

## BREACH OF BETROTHAL IN MALAYSIA: A COMPARATIVE STUDY BETWEEN SYARIAH AND CIVIL LAW

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### Info Artikel

#### Article History:

Received: April 21, 2023

Accepted: July 19, 2024

Published: July 24, 2024

ISSN: 2656-1654

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e-ISSN: 2656-193X

### Abstrak

Acara pertunangan di Malaysia dirayakan dengan upacara resmi yang memakan biaya besar disertai dengan pemberian hadiah-hadiah yang berharga dan mewah. Oleh itu, pembatalan pertunangan dari aspek biaya, hadiah pertunangan itu perlulah dikembalikan akibat timbul rasa penghinaan dan rasa malu yang harus ditanggung oleh pihak yang bersangkutan. Keadaan ini menyebabkan masyarakat perlu melihat kepada undang-undang keluarga Malaysia. Penelitian ini bertujuan untuk menjelaskan konsep pelanggaran pertunangan dari sudut pandang syariah dan hukum. Tulisan ini akan menganalisis permasalahan tersebut dari sudut pandang syariah sekaligus mengevaluasi undang-undang di Malaysia antara syariah dan hukum perdata terkait dengan hal tersebut serta didukung dengan kasus hukumnya. Metodologi kualitatif digunakan untuk menganalisis data termasuk buku, artikel, situs web, dan internet. Penelitian ini juga melakukan wawancara terhadap seorang pengacara dan 2 orang akademisi. Hasil diskusi menunjukkan perbedaan jelas antara undang-undang keluarga Islam dan bukan Islam dalam menyikapi masalah ini. Secara praktek, Undang-Undang atau Pemberlakuan Hukum Keluarga Islam hanya berlaku bagi umat Islam yang dibicarakan di pengadilan Syariah, sedangkan non-Muslim ditangani berdasarkan Undang-undang Kontrak tahun 1950 di pengadilan Perdata terkait pertunangan di Malaysia. Penelitian ini merekomendasikan penyelesaian permasalahan ingkar janji menikah di Malaysia hendaklah melihat kepada undang-undang keluarga Malaysia agar masyarakat Malaysia dapat menciptakan rasa harmonis di kalangan mereka dan undang-undang Malaysia mampu mengurangi kasus ingkar janji menikah di masyarakat.

**Kata kunci:** Syariah, Perdata, Tunangan, Malaysia, Komparatif

### Abstract

Engagement events in Malaysia are celebrated with expensive formal ceremonies accompanied by the giving of valuable and luxurious gifts. Therefore, if the engagement is canceled from a cost aspect, the engagement gift needs to be returned due to the feeling of humiliation and shame that must be borne by the party concerned. This situation causes people to need to look at Malaysian family law. This research aims to explain the concept of breach of engagement from a sharia and legal perspective. This article will analyze this problem from a sharia perspective as well as evaluate the laws in Malaysia between sharia and civil law related to this matter and support it with legal cases. Qualitative methodology was used to analyze data including books, articles, websites, and the internet. This research also conducted interviews with a lawyer and 2 academics. The results of the

discussion showed clear differences between Islamic and non-Islamic family laws in addressing this issue. In practice, the Law or Application of Islamic Family Law only applies to Muslims who are discussed in Sharia courts, while non-Muslims are handled based on the Contract Act of 1950 in Civil courts regarding engagements in Malaysia. This research recommends that solving the problem of broken promises to marry in Malaysia should look at Malaysian family law so that Malaysian society can create a sense of harmony among themselves and Malaysian laws are able to reduce cases of broken promises to marry in society.

**Keywords:** Syariah, Civil, Betrothal, Malaysia, Comparative

## INTRODUCTION

Malaysian marriage ceremonies often include several ancillary customs. In Islam, the practises are recognised as good and reasonable. It offers various advantages, such as *peminangan* or engagement ceremony procession. Also, in Malay tradition, betrothal or *peminangan* is seen as the first step towards marriage. Betrothal can simply be understood as a proposal by a man when he asks a woman personally or through a middleman for her hand in marriage. Basically, Enactment and Islamic Family Law that has been enacted in Malaysia effectively does not give meaning specifically the term of betrothal. However, one of its sections makes references to an arrangement for marriage that is made either directly or through an intermediary, such as a guy that a girl may trust to hear his expression of interest in marriage (Section 15 of Islamic Family Law (Federal Territory) Act 1984 (Act 303).

Basically, being engaged in Malaysia is not a requirement that must be fulfilled prior to marriage. However, according to Malaysian tradition, betrothal is one of the important steps to do before getting married as it is about the agreement between two families that

will hold a marriage. It is purposed merely a declaration to the public that the marriage between the parties will take place in due course of time and at the same time, it might provide the bride and groom the chance to get to know one another. So, it can be said that a promise to marry or a betrothal is simply a commitment to carry out a marriage. As a result, a party may cancel a contract if there is a good basis for doing so or if both parties agree to do so.

