

**MATRIMONIAL PROPERTY: ITS PROVISIONS, PRACTICE
AND APPLICATION IN FEDERAL TERRITORY
OF KUALA LUMPUR**

Azma binti Mamat
(Matric No. P000005)

Academic project submitted in fulfillment for the
BACHELOR OF SYARIAH AND JUDICIARY

Perpustakaan KUIM



1000021520

Faculty of Syariah and Judiciary
KOLEJ UNIVERSITI ISLAM MALAYSIA
Kuala Lumpur

March 2003

AUTHOR DECLARATION

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

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

Date: 17th February 2003

Signature:

Name: Azma binti Mamat

Matric No: P000009

Address: A677 Kg Telaga Daeng
Seberang Takir, 21300

K. Terengganu



ACKNOWLEDGEMENT

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

Alhamdulillah...I am very grateful to the Greatest Creator Allah Subhanahu Wa Ta'ala, because of His Blessings and His Assistance, I have completed my academic Project on time.

In completing this project, I am indebted to many quarters. I express my gratitude to my parents for their prayers for my success, thanks mum...thanks dad.

I also would like to extend a bouquet of thanks to my supervisor, Puan Dina Imam Supaat who supervises my academic project. In particular I wish to acknowledge the trust given to me by the Faculty of Syariah and Judiciary especially to the Dean of the Faculty, Prof. Abdul Samat Musa and to all staff of the faculty.

In particular, I wish to thank the Syariah Court of Federal Territory of Kuala Lumpur especially to the Chief Registrar, Puan Noor Hadina Ahmad Zabidi who has been willing to be interviewed, gives opinions and advice, also thanks to all staff of the Court for your commitment and co-operation.

I wish to acknowledge the help I received from Encik Mohd Faiz Adnan who is a Peguam Syarie from Azlan Shah Shaikh and Rashidi Associates and also to his secretary, Puan Suzana Harun. Thanks a lot to you both.

I would like to express my thanks to all staff of the library especially Chief Librarian of Islamic University College of Malaysia, Puan Norazah Momin, Akademi Islam of University Malaya and the Library of Tun Sri Lanang of Universiti Kebangsaan Malaysia for your assistance.

Finally, I must record my appreciation to all whose unremitting efforts and encouragement, no words of mine could adequately express my gratitude. Thanks for all of you. Only God will reciprocate your efforts. Hope Allah will bless you all!

Thank you.

ABSTRAK

Perkembangan Undang-Undang yang berlaku di Malaysia telah berjaya menempatkan Harta Sepencarian dalam bentuk peruntukan bertulis. Ini dikuatkan lagi kerana Islam turut mengiktiraf harta tersebut dan menganggap ianya sebagai hak yang setimpal setelah apa yang diusahakan atau dimajukan oleh pihak-pihak yang terlibat sepanjang tempoh perkahwinan mereka. Ia mempunyai keunikannya tersendiri yang mana hanya diamalkan di negara-negara Nusantara seperti Malaysia, Brunei, Indonesia dan Singapura. Kajian ini adalah untuk memahami dan menganalisa mengenai konsep Harta Sepencarian itu sendiri sehinggalah kepada penerimaan Islam terhadap pemilikan harta dalam perkahwinan dengan melihat kepada aplikasi dan amalan di Wilayah Persekutuan berdasarkan peruntukan dalam Undang-Undang Keluarga Islam Wilayah Persekutuan 1984 yang diperuntukkan dalam seksyen 58. Untuk memperolehi maklumat, beberapa teknik telah digunakan seperti pemerhatian, merujuk kajian-kajian yang lepas, temubual dan meneliti beberapa dokumen yang berkaitan. Hasil daripada kajian ini mendapati kes yang diputuskan oleh pihak mahkamah adalah konsisten dengan peruntukan yang sedia ada. Semoga dengan kajian ini mampu untuk menilai semula serta memperbaiki kelemahan yang ada agar ia menjadi sebuah undang-undang dan rujukan undang-undang keluarga yang lengkap.

ABSTRACT

The development of Islamic Family Law also encompasses the matrimonial property division in case of divorce. In the Islamic Family Law Act, any property acquired during and within their marriage duration is considered a shared property. Hence, in case of divorce, the property split into equal division and proportion. This Law is similarly adhered to in the Asian Region, namely Indonesia, Singapore, Brunei and Malaysia. This academic project looks into the provision, application and practice of the law as has been practiced in the Syariah Court in the Federal Territory of Kuala Lumpur based on the provision in the Islamic Family Law (Federal Territories) Act 1984 (Act 303) under section 58. Observation, referring books, literature review, research, interviews and reviewing relevant documents were the tools employed for data gathering purpose. The finding indicates that in matrimonial property division cases, which have been decided by Syariah Court, were consistent with the section 58, just sometimes it seen that the Judge has used his discretion power in deciding that cases. Hopefully, this project will be of some help and guidance to whomever it may concern in shedding more insights on this particular section of the Islamic Family Law.

ملخص البحث

التطور في القضاء وقعت في ماليزيا قد نبحث في الوضع مال الزوجية في شكل القضاء وقد اعترف الإسلام لأن يعتبر الإسلام أنها أعظم الهدية بعد الكسب من الزوج والزوجة في وقت نكاحهما. كان في مال الزوجية نفس المميزات ويعمله الماليزي وإندونيسيا وسنغافورة. يعود هذا البحث في فهم وبحث عن التعريف مال الزوجية حتى موافق الإسلام أنها إحدى من أحكام الإسلامية في أمر الأموال الزوجية بالنظر إلى المادة ٥٨ تحتى Akta Undang-Undang Keluarga Islam Wilayah Persekutuan Kuala Lumpur 1984 . وفي تكميل هذا البحث، قد استخدام المناهج المتنوعة مثل الندامج، والمرجعة إلى الكتب وبحوث الماضية، والمقابلة، والمراجعة إلى الوثائق. ووجدت عن هذا البحث أن بعض القضية قد قضيت عن المحكمة الشريعة، لم يوافق للمادة ٥٨ .

CONTENTS	PAGE NO.
AUTHOR DECLARATION	i
ACKNOWLEDGEMENT	ii
ABSTRAK	iii
ABSTRACT	iv
MULAKHAS AL-BAHTH	v
CONTENT	vi
LIST OF CASES	vii
LIST OF STATUTES	ix
ABBREVIATION	x
INTRODUCTION	xi
CHAPTER 1: HISTORY OF HARTA SEPENCARIAN OR MATRIMONIAL PROPERTY	
1.1: History of Harta Sepencarian Or Matrimonial Property	1
1.2: Islamic Law's View of Matrimonial Property	5
1.3: Authority From Al-Quran and Islamic Books	10
CHAPTER 2: DIVISION OF MATRIMONIAL PROPERTY	
2.1: Jurisdiction of Syariah Court	15
2.2: General Overview of Matrimonial Property In Malaysia	17
2.3: The Distribution of Property On Divorce Under Adat Perpatih	24
2.4: Who Can Claim The Matrimonial Property?	26
2.5: When Matrimonial Property Could Be Claimed?	27
CHAPTER 3: MATRIMONIAL PROPERTY:ITS PROVISIONS, PRACTICE AND APPLICATION IN FEDERAL TERRITORY OF KUALA LUMPUR	
3.1: Provision Under Islamic Family Law (Federal Territories) Act 1984 (Act 303) Under Section 58 And Its Practice And Application	29
3.2: Provision Under Section 58	35
3.3: Jurisdiction of Syariah Court of Federal Territory of Kuala Lumpur	37
3.4: Matrimonial Property Cases In Federal Territory of Kuala Lumpur	38
3.5 Issues Relating To The Matrimonial Property In Syariah Court	45
Conclusion	49
Recommendations	50
BIBLIOGRAPHY	51

