

**EPF SAVING: SHOULD IT BE CLASIFIED AS  
HARTA SEPENCARIAN?**

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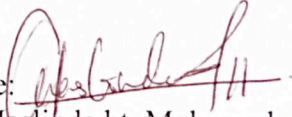
**February 2004**

## AUTHOR DECLARATION

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I hereby declare that work in this academic project is my own except for quotations and summaries which have been duly acknowledged.

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Praise is to Allah. Blessing and peace be upon the Prophet, Muhammad (saw) his family and companions.

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## ABSTRAK

Harta sepencarian merupakan harta yang diperolehi bersama suami dan isteri dalam tempoh perkahwinan di mana biasanya apabila berlaku perceraian masing-masing pihak yang bertikai tidak dapat menentukan hak milik sebenarnya. Termasuk apa-apa nilai aset yang dipunyai oleh satu pihak sebelum perkahwinan yang telah diusahakan dalam masa perkahwinan oleh pihak yang satu lagi atau harta yang diusahakan bersama. Malahan dimutakhir ini timbul cadangan supaya harta yang dikumpul dalam Kumpulan Wang Simpanan Pekerja (KWSP) boleh dituntut sebagai harta sepencarian. Ia wajar diklasifikasikan sebagai harta sepencarian. Kajian yang dilakukan oleh penulis ialah berbentuk lapangan dan rujukan perpustakaan. Selain dari itu, penulis telah mengumpul maklumat dari pelbagai buku dan majalah. Manakala hasil dari kajian ini, penulis telah menjelaskan kedudukan dan konsep sebenar harta sepencarian dan nyatalah bahawa wang caruman KWSP itu tidak boleh dikategorikan sebagai harta sepencarian. Wang tersebut juga selamanya tidak boleh dituntut oleh kedua-dua belah pihak. Melalui kajian ini, penulis berharap agar para pembaca dapat menjadikan ia sebagai satu bahan kajian yang lebih mendalam dan menjadi rujukan pada masa akan datang.

## ABSTRACT

*"Harta sepencarian"* can be defined as a property jointly acquired by a husband and a wife during the marriage. The claim on this jointly property right occurred in the case of divorce whenever both parties could not determined the amount of their right on the properties in question. This jointly acquired property right or *"harta sepencarian"* refers to any kinds of valuable assets or properties obtained by one party before their marriage and it had been developed by his or her spouse during the marriage or jointly effort on those properties. Nowadays, there is an issue to make an EPF saving to be recognized as *"harta sepencarian."* The method of research used is through data collection, library and also interview the certain parties and people those are know the topic. And the result of this research the researcher is the finding that the EPF saving cannot be recognized as *"harta sepencarian"* and ever cannot be claimed by spouse of to a marriage. Through this study, the reader could be able to make this paper as future reference.

## ملخص البحث

المال المختلط بين الزوجين هو المال المكتسب خلال الحياة الزوجية بين الزوجين وأحيانا يضم هذا المال بعض الأموال الذي سبق اكتسابه قبل الزواج منهما حيث يصعب غالبا تقدير القيمة المالية الصحيحة لكل منهما عند التنازع والطلاق بينهما. ظهر مؤخرا اقتراح بإمكانية المطالبة بالمال المختلط المدخرين EPF ( التأمين الوظيفي) والمنهج المتبع في هذا البحث هو دراسة ميدانية ودراسة مكتبية التي تقوم على جمع المعلومات و الحوار مع الأشخاص الذين جربوا هذا الموقف. وجمعة المعلومات من المصادر الأصلية مثل الكتب والمجلات. ونتيجة هذا البحث يؤكد لنا أن المال المختلط بين الزوجين لا يعتبر ضمن المال المختلط بينهما. هناك أيضا بمعنى المال التأميني الظيفي دائما لا يمكن طلبه ضمن المال المختلط بينهما.

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## GLOSSARY

<i>Adat muhakkamah</i>	custom that will be the law
<i>Analogy</i>	similarity
<i>Domestic</i>	attrib of the home, household or family
<i>Faraid</i>	Hukum involving to division of harta pusaka
<i>Fatwa</i>	A technical term used in Islamic law to indicate a formal legal judgments or view
<i>Harta bersama</i>	the property that gain by effort both parties
<i>Iddah</i>	legal “waiting period” beford a divorced a widowed woman may remarry
<i>Integriti</i>	quality of being honest and upright
<i>Literal</i>	corresponding exactly to the original. Word for word
<i>Mufti</i>	One who delivers or is qualified to deliver a fatwa
<i>Nominee</i>	a person nominated to a post of office. A person on Whose life an annuity or lease depends.
<i>Sunnah</i>	all the traditions and practices of the Prophet (pbuh) that Has become a model to be followed by Muslims.
<i>Surah</i>	the part of Quran that is divided into a hundred and Fourteen chapters.
<i>Syariah</i>	the Islamic Law
<i>Syirkah</i>	share
<i>Uruf</i>	the custom that was accepted from society
<i>Wasi</i>	the people those are have a right to get the property

## TRANSLITERATION

### 1. ALPHABET

<u>Arabic</u>	<u>Latin</u>	<u>Word</u>	<u>Transliteration</u>
ب	b	بغية	bughyatul
م	m	مال	Māl
ش	s	شركه	shirkah
ء	ʿ	أجره	u ʿjrah
ق	q	قول	qaul
ع	ʿ	عيانة	ʿiyanat

### 2. DIPHTHONG

<u>Arabic</u>	<u>Latin</u>	<u>Word</u>	<u>Transliteration</u>
ي	īyy	شافعي	shafiʿ īyy

## ABBREVIATION

Act	Akta
ASN	Amanah Saham Nasional
Bil	Bilangan
CPF	Kumpulan wang Simpanan Pekerja Singapura
DBP	Dewan Bahasa Pustaka
Def	Definition
Ed	Edition
EPF	Employee Provident Fund
FT	Federal Territories
Hal	Halaman
Hj	Haji
ILBS	International Law Book Service
JH	Jurnal Hukum
Jld	Jilid
KWSP	Kumpulan Wang Simpanan Pekerja
Lwn	Lawan
LRA	Law Reform Act
MLJ	Malaysia Law Journal
No	Number
n.a	No author
n.d	No date
p.	Page
pbuh	Peace be upon Him
Prof	Prof
SWT	Subhanahu wata'ala
UKM	Universiti Kebangsaan Malaysia
UM	Universiti Malaysia
V	verses
vol	Volume

