by formal-legalistic rules.<sup>19</sup>

Decision of the Constitutional Court Number : 46 / PUU-XIV / 2016 dated December 14, 2017, of course, caused unrest in the community, because the Constitutional Court had indirectly created uncertainty by rejecting the application for judicial review filed by the Professor of IPB, Prof. Euis Sunarti and eleven other petitioners related to the legal norms of adultery, rape and homosexual / lesbian as contained in the provisions of Articles 284, 285 and 292 of the Criminal Code.

Marriage according to Law Number 1 of 1974 concerning Marriage is a physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a family (*a happy and eternal household based on the One Godhead*). From the definition of marriage, we can conclude that Law No. 1 of 1974 has explicitly stipulated that marriage occurs between a man and a woman, there is no gap for same-sex marriage, whether male or female. So, a marriage that is recognized in Law Number 1 of 1974 concerning Marriage is a marriage that is carried out by a man and a woman.

So that same-sex marriage is considered not a form of marriage that is recognized and legal in Indonesian law, because it is contrary to the conditions of marriage in Indonesia as stipulated in Law Number 1 of 1974 concerning Marriage. Same-sex marriages conducted by homosexual couples in Jember, East Java are not only contrary to Law Number 1 of 1974 concerning Marriage but also against religious values and moral values that can cause chaos and disrupt the order that occurs in society.

The Islamic Law Compilation (KHI) does not recognize the existence of same-sex marriage because it is not in accordance with the harmony of marriage as stipulated in Article 14 of the Islamic Law Compilation which states that to carry out a marriage there must be a husband, wife, marriage guardian, 2 (two) witnesses. and consent granted. From the contents of Article 14 of the Compilation of Islamic Law, it is clear that a marriage that is recognized according to the Compilation of Islamic Law is a marriage that is entered into between a man as a future husband and a woman as a potential wife.

## **2. The authority of the State Attorney's Office as a Petitioner to submit a request for cancellation of same-sex marriage according to Indonesian law**

According to the provisions contained in Law Number 1 of 1974 concerning Marriage, it regulates the forms of marriage, one of the parties can request an annulment of the marriage from the authorized party, namely the Prosecutor other than the family party in a straight line up from husband and wife. The parties who are authorized to cancel this marriage are:

1. Families in straight lineage from husband or wife;
2. Husband or wife;
3. The official who is authorized only as long as the marriage has not been decided;

<sup>19</sup> Decision of the Constitutional Court Number: 46 / PUU-XIV / 2016 dated December 14, 2017

4. The appointed official referred to in paragraph (2) Article 16 of this Law and anyone who has a direct legal interest in the marriage, but only after the marriage has broken up.

Based on an interview with the State Attorney at the Jember District Prosecutor's Office, Mr. Dedi Joansyah Putra, SH, which was carried out with the WhatsApp media<sup>20</sup>, explained that the process of implementing a marriage cancellation proposed by the Prosecutor's Office, in this case the State Attorney, is to act actively when hearing cases regarding conflicting marriages. with public order in accordance with the provisions of Article 30 of Law Number 16 Year 2004 concerning the Prosecutor's Office. However, until now, due to a lack of evidence and witnesses, the Attorney General has only been able to act passively and wait for reports from parties who feel they have suffered losses due to violations of the Marriage Law. In the same-sex marriage case that occurred in Jember, KUA Ajung, Ajung Jember District, felt that he was disadvantaged, so he made a report to the Prosecutor's Office and the State Attorney then made a special power of attorney to represent the KUA Ajung Jember.

