

The Legal Recognition of a Wife's Rights of Harta Sepencharian in Malaysia

Mohd Norhusairi Mat Hussin

Universiti Malaya, Malaysia

Raihanah Abdullah*

Universiti Malaya, Malaysia

Nahid Ferdousi

Bangladesh Open University, Bangladesh

Wirdati Mohd Radzi

Zahir Khailani Associate & Solicitors, Malaysia

Abstract

The distribution of *Harta Sepencharian* (classical Malay language for “matrimonial property”) is a complex area within Islamic jurisprudence. The primary reason for the division of *Harta Sepencharian* is to acknowledge the ownership of each spouse (husband and wife), either directly or indirectly, to the property/ies acquired during their marriage and the means to divide the property/ies accordingly in the event of divorce or death. In Malaysia, the *Shari'ah* Court plays a vital role in ensuring fair and equitable protection of Muslim Malay women's rights to matrimonial property. The issue arises when there is a dispute as to the quantum of property distribution, especially if there is a divorce or when one spouse is deceased without leaving any will or clear instructions regarding property distribution. This study analyzes the *Harta Sepencharian* distribution practices and the governing statutes that dictate proper guidelines on how property is divided, whether jointly or solely acquired in Malaysia. This will include a discussion on the jurisdiction of the *Shari'ah Court* in recognizing women's rights and contributions for a fair distribution of the *Harta Sepencharian*, vis-à-vis the relevant provisions and decided cases.

Key words

Harta Sepencharian, matrimonial property, Shari'ah Court, Muslim Family Law

* Corresponding author

Introduction

Malaysia is a modern Muslim country in Southeast Asia; 60% of the population is Muslim amidst a significant minority of other faiths and ethnicities (Malaysian Population Census, 2000). By law, all Malays are Muslim. Ethnic Malays in Malaysia first adopted Islam in the 11th century, where it was syncretized and embedded into an indigenous cultural system described as “*adat*.” Gradually, Islamic religious symbols have taken over the traditional Malay culture and lifestyle as well (Haque, 2003).

After the fall of Malacca in 1511, Malaysia was subsequently colonized by several Western powers, with the British Empire being the last and longest European superpower to govern the nation. With regard to modern Western-style governance, Malaysia prepared to establish a democratic system by means of its first election held in 1955 (Andaya & Andaya, 2001). The nation further progressed into and embraced an adapted version of what Foley (2004) defines as a “neither fully democratic nor fully authoritarian” governance system. It is interesting to note that in Muslim societies, such as Malaysia, Muslim women have always been a major player in many sectors.

Methodology

This is a qualitative research paper that involved library research and case study methods to show the practice of *jointly acquired property* apportionment and the acknowledgment of the Syariah Court toward wives’ rights and contribution to *jointly acquired property* based on Malaysian current law. Documentary research is used to analyze the theory behind the *jointly acquired property* based on the available literature that has been identified and its relevance to this study. Books, journals, and legal statutes are some examples of the primary and secondary sources used for data collection. These are then used to further analyze the concept of *jointly acquired property* and current related laws. The case study method is used to study the judgment from the court on the property apportionment rate of *jointly acquired property* in Malaysia. To ensure that the data obtained are accurate, references on judgment of cases by the Syariah Court have to be made. Content analysis is used to examine the discussion on contributions and their relationship to the apportionment rate of *jointly acquired property*. This method is then used as a basis to reconcile court judgments on wives’ rights and contributions to the apportionment of *jointly acquired property* from a legal perspective.

Muslim Women in Malaysia: A Brief Analysis

Before the arrival of the Western powers, the Malay Muslim Sultanate in Melaka governed a territory from Southern Thailand in the North, to the Sumatran Island and the Eastern Coast of Indonesia in the South. During these feudal times, the Malays were mainly divided into two groups: the ruling elite/aristocracy and the peasantry (Ariffin, 2000).

Looking back to Malaya, in the 18th and early part of the 19th centuries, when British economic influence, this not only effectively marginalized Malay's agricultural development but also successfully divided Malaya into rural and urban areas. The main reason behind the presumed "inactivity" and "passive" Malay women, whose contribution to the national economy was insufficiently recognized, despite some who were significantly involved in their work while gainfully employed (Ariffin, 2000).

