

ENGAGEMENT CANCELLATION AND ITS LEGAL IMPLICATION
IN MALAYSIA
(Woman's Rights Perspective)

Thesis

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A. Background of Research

Process of marriage in Malaysia is generally undertaken with various accompanying customs. The customs are acceptable in Islam as something good and reasonable. It provides many benefits such as *peminangan* or engagement ceremony procession.

Enactment or Islamic family law in Malaysia's States essentially does not give meaning specifically the term of engagement. But in one of its section mentions agreement for marriage that done orally or in writing and done directly or through intermediary i.e. the man who trust to express application to a girl.¹

In Malaysia in the marriage act 303 Islamic Family Law Certificate Federal territories 1984 on part II about Engagement contained in section 15 mentions:

*If any person has, either orally or in writing, and either personally or through an intermediary, entered into a bethrotal 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 bethrotal gift, 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.*²

While, in Indonesia that the majority following the same view with Malaysia community i.e. Syafi'i scholar is not set about engagement in Islamic family law Act. This is because the culture of Indonesia consider that Peminangan is not marriage contract and it can be cancelled by two parties. Only in the Compilation of Islamic Law (KHI) which is one of the regulations that set the marriage law in Indonesia. It is little set about *peminangan* that is set in article 1, 11, 12, and 13. Entire article that set *peminangan* comes from fiqh al-Syafi'iy.³

¹ Mimi Kamariyah, p.15

² Legal Research Board, *Islamic Family Law (Federal Territories) Act 1984 (Act 303)*, (Selangor DarulEhsan: International Law Book Service, 2012), p. 19

³ Amir Nuruddindan Azhari Akmal Tarigan, *Hukum Perdata Islam di Indonesia*, cet. ke-1 (Jakarta: Kencana, 2004), p.57

About legal implication of *peminangan* is described in article 13 containing two verses which basically explain that *peminangan* does not rise to a result or legal implication and the parties are free to cancel, because the sound is as follows:⁴

1. *Peminangan does not raise legal implication and the parties are free to cancel it.*
2. *Freedom to cancel peminangan is done with a good ordinance in accordance with local customs and religious guidance, so it stays made of harmony and mutual respect.*

Engagement in Islam or the promise to marry is only an agreement to hold a marriage. So that one party is permitted to cancel an agreement when there is a clear reason or there is agreement between the two parties to cancel it.⁵

After the occurrence of an engagement are not uncommon to break a promise made by the men. Not uncommon to break this promise was carried out not far from the day of the wedding. This has resulted in some losses on behalf of women who have been preparing for the wedding party. This loss is not only in terms of property but also in terms of dignity (*marwah*) of woman.

Engagement cancellation conducted by man in Malay culture can make the descent of dignity (*marwah*), as well as give the impression of an insult to women. Many people, especially women, who are still a blur to their rights in cases of engagement cancellation that actually has been regulated by the term *kemungkiran janji berkahwin*.

B. Scope and Limitation

In this research will only discuss about engagement cancellation and its legal implication in Malaysia base on Act 303 Islamic Family Law Federal Territory 1984 Malaysia. It is done because this regulation is considered as main regulation of states in Malaysia and most of states follow model of this regulation. Woman's rights perspective that used in this research is base on view of Asghar Ali Engineer and other view of woman's right that related to topic discussed in this research.

C. Statement of Problem

⁴Kompilasi Hukum Islam, Bab III, Pasal 13 ayat (1) dan (2)

⁵Sayid Sabiq, *Perkahwinan dan Pertunangan dalam Islam*, (Subang Jaya: Al-Ramadhan, 1996), p.59

1. What is the legal implication of engagement cancellation in Malaysia?
2. What are the Woman's Rights protection aspect in Act 303 Islamic Family Law Federal Territory 1984 Malaysia?

D. Research Method

This research is normative research which use library material or library research. Approach used in this research is statue approach. Data collecting method is done by documentation method begun from legal material determination, legal material inventirization, and legal material observation comprehensively, systematically, and structural analysis.

E. Result od Research

1. The Dynamics of Islamic Family Law in Malaysia

The legal system applied in Malaysia is essentially based on the Common Law system of England (Anglo-Saxon). Islamic law and customary law is a source of law, especially in the field of personal status.