The procedure for cancellation of a marriage can only be carried out and decided through a court institution to be precise regulated in Article 37 of Government Regulation Number 9 of 1975. The procedure for cancellation of a marriage is contained in the provisions regarding the procedures for divorce lawsuit as regulated in Article 38 Paragraph (2) of Government Regulation Number 9 of 1975 , as well as parties that can file a lawsuit regarding the cancellation of marriage are the parties contained in the provisions of Article 23 to Article 27 of Law Number 1 Year 1974 concerning Marriage, namely:

1. Families in the line of descent from husband or wife
2. Husband or wife
3. Authorized official
4. The appointed official
5. Attorney

The legal basis for the prosecutor in canceling a marriage is regulated in Article 22 of Law Number 1 of 1974 concerning Marriage, which is if the party who is going to get married does not meet the requirements to enter into a marriage.

Marriages that can be canceled by the prosecutor consist of :

1. A marriage which is entered into in front of an unauthorized marriage registrar;
2. A marriage whose legal guardian is not valid;
3. It was held without being attended by 2 (two) witnesses.

In applying for a marriage annulment, the prosecutor, in this case the state attorney, acts to represent the state. To represent a plaintiff or defendant before the trial, those who are given special powers must show a Power of Attorney at the time the trial takes place before the judge. This power of attorney is then followed by a substitutionary power of attorney in which in this type of marriage the Jember District Prosecutor gets or receives power from the KUA Ajung as the party who feels aggrieved from such a marriage.

Prosecutors as civil servants, officials appointed by agencies can represent the state as long as they show a power of attorney from the party that gives the power to represent him inside or outside the

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<sup>20</sup> Interview with WhatsApp on 23 June 2020, at 09.00 WIB

court. However, according to M. Yahya Harahap, the prosecutor does not need a special power of attorney because the prosecutor is a state representative before a civil or legal mandatory court as regulated in Article 123 paragraph (2) HIR and Staatsblad 1922 Number 522 which has been amended with Staatsblad 1941 Number 31 in conjunction with Number 98.<sup>21</sup>

### **3. What are the legal consequences arising from the cancellation of same-sex marriage according to Indonesian law**

The regulation regarding the cancellation of marriage is regulated in Article 22 through Article 28 of Law Number 1 Year 1974 concerning Marriage. Cancellation of a marriage is an act of court decision stating that the marriage bond that has been made is invalid and as a result the marriage is considered never to exist.

For marriages that are carried out in Islam, marriage cancellation is also regulated in Article 27 of the Regulation of the Minister of Religion of the Republic of Indonesia Number 3 of 1975 which states that if the marriage has taken place then it turns out that there is a prohibition according to the Munakahad law or statutory regulations on marriage, the Religious Court can cancel the marriage marriage. at the request of interested parties. Thus the marriage can be null and void by law and can be canceled by the court.

In same-sex marriages that occur in KUA Jember, there is less supervision than KUA Jember, but we cannot fully blame the Jember KUA because the KUA does not have the duty or authority to physically check the gender or authenticity of the data provided by the bride and groom.

In the study of Islamic law, an act related to the law of "taklifi" and law "wad'i" can be valid and can have the value of fasad (fasid) or void (batil). In essence, the facades and fasakh of marriage are the damage and breaking of the marriage contract due to a court decision. The difference between the two is rather slight, because what some people consider fasakh as facade by others.<sup>22</sup>

In the same-sex marriage case that occurred in Jember, the party who felt that he was aggrieved was the Ajung KUH in Jember and gave special powers to the State Attorney to represent in filing a marriage annulment request at the Jember Religious Court. This marriage annulment request was filed at the Jember Religious Court because the two couples of this kind are Muslim.

This request for cancellation of same-sex marriage is made because the same-sex couple has been married in violation of the marriage conditions stipulated in Law Number 1 of 1974 concerning Marriage. The decision from the Jember Religious Court on the request to cancel the marriage stated: 1) cancel the marriage of a same-sex couple in the name of Muhammad Fadholi Bin Samsul with Respondent II Ayu Pujiastutik Binti Marzuki Alias Syaiful Bahri Bin Ibrahim which was held at the Office of Religious Affairs, Ajung District, Jember Regency on July 19 2017; 2) Declare Marriage Deed Number: 0447/062 / VII / 2017, dated July 19, 2017 Not Legally binding.