In earlier times, women and men worked together in agricultural fields as planters, rice cultivators, rubber tappers, or processed seafood producers. They were also involved in trading activities, especially on the East Coast of Peninsular Malaysia. Early history showed that women had to involve themselves and contribute economically as diligently as men, especially in the household economy (Seif Hatimy, 1979). Further observes, "Although these women have played an important role in economic development, their main duties are to look after their children and running the home" (Firth, 1966). The married relationship requires both women and men to work together economically in order to sustain the marriage (Mustaphar, Azahari, & Ahmad, 2020).

After Malaysia gained independence in 1957, more opportunities became available to women, especially in education and employment. Post-independence women, irrespective of their ethnicity, were well equipped with education and training to face the challenges and contributions toward an economically developing society. Women were no longer confined to the agricultural sector. With the restructuring of the education system, more women have been educated. For example, in 1957 (the year of Independence), statistics show that 42.6% of pupils at Malay medium schools were women, while 38.85% of school-going children at English medium schools were women (Ariffin, 2000). The nation's economic development and the shift of emphasis from primary to secondary industries had widened the range of opportunities and also generated diverse employment prospects for women (Omar, 1994).

Muslim Women and Property Ownership

During the Greco-Roman period, women were treated as second-class citizens. Unfortunately, this was also true for both Eastern and Western women (Rowbatham, 1975). Such practices are still prevalent in many parts of the world, such as India (Al-Tekar, 1973), Europe (Oakley, 1982) and the Middle East (Hatimy, 1979).

In Malaysia, according to the common law, a married woman was not entitled to possess property, but the husband was. However, this situation changed with the advent of Islam, which teaches gender equality among human beings. Islam teaches that there are no gender differences that support discrimination (Rauf, 1979). Islam is very clear about women's rights in their daily lives (Sahid, Gunardi, & Zahalin, 2020). For example, equality between men and women is mentioned in *Surah (Chapter) Al-Hujurat* verse 19, and the other teachings of Islam brought by the Prophet Muhammad (*sallAllahu alayhi wasallam*) who also stated this.

In the modern context, women's roles are no longer limited to household management, but also include other aspects of community development (Ibrahim, 2002). This has been further supported by the announcement of the International Women's Year recognized by the United Nations Organization in 1975 (Ismail & Mahbar, 1996). This declaration opened a new chapter in the history of women in global development, including Malaysia, where women were generally given the same rights and roles in the development of home economics as well as the economy of the states.

Despite historical episodes of discrimination, the 20th century attempted to remedy this problem. Article (1) of the Universal Declaration of Human Rights states that, "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood." The UN General Assembly adopted the Universal Declaration of Human Rights (1948), which guarantees equal rights to both sexes. Consequently, in 1979, the UN General Assembly adopted the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which came into force in 1981.

Malaysia is also a signatory to the CEDAW. Article 8 (2) of the Federal Constitution of Malaysia states clearly that matters that discriminate on the basis of gender should never occur. This provision emphasized that rights for men and women were seen as symmetrical with the requisition of Islam, where women are allowed to be parties to contractual arrangements (Buang, 2001).

The Malay community's rituals vary from one area to another. However, in terms of property ownership and gender issues, Malay society is very women-friendly (Hussin & Abdullah, 2016). Moreover, the gender of a newborn baby has never been an issue because, in the Malay community, the birth of any child is considered a blessing from God (Mamat, 1991). Normally, sons and daughters undergo different processes of socialization according to their respective roles. Upon this awareness, similar rights were given to women regarding ownership of property, including matrimonial property, after they got married (Abdullah, Martinez, & Radzi, 2010).

This custom is also supported by the recognition of the distribution of matrimonial property after a divorce, which is known as *Harta Sepencharian* (Ahmad, 2021). The Perak State Council Minute, dated January 18, 1907, declared that the custom of the Malays of Perak in the matter of dividing up property after divorce, when such property has been acquired by the parties, or by one of them during marriage, is to adopt the proportion of two shares to the man and one share to the woman and that gifts between married persons are irrevocable either during marriage or after divorce. (Taylor, 1937)

This declaration shows that customary law is applied with respect to the distribution of property acquired during the subsistence of marriage.