Malaysia birth as a Federation State in 1957 to provide a unique feature of Islamic law setting in Malaysia. Federalism is a concept of a federal institution that is composed of several states with a limited freedom with agreement to form a Federation. As a Federation States, the jurisdiction and authority is shared between the federal Government and the States. Although Islam is declared as official religion of federation government, Islamic religious affairs, handed over to the States. The basic law explains that the *sultan* is the head of Islamic Affairs in the each States. The Division of authority between federal and States refer to the federal Government list authority and State Governments that are listed in the Constitution. Essentially the federal Government regulates almost all of laws, both civil and criminal. However, Islamic law becomes Affairs of the State Government. Non-Muslim family law including the federal State Government authority under the civil court. While, the Muslim family law is a matter for the State Government under the jurisdiction of the Sharia courts. Criminal

law, torts, contracts, agrarian and others include in to the authority of the federal Government that apply to Muslims and non-Muslims.⁶

Among the matter of law that became the authority and regulated by the State is Islamic law and private law, marriage law, inheritance, wills, bequests (*hibah*), marriage, divorce, dowry, a living, adoption, trusteeship, gift, zakat, wakaf Division, Islamic Treasury, mosques and places of worship, criminal offences related to Sharia (except those regulated by the federal State).⁷ Including the authority of states is regulating the establishment and organization of the transition of the Sharia which will have jurisdiction over Muslims. The State also has control over the spread of the Islamic religion. In this jurisdiction, each State is free to impose their version related to Islamic law, and also free to establish Islamic court to solve dispute matter arising from Islamic law decided by the State.⁸

The Federal territory became the first in a set of laws of Islamic family law prepared by the Office of the Attorney General's Office of the federal Government. When viewed from the contents, many of them which is a loan or an Islamic family law adoption of india and pakistan which are follow Hanafi and Maliki scholars. In these matters, the States have the option to follow draft of federal territory or follow draft of Kelantan which is strictly holds the view of Syafi'i.

The principle and the system of court in malaysia that is bifurcated between Islamic law and the Common Law of United Kingdom as described above had an impact in the ruling hierarchy. That Islamic law based and sourced in the text of *syara'* which is emphasizes on the evidence, the oath and the knowledge of the judge. While the Anglo Saxon system of United Kingdom is base on custom source and jurisprudence.⁹

2. Legal Implication Of Engagement Cancellation in Malaysia

⁶Tun Abdul Hamid Mohamad, *Harmonization of Common Law and Shari'ah in Malaysia: A Practical Approach*, Abd al-Razzaq al-Sanhuri Lecture: Islamic Legal Studies Program, Harvard Law School, (6 November 2008), p.3-4

⁷Farid S Shuaib, *The Islamic Legal System in Malaysia*, p.89

⁸Najibah M. Zin, *The Training Appointment and Supervision of Islamic Judges in Malaysia*, Pacific Rim and Policy Journal, 21: (1) 2012, p.116

⁹M. Samir Fuady, *Peran Urf dalam Formalisasi Hukum Peminangan di Malaysia dan Pakistan menurut Tinjauan Dalil Al-Qur'an dan Sunnah*, Jurnal Al-Mu'ashirah Vol.10 (Januari 2013), P. 83

In Malaysia, the law applicable to Muslim on family matters is the Islamic Family Law Act or Enactment which is varying according to each state. As Muslim matrimonial matters are within the state affairs in Malaysia, each state is governed by its respective family law enactment. The statute applicable to Federal Territory of Putrajaya, Labuan and Kuala Lumpur is the Islamic Family Law (Federal Territories) Act 1984 (Act 303) which considered as the main Act.¹⁰

Basically, Malaysian engagement is not an obligatory thing that should be done before marriage. However, Malaysian custom considered that engagement is one of the significant phase to be done before marriage taking place.¹¹

Engagement is an agreement between a man and a woman to have a marriage. A ring or another gift that given at the engagement event used as the sign of the engagement.¹² From the Muslim Family Law Legislation in Malaysia, it is considered as a contract that bond both two sides. Muslim View defined, every single contract that has signed should be obedient as long as the contract is not incompatible with the Islamic law. The implication of the contract is only depend on human's right. In term of *amanah* aspect in fulfilling a promise included to the engagement case, just like what God has emphasized in surah Al-Maidah verse: 1:

يَا أَيُّهَا الَّذِينَ ءَامَنُوا أَوفُوا بِالْعُقُودِ ۚ أُحِلَّتْ لَكُم بَيْمَةٌ الْأَنْعَامِ إِلَّا مَا يُتْلَىٰ عَلَيْكُمْ غَيْرِ مُحِلِّي الصَّيْدِ وَأَنْتُمْ حُرْمٌ ۚ إِنَّ اللَّهَ يَحْكُمُ مَا يُرِيدُ

The Meaning:

O you who believe! Fulfill (your) obligations. Lawful to you (for food) are all the beasts of cattle except that which will be announced to you

¹⁰ Anis Shuhaiza Bt Md Salleh, Noor 'Aza Bt Ahmad, *Cross Boundary Marriage under Malaysian Family Law: Between a Dream of Life and Reality of Legal Requirements*, Journal of Politics and Law, (Kedah: Law Department, College of Law, Government and International Studies Universiti Utara Malaysia, 2010), p.2

¹¹ Ahmad Ibrahim, *Undang-Undang Keluarga Islam di Malaysia*, (Malaysian Law Journal SDN BHD, 1999), p.