# CHAPTER ONE

## CHAPTER ONE

### CONCEPT OF HARTA SEPENCARIAN

#### Introduction

The concept of “*harta sepencarian*” had been existed under The Law of Malay Custom being practiced in Islamic Family Law in Malaysia. This law is remained under the *Fiqh* method, which is based on the principle of “*Al-Adat Muhakkamah*”, viz bring the meaning of “doubtful custom or custom question”. In other words, a custom could be referred as a source of references for legal action. In fact, the practice of “*Harta Sepencarian*” is not available in Islamic law, but such cases occurred in current situation. So, it used to be practiced under The Malay Custom Law Since the principle of “*Harta sepencarian*” is not against the Islamic legalization, So, the scope of “*harta sepencarian*” has been made prettied and being recognized as a part of Islamic Law in Malaysia.

#### 1.1 The definition of “*Harta Sepencarian*” according to the law Perspective

“*Harta Sepencarian*” is an accumulated property acquired by a husband and a wife during the marriage.<sup>1</sup> This definition is stress on the extend of the effort contribution made by each party. The property shall be equally divided between both parties after the divorce. Here, the determining factors whether the property is considered as “*harta sepencarian*” or not is depend on the effort contribute by each party.<sup>2</sup>

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<sup>1</sup> Wahbah Al-Zuhaili 1985, “*Al-Fiqh Al- Islami Wa Adllatuhu*,” Dar Al-Fiqh, Damsyik, Cet 2, Juz 2, p. 764-765.

<sup>2</sup> Abdul Kadir Hj. Muhammad 1996, “*Harta Sepencarian: Konsep Dan Pelaksanaannya Di Malaysia*,” Jurnal Syariah 4, Akademi Islam UM.

According to Kamus Dewan, “*Harta Sepencarian*” is the property jointly acquired by a husband and a wife”.<sup>3</sup>

In another definition, M.B Hooker said that “*Harta Sepencarian*” is a property acquired by both parties (a husband and a wife) during the marriage.<sup>4</sup> According to the Islamic Family Law Enactments among the states in Malaysia, mostly defined this term as: “ Any properties acquired by a husband a wife during the marriage which the division rate is determined according to the condition applied to Islamic Law”.<sup>5</sup>

This definition is similarly defined by some states such as Sarawak, Pulau Pinang, Johore, Malacca, Terengganu and Federal Territory. In Perlis, this definition has been changed with the changing on the new Islamic Family Law Enactments.

In Pahang and Perak, “*Harta Sepencarian*” is defined as:

*“ An income or a property acquired from jointly effort between a husband and a wife which includes the incomes gained from the capital of husband or a wife.... ”*

In contrast, there is no specific definition on property being made under The Islamic Family Law Enactments in Kelantan 1983, but it was defined under The Administration Court of Shari’ah Law Enactments that defined “*Harta Sepencarian as a property acquired by a husband and a wife from the sharing capital.*”<sup>6</sup> According to the Amendment on Islamic Family Law Enactments in Selangor, 1989, defines:

*“ It is a means of property acquired by a husband and a wife regardless of whether the contribution were made formally or informally during the marriage enforce to the condition stated by the Syari’ah (Islamic Law). ”*<sup>7</sup>

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<sup>3</sup> Kamus Dewan 1994, Dewan Bahasa Pustaka, Kuala Lumpur.

<sup>4</sup> M.B Hooker 1976, “*Personel Law Of Malaysia*,” Oxford University Press, Kuala Lumpur. p. 77

<sup>5</sup> Enakmen Pentadiran Undang-Undang Keluarga Islam Wilayah Persekutuan 1989.

<sup>6</sup> Enakmen Undang-Undang Keluarga Islam Kelantan 1983.

<sup>7</sup> Enakmen Undang-Undang Keluarga Islam Selangor 1989.

Kedah is the only state in Malaysia, which is, not defined the exact provision on “*Harta Sepencarian*.” Instead, the court has a power to divide any kinds of assets jointly obtained during the marriage based on the hearing on the issue.

In general, the definition of ‘*Harta Sepencarian*’ by Negeri Selangor is more accurate compared with other definition made by other states. Of course, other states also served the same meaning with Negeri Selangor but they are different in terms of practiced.<sup>8</sup>

## 1.2 The definition of “*harta Sepencarian*” according to Islamic Perspective.

Obviously, the meaning of “*harta Sepencarian*” is not discussed in Islamic law in detail, but there is a wide discussion had been made on the cooperation system of partnership concepts in Islam because these concepts are formerly known. The term of sharing in Islam or according to “*Fiqh*” definitions, it was defined as a mixture of property or effort from two people or more. Some scholars defines ‘*Harta Sepencarian*’ as “A sharing of a something or partnership”.<sup>9</sup>

Based on the several definition above, two or more person cooperates to develop the property or to acquired the profits is called “*Syirkah*”. In ‘*Syirkah*’ this concept has stated that the partnership must not be participated by those who has blood relations or tied the knot in marriage like a husband and a wife.

There is only one definition discussed by the scholars of “*Fiqh*” regarding the property acquired by a husband and a wife during the marriage. This definition is called as “*Mal-Al-Zaujaini*”.

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<sup>8</sup> Abd. Kadir Hj. Muhammad 1998. “*Harta Sepencarian: Konsep Dan Pelaksanaannya Di Malaysia*.”

<sup>9</sup> Ibn Qudamah 1972, “*Al-Mughni*,” Beirut, Dar- Al Kitab Al-Arabi, Jld 5, p. 109.

In short, '*Harta Sepencarian*' is put under the category of sharing property but it does not carrying the meaning of '*syirkah*' in Islam. Both party of a husband and a wife recognizes it as sharing property because the property is accumulated by jointly effort during the period of their marriage. The distinction amount must be based on the contribution effort made by both parties and the agreement reached by them.<sup>10</sup>

### 1.3 The Evidence (Dalil) on "*Harta Sepencarian.*"

There is neither specific evidence or nor discussion made on this issue in the time of prophet hood. However, there is a verse referred from Surah Al-Nisa': verse 32

*" and in no wise those things in which Allah hath bestowed His gifts more freely on some of you then on others: to men is allotted what they earn, and to women what they earn, but ask Allah of His bounty. For Allah hath full knowledge of all things ""<sup>11</sup>*

From the verse, we know that both man and woman has their own right on property and the amount for each party is depend on the sole effort made by each party to obtained the property. In this matter, both parties have their right to make a claim on jointly property during the marriage after the divorce.