List of cases

- Amir Hamzah bin Hj Ismail v. Zaiton binti Yusof (1999) Bil 63
- Amir Shariffudin bin Md Khair v. Md Johari (2001) Bil 109
- Azizah binti Zainal v. Md Amin bin Baba (2001) Bil 116
- Boto' binti Taha v. Jaafar bin Muhammad [1985] 2 MLJ 98
- Che Zaiton Hj Ismail v. Nik Nasaruddin bin Nik Ahmad (1999) Bil 44
- Fatimah binti hj Abdul Molop v. Normawati & Anors;
- Habsah bt. Mat v. Abdullah bin Jusoh [1950] MLJ 60
- Hajah Lijah binti Jamal v. Fatimah binti Mat [1950] MLJ 65
- Hajah Nek Maimunah bte Salleh, Re Kes Mal Bil-41-001-1-95, Mahkamah Tinggi Syariah Terengganu; [1997] 5 Jurnal Syariah 296
- Hajah Sulong v. Mamat [1952] 4 MC 291
- Haji Abdullah bin Damar v. Rupah binte Inal Cases on Native Customary Law in Sabah
- Haleena binti Syed Omar v. Ramli bin Abd Rahman (1999) Bil 67
- Hamzah bin Zainudin v. Noraini binti Abdul Hamid (1998) Bil 25
- Haslin binti Hussein v. Hamdan bin Johan (2002) Bil 106
- Hasmah binte Omar v. Abdul Jalil [1958] MLJ 10
- Hasnah bt Hussein v. Idin bin Buntat & Anors (2000) Bil 82
- Hishamudin bin Jaafar v. Norhayti binti Ahmat (1998) Bil 11
- Hj Abdullah bin Md Yusof v. Umi Hani bt Ayub (1998) Bil 23
- Jamilah binti Baharuddin v. Ramli bin Kimad (1999) Bil 69
- Kamal Bahrin bin Abdul Razak v. Norazlina binti Mohd Yusof (1998) Bil 29
- Laton v. Ramah (1927) 6 FMSLR 128
- Lebar v. Niat 15 JMBRAS (1937) Part I, 48
- Marriah binti Ahmad v. Mohd Shukor bin Mohd Noor (1999) Bil 42
- Mohammed v. Commisioner of Land Terengganu & Anor. [1967] MLJ 76
- Mohd Batca S/O v. Bavani @ Fatimah Bebe binti Abdullah (2001) Bil 50
- Muhammad Khan bin Gulam Khan v. Kasrin binti Abd Rahman (1998) Bil 36
- Nor Hishamudin bin Ismail v. Fatimah binti Ahmad (2000) Bil 74
- Nordin bin Kamaluddin v. Rabeah binti Abd Aziz (2000) Bil 72
- Ramah V. Alpha 4 FMSLR 179

Re Elang, Re Kulop Degor, Lebar v. Niat 15 JMBRAS (1931) Part I, 48
Roberts @ Kamarulzaman v. Ummi Kalthom [1966] MLJ 163
Rokiah binti Haji Jalil v. Mohamed Idris Shamsudin (1989) 7 JH III
Rosita binti Razali v. Hazlan bin Mohd Zain(1999) Bil 57
Salina bt Abdullah v. Azizan bin Rejab (1998) Bil 5
Shariza binti Mustapha v. Azmi Zain bin Ismail (2002) Bil 46
Teh Rasim v. Neman 15 JMBRAS (1937) Part I, 18
Tengku Anun Zahrah v. Dato' Dr. Hussein (1979) 3 JH 125
Wan Mahatan v. Haji Abdul Samat 15 JMBRAS (1937) Part I, 25;(1926) 4 JH 67
Wan Norizan bt Wan Hassanv. Mohd Effendy (1998) Bil 15
Wan Yasmin binti Ahmad Tajuddin v. Bani Hasnan bin Basir (1999) Bil 68
Zainah binti Nekmat v. Zamanhuri bin Majid & Anors (2002) Bil 52
Zaini binti Osman v. Pazmi bin Abdullah (2001) Bil 115
Zurina binti Ramli v. Mohd Zaid bin Ahmad (2000) Bil 93

List of Statutes

Administration of Islamic Law Enactment 1978 (Johore) (Enactment No 14/1978	s 133(3)
Administration of Islamic Law Enactment 1955 (Terengganu)	s 25(1)
Administration of Muslim Law Enactment 1952 (Selangor)	s 45(3)(b)
Administration of Muslim Law Enactment 1959 (Penang)	
Administration of The Islamic Family Law Enactment 1985 (Terengganu)	
Federal Constitution	art 121(A)
Islamic Family Enactment 1983 (Kelantan) (No 1 of 1983)	s9
Islamic Family Law (Federal Territories) Act 1984 Islamic Family Law (Federal Territories) Act 1984 (Act 303)	s2, 58(1)-(5)
Islamic Family Law 1983 (Malacca) (Enactment No 8 of 1983)	
Islamic Family Law Enactment (No 1 of 1984)	
Islamic Family Law Enactment 1984 (Perak) (Enactment No 13 of 1984)	
Islamic Family Law Enactment 1987 (Pahang) (Enactment) (No 3 of 1987)	
Islamic Family Law Enactment 1992 (Perlis) (Enactment No 4 of 1992)	
Islamic Family Law Enactment 1992 (Sabah) (Enactment No 15 of 1992)	
Law Reform (Marriage And Divorce) Act 1976 (Act 164)	
Syariah Court Civil Procedure (Federal Territories) Act 1998 (Act 585)	s244

ABBREVIATIONS

FMSLR	-	Federated Malay States Law Report
JH	-	Jurnal Hukum
JMBRAS	-	Journal Of The Malayan / Malaysian Branch of Asiatic Society
MLJ	-	Malayan Law Journal

INTRODUCTION

The distribution of property is generally relevant to two situations namely, upon a divorce or dissolution of a marriage, and upon death. One of the properties is *Harta Sepencarian*. *Harta sepencarian* born as a custom and it lived among Malay society especially and it was accepted that it is good and it is suitable by Syara' assertion. *Harta sepencarian* or Matrimonial Property is quite synonym with the legacy but it is actually involved between husband and wife in its division.

The coming of Islam into Malay world had influenced most aspects of local belief, culture and custom. Islamic Law is able to explain the position of customs that has been practiced many years ago. The distribution of Matrimonial Property connected to the custom with the Malay society habitual. In fact, the division of Matrimonial Property is universal. In traditional Malay society, there is no need to the system as existed today. Actually it has educated them so that any party in dispute, which has been occurred, it should be solved consultatively. This approach is clearly different with the procedures, which are by the parties in dispute as an important basic will influencing the court decision.

The researcher will search deeply the concept of the *Harta Sepencarian* or Matrimonial Property by Islamic Law. How far its concept of *adat* or *urf* and Islamic Law provision was obeyed in giving the decision in Syariah Court especially in Federal Territory of Kuala Lumpur, which it is a location of this research.

AIM OF RESEARCH

Islamic Law will focus this research to the concept and history of Matrimonial Property as provided under Islamic Law Enactment, which is applicable, and to analyze the extent of its practices and application. The researcher wants to understand how far the contribution of either husband or wife, which is able to establish it. The researcher hopes this research become a reference and might be furthered by any program like conference to understand to the Malay society especially about Matrimonial Property.

OBJECTIVE OF RESEARCH

- To understand the concept and history of Matrimonial property in depth;
- To analyze the provision of the Islamic Family Law Act;
- To compare the past decision of the court in Matrimonial Property cases and its effect to the latest cases
- To examine the Enactments and Laws applied by the Syariah Court of Federal Territory of Kuala Lumpur in deciding Matrimonial Property cases.

RESEARCH METHODOLOGY

1. Library Research

The researcher will examine the documents such as statutes, books, journals, reports, paper works, articles and opinion from any educated person like Qadi or Registrar of Syariah Court.

2. Interview

The author uses this method to get more information about the matrimonial property, its concept, practices in Syariah Court and application especially in Federal Territories of Kuala Lumpur. This method will be used whether by direct or indirect towards the academicians like Judge, Syariah Lawyer, Registrar or lecturer from government agencies and private sectors.

LITERATURE REVIEW

The research, which held is interconnected with the literature review and the research which regarding to the Islamic view of Matrimonial Property has been done before. But in this research, the author focuses to the concept of Matrimonial Property under Islamic Law, which enacted in the Enactment and its practice and application especially in Federal Territory of Kuala Lumpur.

