

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

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### ABSTRACT

Betrothal is an agreement or a promise to marry. The *Shari'ah* and civil law recognise betrothal as a significant plan before and towards a marriage contract. Both laws also agree that in the event of a breach of betrothal, the party in default is liable to certain damages and compensation. Nevertheless, there are different principles as regards general damages for humiliation or embarrassment. This paper deals with betrothal and the legal effect of a breach of betrothal under the *Shari'ah* and civil law. The research is qualitative, adopting library research and content

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analysis. The research seeks to study the position of betrothal generally under both the *Shari'ah* and civil law and the effect of a breach of betrothal on the parties who are at fault. This paper further examines items claimable as compensation under both laws including general damages for humiliation. The paper further analyses certain points of laws on damages in breach of betrothal under both laws that are in harmony and differing. Finally, the paper highlights the possibility of harmonisation between the *Shari'ah* and civil law particularly on general damages of humiliation.

**Keywords:** Betrothal, General Damages for Humiliation, Islamic Law, Civil Law, Harmonisation.

## **PERTUNANGAN DAN GANTI RUGI UMUM UNTUK PENGHINAAN: SUATU PENILAIAN TERHADAP HARMONISASI ANTARA SYARIAH DAN UNDANG- UNDANG SIVIL**

### **ABSTRAK**

Pertunangan adalah suatu perjanjian atau janji untuk berkahwin. Kedua-dua undang-undang Syariah dan sivil mengiktiraf pertunangan sebagai perancangan yang signifikan sebelum dan menuju kepada kontrak perkahwinan. Kedua-dua undang-undang juga bersetuju bahawa dalam kes pelanggaran pertunangan, pihak yang ingkar bertanggungjawab terhadap ganti rugi dan pampasan tertentu. Namun demikian, terdapat prinsip-prinsip yang berbeza berkaitan dengan ganti rugi umum untuk penghinaan atau malu. Kertas ini pada dasarnya membincangkan pertunangan dan kesan undang-undang terhadap pelanggaran pertunangan di bawah undang-undang Syariah dan sivil. Penyelidikan ini adalah penyelidikan kualitatif, menggunakan penyelidikan perpustakaan dan analisis kandungan. Penyelidikan ini bertujuan untuk mengkaji secara umum kedudukan pertunangan di bawah kedua-dua undang-undang Syariah dan sivil serta kesan pelanggaran pertunangan terhadap pihak-pihak yang bersalah. Kertas ini juga meneliti item-item yang boleh dituntut sebagai pampasan di bawah kedua-dua undang-undang termasuk ganti rugi am kerana

keaiban. Kertas ini juga menganalisis beberapa perkara undang-undang mengenai ganti rugi dalam pelanggaran pertunangan di bawah kedua-dua undang-undang yang sejajar dan berbeza. Akhirnya, kertas ini menyoroti kemungkinan harmonisasi antara undang-undang Syariah dan sivil khususnya mengenai ganti rugi am kerana keaiban.

**Kata Kunci:** Pertunangan, Ganti Rugi Am Kerana Keaiban, Undang-Undang Islam, Undang-Undang Sivil, Harmonisasi.

## INTRODUCTION

Marriage is a legal means to establish a legal relationship between a man and a woman. Marriage seemed common and well known in all religions all over the world especially to establish and strengthen a family institution. The institution of marriage is recognised 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, a breach of betrothal carries certain legal effects if it is breached by one party. Such includes the return of betrothal gifts and compensation for whatever money was expended in good faith for marriage preparation. Apart from the stated loss, one of the effects of betrothal can be humiliation or embarrassment on the part of the aggrieved party.

## BETROTHAL UNDER THE *SHARI'AH* AND THE ISLAMIC LAW ENACTMENT

### Concept of Betrothal

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.<sup>1</sup>

Betrothal is the best and legal way which allows the proposer to have a look at his future wife. It gives chance to a man to have a look at a woman (or vice versa) openly and formally without having a secret meeting.<sup>2</sup> If a man wishes to marry a woman, it is good for him to have a plan before the marriage through betrothal as he can investigate the woman through her friends or neighbours or through other means which satisfy him that the woman is a good Muslimah.<sup>3</sup> Betrothal is encouraged so that the parties may be acquainted with one another before the marriage and then marriage takes place after the parties have seen and assessed one another.<sup>4</sup>

### **Breach of Betrothal and Its Effect**

The customary practices relating to betrothal can be followed so long as they are not contrary to Islam. It is a maxim of Islamic law that custom is an arbiter and therefore carries legal force.<sup>5</sup> In a Hadith, it is reported that, the Prophet (s.a.w) said: “*A matter or deed which is regarded as good by the Muslim community is also good with Allah.*”<sup>6</sup>

According to custom, parties are encouraged to give presents to one another and thus help to increase respect and love for one another.<sup>7</sup> The type of gifts which are presented during betrothal depends on the

<sup>1</sup> Muhammad Abi Zahrah, *Al-Ahwal al-shakhsiyyah* (n.pp: Dar al-Fikr al Arabi, 1957/1377), 26.

<sup>2</sup> Ibid., 28. See also Najibah Mohd Zin et al. *Islamic Family Law in Malaysia. Second Edition*, (Subang Jaya: Sweet & Maxwell. 2021), 1.

<sup>3</sup> Najibah Mohd Zin et al., 1.

<sup>4</sup> Ahmad Ibrahim, *Family Law in Malaysia. Third Edition*. (Kuala Lumpur: Malayan Law Journal, 1997), 168. See also Hafiz Ithnin, Dugaan Orang Bertunang, myMetro, at <https://www.hmetro.com.my/WM/2022/07/861354/dugaan-orang-bertunang> accessed on 25 October 2024.

<sup>5</sup> Jalal al-Din ‘Abd al-Rahman Al-Suyuti, *Al-Ashbah wa al-naza’ir* (Beirut: Dar al-Kutub al-‘Ilmiyyah, 1983/1403), 80.

<sup>6</sup> Reported by Imam Ahmad Ibn Hanbal in al-Musnad. Hadith no. 3600; al-Tabrani, hadith no. 8582.

<sup>7</sup> Ahmad Ibrahim, *Family Law in Malaysia*, 168.

custom of society. What is commonly given and exchanged includes engagement rings, food, fruits, etc.<sup>8</sup>

A betrothal is an agreement or a promise to marry. It is a preliminary to a marriage contract. In principle, it is an obligation of every Muslim to stick to the promise as the Qur'ān, says: “*O you who believe, fulfil all obligations.*”<sup>9</sup> In a Hadith, it is reported that the Prophet (s.a.w) said: “*Muslims are bound by their promises and the conditions which they have agreed to.*”<sup>10</sup>

Nevertheless, a betrothal does not constitute a marriage in itself. It is therefore possible for the parties to break the agreement if there are valid reasons for doing so.<sup>11</sup> Betrothal is a sort of moral binding. It does not give rise to the right of alimony, and if broken it does not involve legal consequences.<sup>12</sup>

The Muslim jurists (*fuqaha*) have discussed the effect of a breach of promise to marry especially on the gifts given or exchanged during betrothal.<sup>13</sup> All the *fuqaha* unanimously agree that if both parties or one of them decide to break the engagement, the woman has to return the dowry if taken and it still exists but it no longer exists, she has to return what is similar to it or return the value of the thing if it has value.

<sup>8</sup> Miszairi Sitoris & Nurul 'Arifah Mohamad, 2017. Gantirugi Akibat Pembatalan Pertunangan: Menurut Fiqh serta Amalannya di Mahkamah Syariah, in Anwar Fakhri Omar et. al, *Proceeding of International Conference on Law and Islamic Jurisprudence (ICLIJ 2017)*, 75, See also Kogila A/P Sunder Raj and Muammar Ghaddafi Bin Hanafiah, Adat Bertunang: Satu Kajian Perbandingan Antara Etnik Melayu Dengan Etnik India, *JURNAL WACANA SARJANA*, Vol. 3(2) Sept 2018, 7.

<sup>9</sup> Qur'ān, 5 : 1.