### 1.4 The Division amount on "*harta Sepencarian.*"

At the beginning of 19<sup>th</sup> Century, the concepts of division on '*harta Sepencarian*' in Malaysia only focused on the jointly effort between a husband and a wife. However, this concept has changed after that era since woman's action in the Western and Europe appeared to claim an equal right and freedom right like man. This awareness influenced Asean woman on their right on jointly property during marriage. Nevertheless, to say that

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<sup>10</sup> Siti Zalikhah Mohd. Nor 1996, "*Pemilikan Harta Dalam Perkahwinan,*" DBP Kuala Lumpur. p. 23.

<sup>11</sup> Al-Quran, Surah An-Nisaa': 32.

the terms of “informal Contribution” is derived from woman awareness on their right until this term is recognized as a rule.<sup>12</sup> There is a lot of different views defined among Law Practitioner in Malaysia on the efforts factor which is recognized as the main component in determining the acquired property as “*Harta Sepencarian*” or not.

At Perak, “*Harta Sepencarian*” is mentioned as Company’s property even though both concepts are still unclear to be defined. In a village along Sungai Perak, the determination of division for a wife who is jointly effort to acquire the property has a right to claim a half share from the property. However, if the spouse does not contribute any effort on the land, she just capable to have one-third share on the land. If a woman marries a person who earns wages, and buys the property with his own money, a wife has the right to claim one-third in the land.<sup>13</sup>

Meanwhile, in Pahang, “*Harta Sepencarian*” is defined as any properties acquired during the marriage period. If the property acquired by a spouse before the marriage, so the spouse who contribute on the property could not make any claim on the property as “*harta sepencarian*.” However, he or she is entitled to claim on the principles of wages. Based on this principle, we can conclude that if the asset is recognized as “*Harta Sepencarian*”, both parties are awarded equally between them.

A group of law practitioner’s said, any property acquired during the marriage could not be recognized as “*Harta Sepencarian*” as long as both parties had made an effort contribution directly, whether in terms of energy or capital. On the other hand, another group viewed and recognized “*Harta Sepencarian*” as any property acquire during the marriage regardless of effort contribution made directly”. Means, any property is recognized as “*harta sepencarian*” as long as it is acquired during the marriage regardless of any effort.<sup>14</sup>

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<sup>12</sup> Suwaid Tapah 1996, “*Elemen Sumbangan Dalam Pengamalan Pembahagian Harta Sepencarian Di Malaysia Dalam Konsep Harta Dalam Islam.*” Monograf Syariah 4. Um.

<sup>13</sup> Siti Zalikah Mohd. Nor 1996, “*Pemilikan Harta Dalam Islam.*” Kuala Lumpur.p. 24

<sup>14</sup> Abdul Kadir Muhammad 1996, “*Harta Sepencarian, Konsep Dan Pelaksanannya Di Malaysia.*” Jurnal Syariah 4. Um.

A direct contribution could be divided in two kinds of contribution based on the capital collection and effort towards the development of the property. Another indirect contribution involves opinions, advices and supports. Refer to the case of “*Wan Mahatan Haji Abdul Samad*,”<sup>15</sup> Kadi held that if a wife does no work but only helps the husband in looking after the house and family has no right to claim over her husband’s property. Nevertheless, in case of ‘*Boto’ Binti Tahir v. Jaafar bin Mohd.*’<sup>16</sup> Tan Sri Salleh Abbas as he they was held that any moveable property acquired during a marriage is recognized as ‘*Harta Sepencarian.*’ Similarly, a wife indirect contribution towards husband also consider as ‘*Harta Sepencarian*’ since this effort cherish her husband. A court also held a same result in the case of ‘*Tengku Anum Zaharah v. Dato’ Dr. Hussien.*’<sup>17</sup>

The determined provision is different from one state to another state. The distinction of property in Kedah, Terengganu, Perak and Selangor is held to claim a half share. In Sarawak, a spouse is entitled to claim a one third share in the asset. Other states said that the result of the case is depending on the “*kadi judgment.*”

Moreover, when there is question on the division rate of “*Harta Sepencarian,*” which not meets an agreement from both parties, the decision will be held by the judge. As mentioned earlier by Ahmad Ibrahim, on the case held upon “*Mansjur v. Kamariah*” (1998, VI, 2JJ) about “*Harta Sepencarian*” said, “ When there is problem questioned in the division amount on jointly property, if there is no way to reach agreement between two parties, the result will be made by judge”.<sup>18</sup>

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<sup>15</sup> [1926] 4 JH 67

<sup>16</sup> [1985] 2 MLJ 98

<sup>17</sup> [1980] 3 JH 125

<sup>18</sup> Ghafani Awang The 2002, “*Hak Wanita Yang Perlu Dituntut Selepas Perceraian.*,” <http://www.islam.org.my>

At the end, the judge is responsible to do decision making on this matter. However, there is no specific provision on the division rate. Therefore, a group of judges will determined each party based on their contribution on obtained the property.

