



## CHAPTER I

### INTRODUCTION

#### 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.

A promise to marry so called as *peminangan* in Malay culture is considered as a first process towards marriage. The agreement to marry or commonly called as a contract to conduct the marriage occurs when man

raised the petition called by *peminangan* to the women. The petition is made directly by him or done indirectly through others who he trusts.<sup>1</sup>

Enactment of Islamic family law in Malaysia's States essentially does not give meaning specifically the term of engagement. But in one of its sections 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.<sup>2</sup>

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 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 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.*<sup>3</sup>

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

<sup>1</sup>Mimi Kamariyah Majid, *Undang- Undang Keluarga di Malaysia*, (Butterworths: Kuala Lumpur, 1992) h. 26. Lihat Enakmen Undang- Undang Negeri Persekutuan Akta 303 tahun 1984, Seksyen 15.

<sup>2</sup> Mimi Kamariyah, p.15

<sup>3</sup> Legal Research Board, *Islamic Family Law (Federal Territories) Act 1984 (Act 303)*, (Selangor Darul Ehsan: International Law Book Service, 2012), p. 19

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.<sup>4</sup>

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:<sup>5</sup>

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.<sup>6</sup>

This engagement in the Malay culture is not a contract of marriage because basically there is not a marriage contract in it. So the engagement does not justify all restrictions for both men and women before the existence of a marriage contract.

<sup>4</sup> Amir Nuruddin dan Azhari Akmal Tarigan, *Hukum Perdata Islam di Indonesia*, cet.ke-1 (Jakarta: Kencana, 2004), p.57

<sup>5</sup> Kompilasi Hukum Islam, Bab III, Pasal 13 ayat (1) dan (2)

<sup>6</sup> SayidSabiq, *Perkahwinan dan Pertunangan dalam Islam*, (Subang Jaya: Al-Ramadhan, 1996), p.59

In the presence of an engagement are expected to presence of a wisdom that is to maintain a good relationship between Muslims so will not happen anything unwanted. Engagement can also prevent someone from hurting the other by marrying his brother's fiancé. This is because every Muslims are not allowed to marry his brother's fiancé except it engagement canceled by the man. This is because the man has the right of a woman to not receive the marriage proposal from others. If an agreement is made, then both parties are bound by this agreement. Denying the agreement would lead to other parties will bear the losses and so on.

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*.

Many people often see engagement cancellation as paltry as they assumed that engagement is not something that is comparable to marriage. Part of them, assume that engagement is only custom before the occurrence of

marriage. So, if there are parties who want to cancel it, there should not be a big problem between two families.

There are engagement cancellation case which was forwarded to the syariah Court and was decided by the Court. If we look at the decision of the syariah court we can know that its decision contains the protection of woman's rights. In the case of Aishah vs Jamaluddin (1978), the men have broken a promise to marry the girl. Aishah demand repayment of *Mahar* amounted to RM25, RM800 for marriage expenses and claims she is entitled to continue to keep the engagement ring.<sup>7</sup>

*Kadi Besar* of Kedah as a judge for the case has decided to order the Jamaluddin to pay damages according to the engagement agreement and Aishah also reserves the right to continue to keep the engagement ring given to her. In addition, the judge also orders Jamaluddin pay the cost of bridal shirts to Aishah who has prepared for marriage and also RM400 as payment for the repair done specifically for the preparation of a wedding.

In the engagement cancellation case between Salbiah Othman vs Haji Ahmad Abdul Ghani (2002), the woman had breached a promise to marry. The female has a claim for damages the stigmatization and reimbursed expenses include preparation for engagement and preparation for marriage.<sup>8</sup>

The Syariah High Court in Seremban was answer his application that Salbiah against some claim covering bridal shirts, most fees are changing,

---

<sup>7</sup>Zulkifli Hasan, *Jurnal Hukum*, (Fakulti Syariah dan Undang- undang Kolej University Islam Malaysia ,2005) p.104-105

<sup>8</sup>Zulkifli Hasan, *Jurnal Hukum*, (Fakulti Syariah dan Undang- undang Kolej University Islam Malaysia ,2005) p.13- 14

most curtains and sheets, tents and deposits as well as bed covering legislative fees groceries and wet.