<sup>10</sup> Narrated by al-Tirmizi, Abu Dawud and Ibn Majah. See, Muhammad bin Ismail al-Amir al-Yamani Al-San'ani, *Subul al-Salam, sharh bulugh al-Maram min Jam'I adillat al-Ahkam*. Vol. 3 (Beirut – Lebanon; Dar al-Fikr, 1988), 111.

<sup>11</sup> Ahmad Ibrahim, *Family Law in Malaysia*, 170. See also Miszairi Sitoris, 77.

<sup>12</sup> Ahmad Ibrahim, 168. See also Blog KamarSyarie, 2019, Maqasid Hukum Gantirugi Pertunangan Dalam Undang-undang Keluarga Islam di Malaysia, <https://kamarsyarie.wordpress.com/2019/11/27/maqasid-hukum-gantirugi-pertunangan-dalam-undang-undang-keluarga-islam-di-malaysia/> accessed on 25 October 2024. See also Miszairi Sitoris, 77-79.

<sup>13</sup> Wahbah al-Zuhaili, *Al-Fiqh al-Islami wa Adillatuhu*, tr. Ahmad Shahbari Solomon et. al. (Fiqh & Perundangan Islam), Vol. 7, (Kuala Lumpur: Dewan Bahasa dan Pustaka, 2001), 31-32.

This is because the dowry is only obligatory during the contract (*'aqd*) took place.<sup>14</sup>

The *fuqaha* differ in the case of gifts which are given or exchanged during betrothal. The Hanafis view that the gifts can be returned if there is a possibility of doing so and there are no obstacles such as the donor and the donee are still alive, or the gift or present has perished or damage or the gift is no more in the possession of the donee.<sup>15</sup>

According to the Malikis, if the breach is by the man, the woman does not have to return anything but if the woman is the one who has breached the agreement, the man has the right to get back all that he has given before.<sup>16</sup>

According to the Shafiis, the gifts should be returned whether they are in existence or not. If the goods are still in existence, then the goods themselves should be returned. If the goods have been consumed or used or lost, then their value should be returned.<sup>17</sup>

### **Remedy and Compensation Other Than Return of Advanced Dower (*Mahr*) and the Gifts**

In principle, there is no specific discussion by the classical Muslim jurists on remedy and compensation in the case of breach of betrothal other than the return of the *mahr* and the gifts.<sup>18</sup> According to Muhammad Mustafa Shalabi, the reason might be because there was no such issue that arose during those days. Furthermore, a breach of betrothal during those periods might not cause loss or harm (*dharar*) to either the male or female party.<sup>19</sup>

<sup>14</sup> Muhammad Mustafa Shalabi, *Ahkam al-usrah fi al-Islam; dirasah muqaranah bayna fiqh al-madhahib al-Sunniyyah wa al-madhahib al-Ja'fari wa al-qanun* (Beirut: Dar al-Nahdah al-'Arabiyyah, 1977/1397), 65.

<sup>15</sup> 'Abd al-Karim Zaydan, *Al-Jami' fi al-Fiqh al-Islami. Al-Mufassal fi ahkam al-mar'ah wa al-bayt al-Muslim fi al-Shari'ah al-Islamiyyah*. Vol. 6 (n.pp: Mu'assasat al-Risalah, 2012), 74.

<sup>16</sup> Shalabi, *Ahkam al-usrah*, 66. See also Zaydan, *Al-Jami'*, 75.

<sup>17</sup> Shalabi, *Ahkam al-usrah*, 66.

<sup>18</sup> Shalabi, *Ahkam al-usrah*, 69. See also al-Zuhaily, 32-33.

<sup>19</sup> Shalabi, *Ahkam al-usrah*, 69.

Contemporary Muslim scholars have also discussed the point of other remedies in the case of breach of betrothal. Muhammad Mustafa Shalabi quoted the view of al-Sanhuri, who observed the practice of the court in Egypt when dealing with remedy or compensation in the case of breach of betrothal.<sup>20</sup> Thereby, the court has established three principles related to the effect of breach of betrothal, which is firstly, betrothal is not a binding contract. Secondly, mere withdrawal from a betrothal will not be subject to any remedy or compensation. Thirdly, whenever the breach of betrothal leads to certain damage (*darar*) to the aggrieved party, compensation is allowed. Shalabi seems to agree with these principles as they are in line with the hadith of the Prophet (s.a.w) that states: “*harm may neither be inflicted nor reciprocated*” (*la dharara wa la dhiraar*)<sup>21</sup> as well as *fiqh* maxim ‘harm is to be eliminated’ (*al-dharar yuzal*) and ‘causing indirect harm is liable to a compensation if it is intentional’ (*al-tasabbub fi al-darar, yujib al-dhaman idha kaana ‘amdun*)<sup>22</sup> and the principles of abuse of rights. For example, in the case where the aggrieved party has quitted from his/ her job because of persuasion from the fiancée. Another example is that preparation has been done for marriage like matrimonial home or renovation of the house (as suggested by the party who breached the engagement).<sup>23</sup>

The above view corresponds with another view of the contemporary Muslim scholars, Zakiy al-Din Sha’aban who also discussed the view of Sanhuri.<sup>24</sup> He asserted that in principle, there is no liability to pay compensation in the event of the breach because the parties have the right to withdraw from the betrothal. The default party is liable to pay compensation to the aggrieved party if he contributes to the financial loss incurred on the aggrieved party.<sup>25</sup> He further asserts that if we observe this issue under the principle that governs the issue of damage i.e., the principle ‘there is no harm and reciprocal of harm’<sup>26</sup>;

<sup>20</sup> Shalabi, *Ahkam al-usrah*, 72-73.

<sup>21</sup> Majallat al-Ahkam al-Adliyyah, art.19.

<sup>22</sup> The original maxim states ‘al-tasabbub la yadhman illa bi al-ta’ammud’.

<sup>23</sup> Shalabi, *Ahkam al-usrah*, 72-73.

<sup>24</sup> See Zakiy al-Din Sha’ban, *Ahkam al-Shar’iyyah li Ahwal al-Shakhsiyyah*, 6th ed. (Benghazi: Univeristi Qaryunus, 1993), 79-81.

<sup>25</sup> See for example in the case of *Aishah v Jamaluddin* (1978) 3 JH 104.

<sup>26</sup> This principle means that no one may inflict harm to another person. And if he is inflicted with harm, he cannot reciprocate the harm. For example in the case where a person cause damage to the property of another person,

and the prohibition of deceit under the *Shari'ah*, the default party is liable to pay compensation as he contributes to the loss and deceitful to another party when he withdraws from the engagement.<sup>27</sup> This is also the view of Wahbah al-Zuhaily in his book *al-Fiqh al-Islami wa Adillatuhu*.<sup>28</sup>

On the other hand, according to 'Abd al-Karim Zaydan, in the case of withdrawal, the party who withdraws from the betrothal will not be entitled to any remedy (regardless of breach from any party).<sup>29</sup> The reason is that he is the one who misleads himself in the betrothal and hastens to engage before he can properly investigate the other party. As regards to the aggrieved party, the default party is not liable to pay compensation as well because he is considered exercising his right to withdraw from the betrothal based on the *fiqh* principle 'legal permission is incompatible with liability' (*al-jawaz shar'ie yunafi al-daman*). Zaydan further views that, this issue will not be governed under *fiqh* principle 'harm may neither be inflicted nor reciprocated' (*la darar wa la dirar*) and 'harm is to be eliminated' (*al-darar yuzal*) because both parties have the knowledge that withdrawal from a betrothal is permissible.<sup>30</sup>

The above discussion reflects two different views by contemporary Muslim scholars on remedy other than the return of dowry and gifts in the case of breach of betrothal; namely the aggrieved party is entitled to compensation if the loss is induced by the defaulting party and there is no other remedy as breach the betrothal is the right of either party since it is not a marriage yet and not legally binding. It seems that the first view is preferable especially to establish justice to the aggrieved party who might suffer certain financial loss due to the breach of betrothal. This seems to be agreed by recent authors who

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such person cannot supposed to damage his property in return because this will lead to further damage. Therefore, compensation is more relevant than the return of the harm or damage. See Al-Burno, Muhammad Sidqi bin Ahmad bin Muhammad. *Al-Wajiz fi Idoh Qawa'id al-Fiqh al-Kulliyah*, 5<sup>th</sup> ed. (Beirut-Lebanon: Muassasah al-Risalah, 2002), 251-255.