There are two types of *fatwa* that needs to be studied here, one is Fatwa issued by The Mufti of Terengganu about “*Harta Sepencarian*,” states:

*“ Any personnel property belongs to a husband or a wife is prohibited from being divided into other party”. But a joint effort between a husband and a wife to obtain a property as obliged to be divided based on the given effort of contribution by both party to profits (new capital) regardless of the basic capital whether it was from a husband or a wife.*

According to this fatwa, the determining factor on the division of property between a husband and a wife is regards on the contribution to get profits. Here, morale contribution is out from the considering of the judge. Second, the committee members of Fatwa in Kedah, states that “*Harta Sepencarian*” must be divided based on the reasonable wages on the certain job or effort”. Refer to this passage in *Kitab Al-Qurratu’ –ill-Ain-Fatwa-ala* page 366 until 367, they agreed upon:

1. Make a suggestion to Islamic Council to hold a provision for the Administration of Islamic law, which give a right to a wife or her heirs of kinship. In case, a husband refuses to give her right on the questioned property. She can make a claim at any Syari’ah court, learned kadi has the power to determine the amount obtained held from the assets, or being given to her heirs if she died based on the reasonable wage on the job done.<sup>19</sup>
2. Mazhab Shafi’e did not recognise any properties acquired by a husband and wife during the marriage and this effort of “Muamalah of partnership” included in “*Syarikah Al-Abdan*.” But mazhab Hanafi agreed on this matter regardless on the

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<sup>19</sup> *Ibid.p. 25.*

type of same form or not. It also legal in Mazhab Maliki and Hambali with a condition of the same form. Hence, the committee members of fatwa agreed on the opinion issued by Mazhab Hanafi. This Act is located under section 38(1), The Administration of Islamic law No.9/1962 that follow Mazhab Syafie teaching and authorized by the law unless this teaching is in contrast with the public view on that time. Therefore, The fatwa Committee members could ask the council to get permission from the king to follow the teaching of Mazhab Hanafi, which allowed the concept of Syarikah Al-Abdan without similar Mazhab in the form, which we know "*Harta Sepencarian*" is recognized under "*Syarikah Al-Abdan*".<sup>20</sup>

In fact, the division of "*harta sepencarian*" of "*Harta Syarikah*" must be based on the capital. The determining factor of contribution between a husband and a wife on "*Harta Sepencarian*" could be consider as the determining original capital in '*Syarikah-Al-Milk*.' Therefore, the permanent contribution is from the type of asset and effort and not includes the morale contribution. This morale contribution is not applied to determine the mutual rate. The determination of division made between husband and a wife without look at the contribution is beyond the limitation of '*Syari'ah Law*.' If a wife has not contributed to develop or improve the property during the marriage, she has no right to get any share from those assets and the asset should not be recognized as "*harta Sepencarian*." However, she can apply "*Mutaah*" in the from of asset or money with her spouse agreement. She also can make a claim of "*Hadanah*" in term of wage because she provides a breast feeding to their children and perform the chores in the house." Therefore, a judge should take a deep consideration and observed on the physical, material and morale support made by a wife. In this case, the judge must study on the type of property in question.<sup>21</sup>

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<sup>20</sup> *Ibid*.

<sup>21</sup> *Ibid*.

### 1.5 The claim of “*Harta Sepencarian*’ in Malaysia.

In short, most of the states in Malaysia allowed the claim are made on the “*Harta Sepencarian*” in a divorce case between a husband and a wife. Some state such as Selangor, Terengganu, Pahang, the The Supreme Kadi Court and Kadi Court has the power to listen and make a decision on the division and claim on the said property.

In Perak, minutes meeting of Perak Exco members dated 18<sup>th</sup> Jan, 1907 instructed the claim on property question is only could be processed by a divorced wife based on the Malay Custom in Perak. Similarly, in Pahang the claim should be referred by according to Pahang Custom Law. In 1903, committee members of Supreme kadi and Kadis had make the decision to follow Pahang custom which recognized the right of a wife to claim on jointly property after they divorce or after the death of her husband.

The claim on “*harta sepencarian*” is being allowed in Kelantan before division of heritage assets is process. In a case of ‘*Hajah Saudah v. Hanafi*’ and refer to other cases, The supreme Kadi Court in Kelantan held that the questioned property might be claimed for the death caused. The Kadi court is only has the power to listen and make the decision on the appeal in order to determined the recognized the hearing and their part in *Syarak*’.<sup>22</sup>

### 1.6 The Concepts of “*Harta Sepencarian*” Under Islamic Family Law in Malay

The development of law occurred in Malaysia had contribute the concepts on “*harta sepencarian*” to be built in the form of writing provision. Under Islamic Family Law Enactments, in Kedah held:” A court has a power when permitting the pronouncement of “*talaq*” or when making an order of the divorce, to order the division between the parties of any assets acquired during the marriage by the sole assets and the division between the parties of the proceeds of sale.

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<sup>22</sup> Dr. Zaleha Kamarudin 1997, “*Isu-Isu Kekeluargaan Dan Undang-Undang*” ABIM. p.132.

In the division process, the court shall have regards on several issues such as on how the extend of the contribution made by the party in the form of money, property or work toward the acquiring of the assets. Besides, look on the any debt owing by either party, which were contracted to fit their joint efforts and should consider on the needs or minor children if any of the marriage.

The court shall make an equal division between both parties. Subject to those considerations, the court may divide the assets or the court thinks reasonable but in any case the party by whose efforts the assets were acquired shall receive the greater proportion. Those provision should not be put under the provision of “*Harta Sepencarian*” because those assets is a solely effort of one party. Then, the party who does not belong the assets shall consider those assets as a charity to the family and relates this matter to the contribution claim. Refer to this situation, those assets is recognized as a wage as determined by Mazhab Shafie but still recognized as “*Harta Sepencarian*” in Mazhab Hanafi.

In Federal Territory, Selangor, Pulau Pinang and Negeri Sembilan, are agreed on the provision held in Kedah but it differ under the law provision in Pahang, Kelantan and Perak which state that: “...a court must be able to make a jurisdiction of division extend on their sole effort and capital.”

Clearly, based on this provision, the extend contribution determined the factor of division. Meanwhile, in Sarawak a Malay Court Law determined that the claim is only can be made in the case of divorce. A woman who is jointly work together with her husband (Such as *Melanau custom*), she has a right to claim a half share of the property. But if she does not work together with her husband during the marriage, she just only entitled to have one-third share of the property.<sup>23</sup> If both party owing any debts and the debts is not enough to be paid by using their assets, so the application for divorces is not allowed

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<sup>23</sup> *Ibid.*

unless a husband is affordable to pay the debts. Contribution is beyond the judgment consideration.

Among the right of a wife on "*harta sepencarian*" after the divorce are: when a woman marries a person and both are working (earn wage) the division is based on the extend contribution made by each party. If the wife also performs any kinds of work in the house such as provides breast feeding to their children, washing, cooking, cleaning besides working outside, so she has another right to claim a one third on her husband property besides her part in the earlier provision.

