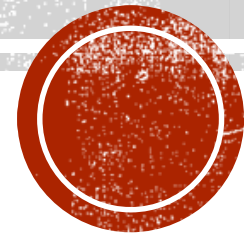


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**BETROTHAL AND GENERAL DAMAGES
FOR HUMILIATION:
AN APPRAISAL ON HARMONISATION OF
SHARI'AH AND CIVIL LAW**



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INTRODUCTION

- Marriage is a legal means to establish a legal relationship between a man and a woman
- It goes without saying that the institution of marriage is recognized by all legal systems nationally and globally.
- Betrothal is a preliminary to a marriage contract. Even though betrothal is not yet a marriage but a mere agreement to marry, breach of betrothal carries certain legal effect
- one of the effects of betrothal can be humiliation or embarrassment on the part of the aggrieved party.



OBJECTIVES OF THE RESEARCH

- To study the effect of Breach of betrothal under both Islamic and Civil Law
- To Appraise the idea of Harmonisation of law under Islamic and Civil Law
- To proposal recommendations on the aspect of harmonisation where relevant and necessary



METHODOLOGY OF RESEARCH

- The research is a qualitative, library research.



BETROTHAL UNDER THE SHARI'AH AND ISLAMIC LAW ENACTMENT

- In Islam, betrothal is known as khitbah which literally means a proposal to marry. Imam Muhammad Abu Zahrah defines khitbah as a proposal to marry which is made by a man to a specific woman for marriage with her either directly through the woman or her guardian (wali) in certain ways.
- There is no definition of betrothal under the Islamic Family Law (Federal Territories) Act 1984 (the IFLA); However sect 15 states the way betrothal is concluded;

““If any person has either orally or in writing, and either personally or through an intermediary, entered into a betrothal in accordance with Hukm Syara...”



BETROTHAL UNDER THE SHARI'AH AND ISLAMIC LAW ENACTMENT

- Betrothal is the best and legal way which allows both parties to have a look for his/her future wife/husband
- Through betrothal, a person can trace the good of his future spouse in a very descent and Islamic way without having to breach any moral decay and values.
- Investigation can be done through a friend or neighbour or through other means which satisfy him that the fiancée is a good Muslim / muslimah



BREACH OF BETROTHAL AND ITS EFFECT

- Betrothal is a plan for a marriage.
- It is highly believed that, When a betrothal is concluded, both parties wish that it will end up with marriage.
- Nevertheless, there are situations where one party might withdraw from a betrothal
- This will give rise to certain remedy esp to compensate the lost suffered by non default party.



REMEDY FOR BREACH OF BETROTHAL

- Remedy for breach of betrothal under the Shari'ah (Hukum Syarak) is envisaged under the Islamic law of the state Enactments in Malaysia.
- “If any person has either orally or in writing, and either personally or through an intermediary, entered into a betrothal in accordance with Hukm 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 may be recovered by action in the Court”
- This provision may be read together with sect 134A;
“(2) In the event of a lacuna or where any matter is not expressly provided for in this Act, the Court shall apply Hukum Syarak”.



REMEDY FOR BREACH OF BETROTHAL

- Return of the Gifts (sect 15)
- Compensation for expenses in marriage preparation expended in good faith (sect 15)
- Return of mahr (Shari'ah & sect 134A (2))

- Issue:
- General Damages for Humiliation



DECISION OF SHARI'AH COURT

- *Salbiah Othman v Hj Ahmad Abdul Ghani*(2006) JH 114
 - *Syariah Court held that remedy for general damages for humiliation can only be claimed in the Civil Court*
- *Mohd Azla bin Hj Kamaruddin v Mokhtar bin Hashim & Anor* (2007) 3 ShLR 128
 - Syariah Court held that injured feelings and mental anguish are feelings that dwell in a person heart and remains a secret to that person
 - In both cases, the Syariah Court allowed the claim for the loss suffered by non default which include marriage expenses and return of gift



BETROTHAL UNDER CIVIL LAW

- Betrothal is an agreement to marry
- Must fulfill all the requirements in order to consider it as a valid contract of betrothal
- It is not provided for under the LRA (Act 164)
- A formal, written agreement or an expressly worded joint promise is not always necessary to establish betrothal. Instead, the commitment to marry can be demonstrated through actions and other forms of evidence that indicate a deliberate intent to marry each other.
- In cases where there is a breach of betrothal, the determination of the contract's validity to marry and the available remedies will be based on common law principles, Contract Act 1950 and established precedents from Malaysian court cases.