However, breach of betrothal occurs when one party demands for the marriage while the other party does not intend to pursue with the marriage without a reasonable excuse. An action for a breach of betrothal will subject to legal action, no matter if it is a man or a woman as this has resulted in some losses on behalf of party who have been preparing for the wedding (Fikriyah, 2015). In general, people in Malaysia still do not know and are still vague about their rights in the provision of Malaysia in the event of a breach of promise whether in syariah or civil law. Due to the misconception that engagement is not something that is comparable to marriage, many people frequently view engagement cancellation as being insignificant. However, as the result, some losses have been experienced by

the party who were preparing for the wedding. This loss is not only in terms of property in which all the cost has been bear by the party but also in terms the dignity of the party.

## RESEARCH METHOD

This research is study in the field of law which focuses on regulation Islamic Family Law in the states of Malaysia and Contract Act 1950 as it relates to engagement or betrothal. Therefore, this research uses a qualitative research method in which focuses on collecting data from the library methods such as research through internet, books, articles and recent studies or theses. In addition, to acquire a better understanding of the comparative study of breach of betrothal between the syariah and civil law provision in Malaysia, some structured interviews were performed with few interviewees who are specialised in the field of syariah such as Prof Madya Dr. Lukman bin Abdul Mutalib, a lecturer in USIM and Tuan Juraish bin Kamaruddin, a Syarie lawyer, also in civil law which is Dr Fareed Mohd Hassan, a lecturer in USIM. The sociological approach in this engagement is to get to know each other towards marriage. This normative act determines or is based on standard or standard rules in issues involving the cancellation of an engagement. Through an anthropological approach, namely the scientific study of human origins, behavior and physical, social and cultural development. The diversity of

clans and nations makes social relations problems very complex and requires a form of law that can be used as a guide in resolving the issue of canceling engagements.

## RESEARCH AND DISCUSSION

To explain the problems that occur in the engagement and the solutions, they will be explained as follows:

### BETROTHAL FROM SYARIAH PERSPECTIVE

An engagement is a promise of marriage made between a man and a woman. In Islam, engagement happens when there is a marriage proposal from a man to a woman, by the man himself or through middleman. The Islamic law also acknowledges betrothal and even encourages it. Both the Hadith of the Prophet Muhammad s.a.w. and the Holy Qur'an include references to betrothal. Allah clearly states in Surah Al-Baqarah verse 235:

وَلَا جُنَاحَ عَلَيْكُمْ فِيمَا عَرَّضْتُمْ بِهِ مِنْ  
خِطْبَةِ النِّسَاءِ أَوْ أَكْنَنْتُمْ فِي أَنْفُسِكُمْ ۗ عَلِمَ اللَّهُ  
أَنَّكُمْ سَتَدْكُرُونَهُنَّ

Meaning: There is no blame on you if you make an offer of betrothal or hold it in your heart. Allah knows that you cherish them in your hearts.

Other than that, according to a reliable hadith:

عَنْ جَابِرِ بْنِ عَبْدِ اللَّهِ، قَالَ قَالَ رَسُولُ  
اللَّهِ : صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ " ذَا حَظَبٍ أَحَدَكُمْ  
الْمَرْأَةَ فَإِنْ اسْتَطَاعَ أَنْ يَنْظُرَ إِلَى مَا يَدْعُوهُ إِلَى  
نِكَاحِهَا فَلْيَفْعَلْ "

Meaning: The Prophet Muhammad, s.a.w. said: When one of you asks a woman in marriage, if he can look at what will induce him to marry her, he should do so. Jabir said I asked a girl in marriage. I used to look at her secretly, until I looked at what induced me to marry her. I therefore married her. Sunan Abu Dawud (2802).

Betrothal is not merely a custom, but the Islamic law also acknowledges it and even encourages betroth as in the presence of an engagement, it is anticipated that there would be wisdom present to sustain good relations amongst Muslim from unfavourable event happen.

Indeed, Islam places great emphasis on building a household on a solid foundation from the very beginning (Ibrahim, 1963). So, with that Islam puts engagement as a prelude before stepping into the realm of marriage which provides an opportunity for both sides of the family members to get to know each other, as it is hoped to achieve compatibility and mutual understanding before entering the realm of marriage. At the same time, the man would have a fantastic opportunity to explain and inform the family of his future wife about his status, financial

situation, and family background and among other things through this approach. It is also customary for the two families to have a thorough discussion of the engagement contract, including the estimated or total cost of the wedding, as well as the date and location of the wedding. However, every single person who is engaged has the right to break the engagement or break the promise in the agreement to marry. Even so, it must be accompanied by a strong and reasonable reason that coincides with Hukum Syara' (Khalid, 2020).