Based on the background above writer is interested to conducting a research under the title “Engagement Cancellation and Its Legal Implication in Malaysia (Women’s Rights Perspective)”

#### B. Scope and Limitation

In this research need to explain about scope and limitation, this limitation given to can focus on the problem that want to discuss in this research. 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

From the background of the problem, the subject matters proposed in thistittle are as follows:

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. Objective of Research

From the formulation of problem used above, this reserach aims:

1. To describe the legal implication of engagement cancellation in Malaysia.
2. To analyze the woman's rights protection aspect in Act 303 Islamic Family Law Federal Territory 1984 Malaysia.

#### E. Significance of Research

The result of this research is expected to be a useful reference, both theoretically and practically.

##### 1. Theoretical Benefit

Theoretically the results of this research are expected to be useful in developing a corpus of scientific knowledge and forethought especially in terms of engagement, legal Implication of engagement and how women's rights protection aspect in engagement cancellation in Malaysia.

##### 2. Practical Benefit

Practically the results of this research are expected to serve as material reference for reflection and thinking for readers, both among academics, practitioners and for the community in understanding the problem that described in this study is about engagement cancellation, its legal implication and women's rights aspect after engagement cancellation in Malaysia.

## F. Research Method

### 1. Type of Research

Based on the background that presented by researcher, this research is study in the field of law. This research focuses on regulation Islamic Family Law Federal Territory Act 303 year 1984 of Malaysia particularly concerning on about betrothal or Engagement. Therefore, this kind of research is normative legal research.<sup>9</sup> This type of research also known as library research. Library research is the research conducted based on written work, including research results that have or have not been published. On this type of legal research, legal conceptualized as what's written in the legislation (law in books) or law or rule conceptualized as the norm which is the benchmark of human behavior which is considered as appropriate deeds. Normative law research is fully use material inform prime and secondary law.<sup>10</sup>

### 2. Research Approach

According to the type of research i.e. normative legal research (juridical normative), then it can use more than one approach. This research used statue approach.

Statue Approach done to search how engagement cancellation, and aspect woman's right protection after engagement cancellation according to Act

<sup>9</sup> See Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Kencana, 2010) and Amiruddin, *Pengantar Metode Penelitian Hukum*, (Jakarta: Rajawali Pers, 2010)

<sup>10</sup> Amiruddin dan Zaina IAsikin, *Pengantar Metode Penelitian Hukum*, (Jakarta: Rajawali Pres, 2006), p.118



303 Islamic Family Law Federal Territory 1984 Malaysia and legal implication of engagement cancellation under article 15 which will help in analyze Process.<sup>11</sup>

### 3. Data Sources

According to Marzuki, the data sources used in the normative research is secondary data, which consists of primary legal materials; secondary legal materials, and tertiary legal materials.<sup>12</sup>

Therefore, the research literature will use the data to help research in the form of secondary data which divided into primary legal materials, secondary legal materials, and tertiary legal materials.

#### 1. Primary Legal Materials

Primary legal material is the law is authority material does have the authority. As for primary legal materials in this research is the Act 303 Islamic Family Law Federal Territory 1984 Malaysia

#### 2. Secondary Legal Materials

Secondary legal research is the material to help or support of primary legal research that will strengthen the explanation in it. Among the secondary law materials in this research are books, thesis, journals and documents about aspect women's rights protection after engagement cancellation and legal implication of engagement according to Act 303 Islamic Family Law

<sup>11</sup>Tim Penyusun, *Pedoman Penulisan Karya Ilmiah* (Malang: Fakultas Syariah UIN Maulana Malik Ibrahim, 2012), p. 29.

<sup>12</sup>Peter Mahmud Marzuki, *Penelitian Hukum*, p.118

Federal Territory 1984 Malaysia. Among the secondary law Materials used in this research are:

- a. Ahmad Ibrahim : Undang- UndangKeluarga Islam di Malaysia
- b. Ahmad Ibrahim : Family Law in Malaysia and Singapore
- c. compilation of Islamic law as the comparison settings regarding engagement in Indonesia and Malaysia
- d. Asghar Ali Engineer : The Rights of Women in Islam
- e. Musawa Journal
- f. And other books that are still relevant to the study discussed

### 3. Tertiary Legal Material

Tertiary legal material is a material that gives the instructions inform or explanation of the material law of primary and secondary law materials such as dictionaries, encyclopedias and inform others.