The Concept

The division of *Harta Sepencharian* upon divorce is a unique and long-term practice in the Malay Archipelago (Mabry, 1998). It can be defined as a property that is jointly acquired during marriage. The practice of distributing jointly acquired property stems from mutual respect between husbands and wives during marriage (Suwaid, 2001). This practice recognizes the importance of sharing elements of property acquired during marriage, acknowledging the significant contributions of both parties. Any property acquired before marriage or property inherited by a party should not be construed as a *Harta Sepencharian* asset, even though acquired during marriage (Aziz, Ibrahim, & Hussin, 2019). Nevertheless, the original property owned by any one party, then expanded during the marriage such as both husband and wife working together in farming, animal breeding, business enterprise, investing, and so forth, can be regarded as joint efforts or *Harta Sepencharian* assets (Tapah, 2003).

Many local scholars have asserted that *Harta Sepencharian* developed from customary traditions, but there has also been an effort to bring such property under

the jurisdiction of Islamic Law. However, a careful examination reveals that the works of classical Muslim jurists do not directly address the idea of *Harta Sepencharian* (Robbi & Mahmud, 2020). Others use the term “*al-mal zanjajyn*,” which refers to the husband and wife’s property, while some relate it to *mata al-bayt*, such as household appliances (Ibrahim, 2007). Imam al-Shāfi‘ī, a traditional Muslim jurist, declared the following:

When there is a dispute between a man and a woman over household items and equipment where both of them live in that house because they are separated (divorced), or even not separated, or both the husband and wife died, and there is a dispute between heirs to both parties or dispute between heirs to one of the two parties; then all solutions are similar... (Al-Shafi‘i, 1996)

Discussions of classical Muslim jurists related to matrimonial property disputes can be summarized into three main themes:

i. The question related to the nature of the property in dispute (al-Shāfi‘ī, 1996)

The properties that were discussed in the argument of scholars cover traditional home appliances, which are frequently used by either the husband or the wife. They include cooking utensils, jewelry, swords, and weaponry, as well as other equipment that are commonly used in households. This is appropriate for that period because there was no complex property as it exists in today’s world.

ii. Method of settlement

Most scholars have also focused on the method of settlement by examining the routines of appliances used. This means that if the equipment is typically used by women, such as cooking utensils, they would naturally become hers. Similarly, if the equipment in question is typically used by men, such as a sword or war equipment, then these items would become the property of the man. However, there is difficulty in using this method, especially when it involves equipment or property that is used for mutual interest, and this is the subject of the third argument with regard to matrimonial property in the books of classical Islamic Jurisprudent (*Fiqh*) (Hanbal, 1930).

iii. Property which is used for mutual interest

The third argument is the focus in classical Islamic jurisprudential books (*Fiqh*), which is about properties used for mutual interest. Some scholars tend to distribute property to men, whereas others tend to divide assets equally between men and

women. For example, Imam Abu Yusuf had a simple view of the issue by asserting that women should be given what they deserved in accordance with the balance given back to the man.

It is clear that discussions in the classical Islamic jurisprudential texts are confined to property, which by its nature are more “domestic,” such as household appliances, war equipment, gardening tools, vehicles, etc. (Sarakhsi, 2001). Discussions that involve the settlement of disputed property are also quite “biased” towards men, such that assets of mutual interests are often granted to them. However, various views of Islamic scholars certainly differ from the realities of matrimonial properties as practiced in Malaysia. Today, *Harta Sepencharian* disputes involve issues of complex properties and lengthy trials in their distribution, such as investments, bonds, movable and immovable properties (Mohd & Mohd, 1998).

The position of *Harta Sepencharian* under Islamic law can be demonstrated through the concepts of “*al-sbarikab*” (Mohd & Mohd, 1998) and “*urf*” (customs). However, many scholars believe that *Harta Sepencharian* is a concept understood through *urf* (customary law) (Zainon, Bakar, Zaghioui, & Urus, 2021). This is a result of the practice of dividing *Harta Sepencharian*, which exists only in the customary practices of the Malay community in Malaysia and in other neighboring countries such as Indonesia, Brunei, Singapore, Southern Thailand, and the southern Philippines.

