TOPIC: THE LEGAL ANALYSIS ON THE LAW OF BETROTHAL IN MALAYSIA

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ABSTRACT

The aim of this assignment is to analyse the law relating to betrothal in Malaysia. The research is conducted based on the analysis in the statutes and decided cases. A comparative analysis is also employed with the position of law relating to betrothal in Islamic law and in common law country which is England & Wales. The findings reveal that there are no specific provisions that administer the law in betrothal under the Law Reform (Marriage and Divorce) Act 1976 and thus the court is using the principle under the contract law to decide the case in breach of betrothal. The second analysis is the abolishment of betrothal in England & Wales and the reason behind the reforms that occurred there. We are of the opinion that these two analyses are significant and relevant to be discussed in the assignment which relate to the topic of betrothal therefore may revealed the current position of the law of betrothal in Malaysia.
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THE LAW ON BETROTHAL UNDER CIVIL FAMILY LAW IN MALAYSIA

1. INTRODUCTION

There are no statutory provisions relating to betrothal in Malaysia and breaches of contracts of marriage are dealt with under the ordinary law following the Contract Act and the English Common Law. It is not necessary that a contract to marry should be evidenced by writing nor even that the mutual promises should be made by express words. So long as a promise to marry is supported by some kind of valuable consideration it will be enforceable even though the promisee has not in turn made an express promise to marry the promisor\(^1\).

The general definition of betrothal is an agreement or promise to marry someone. It is a preliminary to a marriage vow and could be considered as an engagement between the parties prior to a valid marriage.

2. ELEMENTS OF BETROTHAL

In order for there to be a valid contract of betrothal, there are certain elements that must be fulfilled by both parties.

2.1 OFFER

In the context of betrothal, offer exist when a promise to marry is made by one party (promisor) to another party (promisee).

2.2 ACCEPTANCE

Upon offer of marry is made by promisor, it can be said that there is an acceptance of an offer of marry when the promise made is accepted by the promisee. In simple words, the promisee need to accept such offer first then it can be rendered that there is an acceptance to marry.

2.3 CONSIDERATION

Consideration is the consent of the promisee to marry the promisor which may take the form of an act performed by the promisee. For further understanding, this element can be seen in the case of *Harvey v Johnston*\(^2\). In this case, the defendant promised to marry the plaintiff after her

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\(^2\) (1848) 6 C.B. 295.
arrival at Lisahoppin, to which she performed as requested. However, the defendant failed to carry out his promise to marry her and then claimed that there was insufficient consideration. Held, there was perfectly good consideration as the plaintiff went to Lisahoppin as requested by the defendant.

2.4 CAPACITY

In order for the betrothal to be valid, both parties must have the capacity to marry at the time the promise is made.

i. Both parties must be single

In the event where any of the parties in relationship create a promise to marry, he or she must be single and not in the subsistence of any marriage. However, this is not applicable to the Muslim as Islam allows its believers to practise polygamous marriage. For non-Muslim, by virtue of section 5 of The Law Reform (Marriage and Divorce) Act 1976, they are only allowed to practise monogamous marriage and disallowed to practise polygamous marriage after the appointed date.

In Spiers v Hunt\(^3\) the defendant promised the plaintiff, who knew he was a married man, to marry her upon death of his wife who was suffering from a heart ailment and was expected to die early. However, she did not die and survive until eight and a half years later. The defendant then refused to marry the plaintiff. The court held that the promise was illegal due to the incapacity of the defendant on the grounds that the contract was against the public policy and morals.

However, there are exceptions for the element of capacity to marry which will render a party as creating a valid promise to marry and subsequently have a legal effect. There are several cases available to illustrate these exceptions.

In Shaw v Shaw\(^4\) the defendant represented himself to be a widower and proceeded to marry the plaintiff when in fact he was already married to a woman who was alive throughout the marriage. The plaintiff who was unaware that the defendant was married when the promise was made, upon

\(^3\) (1908) 1 KB 720

\(^4\) (1954) 2 Q 3
discovering that she had been illegally married to the defendant all along, sued the administrators of his estate for damages. It was held by the court that the plaintiff was entitled to the damages for the defendant’s breach of contract.

In Fender v St. John-Mildway\textsuperscript{5} The defendant made a promise to marry the plaintiff during the period of decree nisi (a court order for divorce that has yet to become absolute) obtained by his wife, which had yet to absolute (the marriage could still be reconciled). The defendant then broke off the engagement and married another woman. The court held that, although such promise may prevent reconciliation, often when a petitioner had gone so far as to obtain a decree nisi, no reconciliation could take place. Thus, where the promise was valid, the plaintiff was entitled to claim for damages.