Literature Review:

- (a) A. Hale. 1898. *Folklore And The Minangkabau Code In The Negeri Sembilan*. n.pl: n.ph.
- (b) Abdullah Siddek. 1975. *Pengantar Undang-Undang Adat Di Malaysia*. Kuala Lumpur: Universiti Malaya.
- (c) Ahmad Hidayat Buang. 1998. *Undang-Undang Islam Di Mahkamah-Mahkamah Syariah Di Malaysia*. Kuala Lumpur: Universiti Malaya.
- (d) Ahmad Ibrahim. 1975. *Islamic Law In Malaysia*. Kuala Lumpur: Malaysian Sociological Research Ltd.
- (e) Ahmad Ibrahim. 1997. *Family Law In Malaysia*. Third Edition. Kuala Lumpur: Malayan Law Journal.
- (f) Dato' Haji Daud bin Muhammad. January 2002. *Work Paper; Harta Sepencarian: Isu-Isu Dan Amalan*. Dalam Seminar Isu-Isu Mahkamah Syariah.
- (g) Hj Mohd Sanusi bin HJ Mahmood. 1984. *Undang-Undang Keluarga Dalam Islam*. Kelantan: Dian Darul Naim.
- (h) Kamar Ainiah Kamaruzaman. January 2002. *Work Paper; Harta Sepencarian: Isu-Isu Dan Amalan*. Dalam Seminar Isu-Isu Mahkamah Syariah.
- (i) Mat Said bin Haji Mohamad 1995. *Harta Sepencarian: Satu Kajian Kes Di Mahkamah Syariah Kuala Terengganu*. Universiti Malaya.
- (j) Maziah binti Mustaffa. 1992. *Harta Sepencarian Mengikut Undang-Undang Islam Di Malaysia: Satu Kajian Kes Bahagian Wilayah Persekutuan*. Universiti Malaya.
- (k) Md. Akhir Hj. Yaakob & Dr. Siti Zalikhah. 1989. *Beberapa Aspek Mengenai Enakmen Keluarga Islam Di Malaysia*. Selangor: Academe Art & Printing Services Snd. Bhd.
- (l) Mimi Kamariah Majid. 1999. *Family Law In Malaysia*. Kuala Lumpur: Malayan Law Journal Snd. Bhd.
- (m) Mohamed Akhir bin Haji Yaakob. (1405) JH 36 *Harta Sepencarian*.
- (n) Mohamed Azam Mohamed Adi. 1998. *Jurnal Undang; Undang-Undang Perceraian Islam: Hak-Hak Isteri Semasa Dan Selepas Iddah*. Vol 2. Kuala Lumpur: Universiti Malaya.

- (o) Nik Noraini Nik Badli Shah. n.d. *Marriage And Divorce Under Islamic Law*. Kuala Lumpur: International Law Book Services.
- (p) Noor Halidah binti Mohamad. 1994. *Harat Sepencarian: Kajian Kes Di Mahkamah Syariah Kuching Sarawak*. Universiti Malaya.
- (q) Prof Madya Dr Suwaid Tapah. January 2002. *Work Paper; Harta Sepencarian: Isu-Isu Dan Amalan*. Dalam Seminar Isu-Isu Mahkamah Syariah.
- (r) Prof Madya Dr Zaleha Kamaruddin. January 2002. *Work Paper; Harta Sepencarian: Isu-Isu Dan Amalan*. Dalam Seminar Isu-Isu Mahkamah Syariah.
- (s) Prof. Madya Mahmood Zuhdi Hj. Abdul Majid & Raihanah Hj. Azahari. 1989. *Undang-Undang Keluarga Islam: Konsep Dan Pelaksanaannya Di Malaysia*. First Edition. Kuala Lumpur: Akademi Islam, Universiti Malaya.
- (t) Prof. Mehrun Siraj. 1989. *Survey of Malayan Law*. Kuala Lumpur: Malayan Law Jurnal Sdn. Bhd.
- (u) Salleh buang. 1988. *New Frontiers in Harta Sepencarian*. Selangor: Nordin & Salleh Sdn Bhd.
- (v) Sayed Sabiq. 1981. *Kitab Feqh As-Sunnah*. Second Edition. Beirut: Lubnan.
- (w) Siti Zalikhah Md. Nor. 1096. *Pemilikan Harata Dalam Perkawinan*. First Edition. Selangor: Percetakan Dewan Bahasa dan Pustaka.

CHAPTER 1

HISTORY OF HARTA SEPENCARIAN OR MATRIMONIAL PROPERTY

Introduction

The word *harta sepencarian* does not exist in Arabic Dictionary or in any other book or Islamic Feqh. The concept of *harta sepencarian* has only been discussed in Malay countries like Malaysia especially, Indonesia and Singapore. It is a property, which acquired by parties to the marriage and decided upon them.

1.1 History of Harta sepencarian or Matrimonial Property

In Malay's Customary Law, there is no such definition regarding to matrimonial property. It is just a practice among Malays but the beauty is still there. The relationship between families still strong or even better to manage the issue with peace and harmony. Even though they did not have particular law to practice on, but it looks more an inner practicing for them to overcome the matter in their lifetime consultatively. As a result, there is no single case has been written for today's judicial reference.¹

The method is quite different between the modern laws. In modern law practicing, the court posses the ultimate influence among the public to solve their claim especially in matrimonial property.

The term of "*carian laki bini*"² or *harta sepencarian* or matrimonial property are used and practiced in Adat Perpatih in Naning, Melaka and Negeri Sembilan.³ They

¹ Ahmad Hidayat Buang. 1998. *Undang-Undang Islam Di Mahkamah-Mahkamah Syariah Di Malaysia*. Kuala Lumpur: Universiti Malaya.p.122

² Property acquired by joint efforts of husband and wife.

referred to the phrase “*pesaka adat*” or *kata perbilangan, adat pertemuan dinikahi, habis pertemuan diceraikan, carian⁴ bahagi, dapatan⁵ tinggal, pembawa⁶ kembali* and many more. Every single effort and the profit in their marriage they gain are assumed as a matrimonial property.⁷

The tribes in the society had considered women or wives are the parties who suppose to manage the properties and provide the charity for their children. On the other hand, the husband will only manage the compulsory duty to seek and gain the maintenance for his family.⁸

During the colonial period, land officers had to consider the customary system, and may needed to the particular system, which is codified, named as Enactment of Adat Land Holding.⁹ Finally, this system had been accepted and it was enacted in the Division Small Estates (Distribution) Act 1955, and declared as *adat*¹⁰ land in that time.

The main fact in practicing this *adat* and the authority of laws, which has been legislated, are collected property during marriage or *carian laki bini* (matrimonial property), which is accepted by written laws. In this case, it could be transferred regarding to the “*Adat Luak*”.

There was several Law text of Malay’s history mentioning the method to solve the property in dispute after marriage. For example, *The Ninety-nine Laws of Perak* (Undang-undang Sembilan Puluh Sembilan) stated that any property which collected caused by divorce should be divided and the property which is classified as the right of wife.

³ A. Hale. 1898. *Folklore and The Minangkabau Code in The Negeri Sembilan*. p. 43-61.

⁴ Refers to the land

⁵ Legacy which endowed by wife for her parents

⁶ Property which gathered by himself and brought into marriage

⁷ Abdullah Siddek. 1975. *Pengantar Undang-Undang Adat Di Malaysia*. Kuala Lumpur: Universiti Malaya.p.150

⁸ Ahmad Hidayat Buang. 1998. *Undang-Undang Islam Di Mahkamah-Mahkamah Syariah Di Malaysia*. Kuala Lumpur: Universiti Malaya.p. 122

⁹ Enactment of Adat Land Holding. Chapter 215

¹⁰ Custom

The “*Ahkam Syari'yyah Johor*” stated that the marriage property which has been disputed by husband and his wife which assumed that either the property was a marriage property or not, the parties should represent their proves by giving evidence before the judge. If both parties give the evidence and represent their witnesses or any kind of proves, the property should be divided equally each party.¹¹

When we look into a matter, which appeared among the Judges in the Federated States, they normally preferred to decide the cases regarding to the Muslims significantly based on the evidence taken from the Islamic Law or the Malay Customary, which is related to the cases.