Islam recognizes that such customs, either specific or general, can be adopted as a source of Muslim Family Law in Malaysia. This shows that Muslims celebrate customs practiced in certain areas as long as they do not conflict with *Shari’ah*. As we know, the influence of Islam within Malay families is well-developed (Abdullah, 2007). Even Western colonization was unable to alter family matters in the Malay community (Abdullah, 2007). Their own legislative history shows the far reaching influence the Prophet Muhammad (*sallAllahu alayhi wasallam*) had when he was faced with negotiating (legally) around customs (*urf*). Prophet Muhammad (*sallAllahu alayhi wasallam*) took a different attitude toward issues of whether to accept, reject, or amend customs into laws. When a custom proved beneficial, its status changed to law or a regulation that must be enforced. In addition, the jurisprudence method that states “*al-‘adah al-muhakkamah*” (Sayuti, 1983), which means cultural usage shall have the weight of law, also secures the legal conception of matrimonial property in *Shari’ah*. Based on this legal maxim, the Muslim Family Law in Malaysia has provided that a divorced wife holds rights to claim the division of *Harta Sepencharian* together with other financial rights after divorce, such as *nafqah*

(financial support) and *mut'ab* (alimony) (Hussin & Abdullah, 2016).

The concept of *Harta Sepencharian* as based on customary law is also upheld by the court in the case of *Roberts v. Umi Kalibom*, 1 MLJ 163 (1966), where Shah (as he was then) mentioned that

A principle gleaned from these cases established that Harta Sepencharian is a matter of 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: see Ramah v. Laton, supra. In the face of the compelling authorities above, I am of the view that once it is clearly established that property was acquired subsequent to the marriage out of their joint resources or by their joint efforts, a presumption arises that it is Harta Sepencharian...

As far as *Harta Sepencharian* is concerned, it is clear that the Malay custom is not only consistent with the *Shari'ah*, but also brings justice and guarantees the ownership of property acquired during marriage, equally to both the husband and wife (Zainon et al., 2021). This Malay custom has improved the status of women with regard to their rights to own property and is clearly in line with Islamic teachings that do not discriminate against people in regard to their possession of property regardless of gender, ethnicity, and skin color (Ibrahim & Ismail, 2018).

The Distribution of *Harta Sepencharian*

The practice of *Harta Sepencharian* represents indigenous customs, with respect for distribution efforts and ownership of property within the marriage (Tapah, 2003). The Malay community has long held the belief that a housewife is entitled to one-third of the assets the husband acquires throughout the marriage, as compensation for her family support. In *Mansyur v. Kamariah and Rokiah v. M. Idris*, when it was stated that domestic activities were not included in a wife's marital responsibilities under Malaysian Muslim Family Law, it was determined that such a contribution was in compliance with the principles of *Shari'ah*.

Harta Sepencharian, a term that originated from the matrilineal system of the State of Negeri Sembilan, is also known in Indonesia as *carian laki bini* (Abdullah et al., 2010). As we know, Malay women in Malaysia in particular and in the archipelago generally play a considerable role in the development of home economics. Their role is not only limited to that of housewives, but extends to other tasks in

society as well. This situation is not a new culture norm but has been passed down since ancient times. Their participation may be due to their right to own property, which is also a part of Malay customs (Ariffin, 1992).

Furthermore, Malay women in the archipelago have traditionally engaged in work alongside men in agriculture and markets since the advent of colonialism (Reid, 1988). Munshi Abdullah (1796-1854) described the women of Kelantan (one of the Malaysian states situated along the East Coast) who had been in business at markets:

So when it is in the afternoon, then we see hundreds of women walk down the road. Then, there is a deep conviction present for each one to contribute something to the market basket. So, food is carried with baskets, and the foods are fresh vegetables and bananas, sugar cane, and all sorts of herbs and others. (Abmad, 1981)

In addition, women were assisting their husbands in agriculture, particularly in rice fields (Maila, 1996). These circumstances can be examined in the testimony given by his son Muhammad Munshi (1840M-1904M). He detailed women's contributions to agriculture:

Sowing seeds, transforming, weaving, punching, kicking, harvesting, sweeping, and cooking. Collecting, picking, sifting, rolling, deeply, cutting, binding, and so forth. (Othman, 1980)

Women were also engaged in rubber tapping (Abdullah et al., 2010), poultry farming (Swift, 1965) and so forth. In short, most women in Malaysia hold dual roles in the household and business sectors of the economy to generate income. In Malaysia, women play multiple roles in both the domestic and non-domestic sectors. The participation of women in particular sectors qualified them to obtain rights to property acquired during marriage (Ariffin, 2000). Even so, the function and involvement of women clearly changed following their independence. Today, however, the involvement of women in the economic sectors is higher due to more employment and better educational opportunities and policies. These factors have already qualified Malaysian women to obtain rights to *Harta Sepencharian* as a result of their contributions to property acquisition. These rights have been acknowledged under Muslim Family Law and enforced in Malaysia.