Requirements of a valid contract of betrothal:

- a. **Offer**; one party (promisor) makes an offer (a promise to marry) to the other party (promisee)
- b. **Acceptance**; promisee accepts the offer
- c. **Consideration**; consent is given by the promisee to marry the promisor (doing certain act as requested by the promisor)

Harvey v. Johnston [1848] 6 CB 295

- *The Defendant promised to marry the Plaintiff with the consideration that she must travel to Ireland. She agreed and went to Ireland, but the Defendant failed to carry out his promise. She sued him for breach of promise to marry. The court held that there was good consideration as the Plaintiff went to Ireland as requested by the Plaintiff.*

d. **Capacity to marry;**

- i. Both parties are single (some exceptions to the rule e.g., personal law allows polygamous marriage -Nafsiah v Abdul Majid)
- ii. The religion of one or both parties does not prevent them from marrying.
- iii. They should be above the age of 18
- iv. If below 21, the consent of parents is required
- v. They should not be within the prohibited relationship



Breach of Betrothal

- In England, the Law Reform (Miscellaneous Provisions) Act 1970 has abolished the breach of promise to marry as a cause of action in court.
- This however is not applicable in Malaysia by virtue of s.3 of the Civil Law Act 1956. Thus, the breach of promise to marry is still a cause of action in court (it is derived from the Contract Act 1950)
- An action for breach will lie against the party in breach whether it be the man or the woman. If the specific date of the marriage is not determined or known, the marriage is expected to occur within a reasonable time.
- In *Doris Rodrigues v Bala Krishnan* [1982] 2 MLJ 77, the court maintained that the breach of promise to marry constitutes a cause of action in Malaysian court even though the Law Reform (Miscellaneous Provisions) Act 1970 has abolished breach of promise to marry as a cause of action in English court.
- Defences: (misrepresentation/not contract of uberrimae fidei/moral, physical or mental infirmaty)



THE EFFECT OF BREACH OF BETROTHAL UNDER CIVIL LAW IN MALAYSIA

- If the party that breached the contract is unable to present any valid defence, the party that did not breach the contract would be entitled to seek remedies;
 - a. Damages
 - b. Return of gifts (rings) in the absence of agreement to the contrary



A. DAMAGES

- While the English law has abolished actions for damages for breaches of marriage promises, it is maintainable in Malaysia as it is derived from the Contract Act 1950.
- The aggrieved party may seek monetary compensation (damages) for any losses suffered as a result of the breach. These damages could include emotional distress, humiliation, or any financial costs incurred in connection with the betrothal or engagement.
- The damages in an action of breach of promise to marry are almost entirely based on the discretion of the court.
- Damages can be divided into two categories:
 - i. General damages - General damages refers to compensation involving non-monetary aspects of the specific harm suffered such as physical or emotional pain and suffering, loss of companionship, disfigurement, loss of reputation, loss or impairment of mental or physical capacity.

In assessing the amount of damages, the court may take into consideration the injured feelings and wounded pride of the plaintiff.
 - ii. Special damages – damages for the specific items and can be quantified in monetary terms e.g., expenses for wedding preparation.



RAJESWARY & ANOR V BALAKRISHNAN & ORS
[1958] 3 MC 178

The court awarded general damages of \$1,500 to the plaintiff.

The court considered the defendant's unfeeling and contemptible behavior, as well as the letter written to the prospective father-in-law, as aggravating factors while determining the amount of damages awarded to the plaintiff.