Another example of case would be Malaysian local case that portrays the issue of betrothal which is Nafsiah v Abdul Majid\textsuperscript{6}. Basically, this case is based on the Islamic perspective for the betrothal and promise of marriage among Muslim. However, conceptually it could be used to be discussed for further understanding regarding betrothal in family civil law. In this case, the plaintiff sued the defendant who was a married man for damages for breach of contract to marry. It was held by Syariah Court that where the defendant’s personal law (Syariah Law) allows him to marry more than one wife and practise polygamous marriage, the promise to marry is valid thus entitling the plaintiff to damages.

ii. The religion of both parties does not prevent them from marrying.

Generally, Islam does not allow their believers to marry other than Muslim woman or man except if their partners who profess other religion willingly to convert to Islam or they are ‘kitabiyah’\textsuperscript{7}. Other religion, if does not prohibit their believers to marry a person professing religion other than theirs will be allowed to marry and such promise of marry is valid. In Mary

\textsuperscript{5} [1937] AC 1
\textsuperscript{6} [1969] 2 MLJ 174 and 175
\textsuperscript{7} Section 2 of Islamic Family Law (Federal Territories) Act 1984 (Act 303) define ‘Kitabiyah’ as a woman whose ancestor were from the Bani Ya’qub or a Christian woman whose ancestors were Christians before the prophethood of the Prophet Muhammad or a Jewess whose ancestors were Jews before the prophethood of the Prophet Isa.
Joseph Arokiasamy v Sundram\(^8\) a Hindu man made a promise to marry a Christian girl but later breached his promise. It was held by the court that there is no religious impediment against a Hindu man marrying a Christian girl. Thus, the promise to marry is valid and enforceable.

iii. Age of the parties

According to section 10 of the Law Reform (Marriage and Divorce) Act 1976 the minimum age of marriage for girls is 16 years old and 18 years old for boys\(^9\). However, it has to be noted that section 10 of the LRA only concern marriages solemnised overseas which may permit marriages between minors\(^10\). In Khimji Kuverji v Lalji Karamsi\(^11\), a minor may enter into a valid contract to marry. Another case is Rajeswary & Anor v Balakrishnan & Ors\(^12\) where the plaintiff had entered into a contract to marry when she was still a minor. The defendant had breached the contract and she sued him for damages. Held, the minor could enter into a valid contract.

iv. Parties should not be within the prohibited relationship as provided under section 11 of LRA.

The prohibitions in section 11 of LRA are aimed at protecting the sanctity of marriage and the integrity of the family\(^13\). It is interesting to note that in the decision of the European Court of Human Rights in B and L v United Kingdom\(^14\) the court allowed a daughter-in-law to marry her father-in-law. The court stated that the affinity prohibition as existed in England at that time violated the human right enshrined in Article 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950, which provides that men and woman of marriageable age have the right to marry.

\(^{8}\) [1938] MLJ 4
\(^{10}\) Nuraisyah Chua Abdullah, *The Law Reform (Marriage and Divorce) Act 1976: Commentary and Cases*, (Sweet & Maxwell Asia 2013) P. 42.
\(^{11}\) (1941) 43 BOMLR 35
\(^{12}\) [1958] MC 178
\(^{13}\) Nuraisyah Chua Abdullah, *The Law Reform (Marriage and Divorce) Act 1976: Commentary and Cases*, (Sweet & Maxwell Asia 2013) P. 44.
\(^{14}\) [2005] ECHR 584;[2005] 3 FCR 353
and found a family according to the national laws governing the exercise of this right.

However, it is to be noted that any abolition of prohibition based on the affinity would simply mean the destruction of the family and its norms. Abolition of such limitations would undermine the foundations of the family and alter relationship at every level\(^\text{15}\).

v. If the parties are below 21 years, a written consent from the parents of guardians is required as provided under section 12 of LRA. The scope and principle of this section is further explained in the case of Kanagalingam v Kanagarajah\(^\text{16}\). The girl was over 18 years old and had left her home to go through a form of marriage. No consent from her father was obtained. The Federal Court held that in this case the girl was over 18 years of age, intelligent and capable or making her own mind as to what she felt the best for her own interest.