The court also considers the parties' earlier contributions when deciding how to divide the property. Direct contributions are also referred to as "joint contributions" when both partners have made financial contributions to the purchase

of property. In other words, direct contribution happens when a husband and wife collaborate to acquire ownership of a piece of property or another asset, such as a house or a piece of land (Rabi'ah, 2021).

Indirect contributions focus on the housewife, whose tasks are household chores such as managing the household, taking care of their children, and so forth. This leads to women have little chance of getting money or property to buy assets during marriage. Therefore, any claims for *Harta Sepencharian* presented to the court must be proved according to three elements:

- (i) Property or capital accumulation
- (ii) Efforts toward improving existing assets
- (iii) Other contributions such as views, advice, and encouragement.

Recent Developments

The provision of *Harta Sepencharian* under the Muslim Family Law in Malaysia has undergone progressive transformation in the country's legal system. This began with the absence of a specific jurisdiction of the *Shari'ah Court*, in which the trial could be conducted at the Civil High Court, until the 1988 Malaysian Constitutional amendment of Article 121 (1A). The effect of this amendment was that the Civil Court no longer had jurisdiction to hear Islamic matters, including the claims of *Harta Sepencharian* (Hussin & Daud, 2020).

Recent developments of *Harta Sepencharian* were also included in the new amendment of Act A1261 of the Muslim Family Law (Federal Territories) (Amendment) Act 2006. In this amendment, the application for the concept of division of matrimonial property was opened in a wider context, addressing not only property decided upon divorce but also heard and decided by the *Shari'ah Court* in the event where the husband applied to contract a polygamous marriage (Yusoff, Tajul Urus, Yusoff, Md Thahir, Othman, Mohd Zainon, 2021).

The Muslim Family Law in Malaysia provides that no man may contract an additional marriage unless with prior permission from the *Shari'ah Court*. Before the Court grants or rejects any application, the it will normally summon the existing wife to testify. If the Court allows the polygamous marriage, then it must make an order in advance on the division of *Harta Sepencharian* between the husband and the existing wife. The objective of this new amendment is to protect the existing wife's rights to *Harta Sepencharian* in polygamous marriages (Abdullah, Abdullah, & Ferdousi, 2015).

Such a provision is seen as protecting the existing wife and her rights to the

Harta Sepencharian acquired during marriage (Sahari, Manan, Saidon, & Ishak, 2022). The law acknowledges the existing wife's contribution to acquiring property. Moreover, if the wife does not contribute any capital, but instead contributes her time and energy to the welfare of the family, the time or duration of contributions is certainly longer than that of her husband's new wife (Rauf, 1997).

If these provisions are not met, the second wife of the husband will likely submit a claim for matrimonial assets and will face the *Shari'ah* justice system in determining marital property rights in particular, in terms of the timing or duration of the marriage that allows the husband to acquire property, either at the beginning of the marriage with the first or second wife. For example, in the case of *Azizah Yazan v. Norazizi Kassim*, (Case Number:05100-017-0198-2007) at the *Seremban Shari'ah High Court*, the defendant asked for polygamous marriage. The plaintiff (existing wife) filed a *Harta Sepencharian* appeal for a house at the address of No. 44, Jalan TTJS 3/5, Taman Tuanku Jaafar, 71450 Seremban, and Negeri Sembilan. Both the husband and wife purchased the property during their marriage. The case was settled through a settlement in which the defendant agreed to hand over the house to the plaintiff (existing wife) because they agreed that the property was acquired during their marriage and treated it as a matrimonial asset.

With this amendment, the Muslim Family Law in Malaysia provides that the division of *Harta Sepencharian* can be claimed in three circumstances:

- (i) Upon divorce
- (ii) Upon the death of either the husband or the wife
- (iii) When the court has allowed the application of the polygamous husband.