¹² <http://kes2syariah.blogspot.com/search/label/Putus%20Tunang>, accessed at 26 Januari 2015 at 16.00 WIB

(herein), game (also) being unlawful when you assume Ihram for Hajj or Umrah (Pilgrimage). Verily, Allah commands that which He will

Concerning the engagement cancellation in Malaysia that follow on Act 303 Islamic Family Law Federal Territory 1984 Malaysia of the section 15. The Syariah Court might help to the one of the two side who has suffered. According to the previous section, it can be seen that an engagement is a kind of thing which has an implication, it is about law that is able to bond both two parties until it has the same meaning with a contract. The implication of engagement itself could open the opportunities to the both of bride and groom to understand and know each other. By having the engagement, both the bride and groom might see how they are exactly in certain limitation. The man can see hoe the woman and the opposite of it.

Implication of engagement cancellation formulation that can be taken from section 15 Islamic Family Law Federal Territory 1984 Malaysia are:

1. The only one side who cancel the engagement have to return all the gift and give the requisites replacement change.
2. For the one who has the unwilling engagement without any reasonable reason will be given a punishment to replace the requisite.
3. The one side who cancel the engagement should pay the things that has already spent to prepare the engagement and wedding party.

This section clearly differenciate between an engagement cancellation a reason and without reason. The legal engagement cancellation is when it has agreed by both two sides. This explanation also explained in the next verse that state that whether the other side is still expect the engagement. When this kind of thing happen, the one who cancel the engagement might be demanded in syariah court, and if he or she proofed that they find the mistake, he or she must replace the requisite determined.

Several thing that sould be noticed from the section 15 of the IslamicFamily Lw Federal Territory are:¹³

¹³<http://musaawang.blogspot.com/2011/11/dilema-putus-tunang.html>, accesed at Friday, 6 February 2015

1. Engagement is the first main contract before the marriage take place. For all sides who had promised to marry must obey the engagement agreement except they find a huge possibility that will lead to the depraved and they will get dangerous when the continue thei marriage.
2. When one of the parties cancel the engagement, he or she must pay the detriment for all the equipment that has prepared by the other side to hold the wedding parrrty. Beside, he or she must return back all the gifts that had given for the engagement.
3. When one side felt lost out of the engagement cancellation, she or he could prosecute in the Syariah Court
4. As the evidence form of the detriment, it needs autenthic proofs like financing receipt and the purgative of the paymentto prepare themarriage.
5. When the man cancel the engagement, the woman might prosecute the man in Syariah Court. And the opposite of it. The man also might prosecute the woman as long as he has strong evidence that can be proofed.
6. Reasonable or not an engagement cancelled will be evidenced by the Court's action which will be reinforced by witnesses and evidences

In this case the LRA States that in the event of annulment of betrothal may give rise to some of the consequences¹⁴ as follows:

There are two kinds of damages, namely general damages, namely general damages and special damages

a. General damages

Damages for the abstract, i.e. breach of promise to marry.

In assessing the proper amount of damages, the judges are not limited to the mere pecuniary loss which the plaintiff has sustained, but may take into consideration the injured feelings and wounded pride of the plaintiff.

b. Special damages

¹⁴Nuraisyah Chua Abdullah, *Family Law for Non-Muslims in Malaysia*, (Selangor Darul Ehsan: Golden Books Centre SDN.BHD, 2006), p.7

Damages for specific items and which may be quantified in monetary terms, such as damages for medical expenses and wedding preparation

3. Woman Protection Aspect in Act 303 Islamic Family Law Federal Territory 1984 Malaysia (Woman's Rights Perspective)

Islamic Family Law in Malaysia especially is Act 303 Islamic Family Law Federal Territory 1984 Malaysia contain of woman's rights protection. In Islamic family law in Malaysia especially Act 303 Federal Territory Islamic Family Law 1984 women have rights in accordance with their position, namely in the form of rights before marriage, the rights within marriage and the last is the rights after divorce.¹⁵

First, regarding women's rights at the time before marriage there are two rights that become interest i.e rights at the time of the engagement and the right application of the guardian (wali hakim). Secondly, the rights of women in marriage, namely in the form of rights to acquire a living themselves, the right maintain children, and the right to earn a living for the children. Third, the rights of women after marriage breakdown that includes the right to earn a living (nafkah), mut'ah, acquire divorce property, parenting, and the right to earn a living (nafkah) for children.¹⁶