There are many definitions about Matrimonial Property regarding to the decision by Judges in Civil Court relating to it before it is codified in Enactment.

According to Mimi Kamariah Majid in her book, Family Law in Malaysia said that:¹²

“*Harta sepencarian* refers to property acquired by the joint efforts of the parties during the marriage”.

Before 1988, both Civil Court and Syariah Court, have jurisdiction to hear matrimonial property disputes among Muslims. Generally, Civil Court assumed that matrimonial property or *harta sepencarian* as one of the Malay customs. In the case of *Hujah Lijah v Fatimah* Briggs J. defined;

“*Harta sepencarian as acquired property during the subsistence of their marriage of a husband and wife out of their resources or by their joint effort. Briggs J. subsequently said that the rule governing harta sepencarian are not a part of Islamic Law proper, but a matter of Malay*”.¹³

¹¹ n.a.1949Johor: Muhammadiyah Press. Fourth Edition.

¹² Third Impression. p. 366

¹³ Mimi Kamariah Majid.1999.*Family Law In Malaysia*. Kuala Lumpur. Malaysian Law Journal Snd. Bhd. p.367.

In the case of *Roberts v Umni Kalthom*¹⁴, Raja Azlan Shah, J. decided that;

“Harta sepencarian is a matter of a Malay adat and is applicable only to the case of a divorced spouse who claims against the other spouse during his or her lifetime; this rule of law is local law which the court must take judicial notice and it is the duty of the court to propound it”.

And in the case *Boto’ bt Taha v Jaafar bin Muhammad*¹⁵, Salleh Abbas J. decided that;

“Harta sepencarian is not so much based on Islamic Jurisprudence as on customs practiced by the Malays. Harta sepencarian or matrimonial property is not based on Islamic Law or Hukum Syara’. His Lordship further found that harta sencarian applies to all kinds to properties movable and immovable as long as they were acquired during the marriage”.

We can see in the case of *Noor Bee v Ahmad Sanusi*¹⁶ that defined the same meaning about *harta sepencarian*. Hj. Harussani Hj. Zakaria who was the Chief Kadhi of Penang was of the view that;

“Harta Sepencarian was examined by Syara’ based on life partnership and services. The wife manages and controls the household, while the husband seeks sustenance (income). The wife according to syara’ is entitled to have a servant to manage the house, if she has none household work such as cooking, washing and managing the house shall be presumed to be part of the work which relieves the husband of his responsibilities”.

And in another case such as *Kalthom bt. Abdul Wahid v Nordin b. Othman* [1994] JH Jld IX Bhg II Sheikh Ghazali who was the Judge during that time decided that:

“The case of Matrimonial Property had been determined by Syariah Court in Malaysia made based on the opinions of Islamic Jurists and Urf’ in the state”.

Article 121 (1A) of the Federal Constitution now provides that High Court has no jurisdiction in respect of matters within the jurisdiction of the Syariah Court, but prior to

¹⁴ [1966] 1 MLJ 163

¹⁵ [1985] 2 MLJ 98

¹⁶ (1978) 1 JH 2

this amendment, the Syariah Court had heard by the High Court as well as claims for matrimonial property.¹⁷

“The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts”.

Whatever it is, it was accepted by people that it is a property acquired by the joint efforts of the parties during the marriage. Any claim for matrimonial property normally arises upon a divorce or death of a party. On the other hand, the claim, which is appeared during the marriage, is also qualified. It is used to take the form of land, matrimonial of homes, and animal used to work the land. Mimi Kamariah said in her book that:¹⁸

“As the Malays become more modernized, urbanized, and possess greater purchasing power, Matrimonial Property includes movables such as household goods and furnishing”.

All in all, the definitions and its variety which is summarized from different kinds of parties especially the Judges either from Civil Court or Syariah Court indicates that matrimonial property is not a provision stated in the Islamic Law but stipulated and recognized as a customary practice in Islamic Law in Malaysia. Although the definition of matrimonial property has been elaborated obviously, but there are still some riddles in form of the exact law or provision regarding to matrimonial property and its declaration by today’s Islamic Law. What is the point of view in the Islamic Law regarding to matrimonial property?

1.2 Islamic Law’s View of Matrimonial Property

Generally, Islamic Family Law in Malaysia defined *harta sepencarian*¹⁹ or matrimonial property as a property obtained by joint effort during the marriage by husband and wife.²⁰

¹⁷ Nik Noraini Nik Badli Shah. n.d. *Marriage and Divorce Under Islamic Law*. Kuala Lumpur. International Law Book Services. p.125.

¹⁸ Mimi Kamariah Majid.1999.*Family Law In Malaysia*. Kuala Lumpur. Malaysian Law journal Snd. Bhd. p. 367.

¹⁹ Matrimonial property or property acquired by joint efforts

In Islam, *adat* is one of the Islamic Law addition sources or it said that as “*Al-A’datul Muhakkamah*” or in Arabic it said as (عادة المحكمة)²¹ which is any *adat* law or customary practice by Malays has been used as law in Islamic Law.

In Islamic Law practice, the matrimonial property is not obviously mentioned in the Islamic Feqh doctrines. The Judge only will decide based on the evidences, situations and possibilities related to the case either in Civil Court or Syariah High Court. Generally, the rights given to the women or wife who has been divorced by her husband to claim some of the property obtained by joint efforts with her husband during marriage are acceptable in Malay customary practice. After certain time, it was totally accepted and it has been codified in such provision in Islamic Family Law, for example under section 58(1) provides that:²²

“The Court shall have power, when permitting the pronouncement of *talaq*²³ or when making an order of divorce, to order the division between the parties of any assets acquired by them during the marriage by joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale”.

In previous decided cases, the main discussions are the general points without stipulating the first party who made their claim or the first party who apply the divorce and so on. On the other hand, husband also has a right to claim the matrimonial property precisely. Even though they have a right, there still some limitations and the guidelines especially for husband or wife to claim the property.

Fatwa Committee of Kedah defined that, the division of *harta sepencarian* should be divided regarding to the amount of fee of services which is reasonable to the work,

²⁰ Md Akhir Hj Yaakob & Dr Siti Zalikah Md Noor. 1989. *Beberapa aspek Mengenai Enakmen Keluarga Islam Di Malaysia*. First Edition. Selngor: Academe Art % Printing Services Sdn Bhd.p. 86

²¹ na. 1968. *Majalah Al-Ahkam Al-A’dliyyah*. Fifth Edition. Section 36.

²² n.a. 2002. Islamic Family Law (Federal Territories) Act 1984 (Act 303). Selangor: International Law Books Services.p.37

²³ Pronouncement of divorce by the husband

services and efforts. This *fatwa* was based on the phrase from book "*Qurratul Ain bi Fatawa Ulama' al Haramain*"²⁴ which said that;

"When two persons being a partner as a company and intended to divide their yield by half each person, either they are sailors, or their work are different by each other such as, one of them being a sailor while another one being as embroiderer is named as "*Syarikatul al- abdan*".

This partnership is invalid because they have no property. So, who has spent his efforts by himself, he will get his profit. It is absolutely necessary according to Imam Abu Hanifah meanwhile Imam Malik and Ahmad have qualified the similar work.²⁵

Based on this phrase of the book, then the Fatwa Committee of Kedah had decided that:²⁶

- a) Suggested to the Islamic Religion Council to make a provision into Law of Islamic Administration which gives a right to wife or her heirs if her husband denies her right of the matrimonial property to her, make a claim before any Qadi court and the Qadi by his discretion power and overturning could relate the right of the wife through the matrimonial property and determines the reasonable division to her or her heirs if she died based on the reasonable fee depends to the efforts or works;
- b) Caused by relation between husband and wife in yielding the matrimonial property included under "*syarikatul abdan*" or partnership according to the Hanafi School not by Syafie School, which it must be from the same job.

According to the *fatwa*, the conclusion can be made that when they assumed that matrimonial property is similar to "*syarikatul abdan*", *aqad* will become the main qualification to determine either there is a partnership or not. From observation to the Malay customary today, there is no specified term or form of *aqad* in matrimonial property except *aqad or ijab qabul* in marriage.