The legal consequence of the cancellation of a same-sex marriage by the State Attorney is that the same type marriage is canceled by the Jember Religious Court in accordance with the Jember Religious Court's Decision Number: 5253 / Pdt.G / 2017 / PA.Jr dated 12 December 2017. Same-sex marriages conducted by Muhammad Fadholi Bin Samsul with Respondent II Ayu Pujiastutik Binti Marzuki Alias Syaiful Bahri Bin Ibrahim which was held at the Office of Religious Affairs, Ajung District, Jember Regency on July 19, 2017 and Marriage Deed Number: 0447/062 / VII / 2017 dated July 19, 2017 has no power Law.

<sup>21</sup> M. Yahya Harahap, *Civil Procedure Law on Lawsuits, Trials, Confiscation, Evidence, and Second Edition Court Decisions*, Sinar Grafika, Jakarta, 2017, p. 27

<sup>22</sup> Rahmat Hakim, *Islamic Marriage Law*, Pustaka Setia, Bandung, p. 187

With the Jember Religious Court Decision, of course, it has legal consequences for those who carried out the marriage, namely the annulment of, among others: the legal status of the respondent, the legal status of child care, and the status of assets obtained during the marriage and the marriage is considered to have never existed. However, the problem that arises is that the Marriage Law and the Compilation of Islamic Laws do not explicitly regulate the legal status due to the cancellation of marriage related to the legal status of the husband and wife whose marriage was canceled, the legal status of child care and the legal status of assets obtained at marriage after the enactment of the decision. court on annulment of marriage.

### **Conclusion**

1. Based on the provisions of marriage in Indonesia, namely based on the 1945 Constitution, Law Number 1 of 1974 concerning Marriage, Compilation of Islamic Law, and Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974 concerning Marriage that same-sex marriage is not recognized and does not have a legal position in Indonesia because it is against the Marriage Law and also the moral and religious values prevailing in Indonesia and is against public order in society.
2. State Attorneys have the authority to apply for the cancellation of same-sex marriages based on Article 26 of Law Number 1 of 1974 concerning Marriage, and also specifically regulated in Article 30 of Law Number 16 of 2004 concerning the Prosecutor's Office, which is included in the civil and also the authority to enforce public order.
3. The legal consequence of the cancellation of same-sex marriages by the State Attorney is that such marriages are annulled by the Jember Religious Court and similar marriages carried out by same-sex partners on behalf of Respondent I (Muhammad Fadholi Bin Samsul) with Respondent II (Ayu Pujiastutik Binti Marzuki) Alias Syaiful Bahri Bin Ibrahim) which was held at the Office of Religious Affairs, Ajung District, Jember Regency on 19 July 2017; Declare that the Marriage Deed Number: 0447/062 / VII / 2017 dated 19 July 2017 is not legally binding; in accordance with the Jember Religious Court Decision Number: 5253 / Pdt.G / 2017 / PA.Jr dated 12 December 2017. However, the Marriage Law and the Islamic Law Compilation do not explicitly regulate the legal status due to the cancellation of marriage relating to the legal status of the husband and the wife whose marriage was canceled, the legal status of child care and the legal status of assets obtained at the time of marriage after the enactment of a court decision regarding the cancellation of the marriage.

### **Suggestion**

1. In order for the Attorney General's Office in this matter, especially the State Attorney General's Office, to be more proactive in exercising their authority in the civil and state administration sector, especially in relation to law enforcement and authority in the field of public order and to actively provide legal counseling to the public regarding the cancellation of same-sex marriages;
2. It needs to be regulated more clearly by legislators and the legislative council together with the Government and the Attorney General's Office itself in the form of statutory regulations and in the form of a Decree of the Attorney General of the Republic of Indonesia regarding guidelines for exercising the authority to cancel this type of marriage so that the State Attorney General can use the powers they have based on existing provisions, especially in the case of filing requests for cancellation of same-sex marriage at the court level, be it the District Court or the Religious Court.