Next, in Islam, an engagement occurs when a man proposes marriage to a woman. Before making a marriage proposal to a woman, a man should make sure that there is no restriction to marry the woman such as consanguinity, affinity, foster custody, or being someone else's fiancée, or that the proposal is not made during the iddah period. If the parties abide by this prohibition, the betrothal will be void.

In fact, it has become a custom and habit in Malaysia to celebrate the engagement by holding an engagement ceremony. The custom of the engagement ceremony that takes place in Malaysia is held with both parties who are engaged by exchanging gifts. Among the gifts that are a must in the engagement ceremony is the engagement ring. In addition, there are couples who give clothes, food, etc. There are scholars who define the intended gift in the engagement

ceremony as a grant. A gift is part of a grant, and it is a gift given by the grantor to the recipient with the aim of honouring others and showing love to fellow human beings. Malaysians have a tradition of presenting gifts during an engagement ceremony to foster greater intimacy, love, and harmony between the two families. An engagement present that is accepted and approved by both parties is regarded as a symbol of the engagement connection. After the handover gift has changed hands and the proposal has been accepted, the point of question is if there is a cancellation of the engagement either from the man's side or from the woman's side.

Therefore, there is a difference of opinion among four main schools of thought (madhhab) on this issue (Miszairi Sitiris, 2017). According to the Hanafi School, if the other party breaches the agreement, the donor may request the return of the gifts if they are still in good condition, have not been consumed, or have been destroyed (Azizah Mohd, 2019). The Maliki School, on the other hand, holds that if the breach was caused by the man, he has no right to demand the return of the gifts he gave. However, if the woman breaks the agreement, the man has the right to ask for the presents to be returned, regardless of whether they are still in existence. Means, the woman is responsible for the value of the gifts if they are destroyed. The Hanabilah then view that a man can reclaim the gifts he

has given to the woman. Meanwhile, according to our school of thought (the Shafie School), if there is a betrothal breach, gifts should be returned whether they are still in existence or not and the items themselves should be returned if they are still available. However, the value of the presents should be paid if the items have been consumed, used, or lost. According to Lukman bin Abdul Mutalib, a lecturer in USIM, school of thought of Maliki which approved to return all the gift by the defaulting party is in line with the provision and its practise that applicable in Malaysia.

#### **BETROTHAL FROM LEGAL PERSPECTIVE**

Betrothal is an engagement, agreement, or promise to marry also refers to the formal arrangement of a future marriage or engagement between two individuals. Means when a couple is betrothed, means they have entered into a promise or agreement to marry each other at some point in the future. Betrothal is a cultural and historical practice that has been followed in various societies that frequently involving the families of the individuals. It is a commitment which takes place precedes the actual marriage ceremony, and during this period, the couple is regarded as being promised to each other. A promise to marry that is guaranteed by significant consideration will be enforceable even if the promise hasn't explicitly promised to marry the promisor. A

contract to marry does not have to be documented in writing or even require that the mutual promises be made in straightforward terms.

However, the customs and significance of betrothal can vary across different cultures, historical periods, and it is important to note that different societies may have different engagement customs and practises. As certain cultures may not have a formalized engagement period and some betrothal may imply a less formal commitment and is often accompanied by the exchange of rings. The engagement is often publicly announced, and family and friends are informed about the upcoming wedding. The engagement period's duration can vary. Depending on practical and personal preferences, some couples have a relatively short engagement while others may have a longer one. Other than, it is common for couples to start planning for their wedding during the engagement period. This involves total or estimated amount of marriage expenses to be spent for the marriage ceremony, the date and place of the ceremony, guest list, etc. Thus, a breach of promise is maintainable in Malaysia and affords a right to the innocent one to seek compensation from the one in default because breach of betrothal could result in social disgrace that may face by the offending party. This is due to in societies where betrothal is a significant cultural practice, individuals who break off

engagements might be viewed unfavourably by their community.

In the event of a breach of betrothal, the aggrieved party is entitled to recover all expenses incurred in the preparation and contemplation of the marriage, such as deposit money for the wedding venue, cost of the bridal attire, booking made for honeymoon, cost for their wedding rings, etc as the court provided that all costs can be proven through invoices and other documentary evidence (Miszairi Sitiris, 2017). The court may also award damages for the humiliation and disgrace the aggrieved party endured because of the other partner breaking off the engagement. This is because of a breach of a formal betrothal agreement is regarded as a breach of contract, and legal action could be pursued. Thus, in Malaysia, Islamic Family Law Act only applies to Muslims, but the provisions are adopted and referred to in civil court concerning the breach of betrothal between non-Muslim parties.