²⁴ Md Akhir Hj Yaakob & Dr Siti Zalikah Md Noor. 1989. *Beberapa Aspek Mengenai Keluarga Islam Di Malaysia*. Selangor: Academe Art & Printing Services Sdn Bhd.p. 76

²⁵ Prof. Madya Mahmood Zuhdi Hj. Abdul Majid & Raihanah Hj. Azahari. 1989. *Undang-undang Keluarga Islam: Konsep Dan Pelaksanaannya Di Malaysia*. Kuala Lumpur: Akademi Islam Universiti Malaya. First Edition.p.213

²⁶ Dr 'Abd al 'Aziz 'Amir. 1984. *al-Ahwal al-Syakhsiyyah fi al-Syari'ah al-Islamiyyah Fiqhan wa Qada'an*. Mesir: Dr al-Fiqh al-'Arabi. First Edition.p. 30

There are differences between *syarikatul abdan*²⁷ and *harta sepencarian* as below:²⁸

- i. The requirements for *harta sepencarian* are based on two parties which consist of the contributions made by husband and wife;
- ii. In *syarikatul abdan* or partnership, the *aqad or ijab qabul* are the main regulation to ensure the acceptance while *harta sepencarian* does not determine *ijab qabul* as the main issue. It depends on the situation whether such property is *harta sepencarian* or not;
- iii. The division of the property in *syarikatul abdan* are divided by consent of all parties or members while *harta sepencarian* should be divided after divorce either live or death and it is determined by *adat* which practiced by local society;
- iv. In *syarikatul abdan*, all members have to contribute their efforts while *harta sepencarian* does not require compulsorily to both parties. Moral and material support, looking after for children, caring and loving for husband and children are still considered and accepted as contributions of *harta sepencarian*.

In determining some property in *adat* law which practiced in colonial period, the Ruler has a power or discretion power to determine either such property is *harta sepencarian* or not by His mind law in such state.²⁹

So, the author looked at this issue quite different between *syarikatul abdan* and *harta sepencarian*. We cannot say that *harta sepencarian* is similar to the *syarikatul abdan*.

According to *Minangkabau Code or Adat Perpatih*, *harta sepencarian* will be given to wife considering their children. This is quite different in Perak and Terengganu, where the division is half of the property if the parties possess the joint efforts from the property during their marriage. If only one of them had worked while another party only

²⁷ Partnership

²⁸ Ibid.p.31

²⁹ Jurnal Hukum. Vol II. Mei 1982. Kuala Lumpur: Institut Kefahaman Islam Malaysia.p.223

gives morale supports especially wife who are responsible to manage the family, their children, financial and so on will get one-third of the property because her efforts are considered as a contribution.

It is clearly shown here, that everything that comes from husband and wife, which the quantity of contribution could not measured accurately, it should be divided depending on their contributions.

Some said that, *harta sepencarian* is similar with fee or sum payable as paying to a worker. The author found that there were no similarities between *harta sepencarian* and fee or “*upah*”³⁰ because.³¹

- i. The division of fee is different with the division of *harta sepencarian* because fee will be paid reasonable to the work which had done while *harta sepencarian* will be divided relating to the extent contributions which had been contributed by the husband and wife during their marriage;
- ii. The fee will be given after finishing the work or it was qualified that it will be paid in certain period such as one day, or one week, or one month depends to the agreement which had been had while *harta sepencarian* will be given after divorce;
- iii. The fee will be given to the worker who had been worked while *harta sepencarian* will be given based on the ratio of efforts, which had been spent even though one of the parties did not work.

This research can be consolidated by verse from al-Quran, which stated the qualifications of fee or “*upah*”:³²

³⁰ Fee for work done

³¹ Abu Al-Qasim Najmuddin Jaafar bin Al-Hassan.1996. *Syarai' Al-Islam Fi Masail Halal Wal Haram*. Beirut-Lubnan. Third Edition.p.194

³² Al-Quran.Sura an-Nisa' (4) 29.

"يَا أَيُّهَا الَّذِينَ ءَامَنُوا لَا تَأْكُلُوا أَمْوَالِكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلَّا أَنْ تَكُونَ تِجَارَةً عَنْ تَرَاضٍ مِنْكُمْ إِنَّ اللَّهَ كَانَ بِكُمْ رَحِيمًا"

Meaning:

"O you who believe! Do not eat up your property among yourselves in (worthless) deception: But let there be among you exchange and trade By do not kill (or destroy) yourselves: For surely to you, Allah has been Most-Merciful!"

According to the verse of Quran, there are several summarizes and issues appeared, which stated the relation between this verse with the qualifications of the fee:³³

- i. The fee is exactly known in working period;
- ii. The content of *aqad* is completely from *syara*;
- iii. The fee is reasonable with the work;
- iv. The fee should be coming from lawful sources;
- v. The fee must be given after finishing the work.

1.3 Authority From Al-Quran and Islamic Books

Although the discussion on matrimonial property does mention clearly in detail either in Quran or Hadith but there are many keywords explained in the Quran and in the Islamic Books, but most of the Islamic Jurist used these authorities in determining that matrimonial property does not contradict with the *syara* '.

It was stated in the Quran:³⁴

لَوْلَكُمْ نَصْفَ مَا تَرَكَ أَزْوَاجِكُمْ إِنْ لَمْ يَكُن لَكُمْ وَلَدٌ فَإِنْ كَانَ لَهُنَّ وَلَدٌ فَلَكُمْ الرِّبْعَ مِمَّا تَرَكَنَّ مِنْ بَعْدِ وَصِيَّةٍ يُوَصِّينَ بِهَا أَوْ دِينَ وَلَهُنَّ الرِّبْعُ مِمَّا تَرَكَتُمْ إِنْ لَمْ يَكُنْ لَكُمْ وَلَدٌ فَإِنْ كَانَ لَكُمْ الثَّمَنُ مِمَّا تَرَكَتُمْ مِنْ بَعْدِ وَصِيَّةٍ تُوَصِّونَ بِهَا أَوْ دِينَ وَإِنْ كَانَ رَجُلٌ يُورِثُ كَلَّةً أَوْ امْرَأَةٌ وَهِيَ أَوْ أُخْتٌ فَلِكُلِّ وَاحِدٍ

³³ Abu Al-Qasim Najmuddin Jaafar bin Al-Hassan.1996. *Syarai' Al-Islam Fi Masail Halal Wal Haram*. Beirut-Lubnan. Third Edition.p.198

³⁴ Al-Quran. Sura An-Nisa' (4) 12

منهما السدس، فإن كانوا أكثر من ذلك فهم شركاء في الثلث من بعد وصية يوصى بها أو دين غير مضار، وصية من الله والله عليم حلِيم}

Meaning:

"In what your wives leave, your share is a half, If they leave no child; But if they leave a child, you get a fourth; After payment of legacies and debts. In what you leave, their share is a fourth, If you leave no child; If you leave a child, they get eighth; After payment of legacies and debts. If the man or woman Whose inheritance is in question, Has left either parents nor children, But has left a brother or a sister, Each one of the two gets a sixth; But if more than two, they get share in a third; After payments of legacies and debts; So that no loss is caused (to any one). It is thus ordained by Allah; And Allah is All-Knowing, Most Forbearing".

This verse of Quran showed that the division of the property must be done after one of the parties died. Because there is no hint from the verses in Quran to show that *harta sepencarian* or matrimonial property had been discussed in that. But ulama' saw that property should be considered before it will be divided to his or her heirs. Allah also said in the Quran so that uneating or using the property illicitly. He said in Quran:³⁵

{ ولا تأكلوا أموالكم بينكم بالباطل وتدلوا بها إلى الحكام لتأكلوا فريقا من أموال الناس بالإثم وأنتم تعملون }

Meaning:

"And do not eat up your property Among yourselves for show or pettiness, And do not use it as bribe for the judges, With intent that you may eat up wrongly and knowingly (even) A little of (other) people's property".