<sup>27</sup> See Zakiy al-Din Sha'ban, *Ahkam al-Shar'iyah li Ahwal al-Shakhsiyyah*, 6<sup>th</sup> ed. (Benghazi: Univeristi Qaryunus, 1993), 79-81.

<sup>28</sup> See al-Zuhayli, 32-34.

<sup>29</sup> Zaydan, *Al-Jami'*, 77-78.

<sup>30</sup> Zaydan, *Al-Jami'*, 77-78.

suggested that the issue of remedy in breach of betrothal must be more comprehensive i.e. not only constraint to preparation for the marriage.<sup>31</sup>

The above discussion further reflects that under Islamic law, the remedy for humiliation is not highlighted or clearly discussed. Nevertheless, the discussion by contemporary Muslim scholars may be taken as a guideline if the law is to consider a general remedy for humiliation subject to certain conditions and criteria.

### **Betrothal under the Islamic Family Law (Federal Territories) Act 1984**

Administration of Islamic law in Malaysia is governed by State Act and Enactments. Matters relating to the Islamic Family law of a Muslim in the Federal Territories are governed by the Islamic Family Law (Federal Territories) Act 1984 (IFLA)<sup>32</sup> which is regarded as a pioneer Act governing Muslims in Malaysia. While matters relating to the Islamic Family law of a Muslim in other States are governed by the respective State Enactment.<sup>33</sup>

The IFLA does not directly define betrothal. However, the provision that provides for remedy in breach of betrothal indirectly defines a betrothal. The IFLA states 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 Syarak, 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.”<sup>34</sup>*

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<sup>31</sup> See Miszairi Sitiris and Nurul Arifah Mohamad, 82.

<sup>32</sup> Act 303.

<sup>33</sup> See for example Islamic Family Law (Selangor) Enactment 2003, [Enactment No. 2 of 2003]. See also Ahmad Ibrahim, *The Administration of Islamic law in Malaysia* (Kuala Lumpur: IKIM, 2000), 37; Federal Constitution of Malaysia, part VI, Art. 73 & List II, State List, Ninth Schedule, Art. 95B (1) (a).

<sup>34</sup> Islamic Family Law (Federal Territories) Act 1984, s. 15.

The above provision on a remedy for breach of betrothal agreement is merely confined to the return of betrothal gifts and payment of whatever money expended in good faith for marriage preparation. This provision was also based upon and applied to the decisions of the Syariah Court in Malaysia.<sup>35</sup> Whilst the remedy for humiliation is totally silent. The reasons might be due to the absence of clear-cut rules for such claims under Islamic law (*Hukum Syarak*). Furthermore, there is no deliberation on that matter by the Muslim jurists in classical as well as contemporary treatises. Accordingly, section 134A of the IFLA that provides on the lacuna of the law becomes irrelevant as the *Hukum Syarak* itself seems to be silent on that matter. Similar provisions can be found in many other States in Malaysia including Selangor and Negeri Sembilan.<sup>36</sup>

Decisions of the Syariah Court on matters relating to remedy for humiliation indicate that such a claim or remedy is not relevant in the Syariah Court. So far, there are only two cases that provide principles on remedy for humiliation when the claim is made in the Syariah Court.

In the Negeri Sembilan case of *Salbiah Othman v Hj Ahmad Abdul Ghani*,<sup>37</sup> the Plaintiff entered into a betrothal agreement with the defendant on 28<sup>th</sup> July 2001. It was mutually agreed that the marriage contract would be held on 31 August 2001. Nevertheless, the defendant withdrew through his friend on 17 August 2001. Because of that breach, the plaintiff has brought an action for humiliation amounting to RM200,000 and compensation for money expended in good faith for marriage preparation. The Court held among others that the breach by the defendant was without reasonable and lawful reason and that the plaintiff was entitled to the second claim but rejected the claim for remedy of humiliation. Before coming to such decision, the Syariah High Court judge has emphasised that betrothal is a mere promise to marry and may be withdrawn with reasonable or lawful reason. Therefore, as the defendant has breached the promise without unreasonable grounds, he is liable to pay compensation to the plaintiff.

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<sup>35</sup> See for example *Aishah v Jamaluddin* (1978) 3 JH 104; *Amrina Rusyada binti Mohamad Safir v Muhammad Syukri bin Ismail* (2010) JH 30(2), 176.

<sup>36</sup> See Islamic Family Law (Selangor) Enactment 2003, s. 15; Islamic Family Law (Negeri Sembilan) Enactment 2003 [Enactment. No. 11 of 2003], s. 15.

<sup>37</sup> (2006) JH 114.

Nevertheless, as regards remedy for humiliation or embarrassment, the Court believed it is not relevant in the Syariah Court. The Court opined that the most relevant Court to entertain this claim is civil High Court as this matter relates to general compensation due to humiliation or embarrassment, social prejudice, emotional suffering, mental anguish, etc. The Court accordingly rejected the claim for embarrassment and the attention has only been given to remedy that is mentioned by section 15 of Islamic Family Law (Negeri Sembilan) Enactment 2003. There was no further discussion highlighted by the Court on the issue of humiliation. This seems to reflect that such a claim will not be successful and not relevant at all in the Syariah Court.

The same position can be seen in the Selangor case of *Mohd Azla bin Hj Kamaruddin v Mokhtar bin Hashim & Anor*.<sup>38</sup> In this case, the applicant who was the ex-fiance of the second defendant brought an action for breach of betrothal agreement. He claimed among others the remedy of double compensation of the gifts given during the betrothal ceremony as agreed among the parties as well as RM50,000 remedy for humiliation and embarrassment. The Court held that the defendants were at fault and liable to pay a remedy of double compensation. Nevertheless, the applicant has failed to get the remedy for humiliation. The Syariah Court viewed that injured feelings and mental anguish are feelings that dwell in a person's heart and remain a secret to that person. A judge cannot decide based on that secret or something intangible. Moreover, such a remedy is not covered under the Islamic Family Law (Selangor) Enactment 1984.

When addressing the issue of general remedy for humiliation, the Syariah Court judge has not further discussed such position of remedy for humiliation under Islamic law other than one basis i.e., the tradition of the Prophet (s.a.w) that stated to the effect: "*We judge something based on what is apparent (zahir) and Allah knows what is hidden or secret.*"<sup>39</sup>

The above two cases seem to provide a rule that a general remedy for embarrassment is not relevant in the Syariah Court. This is basically based on two reasons namely: lack of jurisdiction on general remedy

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<sup>38</sup> (2007) 3 ShLR 128.

<sup>39</sup> See al-Shawkani, Muhammad bin Ali bin Muhammad, *Al-Fath al-Rabbani min Fatawa al-Imam al-Shawkani*, Vol. 6 (Sana'a: Maktabat al-Jayl al-Jadis, 1423H.), 3043.

for humiliation and that matters relating to humiliation is intangible and remain secretly in the person's heart. Therefore, based on these rules and principles, a claim for a remedy for humiliation in the case of breach of betrothal agreement does not seem to be entertained in the Syariah Court in Malaysia.