## **THE COMPARISON BETWEEN SYARIAH AND CIVIL LAW CONCERNING BREACH OF BETROTHAL IN THE PROVISION OF MALAYSIA**

### **Syariah Law**

The provision on betrothal in Malaysia is the Islamic Family Law Act or Enactment which applicable to Muslim and varies by each state. Basically, matters related to Islam fall under jurisdiction of the state

government as stated in the List II of Ninth Schedule which explains that the religious field includes syariah law, personal and family law is under the jurisdiction of the state government. In relation to Islamic family law, matters empowered by the federal Constitution to the states include aspects of marriage, divorce, dowry, maintenance, adoption, child status, gifts, property division and non-charitable trust and so on. As an example, Islamic Family Law (Federal Territories) Act 1984 (Act 303), which is regarded as the primary Act, is the law that apply to all Muslims living in the Federal Territory and to all Muslims resident in the Federal Territory who are living outside the Federal Territory.

The same provision is also provided for in the Islamic family law of other states in Malaysia such as the Islamic Family Law (State of Selangor) Enactment 2003, the Islamic Family Law (State of Malacca) Enactment 2002, the Islamic Family Law (State of Kelantan) Enactment 2002, and the Islamic Family Law (Kedah Darul Aman) Enactment 2008 and others. Hence each state in Malaysia now is controlled by its own family law statute and has its own laws governing family matters as can be seen in Table 1.

**Table 1** Islamic Family Law in the states in Malaysia

State	Law
Federal Territories	Islamic Family Law Act (Federal Territory) 1984 (Act 303)
Johor	Islamic Family Law

	(State of Johore) Enactment 2003 (Enactment No. 17 of 2003)
Kedah	Islamic Family Law (Kedah Darul Aman) Enactment 2008 (Enactment 11)
Kelantan	Islamic Family Law (State of Kelantan) Enactment 2002 (Enactment No. 6 of 2002)
Melaka	Islamic Family Law (State of Malacca) Enactment 2002 (Enactment No. 12 of 2002)
Negeri Sembilan	Islamic Family Law (Negeri Sembilan) Enactment 2003 (Enactment No. 11 of 2003)
Pahang	Islamic Family Law (State of Pahang) Enactment 2005 (Enactment No. 3 of 2005)
Pulau Pinang	Islamic Family Law (State of Penang) Enactment 2004 (Enactment No. 3 of 2004)
Perak	Islamic Family Law (Perak) Enactment 2004 (Enactment No. 6 of 2004)
Perlis	Islamic Family Law (State of Perlis) Enactment 2006 (Enactment No. 7 of 2006)
Sabah	Islamic Family Law (state of Sabah) Enactment 2004

	(Enactment No. 8 of 2004)
Sarawak	Islamic Family Law Ordinance, 2001 (Ordinance No. 43 of 2001)
Selangor	Islamic Family Law (State of Selangor) Enactment 2003 (Enactment No. 2 of 2003)
Terengganu	Administration Of Islamic Family Law (State of Terengganu) Enactment 1985 (Enactment No. 12 of 1985)

Moving on to the specific law and practice in Malaysia, the entire Islamic family law in the state in Malaysia has provisions related to betrothal such as for the Federal Territories, Johor, Kedah, Kelantan, Melaka, Negeri Sembilan, Pahang, Penang, Perlis, Sabah, and Selangor the law in force fall under Section 15 (Table 1 above) of the enactment which provides that:

“If any person has, either orally or in writing, and either personally or through an intermediary, entered into a betrothal in accordance with Hukum Syara’, and subsequently refuses without lawful reason to marry the other party, the other party being willing to marry, the party in default shall be liable to return the betrothal gifts, if any, or the value thereof and to pay whatever moneys have been expended in good faith by or for the other party in preparation for the marriage, and the same be recovered by action in the Court”.

Thus, from the above provision, the essential points that can be deduced are:

1. There must be an oral or written betrothal agreement or covenant.
2. The agreement is entered into by the parties personally or through an intermediary.
3. There is a breach of such an agreement by one party without lawful reason.
4. The defaulting party shall be liable to return the betrothal gifts if they are still in existent, if not, the value of the gifts must be compensated.
5. The defaulting party must also pay whatever expenditures that have been spent in preparation for the marriage.
6. Such gifts and expenses may be recovered by bringing an action in the Syariah Court.