Analysis of the *Harta Sepencharian* Cases in the Malaysian *Shari'ah* Court

Under Muslim Family Law in Malaysia, all cases of *Harta Sepencharian* are to be initiated at the *State Shari'ah High Court*. Judgments of property cases are adjudicated by judges with discretionary power. There are various *Harta Sepencharian* cases where judgment is based on facts and evidence in court cases, as well as on the guidelines of the *Malaysian Shari'ah Judiciary Department*. In general, the solution is dependent on the desire of the parties and at the discretion of the judge who attempts to implement an amicable approach.

Solution Through Trial

Settlement through trial shows that the court tends to divide the *Harta Sepencharian* into half or one-third of the total property value depending on the contributions of the parties involved in securing the property. In most cases involving direct contributions, the court will decide to divide half of the property, valuing the worth of the effort or capital contribution provided by both parties.

(i) *Division of half.*

Most cases involving the division of a half include the direct contribution elements of the parties. This means that when the court finds that there were contributions from both sides in acquiring the property in dispute, it will order the distribution of half. This is prorated in accordance with the efforts of both parties, either in the form of venture finance, capital, or energy in acquiring the property. When cases decided by the court are surveyed, it is found that the division of property is often half, involving *Felda* settlers. In the case of *Jane, daughter of Md Tan v. Busu bin Md Tan*, 27 JH 303 (2007), the court ruled that the plaintiff was entitled to half of the assets (Foley, 2004):

- a. Home site located at Lot No. 6132, No. 78, Block 4, Felda Jelai 3, Gemas, Negeri Sembilan
- b. Two areas of agricultural land in Lot 11124 and Lot 1125, Reuters Gemas, Negeri Sembilan
- c. Revenue earned from the assets of said land, and
- d. *Felda* monthly subsistence money earned by the defendant.

This judgment was made in consideration of the contribution of the plaintiff in securing the property. Moreover, entry into *Felda's* own family or wife was required. The facts of the case were supported by evidence that the plaintiff and defendant stated that they entered *Felda* after nearly nine months of marriage. As the wife of a settler, she normally took care of the palm oil plantations with her husband. As such, she would usually be entitled to half of the property, which included land, homes, farmland, and monthly income from the proceeds of the sale of crops such as palm oil and rubber. Usually, the court orders a *Felda Manager* to ensure that this judicial order is carried out.

(ii) *Distribution of one-third.*

Distribution at a rate of one-third was the division adopted in some cases in-

volving indirect contributions of parties in securing property. An indirect contribution refers to contributions of moral values, household care, and emotional support to the general work, duties, and responsibilities of a husband. The contribution of these factors helps to allow a husband to work outside the home with confidence and serenity, thus serving as a catalyst for the success of his career. Contributions such as these entitle the wife to one-third of the entire property purchased by the husband, even if the property is purchased or registered in his name only.

In the case of *Norbayati Yusoff v. Ahmad Shab bin Ahmad Tabrani*, 27 JH 33 (2008), the appellants appealed to the *Kelantan Shari'ah Court of Appeal* because they were unsatisfied with the decision of one-fourth ordered by the *Kota Bharu Shari'ah High Court* of a two-story terrace house at No. 35 Jalan Wangsa Maju 6, Wangsa Melati, Kuala Lumpur. The appellant was a housewife who claimed that she contributed indirectly to the purchase and took care of their home. The *Shari'ah Court of Appeal* unanimously allowed the appellant's application and ordered a division of one-third of the value of the home.

(iii) *Division of two-thirds.*

There are also cases involving the division of two-thirds among wives with a claim to property. In the case of *Noraishah bint Ahmad v. Omar bin Jusob*, 26 JH 97 (2008), the plaintiff applied to the court that 70% of the property or the value of property listed in the assets of the deceased be given to her as a matrimonial asset and 30% to her beneficiaries who were eligible according to Islamic Inheritance Law. The plaintiff argued that they managed the assets and assumed the responsibilities of the properties and debts of the deceased. After hearing the arguments, the court judged in favor of the plaintiff by ordering 70% of the assets of the deceased to be given to the former and 30% delivered to the heirs of the deceased.