## BETROTHAL UNDER THE CIVIL LAW

According to the Cambridge Dictionary, betrothal is “*a formal promise to marry someone.*”<sup>40</sup> A formal written agreement, or a joint promise explicitly stated in words, is not always a prerequisite for establishing betrothal. Instead, the intention to marry can be inferred from actions and other forms of evidence that demonstrate a deliberate commitment of the parties to wed each other.<sup>41</sup> If the exact date of the marriage is not specified in the agreement, the law assumes that the parties intended to marry within a reasonable time from the date of the promise.<sup>42</sup> Essentially, for a promise to marry to be considered valid, five key requirements must be met:<sup>43</sup>

- a. Offer: This occurs when one party (the promisor) extends an offer, which is a promise to marry, to the other party (the promisee).
- b. Acceptance: The promisee accepts the offer.
- c. Consideration: This involves the promisee consenting to marry the promisor, often by fulfilling a certain act as requested by the promisor.<sup>44</sup>

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<sup>40</sup>“Betrothal,” Cambridge Dictionary, accessed September 9, 2023, <https://dictionary.cambridge.org/dictionary/english/betrothal>

<sup>41</sup> Norliah Ibrahim et al., *Family Law (non-Muslims) in Malaysia* (Gombak: IIUM Press, 2021), 37.

<sup>42</sup> Ibid., 38. See also Nuraisyah Chua Abdullah, *Family Law for non-Muslims in Malaysia* (Selangor: International Law Book Services, 2013), 5.

<sup>43</sup> See Nuraisyah Chua Abdullah, *Family Law for non-Muslims*, 1.

<sup>44</sup> See *R.S. Thanalachimi v Sundararaju A/L Mattaya* [2010] MLJU 1339, the defendant proposed marriage to the plaintiff in London, and she accepted the proposal. As a result, the plaintiff gave up her job and voluntarily surrendered her home in London, which was mortgaged, and moved to

- d. Capacity to Marry: Both parties must meet several criteria, including being single,<sup>45</sup> not having religious restrictions against marriage,<sup>46</sup> being at least 18 years old,<sup>47</sup> obtaining parental consent if under 21 years old, and not being within a prohibited relationship.

### **Breach of Betrothal**

The Law Reform (Marriage and Divorce) Act 1976<sup>48</sup> (LRA) does not provide any provision for a breach of betrothal or promise to marry. A breach of promise claim can only be pursued if there is a prior agreement or contract to marry in place. An action for breach will lie against the party in breach whether it be the man or the woman. It is worth noting that in England, the Law Reform (Miscellaneous Provisions) Act 1970 has eliminated breach of promise to marry as a

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Singapore. These actions of the plaintiff can be considered as consideration for the promise made by the defendant. See also *Harvey v. Johnston* [1848] 6 CB 295.

<sup>45</sup> See *Spiers v Hunt* [1908] 1 KB 720, the defendant who was 70 years old and already married, promised to marry the 31-year-old plaintiff upon the death of his wife. The plaintiff knew about his marriage, but the defendant's wife did not pass away as expected. Due to his incapacity to marry another person while still being married, the Court ruled in favour of the defendant, dismissing the plaintiff's claim for breach of promise to marry.

<sup>46</sup> See *Mary Joseph Arokiasamy v Sundram* [1938] MLJ 4, a Hindu man promised to marry a Christian girl. He had informed her that his wife had passed away. However, he broke his promise. The High Court ruled that there was no religious impediment against a Hindu man marrying a Christian girl. Therefore, the promise to marry was considered valid and enforceable in the Court.

<sup>47</sup> See *Rajeswary & Anor v Balakrishnan & Ors* [1958] 3 MC 178, the first defendant promised to marry the first plaintiff but later backed out. The first plaintiff, who was a minor at the time, sued the first defendant for breaking the promise. The Court ruled that contracts to marry involving minors are treated differently, and the plaintiff could enter a valid contract. Thus, the contract to marry entered by a minor was not void (The Court decision was before the enforcement of the LRA).

<sup>48</sup> Act 164.

cause of action in court. However, this legal change does not apply to Malaysia.<sup>49</sup>

In the case of *Doris Rodrigues v Bala Krishnan*,<sup>50</sup> the plaintiff's claim for damages for breach of promise to marry was allowed. The Court held that the English Law Reform (Miscellaneous Provisions) Act 1970, which abolished actions for damages for breach of promise of marriage, does not apply in Malaysia. This distinction is rooted in the Civil Law Act 1956, and the Contracts Act 1950, which maintain breach of promise to marry as a valid cause of action in the Malaysian courts. As such, breach of promise to marry remains a viable cause of action in Malaysian legal proceedings.

### Legal Defences in Cases of Breach of Betrothal

There are three defences that individuals may use in defending themselves against a claim of breaking off an engagement or betrothal.<sup>51</sup> First is a common defence, namely, misrepresentation of fact by the plaintiff. This can be seen in the case of *Wharton v Lewis*.<sup>52</sup> In this case, the defendant made two claims of misrepresentation. He argued that before the engagement, the plaintiff's brother said that she would inherit property from her father, but it turned out that the father used the money to pay off debts. The defendant also alleged that the plaintiff lived a questionable life in Oxford, which was later confirmed to be true. The Court held that no misrepresentation occurred as the defendant was not induced to make the promise by false representations or wilful suppression of the truth. Accordingly, the plaintiff was awarded £150 in damages.

The second defence is a contract to marry is not a contract of *uberrimae fidei*. A contract *uberrimae fidei* is one in which a party is required to disclose all relevant facts and information to the other

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<sup>49</sup> Ibrahim et al., *Family Law (non-Muslims)*, 41-43; Abdullah, *Family Law for non-Muslims*, 9. See generally Nuraisyah Chua Abdullah, "Remedies for Breach of Betrothal: The Quest for Survival?," *International Journal of Academic Research in Business and Social Sciences* 12, no. 12 (2022): 43 – 51.

<sup>50</sup> [1982] 2 MLJ 77.

<sup>51</sup> See Nuraisyah Chua Abdullah, *Family Law for non-Muslims*, 5-6.

<sup>52</sup> (1824) 1 C & P 529.

party,<sup>53</sup> such as the plaintiff's prior agreement to marry someone else. In *Beachey v Brown*,<sup>54</sup> the defendant raised a defence, stating that the plaintiff had already agreed to marry someone else at the time they engaged. The defendant argued that had he been aware of this prior commitment, he would not have agreed to marry the plaintiff. However, the Court rejected this defence and ruled in favour of the plaintiff. Cockburn CJ, while acknowledging that there are many aspects to consider about a partner, believed that the defendant's discovery of the plaintiff's prior agreement should not entitle him to break the engagement. His Lordship further mentioned that in extreme cases where a woman's unchaste conduct fundamentally undermines the marriage contract, the man may be released from the engagement. This implies that there might be exceptional circumstances where such a defence could be considered valid.

The third defence is the plaintiff's moral, physical, or mental infirmity. In this defence, the party in default must provide evidence to demonstrate that the other party has an actual moral, physical, or mental infirmity that makes them unfit for marriage. It is necessary to show that this infirmity was either discovered after the engagement contract was made or that it only started to develop after the contract was entered into. For example, in *Jefferson v Paskell*,<sup>55</sup> the plaintiff fell ill with a chest disease soon after the engagement, and the doctor diagnosed her with tuberculosis, rendering her unfit for marriage on the scheduled wedding day. The plaintiff underwent treatment and was declared healthy, but the defendant refused to marry her. Later, it was discovered that the plaintiff did not have tuberculosis, and she sued the defendant for breach of promise to marry. The Court awarded damages of £500 to the plaintiff since the defendant could not prove that he honestly and reasonably believed the plaintiff was unfit for marriage. In *Hall v Wright*,<sup>56</sup> the defendant claimed that his own serious health issues, including occasional severe lung bleeding, made marriage

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<sup>53</sup> "Uberrimae fidei," Thomson Reuters Practical Law, accessed September 12, 2023, [https://uk.practicallaw.thomsonreuters.com/w-018-4024?TransitionType=Default&contextData=\(sc.Default\)#:~:text=Uberrimae%20fidei-Related%20Content,facts%20to%20the%20other%20party](https://uk.practicallaw.thomsonreuters.com/w-018-4024?TransitionType=Default&contextData=(sc.Default)#:~:text=Uberrimae%20fidei-Related%20Content,facts%20to%20the%20other%20party).

<sup>54</sup> (1860) E.B. & E 796, [1843] E.R. Rep. 506.

<sup>55</sup> [1916] 1 KB 57 (CA).