Meanwhile, the state of Sarawak and Terengganu also have similar provisions regarding to betrothal as the states above. However, the provision provided by the Enactment for both states fall under section 13. Section Section 13: Islamic Family Law Ordinance, 2001 (Ordinance No. 43 of 2001), Administration of Islamic Family Law (State of Terengganu) Enactment 1985 (Enactment No. 12 of 1985).

provides that:

“If any person has, either orally or in writing, and either personally or through an intermediary, entered into a contract of betrothal in accordance with Hukum Syara’, and subsequently refuses without lawful reason to marry the other party, the other party being



willing to marry, the party in default, if a man, shall pay as damages the amount of the *mas kahwin* that would have been payable or, in the absence of any agreement fixing the amount of the *mas kahwin* payable, an amount that the Court thinks proper having regard to the requirements of *Hukum Syara'*, together with other moneys expended by or for the woman in good faith in preparation for the marriage, or, if a woman, shall return the betrothal gifts, if any, or the value thereof and shall pay as damages other moneys expended by or for the man in good faith in preparation for the marriage, and the damages and betrothal gifts, or the value thereof, may be recovered by action in the Court.”

Based on the provisions, it can be concluded that:

1. There must be an oral or written betrothal agreement or covenant.
2. The agreement is entered into by the parties personally or through an intermediary.
3. There is a breach of such an agreement by one party without lawful reason.
4. If the breach was caused by the man, the amount of the *mas kahwin* that would have been received by the woman after married should be paid as damages, or, in the absence of an agreement establishing the amount of the *mas kahwin*, the Court will be determine an amount as deems appropriate in regard to the requirements of *Hukum Syara'*, along with other funds expended by

or on behalf of the woman in good faith in the event of the marriage.

5. If the breach was caused by the woman, she must refund any betrothal presents or its value and pay as damages any additional funds used in good faith by the guy or on his behalf to prepare for the marriage.

It can be observed that the entire Islamic family law set its provisions for the cancellation of engagement. This situation is in line with the view of Islamic scholar which allow claims for compensation due to the cancellation of the engagement either material compensation or general compensation as well as refunding the engagement rings or other jewellery is also one of the claims that can be brought against the person who broke the agreement. The legislation also permits the injured party to make a claim for any money paid in good faith toward wedding preparation, including the cost of house repairs and the reservations made for the wedding gowns, the hall, and the sofa. This is because a betrothal break without a good reason may create injury and loss, for which the Syariah Court may hear a claim. However, the Syariah Court does not have jurisdiction over claims for damages resulting from humiliation instead, the most appropriate jurisdiction for such claims to be brought to, would be the Civil Court as this matter is concerning to civil claim as stated by Juraish bin Kamaruddin, a Syarie lawyer in Klang.

There have been cases of engagement cancellation that the Syariah Court heard and ruled. In the case of *Aishah v Jamaluddin* 3 JH 104 (1978), the man has broken his promise to marry the woman without a good explanation. The woman claimed to have paid RM24 for her *mas kahwin*, RM800 for getting ready for marriage, and an engagement ring. The man was ordered by the court to pay RM24 *mas kahwin* in damages. The judge additionally ruled that Aishah was entitled to keep the engagement ring that was given to her, and that Jamaluddin should pay RM400 as compensation for lost house renovations and RM25 for clothing.

Other than that, In the case of *Salbiah Othman v Haji Ahmad Abdul Ghani*, 22 JH (1) 114 (2002), On July 28, 2001, the plaintiff and defendant got engaged. The wedding was scheduled for August 31, 2001. On August 17, 2001, the defendant, however, broke the agreement to get married through his representation without good reason. Subsequently, the plaintiff claimed RM 200,00 in damages for defamation and RM 9,677 in damages for marriage preparation. The defamation claim was dismissed by the court because the case should have been heard in civil court because it involved general damages and the plaintiff's public humiliation because of the defamation.

However, in the case of *Hussin v Moh*, 3 JH 44 (1980), The respondent's daughter was requested for marriage by the appellant on behalf of the son. It was

decided that RM500 should be the *mas kahwin* and a betrothal was set up. The respondent had spent RM350.40 on the marriage and on the day of the marriage, the appellant paid RM300 in cash and RM200 in jewellery on the day of the marriage, which the respondent declined to accept. The marriage did not take place. After that, the respondent filed an RM350.40 lawsuit against the appellant, claiming damages for getting married. The learned Kadi rendered a decision in favour of the respondent and mandated that the man pay RM350.40 in damages to cover the Plaintiff's marriage-related costs. Nevertheless, the Court decided during the appeal that it was the woman, not the man, who had broken the terms of the marriage contract. As a result, the Plaintiff was not entitled to the damages that were sought. According to this case, the only parties entitled to damages from any breakups are those who have failed.

### Civil Law

The laws enforced in Malaysian civil courts are referred to as civil law. The topic of discussion will be non-Muslim family law in Malaysia in this situation. Examining the statutes and court decisions demonstrates that civil law contains explicit provisions for what constitutes a legally binding agreement for a lawful marriage. According to Fareed Mohd Hassan, a lecturer in USIM, generally, in Malaysia, there are no specific provisions of law which relates to the issue of promise to marry.

