Shariah Matrimonial Rights in Malaysia

Dr Aida Othman
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Introduction

In Malaysia, a Muslim woman can make the following financial claims under Islamic family law legislations upon divorce:

• Mutaah, a consolatory gift granted by the husband for his ex-wife who has been divorced without just cause;
• maintenance during the period of Iddah, i.e. the period a woman must observe after the death of her spouse or after a divorce, during which she may not marry another man;
• debts owing to her by the ex-husband, including outstanding mahr or dowry payments and outstanding maintenance;
• Harta Sepencarian; and
• maintenance of children under her custody.
Malaysia is a Federation comprising 13 states and 3 Federal Territories.

Article 3 of the Federal Constitution: Religion of the Federation: Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.

The Federal Constitution has three lists namely: the Federal List, State List and Concurrent List.

Article 74 of the Federal Constitution, read together with the State List (Ninth Schedule of the Federal Constitution) prescribes that Islamic law and Islamic matters, including Islamic family law and the establishment of Syariah courts, come under the jurisdiction of the states.

There exists in each state its own Syariah Courts and Syariah enactments to govern the implementation of Islamic laws there. The state legislature confers jurisdiction upon the Shariah courts through enactments on administration of Islamic law.
The State List stipulates that the Syariah court is to have jurisdiction only over persons professing the religion of Islam.

The following are the matters which State is authorized to legislate on Islamic law:

(a) Succession, testate and intestate, betrothal marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts;

(b) Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State;

(c) Malay customs;

(d) Zakat, Fitrah and Baitulmal or similar Islamic religious revenue;

(e) Mosques or any Islamic public places of worship;

(f) Creation and punishment of offences by persons professing the religion of Islam against precepts of that religion; and

(g) Constitution, organisation and procedure of the Syariah courts.
Definition

- According to Mimi Kamariah Majid, Harta Sepencarian refers to property acquired by the joint efforts of the parties during a marriage. *(Family Law in Malaysia, Malayan Law Journal 1999, p.366)*

- In *Ching Seng Woah @ Cheng Song Huat v. Lim Shook Lin (F) [1997] 1 CLJ 375*, Shankar J defined matrimonial property as:
  - The matrimonial home and everything which is put into it by either spouse with the intention that their home and chattels should be a continuing resource for the spouses and their children to be used jointly and severally for the benefit of the family as a whole.
  - It matters not in this context whether the asset is acquired solely by the one party or the other or by their joint efforts. Whilst the marriage subsists, these assets are matrimonial assets. Such assets could be capital assets. The earning power of each spouse is also an asset.

- In *Hujah Lijah Binti Jamal v Fatimah binti Mat Diah [1950] MLJ 63*, Briggs J defines it as: “acquired property during the subsistence of their marriage of a husband and wife out of their resources or by their joint efforts”.
Basis of *Harta Sepencarian*

- Scholars and judges had viewed that harta sepencarian is rooted in a Malay custom which had been continuously practiced by the Malay community. Briggs J in the *Hujah Lijah case* states that:
  
  “the rules governing matrimonial property were not a part of Islamic law proper, but a matter of Malay custom, and because the recognition of it both in various states and in the courts were clear, the rules governing it formed part of general law of the state”.

- It was said that this custom had been accepted by Muslim scholars as they view that it does not contradict Shariah principles in general. Imam Al-Suyuti in *Al Asybah wa Al-Nadzair* explains the well known Islamic jurisprudential principle that a social custom of a particular nation or community which does not contradict Shariah principles may be recognized as a legal rule (*Harta Sepencarian*, *Akademi Pengajian Islam Kontemporari (ACIS)*, June 2016, *UiTM*)
Basis of Harta Sepencarian 2

- However, later scholars have found that although Harta Sepencarian was not expressly mentioned by the traditional jurists, the concept is found in juristic discussions on mata’ al-bayt (household items) or mal al-zaujayn (married couple’s property).

- Imam Al-Shafie said that: where there is a dispute on the household items between the spouses who lived in the same house, they would be entitled to it in equal portions (Mohd Norhusairi Mat Hussin, Distribution Practice of Harta Sepencarian in Malaysia: A Literature Review, Journal of Shariah Law Research (2016) vol. 1 (1) 75-88).
Types of *Harta Sepencarian* property

- Claims for *Harta Sepencarian* involved land, matrimonial homes and even animals used to work the land. As the Malays become more modernized and urbanized and possess greater purchasing power, matrimonial property also includes movables such as household goods and furnishings. (Mimi Kamariah, *Family Law in Malaysia, Malayan Law Journal* 1999, p.366)

- Shankar J in *Overseas Investment Pte Ltd v Anthony William O’Brien & Anor* [1988] 3 MLJ 332, stated that:
  - *Harta Sepencarian* applies to all property acquired in the course of a marriage out of their joint resources or the joint efforts of the spouses.
  - In the absence of clear evidence that the property was to be the sole property of one spouse, both have an equal share.
  - *Harta Sepencarian* applies to all kinds of properties movable and immovable as long as they were acquired during the marriage.

This case extended the scope of a claim for matrimonial property, from only after a divorce or upon the death of a party, to include claims made during the continuance of the marriage.
Harta Sepencarian in Islamic Family Legislation

- The Islamic Family Law (Federal Territories) Act 1984 defines Harta Sepencarian as a property jointly acquired by husband and wife during the subsistence of marriage in accordance with the provision of hukum syara’.