3. DEFENCES

Where all the requirements are fulfilled, a valid contract to marry (betrothal) is thus established. In the event of a breach of betrothal, the aggrieved party may take action against the party in breach (man or woman). However, there are defences available in an action for breach of betrothal.

i. Misrepresentation of fact by the plaintiff

This defence is further explained in the case of Wharton v Lewis\(^\text{17}\). The defendant was informed before the engagement that the plaintiff would inherit her father’s property upon his death. However, the defendant broke off the engagement upon receiving information regarding the questionable life that the plaintiff had been leading. The plaintiff’s father and brother assured him that the information was false. Held, the jury decided in favour of the plaintiff as the false representations or wilful suppression of

\(^{15}\text{Nuraisyah Chua Abdullah, The Law Reform (Marriage and Divorve) Act 1976: Commentary and Cases, (Swet & Maxwell Asia 2013) P. 44}\)
\(^{16}\text{[1982] 1 MLJ 264}\)
\(^{17}\text{(1824) 1 C & P 529}\)
the truth was not what included the defendant into making the promise to marry. Thus the plaintiff was awarded damages.

ii. A contract to marry is not a contract of uberrimae fidei. A contract to marry is not a contract which requires the utmost good faith. The parties to the contract need not exercise complete disclosure. In Beachey v Brown\textsuperscript{18}, the defendant contended that he had known the plaintiff had agreed to marry to another man when she entered into an agreement with him, he would not have agreed to marry her. However, the court rejected his defence and held although there are many things that a person may want to know about his future wife, the discovery of such attributes should not entitle him to refuse to fulfil the engagement.

iii. The plaintiff own moral, physical or mental infirmity which renders the plaintiff unfit for marriage that was discovered or had only begun to develop after the contract was entered into.

In Jefferson v Paskell\textsuperscript{19} the plaintiff contracted a chest disease soon after her engagement and was rendered unfit for marriage. She underwent treatment but the defendant refused to marry her even after she was given a clean bill of health within less than 6 months. Held, the plaintiff was awarded damages as the defendant had failed to prove that he honestly and reasonably believed the plaintiff to be unfit for marriage.

It has to be noted as well that the defendant’s own mental or physical infirmity is not a defence. In Hall v Wright\textsuperscript{20} the defendant contended that his own supervening ill-health, a serious occasional bleeding from the lungs from which he was still suffering would cause the excitement of marriage to endanger his life. However, the court rejected his infirmity as a defence.

4. REMEDIES

Once a breach of betrothal has been rightfully established, there are two forms of consequences arising from such breach.

i. Damages

a) General Damages

\textsuperscript{18} (1860) EB & E 796
\textsuperscript{19} [1916] 1 KB 57
\textsuperscript{20} [1859] EB & E 765
It is not limited to pecuniary loss sustained but may also include the injured feelings of the plaintiff.

b) Special Damages

Damages for specific items which may be quantified in monetary terms such as damages for medical expenses and wedding preparations. In the case of Dennis v Sennyah\textsuperscript{21} the plaintiff alleged that the breach cause humiliation and mental anguish upon her, to which she then claimed both general and special damages. Held, the plaintiff was awarded general damages of RM 1500 and special damages for food, sarees, and the cost of wedding preparations which amount up to RM 620.10.

The damages for breach of promise to marry are not measured by any fixed standard and are almost entirely in the discretion of the court. They are not merely to repay the plaintiff for temporal loss, but also to punish the defendant in an exemplary manner. In assessing the damages, the injury to the affection of the plaintiff, the prejudice to his or her future life and prospects of marriage, the rank and condition of the parties and the defendant’s means all taken into consideration.

ii. Return of gifts

In Cohen v Stellar\textsuperscript{22} if a woman who has received a gift refuses to fulfil the conditions of the gift, she must return it. However, if the man has refused to carry out his promise of marriage, he cannot demand the return of the ring. If the engagement is dissolved mutually, in the absence of an agreement to the contrary, the gift must be returned by each party. If the marriage does not take place due to the death or disability of the person giving the ring and other conditional gifts, it is implied that the gifts shall be returned.

\textsuperscript{21} [1963] MLJ 95
\textsuperscript{22} [1926] 1KB 536
5. THE CONCEPT OF BETROTHAL IN ISLAMIC LAW

Betrothal do exist in the Islamic law as part and partial of the course of marriage. Under the Holy Quran, chapter of Al-Baqarah, verse 235 provides, “There is no blame on you of you make an offer of betrothal or hold in in yours hears. Allah knows that you cherish them in your hearts. But, do not make a secret contract with them except in terms honourable nor resolve on the tie of marriage until the term prescribed is fulfilled. And know that Allah knows what is in your hearts and take heed of Him. And know that Allah is oft-Forgiving Most Forbearing.”