The court also considered the defendant's financial position while determining the amount of damages.



DENNIS V SENNYAH [1963] MLJ 95

- *The plaintiff and the defendant had an agreement to marry on August 20, 1960. However, on August 10, 1960, the defendant ended the engagement and declined to marry the plaintiff. The plaintiff claimed that due to the breach, she suffered humiliation and mental anguish. Additionally, she incurred expenses totaling \$870.10 and seeks to pursue claims for both general and special damages.*
- *Held: Damages in a breach of promise of marriage case are at the discretion of the Court, and they serve not only to compensate the plaintiff for any actual loss suffered but also to punish the defendant in an exemplary manner. While damages can be substantial in aggravating circumstances, they should not be treated as a mere fine. Various factors are considered in assessing damages, including the emotional distress experienced by the plaintiff, the impact on their future life and marriage prospects, the social status and financial means of the defendant. Applying these principles, the Court awarded \$1,500 as general damages and \$620.10 as special damages in this case.*



DENNIS V SENNYAH [1963] MLJ 95

- *As regards General damages: the court found no aggravating circumstances such as allegation of seduction.*
- *There was naturally mental anguish and humiliation.*
- *The plaintiff was also found to be young and her future prospects not marred as such.*
- *The plaintiff's father standing in the community as a clerk in the Marine Department, Penang was also taken into consideration.*
- *Considering the defendant's occupation as a Revenue Officer in the Customs Department with an income of about \$244 per month, the court deems that general damages totaling \$1,500 would be appropriate in this case.*



***NAGAMAH A/P SUBRAMANIAM LWN
PONNUSAMY A/L RAJOO [2008] 6 MLJ 152***

The defendant, through sweet promises, easily deceived the plaintiff, who was deeply in love with him, into having a sexual relationship with him based on his promise to marry her.

The plaintiff's actions were influenced by the defendant's promise.

However, after the plaintiff asked the defendant to marry her, he ran away, indicating the existence of the promise to marry.

As a consequence of the breach of promise, the plaintiff experienced loss, agony, loss of honor, and humiliation.

The court awarded the plaintiff RM50,000 in damages for breaching of promise to marry, RM20,000 for the plaintiff's loss of honor, reputation, shame, and mental distress as well as RM2,000 for assault.



B. RETURN OF GIFTS

- In a breach of promise to marry, the party who breaks the promise is obligated to return the gifts and engagement ring to the other party.
- If the marriage does not take place either through the demise of the person giving the ring or other conditional gifts, it should be implied that the gifts shall be returned.

Cohen v Sellar [1926] All ER Rep 312

McCardie J in his judgment elucidated that if a woman who has received a ring refuses to fulfil the conditions of the gifts, she must return it to the man. Nevertheless, if the man without a recognised legal justification refuses to carry out his promise of marriage, he cannot demand from the woman for the return of the engagement ring. If the engagement is to be dissolved by mutual consent, both parties must return the engagement ring and gifts to each other.



APPRAISAL OF HARMONISATION

- The above discussion shows that both Islamic and Civil law are in harmony in terms of remedy for breach of betrothal
- Both laws rule for compensation for the loss suffered by non default party in the case of breach of betrothal
- Both laws are in harmony as regards to remedy on the return of the gifts
- As regards to general damages, both laws are in agreement that non default party is entitled to any loss suffered especially in monetary form such as loss of earning



CONCLUSION

- All legal systems in this world be it divine or man-made law is to establish justice.
- It is the common goal of legal systems to provide the remedy and punish the offender so that it can be at the same time lesson to be learnt by others not to commit the same offence.
- As regards the case relating to breach of betrothal, even though it is a civil matter, the right of the parties who suffered loss must be compensated.
- It seems both Islamic and Civil laws to a certain extent are harmonious as they carry the same purposes and objectives i.e. to compensate the non default party and to punish the offender.



THANK YOU