In many cases, the *Shari'ah Court* decided based on a ½ (half) rate for claims to *Harta Sepencharian*, particularly when the parties were successful in proving the existence of equal contributions in obtaining the properties during the period of their marriage. In this situation, the court must identify as much as possible whether the extent of contributions made by both parties are equivalent, whether directly or indirectly. However, the right to obtain 1/3 (one-third) is given if one succeeds in proving a greater contribution. This situation pertaining to division is rather interesting in the appeal case of *Rebanah bt Mohd Dom v. Zainal Abidin Yusof & Another*, (Case Number:10000-017-007-2009). In this case, the *Selangor Shari'ah*

Appeal Court accepted the appeal of the appellant to obtain $\frac{1}{2}$ (half) rights for a house (No. 104, Jalan 18/45, Taman Sri Serdang, 43300 Seri Kembangan, Serdang, Selangor) and $\frac{1}{3}$ (one-third) in several other properties. Other claimed properties remained in the form of shares and land. The litigant appealed because of being dissatisfied with the order of the *Shah Alam Shari'ah High Court* granting $\frac{1}{3}$ (one-third) rights for the said house, while refusing claims against several other properties. This represented case for appeal with respect to a *Harta Sepencharian* claim filed by the appellant against the respondent for properties left by her deceased husband. The respondents were beneficiaries (brothers and sisters) of the deceased husband's properties left according to the principles of the Islamic Law of inheritance. After the trial, the appellant's appeal was accepted, and the court ordered that $\frac{2}{3}$ (two-thirds) value be apportioned from the amount of properties left by the deceased husband.

(iv) *Cases in which the husband is entitled to Harta Sepencharian.*

In the case of *Roberts Kamarulzaman v. Umi Kalthum*, 1 MLJ 163 (1966), the husband and wife bought a house worth RM50,000 in which the husband contributed RM40,000, whereas the wife contributed RM10,000. The husband was not a Malaysian citizen and required a longer process to register the property under his name, the property was registered under the wife's name. Upon divorce, the husband claimed the division of *Harta Sepencharian* based on the ratio contribution made. The court then decided that according to the principle of *Harta Sepencharian*, the value of the house had to be divided by half between the plaintiff and the defendant.

This case shows that any party who is able to prove any contributions made in acquiring any property during the marriage is entitled to initiate action in court and may obtain rights to the division of *Harta Sepencharian*. What is important is to provide documentation to the Court on the existence of either parties' contribution in acquiring the property.

(v) *Division by percentage.*

Other than divisions according to parts, such as $\frac{1}{2}$ (half), $\frac{1}{3}$ (one-third), and $\frac{1}{4}$ (one-quarter), there are also cases indicating the existence of divisions according to percentage. In the case of *Rahamathbi binti Abdul Suban v. Jamal Mohamed bin Abamed Ibrahim*, 36 JH 97 (2011), the appellant submitted an appeal to the court for entire rights over a house, which was a matrimonial property between the appellant and the respondent. The appellant was unsatisfied with the decision of the

court that the property was a *Harta Sepencharian* and ordered that it be divided into 98% for the appellant and 2% for the respondent based on the full contribution by the appellant in the ownership of the said house (Muhammad, 2002).

The appellant was of the opinion that a division of the house should not be given to the respondent even if it is only 2%, as the latter did not contribute to any efforts in acquiring the house but was only present on the day of auction to purchase it. All payments and installments were paid 100% by the appellant. In fact, the appellant submitted that the house was rented out, and the respondent used the revenue from rental without giving the same to the appellant. Based on this submission, the appellant was of the view that no rights should be given to the respondent. Nevertheless, the *Sbari'ab Appeal Court* dismissed the appellant's appeal and affirmed the *Sbari'ab High Court's* decision based on argumentation by the appellant about existing contributions made by the respondent regarding disputed properties. (Ibrahim, 2012).

Settlement Through an Alternative Process

Apart from the diversity of the total distribution to parties involved in a trial, which usually takes a long time to be completed, there are also various alternative forms of distribution in *Harta Sepencharian*. Variations in this division can be seen in the resolved cases that have allowed for *sulb* (mediation) (Adnan & Buang, 2021).