However, breach of promise to marry is still a cause of action in court by virtue of section 3(1) of the Civil Law Act 1956 which provide that in Peninsular Malaysia, the court shall apply the principle under the Law of Contract in Malaysia and the English Common Law are applicable when a promise to marry is made by parties (Zulkifli Hasan, 2004). For that, a breach of promise to marry is dealt with under the Contract Act 1950. Although the principles under the Law of Contract are applicable, there is no need for the contract of a promise to marry to be made in writing. It is sufficient if there is evidence of consideration to create the promise to marry. The applicable provisions under the Contract Act 1950 are sections 10,11, 12 and 24, which relate to the capacity, consent, and consideration of both parties to the contract of promise to marry.

### **Element of betrothal**

To enter a valid contract of betrothal, parties must fulfil the requirement of a valid promise to marry according to the principles in Contract Law, to establish a valid contract of promise to marry, there must be offer, acceptance, consideration, and capacity.

#### ***Offer***

A valid pledge to marry must include both an offer and an acceptance. An offer, sometimes referred to as a proposal, is an element of contract law. An offer is defined as a declaration of intent to engage in a contract, subject to

certain conditions, made with the assumption that it will become legally enforceable if accepted by the (Section 2(a) of Contracts Act 1950).

#### ***Acceptance***

A declaration of desire to accept something that has been offered is called an acceptance. Section 2(b) of the Contract Act of 1950 addresses acceptance and specifies that an offer is considered accepted and turns into a promise when the individual gives his or her assent (Section 2(b) of Contracts Act 1950).

#### ***Consideration***

The consideration will be deemed made if the promisor accepts the promise made by the promisee. However, an action from the parties asks that the others do a certain action also considered as consideration. An example of the action done by the party such as exchange of ring between the parties (Section 24 of Contracts Act 1950).

#### ***Capacity***

a. Both parties must be single

In the event where both parties to the marriage must have the capacity to marry at the time to the marriage, which means that both individuals who intends to get married must be single at the time of the promise of marriage. Thus, if any of the parties to contract of marriage is already marriage, the contract to marry will be held illegal. However, this is not applicable to the

Muslim as Islam allows its believers to practice polygamous marriage.

b. Religion of both parties does not prevent them from entering a promise to marry.

In other religions other than Islam, it does not prohibit their believers to marry a person confessing a religion other than theirs. Means, they are allowed to marry even though they are of different religions and such a promise of marriage is valid. However, Islam does not allow their believers to marry other than a Muslim woman or man with the exception if their partner willingly converts to Islam.

c. Age of the parties

According to section 11 of Contract Act 1950, a person is competent to enter a contract at the age of majority, which in Malaysia is 18 years old and must be of sound mind as well as is not disqualified from contracting any law (Section 11 of Contract Act 1950).

## **Remedies**

Once a betrothal violation has been conclusively proven, there are two types of consequences arising from such breach (Nuraisyah, 2006).

### ***Damages***

a. General Damages

It is referred to the damages for the general breach of the engagement contract. Where judges might consider the plaintiff's hurt feelings and other losses in addition to the financial loss they have suffered when determining the appropriate number of damages. The rank and position of the plaintiff, the

harm done to his or her future life and chances of marriage, as well as the hurt to their feelings, are also considered when determining damages (Section 74(1) of Contract Act 1950).

b. Special Damages

It is damages that apply to specific things and may be measured in money, such as medical costs and wedding preparations.

### ***Return of gifts***

The only one who needs to give the presents and ring back to the plaintiff is the wrongdoer (defendant). The engagement ring and gifts must be returned by both parties if the contract to marry is annulled with their consent. It should be suggested that the gifts must be returned if the marriage does not take place, whether due to the death of the individual presenting the ring or other conditional gifts.

In addition to general and specific damages, it is important to consider the gifts and engagement rings that are typically exchanged or given to mark the engagement. If there is no formal agreement to it, the common law may be used.

There have been cases of engagement cancellation that the Civil Court heard and ruled. Based on the case of *Maria Tunku Sabri v Datuk Wan Johani Wan Hussin* (2012) 7 MLJ 419, plaintiff brought legal action and files a civil suit against the defendant, Datuk Wan Johani claiming that he had breached a contractual agreement to marry her. The plaintiff and defendant then entered into

a settlement agreement on March 10, 2004, for the purpose of settlement due to the breach of promise to marry by the defendant. As the result of the Settlement Agreement both parties agreed as in consideration, defendant paying the plaintiff a sum of RM5,500,000. The court determined that since the plaintiff was a married Muslim woman at the time of entering into the promise to marry, the settlement agreement or its execution was illegal and hence null and void. Moreover, the High Court dismissed the suit filed by Maria Tunku Sabri and ordering her could not enforce the settlement of the agreement as it was invalid under the Contracts Act and since the case was under the jurisdiction of the Syariah Court because both parties were Muslim, and the issue raised involved marriage.