3. It is necessary to make implementing regulations regarding applications for cancellation of same-sex marriage that are clearer and more complete so that the authority of the State Attorney's Office in the cancellation of same-sex marriage can be maximized.

### **Thank-You Note**

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### **Bibliography**

#### **Books :**

- Dadar Junaidi & Dorce Tanjung, *Mental Anomalies (Easy Ways to Know Mental Deviations and Other Abnormal Behaviors)*, Andi Offset, Jakarta, 2012.
- Evy Lusia Ekawati, *The Role of State Attorney Attorneys in Civil Case Handling*, Genta Press, Yogyakarta, 2013.
- Hilman Hadikusuma, *Indonesian Marriage Law According to: Legislation Customary Law, Religious Law*, CV. Mandar Maju, Third Edition, Bandung, 2007.
- H.P. Panggabean, *Application of Legal Theory in the Indonesian Judicial System*, PT. Alumni, Jakarta, 2014.
- Iyus Yosep and Titin Sutini, *Seventh Printing Textbook of Mental Nursing and Advance Mental Health Nursing*, Refika Aditama, Bandung, 2016.
- Komnas Ham, *State Efforts to Ensure the Rights of Minority Groups in Indonesia (A Preliminary Report)*, Jakarta, 2016.
- M. Yahya Harahap, *Civil Procedure Law on Lawsuits, Trials, Confiscation, Evidence, and Second Edition Court Decisions*, Sinar Grafika, Jakarta, 2017.
- Peter Mahmud Marzuki, *Legal Research*, Kencana Prenada Media Group, Jakarta, 2011.
- Rahmat Hakim, *Islamic Marriage Law*, Pustaka Setia, Bandung, 2000.
- Riduan Syahrani, *Summary of the Digest of Legal Studies*, Publisher Cita Aditya Bakti, Bandung, 1999.
- Satjipto Raharjo, *Law Enforcement Problems A Sociological Overview*, Sinar Baru, Bandung, 1993.
- Sirman Dahwal, *Comparison of Marriage Law*, Mandar Maju, Bandung, 2017.

### **Journal**

- Nanang Fahrudin, 2013, "The Prosecutor's Authority to File a Marriage Cancellation Request According to Law No. 1 of 1974 Concerning Marriage", Journal of Scientific Work, Law Study Program, Faculty of Law, University of Jember (No Volume), (No Number)

## **Laws and Regulations**

1945 Constitution

Law Number 1 Year 1974 Concerning Marriage

Law Number 7 of 1989 concerning Religious Courts

Law Number 16 of 2004 concerning the Attorney General's Office

Regulation of the Attorney General of the Republic of Indonesia Number : 040 / A / J.A / 12/2010 dated December 13, 2010 concerning Standard Operating Procedures (SOP) for the Implementation of Civil and State Administrative Duties, Functions and Authorities.

Letter of the Junior Attorney General for Civil and State Administration Number : B - 017 / G / 2/1996 dated 29 February 1996

## **Internet**

<https://dosenpsikologi.com/pengertian-lgbt-menurut-para-ahli>, last accessed on October 31, 2018, at 14.50 WIB

<https://www.republika.co.id/berita/nasional/umum/16/01/23/oleaq5394-ini-provinsi-dengan-jumlah-gay-terbanyak>, accessed on 23 July 2020 at 23.00 WIB

<https://news.detik.com/berita-jawa-timur/d-3696034/warga-jember-dihebohkan-kabar-pernikahan-sesama-jenis>, last accessed on October 31, 2018, at 19.00 WIB

## **Decision**

Decision of the Constitutional Court Number: 46 / PUU-XIV / 2016 dated December 14, 2017

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