Besides that, if a husband is the only party work while his wife does not work but only stay at home and looking after their house and children, the wife shall get a one –third share of the property of question. If a wife is only stay at home and the husband provides a servant, a cook, a washer, a baby sitter to their children and other services, so in this case the wife has no right to claim a one-third share from the property question. However, the decision is located on judge 's hand to determine her reasonable part. So, Why there is a question arise on the right to make a claim against EPF saving? Generally, we know that those saving is involves the direct contribution from both party. What is the response or feedback from the society towards the statements mentioned by Dato' Shahrizat Abdul Jalil who ask to make EPF saving is deemed as "*harta sepencarian*" and shall be indirect contribution from one party to another party. The answer on these questions will be discussed in detail in the next chapter.<sup>24</sup>

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<sup>24</sup> *Ibid.*

## CHAPTER TWO

## CHAPTER TWO

### CONTRIBUTION UNDER EPF

#### **Introduction**

Actually, many people are not truly understand about EPF system and doubtful for their operation. Beside that, the committee members also didn't know what are their rights and how to used the accommodations that were provided to them. However, EPF always provide the good service and the members are their main priority for having ease to all the members.

As a statutory body and a trustee fund, the main role of the EPF is to provide financial security o its members, especially after retirement through a compulsory savings scheme. When the EPF was first set up, its aim was to safe guard interest of the lower income group of the private sector employees. The scheme originally covered workers of 16 years of age and above, who earned not more than RM400 and were on the payroll of an employer with a staff of over 10. Prior to EPF's establishment there were a number of private funds in operation for the mining and plantation sectors, which were the mainstay of the economy at the time. Contributions were not uniform. Then, the Federal Labour Department mooted the idea of a uniform scheme for certain categories of workers and the government decided to implement a compulsory national savings scheme to provide security to the lower income group. The scheme was extended to all workers except for pension able public sector employees by the 1970s. Today EPF's primary members are the private and non-pension able public sector employees.

## **Background Of Employee Provident Fund**

EPF is the abbreviation for Employees Provident Fund is commonly known in a Malay terms as KWSP or Kumpulan Wang Simpanan Pekerja. EPF was first establish on 1 October 1951 under the Ordinance 1951 which was subsequently known as the EPF Act 1951 has since then been replaced by the EPF Act 1991 in June 1991.

Besides being the world's oldest national provident funds of its kind, providing the compulsory savings scheme to ensure security and well being old age. The EPF was made up of a Chairman, a Deputy Chairman and 18 others members, which comprise of 5 government representative, 5 employer representative, 5 employee representative and 3 professional representative.

Employees Provident Fund is a compulsory savings scheme in Malaysia. Its primary aims are to provide a measure of security for old age retirement to its members. It also provides supplementary benefits to members to utilize part of their savings form house ownership and other withdrawal schemes.

EPF is the abbreviation for Employees Provident Fund. Employees Provident Fund is commonly known in the Malay team as KWSP or Kumpulan Wang Simpanan Pekerja. Employees Provident Fund Act 1991 is the act governing the Employees Provident Fund in Malaysia. The Employees Provident Fund, Malaysia, administers this act. All employees in Malaysia who have reached the age of 16 and employed under a contract of service whether express or implied, and oral or in writing must be registered as a member of the Employees Provident Fund. An employer will contribute 12% of the employee's wages and the employee contributes 11% of the monthly wages towards the employee's account.<sup>25</sup>

Till December 2001, the EPF have 10.18 billions members include the active members is 5.04 billions. The savings total is the money that was in individuals account.

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<sup>25</sup> <http://www.kwsp.gov.my>

On 1 November 1994, each member's account in EPF is subdivided and maintained in three separate accounts, first is Account I, for the retirement purpose at age 55 on 60%, Account II, for housing and withdrawal and Account III, for health and medical costs on 10%. It has recently been announced that contributors below the age of 55 years with more than RM50,000 under Account I will be allowed to invest up to 20% of their funds in unit trusts beginning from 1997.

Prior to 1<sup>st</sup> August 1998, expatriates and foreign workers were not required to contribute to the EPF although they may elect to do so. However, with effect from 1<sup>st</sup> August 1998, all foreign workers and expatriates earning less than RM2,500 per month are also required to contribute to EPF with the exception of certain categories. Those who are exempted from making the compulsory contribution are employees or workers holding Employment Pass or expatriates holding Visit Pass (Temporary Employment) whose monthly wages is not less than RM2,500. Besides that, the Thai workers who enter Malaysia with a Territorial Pass, Seamen, Foreign domestic maids, Self-employed persons, Out-workers who do cleaning and alteration repair works, Persons detained in custody, in prison, Henry Gurney School and mental hospital and the pensioners. The procedure to register an employee with the EPF within under 7 days of employment under law. Under Section 41(2) of the EPF Act 1991, an employer who contravenes the above shall be found guilty of an offence and shall be liable, on conviction to imprisonment for a term not exceeding 3 years or fine not exceeding RM10,000 or both. An employer shall register the company or firm with the EPF by submitting the KWSP 1 Form. This can be obtained from the nearest EPF branch office. An employer shall before the end of the first week in the month in which he is paying required paying contribution to the Employees Provident Fund. An employer shall prepare and furnish a statement of wages to each employee. An employer who fails to make contributions to EPF shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding years or to a fine not exceeding RM10,000 or to both.

Under the Death Withdrawal Scheme, the beneficiary that has been registered by the deceased as his or her heir or where the deceased has not named a beneficiary, certain person deemed acceptable by EPF has the right to apply for the deceased savings. The

next- of-kin or beneficiary is allowed to withdraw the entire savings. If a member dies before reaching 60 years of age, the member's dependants will be paid Death Benefits. Nominees of the member are entitled to monies upon the member's death irrespective of whether there is a will or not. However, nominations made before marriage, are automatically cancelled and fresh nominations must be made. When a member dies without named beneficiary, the following persons will have the right to withdraw the savings. If the deceased is married the beneficiary is to inheritance administrator, spouse of the deceased, children of the deceased or their guardians, parents of the deceased, siblings of the deceased, anyone who is deemed acceptable by the EPF as qualified to receive the monies. If the deceased is single, the beneficiary is come to the inheritance administrator, parents of the deceased, siblings of the deceased, anyone who is deemed acceptable by the EPF as qualified to receive the monies.