This is also supported by the Prophet’s Hadith that reported by Ibn Umar which said, “A person shall enter into a transaction when his brother had already entered into but not finalised and he should not make a proposal (khitbah) already made by his brother, until he permits it or until he gives it up”. Betrothal or khitbah in Arab according to Islamic law is take place in accordance to the custom of the society. The principle is the custom may be continue as long as they are not in contrary to Hukm Syarak and this includes betrothal. In the case of Malaysia, the custom is known as ‘bertunang’ which resembles with the betrothal in Islamic law.

In order for the couple to betroth, they must fulfil certain condition such as the party must not have been betrothed to the other person, or engagement with person who he or she is forbid to marry for which in the relationship of either consanguinity, affinity or fosterage, or betroth occurred when the woman in her period of iddah. If the parties follow such prohibition, it will render the betrothal to be void.

The similar issue also happen in the betrothal is Islam in regards to the breach of promise to marriage to which how the gifts will be distributed to the parties to the promise. Under the Islamic school of law, they have different opinion and views. The Hanafi school opines that where the betrothal gifts is still intact and has not changed the character, the giver can ask for the return of the gifts if the breach is by the other party. While, Maliki’s school in on view that if the breach is by the man, he has no right to ask for the return of gifts given by him, but if the breach is by woman, the man is entitled to claim for the gifts. Whereas, the Shafie’s school states that the gifts should be returned whether they are in existence or not by both parties.
5.1 BREACH OF BETROTHAL UNDER ISLAMIC LAW IN MALAYSIA

The court that have jurisdiction in determining the case of breach of betrothal under Islamic law in Malaysia is under Shariah court as the matters falls under the jurisdiction of the state as enshrined in List II, Ninth Schedule of the Federal Constitution. Therefore, each state via their enactment do provides certain provisions that dealt with the matters relating to the return of gifts after breach of promise to marriage.

For example, it was provided in the sec 124 of Selangor Administration of Muslim law Enactment 1952, sec 119 of Kedah Administration of Muslim Law Enactment 1962, sec 15 of Islamic Family Law (Federal Territories) Act 1984, and many more. Generally, most of the laws is following the Shafie’s school view in case of return of gifts. The classic case that may illustrated the return of gifts is the case of Aishah v Jamaluddin23 where the man broke a promise to marry and the woman claim the payment of RM25 maskahwin, RM800 of marriage expenses and also claimed the right to keep the engagement rings. The court held in favour to the woman.

In Malaysia, the law is arguably has provides the avenue for the woman to claim for damages if the man had breached the promise to marry. This can be done in the civil court to which the law that applicable is the contract law under the Contract Act 1950. Despite the jurisdiction is under Shariah court (Article 121(1A) Federal Constitution), there are Muslim parties that do bring the case to the High Court and the court do entertain the case. The case that may illustrated the issue is the case of Maria Tunku Sabri v Datuk Wan Johani Wan Hussin24, where the plaintiff sought damages in an action against the defendant for his alleged breach of promise to marry. However, the promise was made upon contingency that the plaintiff would divorce her current husband first. The court in entertaining the case held that the plaintiff had yet to divorce her husband, and had yet to be married to the defendant, there cannot be said to have been a breach of promise to marry. A promise to marry is only enforceable on the day of the solemnization. Before such period, any form of promise for such purpose cannot be fulfilled.

Nevertheless, the conflict occur is arguably had been settle since the abolishment of law in breach of promise to marry in common law, thus the precedent may not be followed by

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23 [1978] 3 JH 104
24 [2012] 7 MLJ 419
the Malaysian civil court thereby provides clear separation of jurisdiction between civil and Syariah courts in Malaysia.

6. THE LAW OF BETROTHAL IN ENGLAND AND WALES

The concept of betrothal or commonly known as engagement was also among the practice in western community, particularly in England. Basically, the couples before marriage happen will vow in words such as “Will you marry me?” to which the reply “I do” in present tense will indicates a promise to marry thereby binds the parties. The sexual intercourse may have occurred during the engagement that is different from Muslim betrothal whereby the sexual intercourse during the course of engagement is strictly prohibited.