Tertiary law materials in this research are:

- a. Legal Dictionary
- b. Malay Dictionary
- c. Encyclopedia of Islamic law
- d. And other

### 4. Data Collecting Technique

The collection legal materials in the library legal research is the documentary technique that is collected and review archive or library studies such as books, papers, articles, magazine, journal, newspaper or paper experts. In addition, the interview was also one of the

collection techniques of the material support documentary technique in this research.

#### 5. Data processing techniques

The first step is editing, i.e. inspection of the returned materials inform obtained primarily from the completeness, clarity of meaning, appropriateness, and relevance to the group. The next step is coding by giving a record or a sign stating what type of material law (literature, legislation or document). The next step is reconstruction material (reconstructing) i.e. reorder materials inform regularly, sequential, logical, so easily understood and interpreted. And the last of systematizing the law ordered by material puts systematic framework discussion based on sequence problem.

#### 6. Data Analysis Technique

After the Legal material is collected than it analyzed to obtain the conclusion, in the form of legal materials analysis techniques is a Content Analysis.

#### G. Previous Research

N o.	Writter	Tittle	Kind of Research	Research Focus
1	Siti Nurhayati	Ganti Rugi Pembatalan Peminangan Khithbah Dalam Tinjauan Sosiologis (Study Kasus Masyarakat Desa Pulung Rejo	Empirical research	Giving indemnityis intended to prevent the breakdown of marriage. This is done as a community effort for the prevention of violations they have

		Kecamatan Rimbo Ilir Jambi		agreed on a rule or norm in public life. This is a community effort made to restore it back to peace condition, as before.
2	Nur Wahid Yasin	Tinjauan Hukum Islam Terhadap Sanksi Pembatalan Peminangan (Study Kasus di Desa Ngreco, Kecamatan Weru, Kabupaten Sukoharjo	Empirical research	Islamic Law view to the sanction of Engagement cancellation. Engagement cancellation sanctions are intended to strengthen agreement will marry.

Research on Engagement Cancellation has been done by several researchers, Such as: thesis written by Siti Nurhayati (2010), student of State Islamic University Syarif Hidayatullah of Jakarta, Comparative schools and law studies program of Sharia and Law Faculty, under the title "Ganti Rugi Pembatalan Peminangan Khithbah Dalam Tinjauan Sosiologis (Study Kasus Masyarakat Desa Pulung Rejo Kecamatan Rimbo Ilir Jambi "<sup>13</sup>. From the results of this research can be aware that giving indemnity in *khithbah* cancellation is intended to prevent the breakdown of marriage. This is done as a community effort for the prevention of violations they have agreed on a rule or norm in public life. Soak a sense of disappointment, resentment, indemnify ceremony performed when the application's implementation, enforcing the sense of fairness as well as keep so as not to be conflict between the families on both sides. This is a community effort made to restore it back to peace condition, as

<sup>13</sup>Siti Nurhayati, *Ganti Rugi Pembatalan Peminangan Khithbah Dalam Tinjauan Sosiologis (Study Kasus Masyarakat Desa Pulung Rejo Kecamatan Rimbo Ilir Jambi, Skripsi* ( Jakarta: UIN Syarif Hidayatullah, 2010),

before. In addition, for the realization of the principle of mutual respect and the tenets of life respect each other.

A thesis written by Nur Wahid Yasin (2010) Faculty of Shariah and law student of State Islamic University Sunan Kalijaga of Yogyakarta entitled "Tinjauan Hukum Islam Terhadap Sanksi Pembatalan Peminangan (Study Kasus di Desa Ngreco, Kecamatan Weru, Kabupaten Sukoharjo)"<sup>14</sup>. This research was conducted in an effort to uncover how the implementation of engagement cancellation in the village of Ngreco, Weru District, Sukoharjo Regency and how the views of Islamic law on this subject. From the results of the study found that the engagement cancellation sanctions are intended to strengthen agreement will marry. With the expectation will not occur engagement cancellation which can lead to animosity and revenge that threatens the safety of people, property and sense. With the theory of *sad Al-dzar'iah* we can get the conclusion that giving sanction to the engagement cancellation with the goal the annulment of sanctions as presented above allowed according to Islamic law.