- The Shariah courts of the Federal Territory are empowered to make orders pertaining Harta Sepencarian by virtue of Section 122 which provides the Shariah Court with the judicial discretionary power for to decide Harta Sepencarian claims based on the contribution of assets by the spouse to the marriage either jointly or solely acquired by them.
Harta Sepencarian in Islamic Family Legislation 2

- Section 122(1) of the Act provides that the court shall have power, when permitting the pronouncement of *talaq* or when making an order of divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.

- In exercising the aforesaid power, the court has to regard to a few matters, namely:
  a) The extent of the contributions made by each party in money, property, or labour towards the acquiring of the assets;
  b) Any debts owing by either party that were contracted for their joint benefit;
  c) The needs of the minor children, of the marriage, if any.

- Section 122(2) of the Act states that, subject to these considerations, the court shall incline towards equality of division.
Harta Sepencarian in Islamic Family Legislation 3

- Section 122(3) provides for the situation where the assets acquired during the marriage were solely by the efforts of one party to the marriage. The court may divide the assets or the proceeds of the sale of the assets provided it gives regard to the following:
  a) The extent of the contributions 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;
  b) The needs of the minor children of the marriage, if any.

- Section 122(4) of the Act states that subject to these considerations, the court may divide the assets or the proceeds of sale in such proportions as the court thinks reasonable, but in any case the party by whose efforts the assets were acquired shall receive a greater proportion.

- Section 122(5) states that harta sepencarian includes assets owned before the marriage by one party that have been substantially improved during the marriage by the other party or by their joint efforts.
The Islamic Family Law (Federal Territories) Act 1984 has been amended in 2006 by insertion of the new section 107A [vide section 20 of the Islamic Family Law (Federal Territory) Act (Amendment) 2006 (Act A1261)].

“Prohibitory order against the disposal of harta sepencarian

107A. (1) The Court may, on the application of any party to a marriage—
(a) where any matrimonial proceeding is pending; or
(b) in any proceeding where the Court may make an order under section 122, make an order prohibiting the wife or husband, as the case may be, from disposing of any assets acquired by them, jointly or solely, during the subsistence of their marriage if the Court is satisfied that it is necessary to do so.
(2) The failure to comply with an order made under subsection (1) shall be punishable as a contempt of Court”.

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Harta Sepencarian in Polygamous Marriages

The new section 23(9) was inserted into the Islamic Family Law (Federal Territories) Act 1984 in 2006 [vide section 6 of the Islamic Family Law (Federal Territory) Act (Amendment) 2006 (Act A1261)].

“Section 23. Polygamy
Application for permission to contract a polygamous marriage:
(9). Every Court that grants the permission or orders a marriage to be registered under this section shall have the power on the application by any party to the marriage—
(a) to require a person to pay maintenance to his existing wife or wives; or
(b) to order the division between the parties of the marriage of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division of the proceeds of the sale”. 
**Decided cases**

- **Boto v Jaafar (1985) 2 MLJ 98**
  Husband ran a fishery business which flourished after the marriage. The wife took no direct part in the business but she accompanied her husband in many of his business trips. The court held that the fact that the wife accompanied her husband in his business trips and gave up employment because of her marriage amounted to her joint effort in the acquisition of the properties and declared that she was entitled to a one-third share of the properties acquired during the marriage. In the case of one of the boats which were registered in their joint names, the judge ordered it to be divided equally.

- **Rokiah v Mohamed Idris (1987) 6 JH 272.**
  The divorced wife claimed for a land in KL, shares and money in banks as harta sepencarian from her husband. The court took into account of the indirect contribution of the wife in looking after the household, the husband and the children for the period of over 35 years of the marriage. She was granted one-third of the properties.
The plaintiff and defendant had married in 1969 and divorced in 2003. The plaintiff wife claimed before Shariah Court of Melaka for Harta Sepencarian on the following assets:

Half (1/2) of piece of land held under strata title No. PM 1294, Lot. No. 3082, Mukim Nyalas, Daerah Jasin Melaka at 4217 hectares or 10.4 acres.

Half (1/2) of piece of land held under strata title No. PM 1607 Lot. No 3989 Mukim Nyalas, Daerah Jasin Melaka at 1123 s/m or 12087 square foot together with the house built by the Plaintiff for RM 50,000.00 from FELDA.

The court divided the lands together with the house equally between the spouses. The court considered that all the said assets were acquired jointly between both plaintiff and defendant during their participation in the FELDA land development scheme. She had also developed the lands together with the defendant and their children.
Mohd Najib bin Md Nasir v Mastura bt Ahmad [2015] 1 SHLR 90

The appellant and respondent had married in 1981 and divorced in 2007. The respondent filed an application for Harta Sepencarian on a double story house in Selangor. She pleaded for an order that the property be divided 40% for herself and 60% for the appellant and enforcement of the order via sale. The appellant alleged inter alia that the trial judge had erred in law and facts when he ordered the division of 40% of the said property in favour of the respondent as the respondent had failed to prove the extent of her contribution.

In fact, the respondent had admitted that she was a full-time housewife and her contribution in the said acquisition was from her collection of money received from the appellant thus far.
Decided cases 3

- The appeal court rejected the appellant’s allegation.
- The evidence sufficiently showed her direct and indirect contribution.
- The court also considered that the 40% rate decided by the trial judge was reasonable. This is because in determining the rate, the respondent's direct and indirect contribution had been considered, i.e. she had taken good care of the family’s affairs for 26 years enabling her husband to focus on his work and earn more salary in order to maintain their family.
- This is also based on the ratio of earlier cases which had awarded 1/3 to the wife when her contribution toward the acquisition of the property was indirect. Considering the extent of the parties’ contributions, the court reiterated that the 40% decided by the trial judge was reasonable.
Thank you!

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