<sup>56</sup> [1859] EB & E 765.

dangerous for him. Despite agreeing to marry the plaintiff within a reasonable time, he later refused to do so, citing his bodily disease as the reason. The Court ruled that the defendant's own mental or physical infirmity could not be used as a defence in an action of breach of promise to marry.

Defences play a vital role in the legal process, allowing individuals the chance to contest accusations and present their perspectives. However, the success of a defence hinges on the quality of legal arguments and the evidence presented. Thus, in action for breach of promise to marry or betrothal, an individual may use these defences to prove his or her case to the Court in which he or she should not be held liable for the breach.

### **The Effect of Breach of Betrothal under the Civil Law in Malaysia**

If the party that breached the contract of betrothal is unable to present any valid defences, the aggrieved party would be entitled to seek remedies, namely, damages and return of gifts (e.g. rings) in the absence of an agreement to the contrary.

#### ***Damages***

The aggrieved party may seek damages for any losses suffered as a result of the breach. For example, a promise by a married man or woman to marry another person is actionable where the plaintiff was unaware of the defendant's marital status when the promise to marry was made. In the case of *Shaw v Shaw & Anor*,<sup>57</sup> the deceased and the plaintiff went through a marriage ceremony and lived together for over twelve years. However, after the deceased's death, it was revealed that their marriage was not legally valid because he had not properly divorced his first wife. So, the second marriage was considered void from the start, and the plaintiff wasn't legally his widow. However, the Court still awarded the plaintiff compensation. This compensation was based on either a breach of the capacity to marry or a promise to marry. The amount of compensation was determined as if she had been the legal widow. In addition, the promise to marry made during the period

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<sup>57</sup> [1954] 2 QB 429.

of *decree nisi* is also actionable. In *Fender v St. John Mildway*,<sup>58</sup> the defendant was married when he met the plaintiff, a nurse. He expressed dissatisfaction with his marriage and asked if the plaintiff would marry him after he got a divorce. She agreed, and they became involved romantically. The defendant's wife obtained a *decree nisi* citing his relationship with the plaintiff and the defendant promised to marry the plaintiff once the divorce was official. However, after the divorce was finalised, the defendant broke his promise and married another woman. The House of Lords ruled that a promise to marry made after the *decree nisi* has been issued is not considered void as being against public policy. Thus, they awarded the plaintiff damages for the breach of promise. Furthermore, if the defendant's personal law permits polygamous marriages, it may also result in legal consequences for the party who fails to fulfil the promise to marry. This is illustrated in the case of *Nafsiah v Abdul Majid No. 2*,<sup>59</sup> where both parties were Muslims. In this case, the plaintiff filed a lawsuit seeking damages for a breach of a promise to marry. She argued that the damages should be increased because she had been seduced by the defendant. The Court was presented with the argument that the plaintiff's knowledge of the defendant's existing marriage rendered any promise to marry null and void. It was held that the plaintiff's awareness of the defendant's existing marriage did not invalidate the promise, as the defendant was permitted, according to his personal law, to have more than one wife. There was also enough evidence to establish that the defendant had indeed promised to marry the plaintiff. Therefore, damages were granted to the plaintiff. It follows that these three situations are the exceptions to the rule that a promise to marry would be void if one of the parties is not single at the time the promise was made.<sup>60</sup> These situations further imply that one party might have legal grounds to sue the other party for failing to keep their promise to marry entitling them the damages.

In a breach of promise to marry case, damages can cover various aspects such as humiliation, emotional distress, and financial expenses related to the engagement. These damages fall into two main categories: general and special damages. General damages are more abstract and may be challenging to quantify initially, like the emotional

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<sup>58</sup> [1938] A.C.1.

<sup>59</sup> [1969] 2 MLJ 175.

<sup>60</sup> See Nuraisyah Chua Abdullah, *Family Law for non-Muslims*, 2-4.

distress in such cases. Courts consider the plaintiff's hurt feelings and damaged pride when determining the amount. On the other hand, special damages are specific monetary losses caused by the breach, such as wedding preparation costs.<sup>61</sup>

The case of *Dennis v Senayah*,<sup>62</sup> illustrates these two categories of damages in the context of a breach of promise to marry. In this case, 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 totalling RM870.10 and seeks to pursue claims for both general and special damages. It was held that the 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, and the social status and financial means of the defendant.

Regarding general damages, the Court found no aggravating circumstances such as an allegation of seduction. There was naturally mental anguish and humiliation. Besides that, the plaintiff was also found to be young and her prospects were 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 RM244 per month, the Court deems that general damages totalling RM1,500 would be appropriate in this case.

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<sup>61</sup> Nuraisyah Chua Abdullah 7-8. See also Bhag Sing, "Awarding damages in Civil Claims," *Malaysian Bar*, January 18, 2011, <https://www.malaysianbar.org.my/article/news/legal-and-general-news/members-opinions/awarding-damages-in-civil-claims#:~:text=Whilst%20in%20the%20case%20of,get%20all%20that%20he%20wants.>

<sup>62</sup> [1963] MLJ 95.

As for special damages, the Court found that the plaintiff claimed RM150 for saris as special damages. However, as the defendant's brother had already given an engagement sari to the plaintiff, the Court deemed the claim unnecessary. Regarding the amount claimed for food, there was a discrepancy between the plaintiff's father's statement and the defendant's brother's estimate. To resolve these discrepancies, the Court decided to allow RM150 for food in item (1) and RM100 for food in item (2), deeming it fair. The Court assessed the special damage in full at RM620.10.

### ***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.<sup>63</sup> If there is no specific agreement in place, common law principles can be invoked. In *Cohen v Sellar*,<sup>64</sup> in his judgment, McCardie J explained that if a woman who has received an engagement ring fails to fulfil the agreed conditions, she should return the ring to the man. However, if the man, without a legally recognised justification, refuses to honour his promise of marriage, he cannot demand the return of the engagement ring from the woman. In cases where the engagement is mutually dissolved, both parties should return the engagement ring and any exchanged gifts to each other. If the marriage does not take place due to the death of the person who gave the ring or other conditional gifts, it is implied that the gifts should be returned.

Thus, under civil law, damages can be sought for both emotional distress (general damages) and quantifiable financial losses (special damages) resulting from a breach of promise to marry. Additionally, the return of betrothal gifts is typically addressed to ensure fairness between the parties involved. These consequences aim to provide compensation and restitution for the aggrieved party.

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<sup>63</sup> See Nuraisyah Chua Abdullah, *Family Law for non-Muslims*, 8.

<sup>64</sup> [1926] All ER Rep 312.

## General Remedy of Humiliation or Embarrassment under the Civil Law

The LRA does not specify remedies for breach of promise to marry. General damages, however, can be sought in cases of breach of promise to marry to compensate the plaintiff for various injuries, such as humiliation or embarrassment, mental distress, loss of reputation or marriage prospects, and more. The amount of damages in such cases is determined at the Court's discretion. Since breach of promise to marry is based on common law,<sup>65</sup> it is necessary to refer to old English and Malaysian cases for guidance on awarding damages, using established precedents to determine appropriate general damages for these emotional injuries.

In *Harrison v Cage and Wife*,<sup>66</sup> the plaintiff claimed that, as part of their agreement, he promised to marry the defendant's wife, who was single at the time. In return, she agreed and promised to marry him. The plaintiff asserted that he was prepared and even offered to marry her, but she married the defendant. The Court in this case found in favour of the plaintiff, awarding him damages of £400. In the case of *Berry v Da Costa*,<sup>67</sup> the defendant had convinced the plaintiff to leave her home and live with him in anticipation of their upcoming marriage.