The position of law in betrothal in England and Wales before the Second World War is it is regarded as a contract of promise to marry under which it is governed by contract law. Failure of the parties to honour the contract or failure of the parties to marry will render the party to sue for breach of contract in the court. The law also indicates that the withdrawal from the engagement without lawful justification will also render the party to sue for breach of contract. Further, the courts may have powers to compel the couples to solemnize the marriage if the engagement was validly made. This signify that the engagement had an important legal consequence back then.

Nevertheless, the legal action of breach of promise to marry was abolished with the enactment of Law Reform (Miscellaneous Provisions) Act 1970. Under section 1 of the Act, it states that no agreement to marry shall take effect as a legally enforceable contract and that no action shall lie in this country for breach of such an agreement, wherever it was made. There are many factors that lead to the abolishment of contract of promise to marry. The abolishment was recommended by the Law Commission in taken into consideration many circumstances. First, in general, during the post Second World War, the legal action taken in court for breaching of betrothal had become rarely made as it bring a difficulty to prove damage occurred. Second, is relating to the abuse process of courts. There was time where the legal action for breach of betrothal become the potential gold-digger whereby the couples was promising to marry knowingly just to break the promise, so that the claim for damages can be made.

Third is the issue of public policy. Lowe, Bromley & Douglas (2007) states that the engagement is regard to be against public policy as the parties to an engagement was convinced that they ought not to marry the other and this may lead to threat of an action to have a
potentially unstable marriage. This may also defeat the sanctity of marriage to which the betrothal should be conduct in good faith and sincere and the parties is not as if they were compelled to marry after the betrothal. Therefore, these may have change the social views towards the betrothal and hence the abolishment is necessary in England and Wales.

Currently, the law only allowed for the claim of gifts that acquired during the subsistence of betrothal to which the condition is the marriage is occurred afterwards. Under the Civil Partnership Act 2004, it provides rules that deals with gifts between those who have agreed to marry. The rule is that the gift of an engagement ring is rebuttably presumed to be absolute, but other gifts may be recovered if they were conditional on the marriage taking place. But, the case of Cox v Jones [2004] illustrated the difficulty to rebut such presumption. In this case as there was contradictory evidence given by the parties regarding the gifts, the court held that in the context of romantic holiday, it was uncertain that the defendant had told the claimant that the gift was conditional.

Secondly, the other avenue available is stipulated under section 17 of the Married Women’s Property Act 1882 where it provides that for any dispute or claim in relation to property that either or both parties had a beneficial interest while the agreement was in force, the proceedings can be instituted within three years of the termination of the agreement. The provision is applied as a rule to govern the property rights of spouses to the determination of beneficial interests in property acquired during an engagement. The rules are based on the law of trust under the principle of presumption of advancement as well as the statutory principle that stated under the Matrimonial Proceedings and Property Act 1970. The Act provides that contributor is regards to have a beneficial interest in the property if there was a substantial contribution in money or money’s worth to the improvement of property.

In lieu to the rules above that only allowed for the gifts that was given during the period of engagement and the marriage is occurred to be claimed, the court may have to decide whether a valid agreement of promise to marry is taken place before the marriage.

First, the court may have to consider whether the engagement is really occurred to which an agreement was established. The principle is that an engagement is only recognisable if it would have amounted to a legally enforceable contract at common law. The precedent that can be refer is under the case of Shaw v Fitzgerald where the court held that the test to

25 [1992] 1 FCR 162
consider whether the engagement is taken place is there must be an unconditional agreement to marry. Thus, indicates that there was a valid agreement thereby cause the gifts can be claim.

Secondly, the court need to consider the prove of an engagement. Under section 44 of the Family Law Act 1996, it provides that where an engagement is relied upon as the basis for seeking orders, there must be produced to the court evidence in writing of the existence of the agreement to marry, or evidence by the gifts of an engagement ring by one party to the agreement to the other, in contemplation of their marriage, or evidence of a ceremony entered into by the parties in the presence of one or more other persons assembled for the purpose of witnessing the ceremony. This signify the clear indication and circumstances for the UK court to look into the reliability of the engagement, thus ease the court for the purpose of assessment.

For conclusion, the reformation that was occurred in England and Wales is significant to be discussed as it indicates a total separation of Malaysian family law matters from the common law position. Among the reason of this separation is due to the facts that both society have different norms, so social views towards certain principle under the family matters may be different and thus the reformation is necessary.
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