Where the deceased total savings is not more named beneficiary, there are three kinds of payments made by EPF. Then, when the deceased total savings is not more RM20, 000 and a Probation Letter or Administrative Letter or Distributing Command is not within 2 months from the date of the death, EPF has the right to relay the monies to parties whom the EPF deems qualified to hold of these letters, beside to relay the monies to parties which the EPF deems qualified to receive interest from the deceased. Where the total savings of the deceased is between RM20,000 and RM30, 000, EPF cannot pay more than 50% of the total savings to the persons. Where the total savings of the deceased is more than RM30,000, EPF can pay up to 25% of the total savings or RM 30,000 whichever is lower, to the above persons. Where the member is a Muslim with named beneficiary, the beneficiary will only acts as an executor or "*wasi*" who will upon the member's upon the death be responsible for the distribution of the deceased savings in accordance with the *Faraid (inheritance) laws* to the legal heirs. Named beneficiary who has not reach 18 years of age will have to complete additional KWSP 22 Form and for applicants which is legal heir to the named beneficiary that passed away after the deceased member will have to submit KWSP 10A Form in addition to KWSP 9(KM) Form. Members are always

encouraged to name their beneficiary to avoid any inconvenience for the beloved ones or next-of kin in the event of death.<sup>26</sup>

EPF as a property holder for their members takes a main rule to give the finance guarantee, particularly after the retirement. Through the compulsory savings scheme all the members can withdrawal their money at age 55 years for their life without worried about the expenditure after retirement. As an addition profit, the members are allowed to use half of their savings for the purchase or construction of a residential house and to meet medical treatment costs. Many countries have a similar fund. Generally there are two main types of old protection schemes. First are savings schemes and social insurance or pension schemes. Some are state-driven, some employer- driven, some employer and others may be voluntary. In Malaysia, the EPF is an example of savings scheme and the Public Service Pension scheme is an example of a pension scheme. It is interesting to note that provident funds tend to exist in Former British colonies including countries in Asia such as India, Singapore and Malaysia. Singapore CPF for example, works on roughly the some principles as our EPF. Different schemes have funding mechanisms. Some are financed through contributions from workers and employers, while other receive contribution from the state as well. In a saving scheme like the EPF, the individual or the contributor provides for his own retirement security and well being but their mechanisms may differ.

Based on EPF Act 1991 (Act 452) EPF was pronounce the term of nominator in division of EPF saving. If the contribution has the name of nominator, EPF will manage the process of withdrawal money and when the situation the saving has not the nominator it will be divide by other divisions or through the *Pusaka Administrator*. It is qualified that someone who 18 years old and above only named everyone whom choose to received saving money in EPF after the nominator passed away.

That means, nominator that done did not annuity with any will or any act and occurrence that happened. On 20th September 1973, *Jawatankuasa Fatwa Majlis*

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<sup>26</sup> <http://www.kwsp.gov.my>

*Kebangsaan for Hal Ehwal Agama Islam ke-96* was declare by *Mesyuarat Majlis Kebangsaan* as followed:

“ EPF nominators, post office money savings scheme, insurance and company as the person who are manage the will from that sources for divided to the people which have the right to claim the division by *Faraid*”

Based of above, nominator only acts as a *wasi (executor)* or the trustee holder and responsible to divided that property to the others relatives refer *hokum faraid*. Based on that, clearly that EPF are personal owners, no matter from husband or wives. Suitable with the aim of contribution for the future. The wife only can get saving when her husband died. If the divorce during his life, wives will never get claim the savings money as the matrimonial property.<sup>27</sup>

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<sup>27</sup> <http://www.kwsp.gov.my>

## CHAPTER THREE

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### JURISDICTION OF SYARIAH COURT

#### 3.1 The Extend in the contribution of wives recognized in “*harta sepencarian*”

Islam was the first legal system in the world, which recognized women’s individuality and her right to own and dispose of property. Islam has greatly enhanced women’s position *vis-à-vis* her husband. Her consent to marriage in necessary, the dower is a necessary requirement of the marriage contract and it is the responsibility of the husband to provide maintenance to his wife.<sup>27</sup> Thus, the issue is does Islam recognize the joint property rights of a wife. In addition, what is the position if the wife has no direct involvement in acquiring the properties accumulated during the period of marriage?

Primarily, it is important to bear in mind that the wife has no duty towards the household work, as it is the responsibility of her husband to provide her cooked food and stitched clothes. As such, for whatever work she performs in the house, her husband has to compensate her if she so desires. In view of the husband’s responsibilities, there is simply no doubt that whenever a wife performs any work in the house, Islam recognizes it as productive and she is entitled to remuneration for the services rendered by her if she so desires. Therefore, the wife’s labour in the household should be recognized in her claim to “*harta sepencarian*” as joint assets of the properties during the marriage.

In *Rokiah v. Mohd Idris*,<sup>28</sup> the learned judge referred to an extract from ‘*kitab al Majmu*’ to the effect:

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<sup>27</sup> Faizan Mustafa 1995-1996, “*Domestic Work As Work: Recognizing Joint Property Rights For Wives*.” Vol. IV

<sup>28</sup> [1989] 3 MLJ 1x .

*“ It is not incumbent on the wife to serve the husband in making bread, pounding the wheat, cooking, washing and like as the contract of marriage entered into by the husband with her is to enjoy each other’s company, and it is not incumbent on the wife to do more than that.”*

Thus, where the wife in fact helps the husband in looking after the house and family and the family and in keeping him company in his life, profession or business, and he is able thereby to acquire property by his efforts, it was held that the wife had contributed indirectly to the acquisition of the property and she is entitled to a share of the jointly acquired property.