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<sup>65</sup> See *Holcroft v Dickenson* 3 Keble 148; 84 ER 645, Mary Holcroft asserted that due to the defendant's breach of the contract to marry her, she had suffered expectation damages totalling £100. The Court of King's Bench ruled that the failure to proceed with the marriage constituted a tangible loss that fell within the jurisdiction of the secular courts. Consequently, common law allowed for a damages remedy based on the theory that a promise to marry was a contract. The Court upheld the plaintiff's claim, emphasizing the presence of mutual promises between the parties in which the fact that the plaintiff's promise to marry the defendant is given in exchange for the defendant's promise to marry the plaintiff. See also Saskia Lettmaier, *Broken Engagements: The Action for Breach of Promise of Marriage and the Feminine Ideal, 1800-1940* (Oxford: Oxford University Press, 2010), 25, describing that the contractual principle governing recovery in such cases is that the plaintiff is entitled to receive the value of the expectations they have lost, often referred to as expectation damages. This award aims to compensate the plaintiff and, to the extent possible, restore them to the position they would have been in if the contract had been fulfilled.

<sup>66</sup> (1698) Carth 467.

<sup>67</sup> (1866) LR 1 CP.

However, he later abandoned the plaintiff and married another woman. The judge in this case awarded £2,500 in damages to the plaintiff. This compensation included an amount to address the degradation and misery that the plaintiff had endured as a result of the defendant's actions. Willes J observed that in an action for a breach of promise of marriage, the jury is not restricted to considering only the financial losses suffered by the plaintiff. They are also allowed to take into account the plaintiff's injured feelings and wounded pride.

As previously mentioned, in a Malaysian case, *Dennis v Senayah*,<sup>68</sup> the plaintiff alleged that as a result of the defendant's breach of promise to marry, she had to endure humiliation and mental suffering. Various factors are considered in assessing damages, including the emotional distress experienced by the plaintiff, the impact on the future life and marriage prospects, the social status, and financial means of the defendant. In this case, general damages amounting to RM1,500 were awarded to the plaintiff. Similarly, in *Rajeswary & Anor v Balakrishnan & Ors*,<sup>69</sup> the Court awarded general damages of RM1,500 to the plaintiff. The parties involved in this case were Ceylonese Hindus. The defendant's father initiated discussions with the plaintiff's father, about their marriage. After some initial agreement, both families met and created a written agreement for the marriage. They included a dowry of RM3,000 and a penalty of RM5,000 for breaking the agreement. They also performed a customary betrothal ceremony called Nichayartham, where the plaintiff's father gave the defendant a gold sovereign. Later, gifts were exchanged between the families. However, the defendant later sent four letters to the plaintiff's father, essentially repudiating his promise to marry the plaintiff. In determining the amount of damages awarded to the plaintiff, the Court considered the defendant's unfeeling and contemptible behaviour, as well as the letters written to the prospective father-in-law, as aggravating factors. Additionally, the Court also considered the defendant's financial position.

In *Dorris Rodrigues v. Bala Krishnan*,<sup>70</sup> the plaintiff sued the defendant and sought damages for breach of promise to marry. They had lived together as a couple for several years, but the defendant left

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<sup>68</sup> [1963] MLJ 95.

<sup>69</sup> [1958] 3 MC 178.

<sup>70</sup> [1982] 2 MLJ 77.

her to marry someone else. The High Court held in favour of the plaintiff and awarded her a sum of RM5,000 as damages, compensating her injuries. Similarly, in the case of *Nagamah a/p Subramaniam v Ponnusamy a/l Rajoo*,<sup>71</sup> the defendant made sweet promises to the plaintiff, assuring her that he would marry her once his business prospered, and after his elder brother got married. The plaintiff, deeply in love and trusting the defendant's commitment, engaged in a sexual relationship with the defendant voluntarily on multiple occasions, and sometimes forced by the defendant. However, after the plaintiff asked the defendant to marry her, he started avoiding her. She later learned he was engaged to someone else. This breach of promise led the plaintiff to sue for damages and other remedies. The Court held that the defendant's actions of avoiding the plaintiff after she asked him to marry her indicated the existence of a promise to marry. Due to the breach, the plaintiff suffered loss, agony, loss of honour and humiliation. The Court awarded the plaintiff RM50,000 in damages for breaching of promise to marry since she was a virgin and unmarried, the total amount is RM20,000 for the plaintiff's loss of honour, reputation, shame, and mental distress as well as RM2,000 for assault.

In the case of *R.S. Thanalachimi v Sundararaju A/L Mattaya*,<sup>72</sup> the plaintiff, a Singaporean residing and employed in London, was introduced to the defendant, a Malaysian living in California, through their parents. During the defendant's visits to London, he proposed marriage to the plaintiff, and she accepted. Relying on his commitment to marry her, she resigned from her job and handed over her London residence to the mortgagee before relocating to Singapore. However, the defendant subsequently broke his promise to marry the plaintiff, causing her significant distress, hurt, humiliation, and anguish. As this case involved a foreign plaintiff and having taken into account the standing and conduct of the parties including her sacrifices, losses, hurt, pride and shame, a sum of RM150,000 was awarded in general damages.

While in *Lau Pin Sien v Kong Chung Sng*,<sup>73</sup> the plaintiff appealed against the decision of the Session Court Judge which dismissed her claim for damages from the defendant for breach of

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<sup>71</sup> [2008] 6 MLJ 152.

<sup>72</sup> [2010] MLJU 1339.

<sup>73</sup> [2015] MLJU 354.

promise to marry. In this case, the plaintiff argued that even after learning that the plaintiff was still married, the defendant continued their friendship in 2002. In 2004, the defendant made a promise to marry the plaintiff, and they lived together. However, when the plaintiff's husband passed away in 2011, she was prepared to formalise their marriage, but the defendant reneged on his promise to marry her. The Court ruled in favour of the plaintiff, stating that the defendant could not take advantage of the plaintiff's married status and then use illegality and unenforceability as excuses to avoid his promise to marry. The appeal was allowed, and the plaintiff's claim was upheld.

The Court in *Foo Lai Sin v Wong Lee Hong*<sup>74</sup> acknowledged that a woman in the defendant's situation would have experienced emotional stress and distress due to the plaintiff's breach of promise to marry her. To suggest otherwise would go against natural instincts and the course of nature. Nevertheless, the Court also believed that she had been adequately compensated through the plaintiff's transfer of his half-share of the property to her. Consequently, no further payment of damages or costs is ordered. In this case, the plaintiff and defendant met through a dating service in 2011 and became close. They decided to buy a house together for RM1.4 million in Shah Alam, Selangor. The plaintiff sold his share in the property to the defendant without receiving any monetary compensation. The defendant believed they had marriage plans due to the plaintiff's actions. However, the plaintiff later revealed that he had a new girlfriend, breaking the promise to marry the defendant, and leaving her devastated. The plaintiff then offered to transfer his share of the property to the defendant as compensation for the broken engagement. The Court agreed that this was an appropriate form of compensation.

In a recent case of *Wang Kang Xiang v Hee Chai Hui*,<sup>75</sup> the plaintiff, a single mother, and the defendant started a romantic relationship in 2018 after the plaintiff's divorce. Later in 2018, the defendant moved in with the plaintiff at her father's home upon her invitation. In October 2018, the plaintiff informed the defendant that she was pregnant with his child. The defendant allegedly promised to marry her upon hearing the news, and they began preparing for the marriage. However, the defendant breached the promise. The

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<sup>74</sup> [2017] MLJU 2063.

<sup>75</sup> [2022] MLJU 723.

defendant appealed against the decision of the Sessions court Judge, who ruled in favour of the plaintiff's claim for breach of promise to marry. The Sessions court Judge awarded RM150,000.00 as general damages and RM100,000.00 as exemplary damages to the plaintiff.

The High Court in re-assessing the quantum of damages referred to the case of *Nafsiah's case* (similar facts) and *Dennis's case*. The Court found that the Sessions Court Judge did not consider the defendant's financial condition when awarding the damages, which was a misdirection. The defendant was a small-time contractor, and such large awards totalling RM250,000.00 could lead to his financial ruin. There was also no evidence of aggravating conduct by the defendant, making the award of exemplary damages unjustified. Even in *Thanalachimi's case*, exemplary or punitive damages were not awarded. The High Court held that the awarded amounts appear to be significantly disproportionate to the defendant's wrongdoing. As a result, the High Court reduced the general damages to RM50,000.00 and set aside the award of exemplary damages made by the Sessions Judge.