Asghar never condemn for state interference on marriage as long as it will create welfare and social justice. Furthermore, he praises several states for their family law which accommodate human right and treat the marginal group equally. For instance, he praises several countries which restrict or forbid polygamy such as Pakistan, Libya, Lebanon, Iraq, and Jordania.¹⁷ He never condemns the interference of the state as long as it provides the true Islamic justice. In other hand, he criticizes an implementation of injustice regulation, especially toward marginal group (oftently woman) such as Saudi Arabia.¹⁸

¹⁵<http://senadapwkm.wordpress.com/2011/02/14/hak-hak-di-dalam-undang-undang-keluarga-islam/>, accessed on 29 January, 2015 at 15.00 WIB

¹⁶<http://senadapwkm.wordpress.com/2011/02/14/hak-hak-di-dalam-undang-undang-keluarga-islam/>, accessed on 29 January, 2015, at 15.00 WIB

¹⁷ Asghar Ali Engineer, *Islam, Women, and Gender Justice in What Men Owe to Women* edited by John C. Raines and Daniel C. Maguire, (New York: State University of New York Press, 2001) p. 164

¹⁸ Asghar Ali Engineer, *Islam, Women, and Gender Justice in What Men Owe to Women*, p.164

The interference of government through this regulation is another effort to bring social justice for society. It is similar to the role of Muhammad as explained by Asghar as the leader of government in creating social justice. Muhammad revealed Islamic value and law to improve social injustice occurred in his society. In this matter, Muslim's marriage as regulated by Malaysia's Governments in Act 303 Islamic Family Law Federal Territory Malaysia 1984 is an effort to create equality rights between man and woman in marriage life. Arranging of its Act is as effort to repair the woman's position in marriage. This happen because Malay Custom, woman has the lower position than man. Here, woman's rights try to be protected in the time before marriage, inside marriage and after divorce

If analyzed from section 15 Islamic Family Law Federal Territory 1984 Malaysia will be found an understanding that actually engagement is does not contains like marriage contract, does not contain a legal obligation and not also ensures the implementation of the marriage, but in terms of this section is binding on the parties to keep the commitment.

Qasim Amin thought is an attempt to raise back the dignity (*marwah*) of women, in accordance with the teachings of islam, so that women are able to carry out her duties as a wife, as the first and foremost educators of children, as well as members of good community. This view is accordance with the purpose of islamic family law reform in Malaysia trough Act 303 Islamic Federal Territory 1984.

F. CONCLUSION

1. Engagement cancellation in Malaysia has the legal implication. Based on Family Law Legislation in Malaysia, it is considered as a contract that bond man and woman. Engagement cancellation in Malaysia is not only set in Act 303 Islamic Family Law Federal Territory, but also set in enactment from all states in Malaysia that has the same arrangement. According to the previous section, it can be seen that an engagement is a kind of thing which has an implication, it is about law that is able to bond both two parties until it has the same meaning with a contract. The implication of engagement itself could open the opportunities to the both of bride and groom to understand and know each other. The implication

of engagement cancellation that can be taken from section 15 Act 303 Islamic Family Law Federal Territory are: The only one side who cancel the engagement have to return all the gift and give the requisites replacement change, For the one who has the unwilling engagement without any reasonable reason will be given a punishment to replace all the gifts, and The one side who cancel the engagement should pay the things that has already spent to prepare the engagement and wedding party. It has explained clearly that an engagement protect by the law Act. The parties who feel damaged because of engagement cancellation can make prosecution in Syariah Court.

2. Regulation of Islamic Family Law in Malaysia especially Act 303 Islamic Family Law federal Territory contain of woman's rights protection. It has a protectionist nature towards women's rights and meet practical gender needs. In Islamic family law in Malaysia especially Act 303 Federal Territory Islamic Family Law 1984 women have rights in accordance with their position, namely in the form of rights before marriage, the rights within marriage and the last is the rights after the breakdown of marriage. Women's rights protection aspects that contained in the Act 303 Islamic Family Law Federal Territory generally not only in case of engagement cancellation or breach of promise of marriage (betrothal) but in all the rights of women in marriage. It has the purpose to protect women's rights, this regulation give attention by prevent the occurrence of a violation of women's right in marriage life. The woman's protection Aspect contained in Act 303 Islamic Family Law Federal Territory 1984 Malaysia is accordance with the some views of gender figure such as Asghar Ali Engineer, Qasim Amin, other view of woman's rights. They support the protection of woman's right in family law and consider man and woman are equal in their position in family.