The Islamic Jurist holds to the a few verses of Quran and Books, which mentioned indirectly about the matrimonial property but quite exact such as stated in Quran:³⁶

{ ولا تمنوا ما فضل الله به بعضكم على بعض، للرجال نصيب مما اكتسبوا وللنساء نصيب مما اكتسبن، وسئلوا الله من فضله إن الله كان بكل شيء عليمًا }

³⁵ Al-Quran. Sura Al-Baqara (2) 188

³⁶ Al-Quran. Sura An-Nisa' (4) 32

Meaning:

“And it is not wise to seek out those things In Which Allah has bestowed His gifts more freely on some of you than on others: To men is allotted what they earn, But ask Allah of His bounty. For Allah has full knowledge of all things”.

This verse of Quran showed that Quran had declared what the husband and wife have done during their marriage. It is a property, and the property, which obtained during the marriage, is matrimonial property even it is not explained clearly but the Islamic Jurists described the method, which could benefit all Muslims.

There are Books referred by Judges in Syariah Court in dealing the matrimonial property such as in *Bughyatul Mustarshidin* page 159 which said that:³⁷

“اختلط مال الزوجين ولم يعلم لأيهما ولا قرينة تميز أحدهما وحصلت بينهما فرقة أموت لم يصح لأحدهما ولا وارثة تصرف في شيء منه قبل التمييز أو الصلح إلا مع صاحبه، إذ لا مرجح كما قالوا فيما لو اختلط حمامهما وحينئذ فإن أمكن معرفتها والوقوف الأمر حتى يصطلح الزوجان أو ورثتهما بلفظ صلح أو بواهب بتساو أو تفاوت إن كانوا كاملين ويجب أن ينقص عن النصف في المحجور نعم أن جرت العادة بأن أحدهما يكسب أكثر من الآخر كان الصلح والتواهب على نحو ذلك فإن لم يتفقوا على شيء من ذلك فمن بيده شيء من المال فالقول قوله بيمينه أنه ملكه فإن كان بيدهما فلكل الحليف الآخر ثم يقسم نصفين.”

Meaning:

“It has been mixed together between property of husband and wife and it does not known which are theirs, later they divorced or one of them died, so it is not valid if one of them uses the property without doing the agreement (sulh) except the owners are there because there is no symptom to differ it, it should be postponed until there is agreement made between them, or giving them an equal amount, but if one of them got his or her salary more than other, so, they will get it regarding to the extent of contribution have been made, or if they do not agree, so, they should take an oath, if there is doubt or difficulties to decide, the Judge will decide that the property should be divided half for each party”.

³⁷ As-Sayed ‘Abd al-A’lawi. 1952. Last Edition. Thailand: Maktabah wa Matba’ah Muhammad al-Nahri wa Awaladihi.p.159.

The first sentence from the passage above (اختلط مال الزوجان) means, the mixed property between the husband and wife during their marriage and they do not know how many have been contributed in acquiring the property by them. This meaning is similar with the matrimonial property, which is defined a property obtained by jointly efforts during the marriage.

Some Islamic Jurists referred to the Book of *Ia'natul Talibin*³⁸ and they agreed that matrimonial property is similar with the "*syarikatul abdan*" or partnership. But according to Syafie School, it is not valid because there is no property in that trade.

According to Sayed Sabiq in his *Kitab of Fiqh As-Sunnah*³⁹ said that what has been determined by Islam in managing and arranging the spouse life is reasonable to the habit of the human being which the husband will spend his concentration to his work in seeking for maintenance to his family while the wife spend much time at home to manage the family, looking after the children, cooking even she also act as a financial manager. The prophet (PBUH) also declared that works between husband and wife are their responsibilities, so, it is expedient that the property which was obtained by joint efforts during their marriage should be divided justly. He said like that based on the verse of Quran:⁴⁰

"ولهن مثل الذي عليهن بالمعروف وللرجال عليهن درجة"

Meaning:

"The wives has right as husband's responsibilities which contracted against her husband by the expediently way. In that time, the husband has one special degree upon his wife because he has a power to control and give maintenance to his family".

³⁸ Sayed Bakri Shatta.nd..*Ia'natul Talibin*.Fourth Version. Beirut, Lubnan: darul Kutub.p. 247

³⁹ Sayed Sabiq. 1971. *Fiqh al-Sunnah*. Beirut, Lubnan: Dar al-Kitab al-'Arabi.p. 455-456

⁴⁰ Al-Quran. Sura Al-Baqara (2) 288.

In *Kitab At-Turuq Al-Hukmiyyah Fi As-Siyasah As-Syariah* written by Al-Imam Ibnu Qayyim Al-Juziah it was said that, it is not considered that who has been kept for the property only has a right to the property as granted in land agreement if the property is obtained during the marriage, in this case it can be enfigurated to the other property like house, land, transport and so on as long as no evidence to show that the property have been divided.⁴¹

It can be summarized that Islam declares the existence of matrimonial property and it is accepted by *hukum syara'*⁴² based on the opinions from the Islamic Jurist and principles which has been used in determining the division of the property. It is relevant with the method of Fiqhiyyah brought from *adat (Adatul Muhakkamah)*. The philosophy of Islam and its knowledge are flexible and suitable to anyone in any period of time. The opinions and its practice should be developed continuously in order to improve the Islamic Law practice and its judiciary among the challenging world nowadays.

⁴¹ Al-Imam Ibnu Qayyim Al-Juziah.1961. Matba'ah Al-Madani.p.24

⁴² It means;principles of Islamic Law

CHAPTER 2

DIVISION OF MATRIMONIAL PROPERTY

Introduction

The concept of *harta sepencarian* has long existed under Malay customary laws, and has been codified in Islamic family law statutes in Malaysia. “Harta Sepencarian” is defined in section 2 of the Islamic Family Law (Federal Territories) Act 1984 as:

“Property jointly acquired by husband and wife during the subsistence of marriage in accordance with the conditions stipulated by Hukum Syara”.

2.1 Jurisdiction of Syariah Court

The Syariah Courts should handle the jurisdiction of disputes in matrimonial property because it is relating to the Muslim matter. Civil Courts should not interfere with the jurisdiction of such cases and they also are not established to handle specific Islamic Laws and Malay custom.

All matrimonial property applications came under the jurisdiction of Civil Courts until 1988 when Syariah Courts were given the power exclusively to handle the cases and to determine it. Before that, the Civil Court had to face with in handling the cases of matrimonial property disputes of Muslims. In several such cases, they called the Qadi or Malay jurist to court to give the jurisdiction of the cases.⁴³

The Islamic Law applied in Malaysia is contained in a separate enactment, which stated that there has a provision special for matrimonial property that empowers Syariah

⁴³ Ahmad Ibrahim. 1997. *Family Law In Malaysia*. Third Edition. Kuala Lumpur: Malayan Law Journal Sdn Bhd.p.310

Court to make any order including the order to divide the matrimonial property, which relates to the marriage when there is dissolution of marriage or death of the spouse.

What type of claims that can be referred to the Islamic Family (Federal Territories) Act 1984 (Act 303) in Part V of Dissolution of Marriage, which states that:⁴⁴

“Save as is otherwise expressly provided, nothing in this Act shall authorize the Court to make an order of divorce or an order pertaining to a divorce or to permit a husband to pronounce a *talaq* except-

- a) Where the marriage has been registered or deemed to be registered under this Act; or
- b) Where the marriage was contracted in accordance with Hukum Syara’; and
- c) Where the residence of either of the parties to the marriage at the time when the application is presented is in the Federal Territory”.

Section 58, subsection (1) provides for the power of the court, when permitting *talaq* or when making an order of divorce, to order the division between the parties of any assets acquired by their joint efforts,

(3) Empowers the court to order the division of any assets acquired by the sole efforts of one party to the marriage.