Thus, in the absence of specific provisions in the LRA addressing the remedies for breach of promise to marry, the Court relies on common law principles and established case precedents. When assessing general damages, the Court considers various factors, including the extent of humiliation or embarrassment, emotional injuries, loss of reputation, mental anguish, and other non-monetary harm suffered by the plaintiff. Individual circumstances, such as the financial means of the defendant, the impact of the breach, and the conduct of both parties, are also taken into account. Nuraisyah Chua Abdullah further highlights that there are significant legal considerations that must be factored in, beyond the typical issues of embarrassment, anxiety, or emotional distress, when determining the appropriate approach for addressing breaches of betrothal agreements.<sup>76</sup> First is the potential dispute that may arise concerning the transfer of property made by the aggrieved party as part of the marriage commitment. Second is when one of the parties makes a marriage promise and subsequently breaches it, benefiting from the other party's circumstances. Additionally, significant attention should

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<sup>76</sup> See generally Nuraisyah Chua Abdullah, "Remedies for Breach of Betrothal."

be directed towards cases where the aggrieved party becomes pregnant due to sexual activity after the betrothal was later broken by the promisor.<sup>77</sup> The ultimate goal is to provide fair and just compensation to the injured party for the harm caused by the breach of promise to marry.

## APPRAISAL OF HARMONISATION OF *SHARI'AH* AND CIVIL LAW

Harmonisation of laws can be simply understood as a process of bringing in two different legal systems into harmony or agreement, in line or compatible with one another. According to Akram Hussien Alarashi, harmonisation refers to a process to bring different components in harmony, which in general creates a relationship between different components.<sup>78</sup> The main purpose is to facilitate consistencies and diminish barriers and such inconsistencies between the two legal systems whenever deemed possible.<sup>79</sup>

In Malaysia, harmonisation of *Shari'ah* and civil Law is not a new concept. This is apparently because Malaysia is practising dual legal system which are the Islamic and civil law.<sup>80</sup> According to Abdul Hamid bin Haji Mohamad<sup>81</sup> process of harmonisation has been ongoing for over two decades in Malaysia, except that the word “harmonisation” is not used. There are several provisions of the statutes that are in harmony with the *Shari'ah* for example the provisions of the

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<sup>77</sup> See generally Nuraisyah Chua Abdullah, “Remedies for Breach of Betrothal.”

<sup>78</sup> See Akram Hussein Alarasi, *The Concept Of Harmonization And Unification Of The Law In Malaysia: An Islamic Appraisal*, Journal of Integrated Sciences Volume 2, Issue 1, December 2021, p. 14.

<sup>79</sup> See also <https://www.lexisnexis.co.uk/legal/glossary/harmonisation>, and <https://dictionary.cambridge.org/dictionary/english/harmonize> accessed on 9/8/2024.

<sup>80</sup> See Azizah Mohd, “Challenges and innovations in harmonising shari'ah and modern family law: Malaysia experience”, *Al-Kashaf*, 04 (03 (Special Issue), 2024, 23.

<sup>81</sup> Abdul Hamid bin Hj Mohamad. "Harmonisation of *Shari'ah* and Civil Law in Malaysia: Present Reality and Future Actions." Islamic Law and Society, 2003.

Registration of Adoptions Act 1952,<sup>82</sup> and parts of the provisions of division of matrimonial property under the Law Reform Marriage and Divorce Act 1976.<sup>83</sup>

As to the harmonisation on the provisions relating to breach of betrothal agreement, the IFLA through section 15 specifically provides for remedies in breach of promise to marry, namely, the return of gifts and compensation regarding the money incurred in relation to the betrothal or preparation for marriage. As regards to civil law, although there is no specific statutory provision addressing a breach of promise to marry in the LRA, it can be pursued as a legal cause of action in civil courts. In such cases, the aggrieved party, often the one whose trust and expectations were violated, can seek legal remedies by relying on established contract law principles. To initiate a successful claim, the plaintiff must first demonstrate the existence of a valid contract for marriage or promise to marry. This typically involves showing that there was an offer, an acceptance, and some form of consideration exchanged between the parties. Then the plaintiff must show that the defendant breached the contract usually by not fulfilling their promise to marry. However, in civil law, defendants can also use various defences to avoid liability, such as challenging the contract's validity, denying a breach, or citing mitigating factors.

It follows that both Islamic and civil laws are in harmony in terms of remedies for breach of betrothal or promise to marry. Both laws rule for the return of gifts and compensation for the loss suffered by a non-default party in the case of a breach.<sup>84</sup> However, based on the legal principles and jurisdictional considerations, it appears that claims for remedies related to humiliation or embarrassment in cases of a breach of betrothal agreements may not be entertained in the Syariah Court. Furthermore, the civil law seems to regard such claim for

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<sup>82</sup> Act 253. See for example s. 6 on the effect of adoption. For further reading see Azizah Mohd, Najibah Mohd Zin, Nadhilah A.Kadir, Zati Ilham Abdul Manaf (2023) *Registration of Adoptions Act 1952: towards harmonisation of adoption laws governing Muslims and non-Muslims in Malaysia*. In: *Harmonisation of Shariah and Law: Approaches and Progress*. Harun M. Hashim Law Centre, Kuala Lumpur, Malaysia, pp. 155-176.

<sup>83</sup> Act 164, See for example s. 76 LRA.

<sup>84</sup> See Islamic Family law (Federal Territories) Act 1984, s. 15 and the case of *Cohen v Sellar* [1926] All ER Rep 312, as discussed above.

general damages of humiliations fall under breach of contract of promise to marry. Whilst the IFLA does not explicitly provide for remedies related to humiliation or embarrassment in the context of breach of betrothal agreements.<sup>85</sup> Nevertheless, remedies provided in the IFLA from return of gifts and money expended in good faith for marriage preparation seem adequate to cover damages for humiliation as well.<sup>86</sup> This is because, betrothal is merely morally binding and is not a marriage yet. It is just a plan for a marriage. If the Court allows general damages for humiliation, it might open a door for uncertain severe claims of remedy. At this juncture, the opinion given by Zaydan, as previously discussed, is agreed upon.<sup>87</sup>

On the other hand, the remedy for humiliation seems reasonable on a case-to-case basis for example, the default party was in breach one day before the marriage ceremony and the marriage was widely publicised. Perhaps at this point, Islamic law Act or Enactment may be revised to provide certain proper guidelines for remedy for humiliation in case of breach of betrothal and a certain minimum amount of quantified damages to protect the aggrieved party. Alternatively, as a claim for a general remedy for humiliation is entertained under the Contract Act 1950, Muslim parties may also bring their claim for compensation for general damages for humiliation in the civil courts as suggested in *Salbiah's case*.

It is established that under Malaysian civil law, including the common law system inherited from the British legal tradition, individuals have the right to seek remedies for humiliation or embarrassment in various legal matters, such as breach of contract or personal injury cases. It follows that civil courts have jurisdiction to hear cases related to general damages for humiliation or embarrassment due to a breach of promise to marry. These damages are often awarded as compensation for the emotional distress and harm caused to the plaintiff. The amount of damages awarded in such cases is determined by the Court based on factors such as the severity of the harm, the

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<sup>85</sup> See *Salbiah Othman v Hj Ahmad Abdul Ghani* (2006) JH 114 & *Mohd Azla bin Hj Kamaruddin v Mokhtar bin Hashim & Anor* (2007) 3 ShLR 128 as discussed above.

<sup>86</sup> See Islamic Family Law (Federal Territories) Act 1984, s. 15.

<sup>87</sup> Zaydan, *Al-Jami'*, 77-78.

impact on the plaintiff's life, the defendant's financial standing, and other relevant considerations.