Sulb is defined as an amicable alternative solution. *Sulb*, in the current *Harta Sepencharian* cases, literally means “mutual truce” (*al-musalamah*) after disputes (*al-munaẓa'ah*) (Azahari, 2008). Ibnu Manẓūr states that *ṣulḥ* is the name of *al-muṣalaḥah*, which means peace (*al-silm*), and that the word *al-mukhasamah* is mutually connected to it. *Sulḥ* are processes that take place based on several factors and hostilities (Manẓūr, 1990). The word is often employed to prevent destruction or damage that often occurs due to a dispute (Azahari, 2008). This process is based on several factors, including

(i) An existing feeling of love and affection when the husband allows his wife to live in a house paid for by both parties as long as the other chooses to remain unmarried. For example, in the case of *Zaiton Azīz v. Mohd Sidek Mohd Sarjan*, (Case Number:05100-017-0122-2007), the plaintiff and defendant were married on 20/10/1983 and divorced on 07/03/2005. They were blessed with seven children, and the defendant owned a low-cost house: Lot 13245, Mukim Rantau, Jalan SJ 3/2C, Taman Seremban Jaya, Negeri Sembilan. The case was resolved through a

settlement in which the defendant agreed that the plaintiff was allowed to stay in the house until the end of her life, provided that the plaintiff did not remarry. If the house was sold, then the distribution would be based on a 60% 40% split distributed between the defendant and plaintiff. (Mohamad, Hussein, & Nor, 2021).

(ii) There is also an agreement that is achieved through the possession of a property in the names of children. This means that the property is renamed the name of the children. In the case of *Siti Suzana Zakaria v. Rusdi Salleh*, (Case Number:05100-017-0021-2007), which was conducted in the *Seremban Shari'ah High Court*, the defendant agreed to submit half the rights of a house at No. 254, Lorong Desa Ixora 1/20, Taman Desa Ixora, Senawang, to the children. The defendant also agreed to appoint the plaintiff as a trustee of the property until their children became adults.

(iii) The next solution is a settlement that is considered as a “win-win situation.” Settlement of the *Harta Sepencharian*, may involve payment, as seen in the case of *Poziah binti Mamat v. Jobari bin Abdullah* (Case Number:05100-017-0076-2007), whereby an agreement was reached whereby the defendant would pay RM6000 to the plaintiff as a *Harta Sepencharian* settlement involving a house at No.1082, Jalan Gunung Dato' 14, Taman Anggerik Mas, Seremban, Negeri Sembilan (Crown, 1988).

Sullb is intended to establish an agreement, peace, and accelerate the trial process in the courts of *Shari'ah*. Although this practice has pros and cons, it assists considerably in the parties reaching an amicable solution regarding disputed properties.

Conclusion

It is clear from the discussion that the division of *Harta Sepencharian* in the *Shari'ah Court* of Malaysia shows that legal protection is extended to Malay Muslim women as well as men. Contributions made by women in possession of property should not be underestimated because they certainly contribute to the stability of the household economy and serve as catalysts for the acquisition of property during marriage. The *Harta Sepencharian* cases tried in the *Shari'ah Court* of Malaysia are a manifestation of the recognition of the contribution of Malay women. Divisions of property ordered by the court are subject to the discretion of the parties if a case can be resolved through an agreement process (*sullb*), as well as the discretion of the court upon arriving at the extent of contributions made by both parties, which have been enacted by Muslim Family Law enforced in respective states.

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Biographical Note: **Mohd Norhusairi Mat Hussin** (Ph.D), is currently a senior lecturer at the Academy of Islamic Studies, Universiti Malaya, Kuala Lumpur. He obtained his PhD in Islamic Family Law. He also a registered Shari'ah Lawyer and family consultant in Malaysia whose revolve around Islamic Family Law and Islamic Law and Society. He is an expert in the area Islamic Family Law, Shariah Court Prosedur and Socio-Legal Studies.

Biographical Note: **Raihanah Abdullah** (Ph.D), is a Professor at the Department of Shari'ah and Law, Academy of Islamic Studies, Universiti Malaya and a registered Shari'ah lawyer and a certified mediator whose interests revolve around Islamic Family Law, Islamic Law and Gender, and Islamic Law and Society. She is an expert in the area of women's human rights, the issue of violence against women and the human rights of the marginalized group of society – the elderly, children and people with disability.

Biographical Note: **Nahid Ferdousi** (Ph.D), is a Professor of Law at Bangladesh Open University (BOU, Bangladesh). Her research interest is related to women rights, child protection and juvenile justice, gender and law, environmental justice and ethical issues.

Biographical Note: **Wirdati Mohd Radzi** (Ph.D), is formerly a senior lecturer at the Sport Centre, Universiti Malaya Kuala Lumpur, and currently at Zahir Khailani Legal Firm as legal practioner.

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