In fact, the recognition of the wife’s contribution to the family economy can be viewed from the written record of the judge in “*Ramah v Laton*” dated 2<sup>nd</sup> June 1922, the scholars are of the opinion that according to the law, a wife has the right to claim her contribution during the period of marriage, not only in terms of assisting the husband outdoors and in performing household chores but also in suckling the children of the marriage, if any....<sup>29</sup>

The above view may be strengthened by the writings of “*Snouck Hurgronge J.*” when he said,

*“ In districts where it is the custom for the wife to assist her husband in his employment, the property accumulated during the marriage by their respective toils is in the event of a divorce divided in equal shares between the man and the woman or their respective heirs. Where one of the two dies, the survivor obtains, in addition to this half – share, his lawful portion of the heritable property to which the other half of their common earnings is regarded as belonging. Thus, we find in Acheh the same peculiarity that exists in Java and Madura and most Malayan countries, viz that is where the woman is the fellow worker of her husband there gradually grows up a kind of partnership between the two.”*<sup>30</sup>

However, in “*Wan Mahatan v Hj. Abdul Samat*”,<sup>31</sup> the kadi of Larut held that a wife who did not do anything beyond caring for the family and attending to the usual household chores and to the needs of the husband, has no right to claim for “*harta sepencarian*.” The principle is that if a woman marries a person who earns wages and the woman does no work, but she cherishes her husband by cooking rice and washing

<sup>29</sup> [1927] 6 MLJ 128.

<sup>30</sup> Snouck Hurgronge 1906, “*The Achenese*” Leyden, Vol I, p.189.

<sup>31</sup> Ipoh Civil App No 27 In E.Taylor, “*Malay Family Law*,” p.25.

his clothes as is usual for a Malay woman of the present day, property obtained in that way is not in partnership with the woman but is appropriated to her husband alone.<sup>32</sup>

Now, the above judgment is no longer applicable since it is settled law in the case of *Boto' bt Taha v. Jaafar bin Muhamed*<sup>33</sup> that acquisition of matrimonial assets by the sole efforts of one party to the marriage does not prevent such assets to be deemed "*harta sepencarian*" if the other party has nevertheless rendered other contributions.

In this case, the plaintiff wife worked as a coffeshop assistant while the defendant husband worked in the fishmonger business in Dungun, Terengganu. The business prospered and he bought a matrimonial property home, a piece of land, four fishing boats, fishing nets and fish stall. The wife took no direct part in the business but she usually accompanied the husband on his many trip from home in connection with the business. The parties divorced subsequently and the defendant merely gave the plaintiff maintenance during her period of "*iddah*." The plaintiff claimed a one half share in all the properties acquired during her marriage to the defendant and one half share of all income derived from the properties since their divorce.

*"Thus jurisprudentially "harta sepencarian" rests upon legal recognition of the part played by a divorced spouse in the acquisition of the relevant property and in improvements done to it (in cases where it was acquired by the sole effort of one spouse only). It is due to this effort or joint labour that a divorced spouse is entitled to a share in the property. Thus, once that a property was so acquired or that the claimant had assisted in the working of it, the law presumes that the property was "harta sepencarian" and it therefore falls on the other spouse who denies the claims to rebut the presumption."*

The court held that the wife is entitled to one-third share of the properties acquired during the marriage which were registered in the husband's name. The share of one-third was awarded because evidence showed that she was helping the husband's business indirectly as a partner in his business trips.

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<sup>32</sup> *Ibid*, p. 27.

<sup>33</sup> [1985] 2 MLJ 98

The following principles are summarized from the judgment of his Lordships:

- (i) The fact that the wife accompanied her husband on his business trips and gave up her employment because of the marriage must amount to joint efforts in the acquisition of the properties. This principle might be termed as Constructive Contribution.
- (ii) A divorced wife is automatically entitled to one third share of properties acquired during the marriage and to one half share if she assisted in the cultivation of the land or the acquisition of the property. This new principle of “*Automatic Entitlement*” to a minimum one-third goes further than a mere rebuttable presumption.
- (iii) The law of “*harta sepencarian*” applies both to movable and immovable properties as long as they are acquired during the covertures of the marriage.<sup>34</sup>

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### 3.2 Subject Matter Of “*Harta Sepencarian*”

“*Harta sepencarian*” used to take the form of land, matrimonial houses and animals used to work the land. As the Malays become more modernized, urbanized and possessed greater purchasing power, “*harta sepencarian*” included movables such as household goods and furnishings, moto vehicles, etc.<sup>35</sup> In the case “*Boto’ bin Taha v Jaafar b. Mohamad*,”<sup>36</sup> the court held that “*harta sepencarian*” applies to all kinds of properties, movable and immovable, as long as they are acquired during the marriage. As such, “*harta sepencarian*” may included joint accounts, compensation paid for land acquired by government<sup>i</sup> and units of shares registered in the name of either spouse.<sup>37</sup>

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<sup>34</sup> Salleh Buang 1998, “*New Frontier*” pp.47-48.

<sup>35</sup> Mimi Kamariah, “*Family Law*,” p.366.

<sup>36</sup> [1985] 2 MLJ 98

<sup>37</sup> Kamariah V Mansjur [1991] 9 JH 178.

### 3.3 Cases Involving Claims For “*Harta Sepencarian*” In The Syariah Court In Malaysia

#### (i) Wife’s claim for “*harta sepencarian*”

Wife’s moral contribution

In *Tengku Anun Zaharah v Dato’ Dr. Hussein*,<sup>38</sup> the husband had during the marriage acquired considerable property amounting to five pieces of land and five shops and the wife claimed for a share in those properties. The Selangor Syariah Court found, on the evidence, that the properties were acquired by the sole efforts and ability of the husband and that the wife had made no contribution either in money or labour, but held that she had made a “moral” contribution since the husband also partly owed his rapid success in business due to the public confidence that he had been able to enjoy due to the wife’s status as a member of royalty. The court gave her a half-share in one of the pieces of land that was acquired by the husband.

In this case, the “*moral*” contribution was based on the particular circumstances of the parties concerned rather than on a general principle that the spouse who made no financial contribution is also entitled to a share of the property acquired during the marriage by looking after the home or caring for the welfare of the family.

#### (ii) Wife’s contribution in looking after the household

In *Rokiah v Mohd. Idris*<sup>39</sup> the leaned Chief Kadi had dismissed the wife’s claim or “*harta sepencarian*” on the ground that the properties in question were acquired during by the husband with his own money. The federal Territory Board of Appeal, in allowing the wife’s appeal on the issue of “*harta sepencarian*,” held that the wife’s

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<sup>38</sup> [1980] 3 JH 125

<sup>39</sup> [1989] 3 MLJ IX

indirect contribution to the acquisition of the properties that were acquired during the marriage by looking after the household and the family must also be considered.