However, in the breach a promise to marry cases for non-Muslims, it applied the element of contract such as regarding to case of Mary Joseph Arokiasamy by her next friend Sp Arokiasamy v Gs Sundram (1938) 1 MLJ 4, the Plaintiff claimed that both parties agreed to marry one another based on the love letter given by the defendant. The defendant then seduced the plaintiff with her consent resulting in her becoming pregnant and giving birth. Defendant denied paternity of the child and admitted never willing to marry plaintiff as they have differences of religion as the plaintiff is a Christian while the defendant is a Hindu and a

married man. She sought general damages as well as special damages, including maintenance for the kid for 15 months and medical costs related to her pregnancy and subsequent care of the child. The plaintiff is accordingly entitled to damages. She will be entitled to the special damages claimed amounting to RM420. She will also be entitled to general damages which have regard to the status of the parties and the unfortunate position at RM2,500. This case was ruled in Singapore and recognized by civil court of Malaysia and both parties are citizen of Malaysia.

Next, in the case of Foo Lai Sin v Wong Lee Hong (2017), Both the defendant and the plaintiff are individuals who connected via a dating agency. They then enter into a sale and purchase agreement to buy a house in Shah Alam, Selangor for RM1.4 million after getting to know each other for such a long time. Following the acquisition of the property, the plaintiff gave the defendant half of his property. Subsequently, the plaintiff said he never made marriage promises to the defendant and told the defendant he already had a new girlfriend. The plaintiff broke his promise to marry her, which devastated the defendant. The court held that by looking at how the plaintiff's relationship with the defendant went about, and the transfer of his half of his share of the property to the defendant, it can be said that the plaintiff did so because he had breached his promise to marry the defendant. The

court then satisfied that she has been adequately compensated by the plaintiff's transfer of his half share of the property to her.

## **RESOLUTION OF THE ISSUE OF BREACH OF BETROTHAL IN MALAYSIA**

### **Reform of legislation and enforcement of laws**

As we can see, betrothal was deemed to be an agreement that will usually be entered into by two parties to promise each other to get married. The common issue that will arise upon a breach of promise to marry will be whether any legal action can be taken against the party who has breached it. In Malaysia, it is stated that the defaulting party shall be liable to return the betrothal gifts if they are still in existent, if not, the value of the gifts must be compensated as well as pay whatever expenditures that have been spent in preparation for the marriage as stated under Section 15 of the IFLA for Muslim as well under Contract Act for non-Muslim (Section 15 of Islamic Family Law (Federal Territory) Act 1984 (Act 303)).

Nevertheless, society nowadays now takes it for granted regarding to breach of betrothal. This is because the legislation provided is not very strict and effective which the defaulting party only have to return the betrothal gifts and recover the expenses that other party has already spent as preparations for the wedding. Although breach of betrothal is punishable by fine,

enforcement is weak and is exacerbated by the lack of a reliable knowledge of individual.

In this situation, the loss by other party is not only in terms of property in which all the cost has been bear by the party for the wedding preparation but also due to humiliation and embarrassment must bear in consequence of the cancellation of engagement. So, the government must set specific legislation to the law breaker which including of strengthen the law. It can be done by proposing a new clause in the legislation by the state authority after reviewing current law in each state which is to make it fair between the parties due to breach of betrothal, enhance the law by enforce double pay to the defaulting party that called of the engagement without a lawful reason so that the justice can be restore by the injured party who facing the humiliation and high cost of money for the wedding preparation due to breach of betrothal. This will help bring about changes that will end breach of betrothal without a valid reason in Malaysia as it will be a lesson to the defaulting party and at the same time protect the right of the harmed party.

### **Application of Sulh in resolving betrothal issues**

In Malaysia, there is no training given to individual how to resolve dispute. However, it is widely practised by the Muslims to refer to their family member whenever a problem occurs. Family

members, typically an elder, will provide parties advice on how to settle their disagreement, but this is ineffective because it may be biased. Then, Sulh has been implemented in Malaysia via the Syariah Court uses elements of different forms of alternative conflict resolution with the goal of resolving ongoing hostilities between the parties, restoring their relationship in a peaceful way, and upholding their respective rights. Sulh is undoubtedly a very effective method of resolving disputes. This is evident in the statistics of Sulh provided by the Department of Syariah Judiciary Malaysia (JKSM) (The Department of Syariah, Malaysia at <http://www.jksm.gov.my/>). The objective of the session is to resolve dispute and maintain the good relationship between parties by resort to a third party or mediator to resolve the conflict.