In exercising its power under subsection (1), the court shall have regard, inter alia, to the extent of each party’s contribution in money, property or labour and needs of the minor children, if any and subject to those considerations, the court shall have regard to the extent of the contribution made by the party who did not acquire the assets, to the welfare of the family by looking after the home or caring for the family and the needs of the minor children, and in any case the party by whose efforts the assets were acquired shall receive a greater proportion [subsection (4)].⁴⁵ Assets acquired during the marriage also include assets owned before the marriage that have been substantially improved during the marriage by the other party or by their joint efforts [subsection (5)].⁴⁶

⁴⁴ S. 45.p.26

⁴⁵ Ibid.s.58.p.37

⁴⁶ Ibid.p.38

2.2 General Overview of Matrimonial Property in Malaysia

Several factors are taken into account in determining the division of matrimonial property. This includes how many properties had been given, morale supports, looking after the children, managing household financial and others. There is no statute to show that what is the contribution to be considered but it will be looked by the decisions that has been decided by Judges in many cases relating to the *harta sepencarian* or matrimonial property.

In the case of *Roberts @ Kamarulzaman v. Umi Kalthum*,⁴⁷ the husband brought a claim for *harta sepencarian*. His claim was for a share in the house that was registered in the wife's name. The parties at the price of RM 50,000 had bought the house with the husband contributing RM 40,000 and the wife contributing RM 10,000 towards the purchase price. The court found that there was no evidence that it was intended to be a gift to the wife, and the facts indicated that it was registered solely in the wife's name because it was easier to do so. The court held that it was ready to divide the property equally between the parties if each agreed to such a division, which they did. An interesting point in this case is that although the amount of financial contribution of each party was undisputed, the court divided the property equally between the parties instead of giving a larger share to the husband. Had this case been decided under the present statutory provisions in section 58 of the Islamic Family Law act 1984, it might also be possible to explain this division by referring to the wife's contributions to entitle her to receive a one-half share.

In the case of *Boto' v. Jaafar*,⁴⁸ the court stated that *harta sepencarian* is based upon "legal recognition of the party 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)... once it is proved that the property was acquired (during covertures) or that the claimant has assisted in the working of it, the law presumes that the

⁴⁷ [1966] 1 MLJ 163

⁴⁸ [1985] 2 MLJ 98

property was *harta sepencarian* and it therefore falls on the other spouse who denies the claim to rebut the presumption”.⁴⁹

In this case, the husband was carrying on a fishmonger, which flourished after marriage. The wife took no direct part in the business but she usually accompanied the husband in his many trips from home in connection with the business. The court held that the fact that, the wife accompanied the husband in his business trips and giving up employment because of her marriage to her joint efforts in the acquisition of the properties and declared that she was entitled to a one-third share of the properties acquired during the marriage which were registered in the husband's name. Even though Boto' claimed one-half of the accommodated property since the divorce, but the Court considered to her indirect contribution like accompanying her husband went to workplace and gave peacefulness to her husband.

In the case of *Tengku Anum Zaharah v. Dato' Dr Hussein*,⁵⁰ the husband had bought five pieces of land and five shops during the marriage acquired considerable property. The Selangor Syariah Court found that the properties were acquired by the sole efforts and ability of the husband and that the wife had made “moral” contribution since the husband also partly owed his rapid success in business 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 half-share in one of the pieces of land that was acquired by the husband. The “moral” contribution in this case was based on the particular circumstances of the parties 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.

⁴⁹ Nik Noraini Nik Badli Shah. n.d *Marriage and Divorce Under Islamic Law*. Kuala Lumpur: International Law Book services.p.126.

⁵⁰ (1980) 3 JH 125

While in the case of *Mansjur v. Kamariah*,⁵¹ the husband appealed against the decision of the learned Chief Qadi, which 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 writing in Shafii's *Kitab al-Umm*, the *Bughyatul Murtashidin*, the *ianat-Talibin*, the *Kitab al-Bajuri*, the *Kitabal-Muhazab* and the *Bulugh al-Maram*.

To put it briefly the passages referred in those Books say that where the properties of husband and wife have been mixed up (*musha*)⁵², 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. And 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-'ain* and the Hanafi ruling which permits *syarikatul abdan* (partnership) without any condition that the work of the partners should be the same in order to get reasonable payment for the work.⁵³ In this case, the husband in fact suggested that the compensation be divided into seven parts, 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. However, the Board dismissed the husband's appeal, holding that there was no reason to disturb the exercise of the discretion of the learned Chief Qadi in giving equal shares to the husband and wife.

The distribution of matrimonial property among the Malay families was strongly influenced by the Malay custom, which is of matriarchal origin. In the case of divorce or

⁵¹ [1988] 3 MLJ xlv.

⁵² Mixing up property

⁵³ Nik Noraini Nik Badli Shah. n.d *Marriage and Divorce Under Islamic Law*. Kuala Lumpur: International Law Book Services.p.128

on the death of the husband, the wife could claim a substantial share of land acquired during the marriage or other property, which also acquired during their marriage. Her rights as actually conceded in the other Malay States approximated very closely to the *carian laki bini* of the matriarchal tribes in Negeri Sembilan as discussed by the writer before.

It has been held that generally throughout the Malay States, a divorced wife is entitled to a share of all property acquired during the marriage. Where she has in fact assisted to cultivate the land, she is entitled to one-half of the property, and in other cases to one-third of the jointly acquired property of the marriage.⁵⁴

In Perak, the matter was settled by a Perak State Council minute dated the 18th January 1907. In that minute the Council declared and ordered to be recorded:⁵⁵

“That the custom of the Malays in Perak in the matter of dividing up property after divorce, when such property has been acquired by the parties or one of them during marriage is to adopt the proportion of two shares to the man and one share to the woman and the gifts between married persons are irrevocable either during marriage or after divorce”.

It may be concluded here that, the court or Collectors of Land Revenue, which case of land registered in the Mukim Registers but Kathis are called in as advisers on questions of principle, deals with claims to such property. The claim of the divorced wife to one-third of the value of the lands acquired during the marriage is not defeated even if it is proved that *talaq (khulu)*⁵⁶ unless the consideration for the *tebus talaq*⁵⁷ was the waiver of her claim to the matrimonial property.⁵⁸ The divorced wife's share may be increased to one-half depending upon the nature of the work actually done by her on the jointly acquired property. In case of *Re Elang, Re Kulop Degor, Lebar v. Niat*, Taylor C.L.R. said that:⁵⁹

⁵⁴ Mehrun Siraj. 1989. *Survey of Malaysian Law*. Kuala Lumpur: Malayan Law Journal.p.252

⁵⁵ E.N Taylor. 1937. *Malay Family Law*. Journal of the Royal Asiatic Society, Malayan Branch, Part I.p. 41

⁵⁶ Divorce sought by the wife upon payment of a consideration to the husband.

⁵⁷ Divorce by redemption (where the wife is said to “redeem” her martial obligations) amount to husband.

⁵⁸ E.N. Taylor. 1937. *Malay Family Law*.p. 25.

⁵⁹ *Ibid*.p.55-56

“The evidence of the six witnesses who were examined before me establishes that in the Perak River kampongs, there is a custom almost invariably followed by which on divorce the property acquired during the marriage is divided between the parties that division depending on the circumstances and is arranged by the two families and the ketua kampong; if the woman assisted in the actual cultivation she can claim half; if she did not work on the land she received a smaller share- perhaps one-third. If a man of this class earns a salary and property is bought out of this earnings the wife’s share is one-third”.

There is some doubt as to the position where the man earns a salary and property is bought out of his earnings. In case *Re Elang*, deceased, supra, it was stated that in such a case the wife’s share is one-third but in the case *Wan Mahantan v. Haji Abdul Samad*⁶⁰ it was stated by the Qadi⁶¹ of Larut that, where a woman married a person who earns wages and the wife, merely looks after the household, the property obtained by the husband during the marriage is not in partnership with the woman but is appropriated to the husband alone. But after looking to the case of *Re Noorijah*,⁶² which the facts were that, the deceased, the wife of a public servant, left land and registered in her name. The land was bought by the husband but registered in the name of his wife. There was no evidence of any gift to the deceased by her husband. It was held that the husband was solely entitled to the property and it should not be regarded as the estate of the deceased.