Research title that will done by researcher is never done by other. To know that this reserach is have the differences and never done by other with the same topic i.e about *khithbah* or engagement, so need to explain the result of previous research to examine and studied, the research are:

First, reserach by Siti Nurhayati under the tittle "Ganti Rugi Pembatalan Peminangan Khithbah Dalam Tinjauan Sosiologis (Study Kasus

---

<sup>14</sup>Nur Wahid Yasin, *Tinjauan Hukum Islam Terhadap Sanksi Pembatalan Peminangan (Study Kasus di Desa Ngreco, Kecamatan Weru, Kabupaten Sukoharjo, Skripsi* (Yogyakarta: UIN Sunan Kalijaga Yogyakarta, 2010),

Masyarakat Desa Pulung Rejo Kecamatan Rimbo Liir Jambi)”. In that reserach researcher want to know how the implementation of *khithbah* in Pulung Rejo Village, Rimbo Liir Jambi and also to know what the factor which cause engagement cancellation case there. While, in the research that wiil done by researcher is focus on the implication of *kihthbah* or engagement in Malaysian society. Then in the research that done by Siti Nurhayati want to know what is the purpose of giving compensation on engagemnet cancellation. While, in research that done by researcher want to know how is the legal implication of engagement cancellation base on Act 303 Islamic Family Law Federal Territory 1984 Malaysia and how is the woman’s protection aspect on engagement cancellation. Means this research is different with the previous research althought there have same topic i.e about implication of engegement (*khithbah*) cancellation but there are have some different object.

Second, research by Nur Wahid Yasin under the title “Tinjauan Hukum Islam Terhadap Sanksi Pembatalan Peminangan (StudiKasus di Desa Ngreco, Kecamatan Weru, Kabupaten Sukoharjo)”. In that research, researcher examine about how is and why there are engagement cancellation sanction that implemented in Ngreco Village, Weru, Sukoharjo. While, research that will done by researcher is about how is the implementaion of engagemnet in malaysian society and how is legal implication of engagement cancellation base on Act 303 Islamic Family Law Federal Territory 1984 Malaysia. Then in research that done by Nur Wahid Yasin

search about how is islamic law view to the practice of giving sanction for engagement cancellation in Ngreco Village, Weru, Sukoharjo. While research that done by researcher is about how is woman's rights protection aspect on engegement cancellation in view of Asghar Ali Engineer. Means researcht that will done by researcher is different with the previous research althought they have same topic i.e about engagement or *khithbah* cancellation but both have some differences from object, place and kind of research.

#### H. Structure of Discussion

Generally the systematic discussion of this research divided into five chapters of nature as described as follows:

Chapter I (Introduction), In this chapter the researchers explain things that includes include background problems, problem formulation, research objectives, research methods, benefits of research and systematic discussion.

Chapter II to review the concept of engagement and women rights in family in Islamic perspective. In this chapter contains a previous research and theory framework that includes the definition of Engagement according to Islam which discusses definition of engagement and basic Legal terms of engagement, the requirements of engagement, Engagement Process Malay community in Malaysia, and the implication of the engagement.

Then also explain about women's rights in marriage according to Islam. In this part includes Marriage and the role of the Trustee, and the filing requirements in the marriage.

Chapter III to explain about the legal implication of engagement cancellation and woman rights protection aspect after engagement cancellation in act 303 Islamic family law federal territory 1984 in Malaysia (women's rights perspective). This chapter is the core of research. In this chapter, where researchers will conduct the exposure data research results and analyze the problem formulation using theories and concepts that are described in previous chapter therefore at this chapter is the core of research.

Chapter IV is closing. In this chapter is closing that containing the conclusion as an answer to the problem formulation and advice.