Therefore, it seems that based on the Contract Act 1950, the plaintiff regardless of whether they are Muslims or non-Muslims could apply to a civil court for breach of promise to marry, seeking compensation for emotional distress or humiliation caused by the breach. By taking these steps, it may be possible to bridge the gap between Islamic and civil laws regarding remedies for humiliation or embarrassment in breach of promise to marry cases. This would ultimately ensure that individuals have fair and just avenues for seeking redress within both the *Shari'ah* and civil legal frameworks. This approach further highlights the fact that *Shari'ah* and civil law can be harmonised so long as the law does not contradict the Islamic principles in the course of justice and protecting the interest of the people.

## CONCLUSION

The fundamental aim of all legal systems, whether rooted in divine or human-made law, is to establish justice. They share the common goal of providing remedies and penalties to ensure that justice is served and to deter others from similar wrongdoing. Breach of promise to marry cases in Malaysia presents a legal scenario where *Shari'ah* and civil laws are both in harmony and differing, especially concerning the award of general damages for humiliation or embarrassment. Nevertheless, it remains imperative to compensate those who have suffered losses. In this context, Islamic and civil laws, to a certain extent are harmonious as they carry the same objectives i.e., to compensate the non-default party and to punish the offender. Additionally, while implementing justice within the *Shari'ah* legal framework that respects Islamic values in addressing emotional harm, Malaysia can also strike a balance between legal systems and ensure that individuals have fair and just avenues for seeking redress in breach of promise to marry cases. This harmonisation would reflect the evolving legal landscape while upholding the principles of justice and equity.

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**REFERENCES**

- Abdullah, Nuraisyah Chua. "Remedies for Breach of Betrothal: The Quest for Survival?." *International Journal of Academic Research in Business and Social Sciences* 12, no. 12 (2022): 43 – 51.
- Abdullah, Nuraisyah Chua. *Family Law for non-Muslims in Malaysia*. Selangor: International Law Book Services, (2013).
- Al-Burno, Muhammad Sidqi bin Ahmad bin Muhammad. *Al-Wajiz fi Idoh Qawa'id al-Fiqh al-Kulliyah*, 5<sup>th</sup> ed., Beirut-Lebanon: Muassasah al-Risalah, (2002).
- Al-San'ani, Muhammad bin Ismail al-Amir al-Yamani. *Subul al-Salam, sharh bulugh al-Maram min Jam'I adillat al-Ahkam*. Vol. 3. Beirut – Lebanon; Dar al-Fikr, (1988).
- Al-Shawkani, Muhammad bin Ali bin Muhammad, *Al-Fath al-Rabbani min Fatawa al-Imam al-Shawkani*, Vol. 6. Sana'a: Maktabat al-Jayl al-Jadid, (1423H).
- Al-Suyuti, Jalal al-Din 'Abd al-Rahman. *Al-Ashbah wa al-naza'ir*. Beirut: Dar al-Kutub al-'Ilmiyyah, (1983/1403).
- Al-Zuhaili, Wahbah, *Al-Fiqh al-Islami wa Adillatuhu*, tr. Ahmad Shahbari Solomon et. al. (Fiqh & Perundangan Islam), Vol. 7, Kuala Lumpur: Dewan Bahasa dan Pustaka, (2001)
- Blog Kamar Syarie, 2019, Maqasid Hukum Gantirugi Pertunangan Dalam Undang-undang Keluarga Islam di Malaysia, <https://kamarsyarie.wordpress.com/2019/11/27/maqasid-hukum-gantirugi-pertunangan-dalam-undang-undang-keluarga-islam-di-malaysia/> accessed on 25 October (2024).
- Cambridge Dictionary. "Betrothal." Accessed September 9, (2023). <https://dictionary.cambridge.org/dictionary/english/betrothal>
- Hj Mohamad, Abdul Hamid. "Harmonisation of *Sharī'ah* and Civil Law in Malaysia: Present Reality and Future Actions." *Islamic Law and Society*, (2003).
- Ibrahim, Ahmad. *Family Law in Malaysia. Third Edition*. Kuala Lumpur: Malayan Law Journal, (1997).

- Ibrahim, Norliah., Noraini Md Hashim, Najbah Mohd Zin, Azizah Mohd, Nora Abdul Hak, Normi Abdul Malek, Roslina Che Soh and Mohd Hisham Mohd Kamal. *Family Law (non-Muslims) in Malaysia*. Gombak: IIUM Press, (2021).
- Ithnin, Hafiz, Dugaan Orang Bertunang, myMetro, at <https://www.hmetro.com.my/WM/2022/07/861354/dugaan-orang-bertunang> accessed on 25 October (2024).
- Letzmaier, Saskia. *Broken Engagements: The Action for Breach of Promise of Marriage and the Feminine Ideal, 1800-1940*. Oxford: Oxford University Press, (2010).
- Mohd, Azizah, “Challenges and innovations in harmonising shari‘ah and modern family law: Malaysia experience”, *Al-Kashaf, 04 (03 (Special Issue), (2024), 23-35*.
- Mohd, Azizah, Najibah Mohd Zin, Nadhilah A.Kadir, Zati Ilham Abdul Manaf. “Registration of Adoptions Act 1952: towards harmonisation of adoption laws governing Muslims and non-Muslims in Malaysia”. *In: Harmonisation of Shariah and Law: Approaches and Progress*, edited by Najibah Mohd Zin, Azizah Mohd, Norjihah Abd. Aziz & Nasimah Husin, 155-176, Harun M. Hashim Law Centre, Kuala Lumpur, Malaysia, 2023.
- Mohd Zin, Najibah, Nora Abdul Hak, Azizah Mohd, Normi Abdul Malek, Norliah Ibrahim, Roslina Che Soh @ Yusoff, Noraini Md Hashim and Badruddin Ibrahim. *Islamic Family Law in Malaysia. Second Edition*, Subang Jaya: Sweet & Maxwell, (2021)
- Sha’ban, Zakiy al-Din. *Ahkam al-Shar’iyyah li Ahwal al-Shakhsiyyah*, 6th ed. Benghazi: Univeristi Qaryunus, (1993).
- Shalabi, Muhammad Mustafa. *Ahkam al-usrah fi al-Islam; dirasah muqaranah bayna fiqh al-madhahib al-Sunniyyah wa al-madhahib al-Ja’fari wa al-qanun*. Beirut: Dar al-Nahdah al-‘Arabiyyah, (1977/1397).
- Sing, Bhag. “Awarding damages in Civil Claims.” *Malaysian Bar*, January 18, 2011. <https://www.malaysianbar.org.my/article/news/legal-and->

general-news/members-opinions/awarding-damages-in-civil-claims.

- Sitiris, Miszairi & Nurul 'Arifah Mohamad, 2017. Gantirugi Akibat Pembatalan Pertunangan: Menurut Fiqh serta Amalannya di Mahkamah Syariah, in Anwar Fakhri Omar et. al, *Proceeding of International Conference on Law and Islamic Jurisprudence (ICLIJ 2017)*
- Sunder Raj, Kogila and Muammar Ghaddafi Bin Hanafiah, Adat Bertunang: Satu Kajian Perbandingan Antara Etnik Melayu Dengan Etnik India, *JURNAL WACANA SARJANA*, Vol. 3(2) Sept (2018): 1- 9
- Thomson Reuters Practical Law. "Uberimae fidei." Accessed September 12, 2023. [https://uk.practicallaw.thomsonreuters.com/w-018-4024?transitionType=Default&contextData=\(sc.Default\)#:~:text=A%20Latin%20term%20meaning%20%22utmost,facts%20to%20the%20other%20party.](https://uk.practicallaw.thomsonreuters.com/w-018-4024?transitionType=Default&contextData=(sc.Default)#:~:text=A%20Latin%20term%20meaning%20%22utmost,facts%20to%20the%20other%20party.)
- Zahrah, Muhammad Abi. *Al-Ahwal al-shakhsiyyah*. n.pp: Dar al-Fikr al-Arabi, (1957/1377).
- Zaydan, 'Abd al-Karim. *Al-Jami' fi al-Fiqh al-Islami. Al-Mufassal fi ahkam al-mar'ah wa al-bayt al-Muslim fi al-Shari'ah al-Islamiyyah*. Vol. 6. n.pp: Mu'assasat al-Risalah, (2012).