After looking at above cases explanation, they showed that, the provision which provided in Perak that a woman or a man who has been divorced from the husband or wife may by application in the Syariah Court obtain an order against her former husband or wife for the division of matrimonial property.⁶³

In Selangor case, *Laton v. Ramah*⁶⁴ the trial judge held on the evidence of Qadi that the widow is entitled to one-half of the value of the immovable property of the deceased husband at the time of his death but on appeal the Court of Appeal held that the

⁶⁰ Ibid.p. 25

⁶¹ Judge in Syariah matters.

⁶² Associate Prof. Mehrun Siraj. 1989. *Survey of Malasian Law*. MLJ 1991.p.253

⁶³ Perak Administration of Muslim Law Enactment. 1965.s.138(3)

⁶⁴ (1926) 6 F.M.S.L.R.179

evidence of the Qadi was not admissible and they ordered a retrial. A Muslim divorced husband can therefore claim a half share as matrimonial property or called as *harta sepencarian* of immovable property jointly acquired by both spouses during the marriage. The Administration of Muslim Law Enactment 1952, empowers to the Court of Qadi Besar⁶⁵ and to the Court of a Qadi to hear and determine actions and proceedings relating to the division of or claims of matrimonial property.⁶⁶

In Pahang, it was held in the case of *Haji Saemah v. Haji Sulaiman*⁶⁷ that evidence called in that case did not prove the existence of any custom that the widow is entitled to more than Quranic share in her deceased husband's estate and the widow's claim to a half-share of the lands of her deceased husband as matrimonial property was dismissed.

In the case of *Teh binti Chik v. Kalsom binti Haji Abbas*⁶⁸ it was assumed, however that claims for matrimonial property can be validly and successfully made in Pahang. It was held in that case, however that matrimonial property is only applicable to property acquired during marriage and not to property acquired before marriage. If the property is acquired before marriage and either spouse has put in money or labor to that property of matrimonial property does not apply but either spouse is entitled to claim what is known as *upah* or remuneration for work done.

In 1930, the Chief Qadi and Qadis of Pahang gave their opinion that a woman can claim matrimonial property according to Pahang custom on divorce or on the death of her husband. The claim can be made in respect of land and movable property. There is no fixed rule as to the share of the divorced wife or widow but either equal or unequal shares may be awarded pursuant to an agreement between the parties or confirming a gift or by judgment of the Qadi.

⁶⁵ Chief Qadi.

⁶⁶ S.45 (3).

⁶⁷ [1942] M.L.J. 17

⁶⁸ [1939] M.L.J. 289.

Looking at this situation, the author found that the woman in Pahang who has been divorced by her husband might make a claim in any court at any time after divorce has been pronounced in respect of joint property. Furthermore, a woman or a man who has been divorced from her husband or wife may by application in court obtain an order against her husband or his wife relating to the apportionment of their joint property.

In Kedah, it has been stated that on the dissolution of Malay marriage the property acquired by the husband and wife is divided between them but there is no established rule or principle to guide the court in deciding the respective shares. However, in case of *Habsah v. Abdullah*⁶⁹ it was held that on divorce a woman in Kedah is entitled by customary law to half of any property acquired during the marriage by joint effort and such a claim is not barred or extinguished by her remarriage (*rujuk*).

In Penang, Malacca and Negeri Sembilan, the court of the Chief Qadi and of a Qadi is given jurisdiction to hear and determine all actions and proceedings relating to the division *inter vivos* of matrimonial property.⁷⁰

In Kelantan and Terengganu, the Courts of the Chief Qadi and Court of a Qadi are given jurisdiction to hear and determine actions and proceedings which relate to divisions of or claims to matrimonial property.⁷¹ We can see in case of *Hajah Lijah v. Fatimah*⁷², it was held that on the facts the claim for a half-share of the land as matrimonial property had been substantiated and therefore judgment was given for the plaintiff. While in case of *Hajah Sulong v. Mamat*,⁷³ it was held that in Terengganu, a divorced wife was entitled to a half share in the jointly acquired property as her matrimonial property.

In Perlis, the court of a qadi and assistant qadi are given jurisdiction to hear and determine all actions and proceedings, which relate to divisions of claims to matrimonial

⁶⁹ [1950] M.L.J. 60.

⁷⁰ Penang Administration of Muslim Law Enactment 1959.s.40(3)

⁷¹ Kelantan Syariah Courts and Muslim Matrimonial Causes Enactment. 1966. S. 9; Terengganu Administration of Islamic Law Enactment 1955. s. 25(1).

⁷² [1950] M.L.J. 63.

⁷³ (1952) 4 M.C. 291.

property. A woman who has been divorced by her husband may apply to a qadi for her share of the common property called *harta sepencarian* and the qadi may after hearing the parties make an order for payment of such sums may be just.⁷⁴

While in Johore,⁷⁵ it is provided that a woman or a man who has been divorced from the husband or wife may by application in the court obtain an order against her former wife or husband in respect of the division of matrimonial property.

In Sarawak, it is provided in the Undang-undang Mahkamah Melayu Sarawak⁷⁶ that if both parties join in acquiring the matrimonial property, for example, a farm or rice field, then on divorce, the wife is entitled to one-half of the matrimonial property. If, on the other hand, the husband is the only earner, then on divorce, the wife is entitled to one-third of the matrimonial property.

How about in Sabah? It could be seen in case of *Haji Abdullah bin Damar v. Rupah binti Inal*⁷⁷ that, the facts were that the appellant had married the respondent in 1928. There was a divorce in 1933. They remarried in 1946 but there was a further divorce in 1964. The Native Court made an order for the distribution of the matrimonial property and the District Officer confirmed this. On appeal, it was argued that the order of distribution made by the Native Court was wrong in that it did not follow the Muslim law exclusively. The Native Court dismissed the appeal, in effect agreeing that the property was matrimonial property and was distributed.

2.3 The Distribution of Property on Divorce Under Adat Perpatih

In the parts of Negeri Sembilan and Malacca where the matriarchal *adat perpatih* is followed, the distribution of property on divorce follows the *adat* or customary law. As

⁷⁴ Perlis Administration of Muslim Law Enactment, 1963. ss.11 and 94

⁷⁵ Johore Administration of Islamic Law Enactment, 1978.s.133(3).

⁷⁶ Undang-Undang Melayu Sarawak. s.41.

⁷⁷ Lee Hun Hoe. Cases on Native Customary Law in Sabah.p.65

explained by the writer before that all cases of dissolution of the marriage not only the carian laki bini, but the whole of the property of both the parties, movable and immovable, must be brought into account irrespective of its origin and of the name in which the land is registered.

Marriage property falls into three classes. That which is acquired during wedlock is called *harta carian*, such as rubber estate, herd of husbandry, joint-savings or rice crop. That which the husband brought at the time of the marriage is called *harta pembawa*. That which belonged to the wife at the time of the marriage commenced must be restored or made good to the respective parties; *dapatan tinggal*- the wife's separate estate remains with her or her tribe; and *pembawa kemabalek*- the personal estate brought by the man returns to him.

The carian laki bini is divided equally on divorce between husband and wife, irrespective of who is to blame for the divorce, irrespective even of the wife's adultery and irrespective of the number of children. As under the customary law, the children remain with the mother on divorce, it is usual for the father to agree to give part of equal division on divorce; in the case of *cerai taalik*⁷⁸, the wife retains the whole of the property.⁷⁹

"The practice in Rembau is that claims for partition must be made at the time of divorce; relief can be given but not afterwards. The qadi is precluded from issuing the certificate of divorce until he is satisfied that all questions of property have been adjusted and if any such question is taken to the Court or the Collector, the qadi must obtain leave of the Court or Collector before issuing his certificate. We can see in the case of *Hasmah binti Omar v. Abdul Jalil*⁸⁰, it was held that the custom in Kuala Pilah is different from that in Rembau and that according to the *adat* in Kuala Pilah proceedings to recover land can be commenced after divorce."⁸¹

⁷⁸ Conditions agreed upon by the husband, breach of which entitles the wife to a divorce.

⁷⁹ Mehrun Siraj. 1989. Survey of Malaysian Law. [1991] MLJ. 257.

⁸⁰ [1958] M.L.J.10.

⁸¹ Mehrun Siraj. 1989. Survey of Malaysian Law. [1991] MLJ. 258