In its judgment, the Board referred to a passage in “*Kitab al- Majmu*” which says that it is not compulsory for a wife to serve her husband in cooking, washing clothes and the like as the intention of the contract of marriage is for them to enjoy each other’s company. Where the wife in fact helps the husband in looking after the house and the family and keeping him company in his life, profession or business and he is able thereby to acquire property by his efforts, the wife had contributed indirectly to the acquisition of the property. The Board therefore awarded the wife a one-third share in the house, land and certain investments of the husband.

(iii) Distinction between “*harta sepencarian*” and “*harta perkongsian*”

In *Piah v Che Lah*<sup>40</sup> the court observed that “*harta sepencarian*” is the property jointly acquired by a husband and wife during their life together, regardless of whether their contributions were in the same form or not, or whether the contributions were made formally or informally. “*Harta sepencarian*” is therefore different from partners sharing in the capital for its acquisition. In this case, the husband did not contest the wife’s claim for “*harta sepencarian*” in respect of the matrimonial home and was willing to transfer the property to the wife’s sole name if she paid to him the price for his half- share in the land.

(iv) Cases of equal division of “*harta sepencarian*”

In *Zainuddin v. Anita*,<sup>41</sup> the Federal Territory Syariah Board of Appeal held that if there were insufficient evidence as regards each of their contributions they would be required to take an oath. If they both take the oath the property will be divided equally between them. If they both take the oath the property is again divided equally. If one of them declines to take the oath the property will go to the person who takes the oath. In this case the trial court had held that the house in question was “*harta*

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<sup>40</sup> [1983] 3 JH 220

<sup>41</sup> [1983] 4 JH 73

*sepencarian*.” The husband appealed to the Board. The Board asked the parties whether they were willing to take oath. Both parties were willing and the husband took an oath denying that the property was “*harta sepencarian*” while the wife took an oath that the property was “*harta sepencarian*.” The Board divided the property equally between them.

In *Mansjur v. Kamariah*,<sup>42</sup> the husband appealed against the decision of the learned Chief Kadi that held that the wife was entitled to a half- share of the compensation payable by a housing development company for the land obtained by the husband during his marriage to the wife. The Federal Territory Syariah Board of Appeal discussed the principles and found support for the rule of “*harta sepencarian*” by referring to Islamic juristic in “*Shafi’I’s al-Umn*,” the “*Bughyatul Murtarshidin*,” the “*Ianat-Talibin*,” the “*Kitab al-Bajuri*,” the “*Kitab al-Muhazab and Bulugh al-Maram*.” To put it briefly, the passages referred to in those Kitab say that where the properties of husband and wife have been mixed up (*musha*) and no agreement can be reached as to its division, then they should both take the oath and the properties will be divided equally between them. The Board observed that although the authorities seem to refer to the case of “*musha*,” it seems justifiable to extend the principles to cases of claims to “*harta sepencarian*.” The Board also referred to a passage in the “*Kitab Qurratal a’in*” and the “*Hanafi*” ruling which permits “*sharikah abdan*” (partnership) without any condition that the work of the (partnership) without any condition that the work of the partners should be the same in order to get reasonable payment for the work.<sup>43</sup>

In the case the husband was able to obtain the land because he was married to the wife, who was citizen (at that time the husband was not a citizen), and was not denied that the wife did help in clearing and working on the land. The husband in fact suggested that the compensation be divided into seven part, five parts to be given to him and two parts to be given to the wife, on the rationale that he would like to claim the shares of the four children in his custody and give the wife only her share and the share of the child in her custody. The Board dismissed the husband’s appeal, holding

<sup>42</sup> [1998] JLD VI 2 J.J

<sup>43</sup> Nik Noraini Nik Badli Shah 1998, “*Marriage And Divorce Under Islamic Law*.” ILBS, Kuala Lumpur. p. 32.

that there was no reason to disturb the exercise of the discretion of the learned Chief Kadi in giving equal shares to the husband and wife. It was also noted that the Land Committee had approved the development of the company as to the amount of the compensation on the understanding that the compensation payable would be divided equally between the husbands equally between the husband and wife.

In *Kalthom v. Nordin*,<sup>44</sup> the Kuala Lumpur Syariah High Court referred to the cases of *Zainuddin v. Anita*<sup>45</sup> and *Mansjur v. Kamariah*<sup>46</sup> as well as to passage in such authorities as “*Tuhfat, Bughyah al-Murtarshidin, Kitab al-Umm, Kitab al-Bajuri* and *Kitab al-Muhazzab.*” In this case, the parties were married in 1949 and obtained land under a government scheme during their marriage. In 1976, the husband with the consent of the wife married another woman and since then, he rarely returned to the first wife and eventually divorced her. The divorce was registered in 1985. Throughout the marriage, the wife had contributed greatly towards clearing and cultivating the land in question. The Syarikat Perumahan Pegawai Kerajaan subsequently acquired the land and the wife applied for half the compensation to be given to her as “*harta sepencarian.*” The court held that the property was “*harta sepencarian*” and ordered that half the amount of the compensation be given to the wife.<sup>47</sup>

(v) Husband’s claim for “*harta sepencarian*”

It should be remembered either spouse might claim that “*harta sepencarian.*” It is possible, however, that a husband’s claim for “*harta sepencarian*” may be complicated in a polygamous marriage. In the Kelantan case of *Mat Hussain v. Zawiah*,<sup>48</sup> the plaintiff/ husband claimed “*harta sepencarian*” in respect of two pieces of land, a shop house and a bungalow. As there was insufficient evidence to support the husband’s claim and the defendant/wife denied the claim, the Kadi Besar asked the wife to take an oath to deny the claim and when she did so, he dismissed the husband’s claim. The defendant/ wife was the second wife of the plaintiff/ husband

<sup>44</sup> [1990] 9 JH 178

<sup>45</sup> [1983] 4 JH 73

<sup>46</sup> [1998] JLD VI 2 J.J

<sup>47</sup> Nik Noraini Nik Badli Shah 1998, “*Marriage And Divorce Under Islamic Law.*” ILBS, Kuala Lumpur. p. 32.

<sup>48</sup> [1990] 8 JH 60