Furthermore, this approach is preferable because the Malays would like family conflicts to remain private or be limited to a small group of individuals Sulh, on the other hand, is restricted to marriage conflicts in Malaysia and includes polygamy, divorce, maintenance, jointly acquired property, child custody, and mut'ah. In essence, all Syariah issues in Malaysia can be resolved within the present Sulh process, except for betrothal proceedings. In this issue, the Department of Syariah Judiciary taking the next step in its development to introduce betrothal as the form of Sulh

proceedings. This will allow the disputants to have access to a wider range of solutions in resolving the dispute between them especially in the betrothal issue to protect the right of the harmed parties due to the break a promise to marry as well as to reduce this on-going conflict between party for a better solution via an amicable settlement. Meanwhile, among the ADR method practiced in Malaysia outside the syariah court such as arbitration (Arbitration Act 2005), mediation (Mediation Act 2012), conciliation, and negotiation which applicable for non-Muslim in terms of civil cases other than marital disputes. Disputants in other types of civil disputes may now consider an alternative to litigation as its development and its implementation has been widely practiced throughout the world and Malaysia is part of this development.

### **Implementation of written agreement contract**

Basically, unlike marriage, engagement does not establish or impose mutual rights and responsibilities under the law. Thus, when a breach of betrothal occurs, people still do not know and are still vague about their rights due to breach of betrothal in the law provision whether the wronged party may file a lawsuit against their fiancée, who turned their back on them as there is no written contract of both parties binding to one another. As we know, a promise by one

party to marry another is not legally binding until the other party also promises to marry the first party, thereby creating a legally enforceable contract between the parties.

In Malaysia, a contract to marry does not need to be evidenced by writing or even that express words should make the mutual promises so long as a promise to marry is supported by some valuable consideration, it will be enforceable even though the promise has not, in turn, made an express promise to marry the promisor. While oral agreements to betroth can still be enforceable, it's better to have betrothal contracts in writing as to prevent fraud and protect the rights of both parties. To be conclude, the government must enact new law to impose written betrothal contract as compulsory in Malaysia.

### **Conduct social awareness campaign to raise consciousness on betrothal**

As we can see, poor implementation and limited awareness of breach of betrothal legislation are one of the reasons for the high prevalence of break a promise to marry in Malaysia. Therefore, a free program available to communities or campaign in relation to the breach of betrothal in the school, university and so on by the authorities or NGO must take place to highlight these concerns and help bring about changes that will end breach of betrothal without valid reason in Malaysia as the primary goal of the campaign itself is raising awareness and illuminating

people's minds to address the dark side of this issues. It is vital to give the lesson to the society to not to call off the engagement without a lawful reason as it would give a bad implication to the other parties especially to the party who has been preparing for the wedding. This is also a tremendous opportunity to raise awareness and visibility as well as bring the issue to the forefront of discourse, policy, and laws.

Other than that, the authorities also may launch a social media awareness campaign to promote information-sharing on dark side of breach of betrothal. The campaign will feature a series of social media posts and interactive content, including videos, and chatbots designed to engage and educate young people in Malaysia. The campaign seeks to engage young people in an easy and interactive approach, providing them with the necessary knowledge and information to make informed choices about their lives. The initiative is part of the government efforts to reduce the issue in Malaysia, which affects the innocent parties, has a serious negative impact on their mental health, life, and prospects. Through the campaign, the government, and the NGO aim to increase understanding of the risks associated with the issue and to provide young people with resources and support to gain knowledge about the law provision in Malaysia.

The issues that arise regarding the breach of betrothal for the Islamic community also look at local customary



law as a support for Malaysian Islamic family law. This will provide a way to resolve the issue of breach of betrothal to move towards a *sakinah* and *mawaddah* family.

## CONCLUSION

Engagements are protected by Malaysian law, if there is an annulment there must be a suitable reason. One party violates the agreement without clear reasons, the other party can file a lawsuit against the defaulting party in the Sharia or Civil Court, depending on the jurisdiction of the court. Cases of breach of engagement often occur in society and are very detrimental to the parties involved, both socially and economically. Thus, in Malaysia, breaking off an engagement has legal consequences because engagement is more than just a tradition that should not be taken seriously because it signifies an agreement between a man and a woman who agree to enter into marriage.

The legal guidelines for canceling an engagement in Malaysia can be seen from two different sides, namely the Islamic and non-Islamic family sides. The Islamic Family Law Act or Enforcement only applies to Muslims in Sharia courts, while non-Muslims are dealt with under the Contract Act 1950 in Civil Courts regarding engagements in Malaysia. So, parties who feel disadvantaged due to the cancellation of the agreement can file a lawsuit in the form of compensation and financial losses because the judge will decide with certainty the costs that must be paid by the party who is in default due to the breach of the agreement.

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