



DIVISION OF *HARTA SEPENCARIAN* IN THE
MALAYSIAN SYARIAH COURTS: AN ANALYSIS OF
THE JUDICIAL APPROACHES

BY

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ABSTRACT

Division of matrimonial assets is often associated with unfairness to the parties due to the failure of the existing provision to provide appropriate and fair methods to be used in the division. The current provision does not appear practical as it causes the court to adopt different interpretations in ascertaining allocated shares to the parties involved. The Malaysian family law for Muslim regulates, among others, the right for the husband and wife to apply for division of matrimonial assets which is normally claimable after the divorce or death of a spouse including during polygamous marriage. This provision aims to protect the interest of the wife and children. Thus, this study is undertaken to examine the effectiveness of the law in dividing assets through court practices. For that purpose, the study adopts a qualitative method by using both library research and field work to collect data. The analysis was conducted on a carefully selected sample of 215 decided cases within the period of 2000-2012. Data were collected from six zones representing Syariah Courts in Malaysia. Data were analysed based on several variables such as types of matrimonial property, factors for consideration and proportion of distribution of assets. The sampling shows that the direction of provision emphasises the contribution of a spouse as the sole determinator when dividing the assets thus, causing uncertainty and encouraging litigation. The study discloses that a loose draft of the provisions has caused various discrepancies in applying the law into practice. Other problems include the ambiguity in defining the scope of matrimonial assets and the role of the homemaker which has also not been properly addressed. Thus, this study suggests that the courts adopt more discretion when dealing with a division and take into account general considerations and factors including length of marriage, welfare of parties and other forms of contributions other than that of financial aspects. The use of sulh as a mode of dividing matrimonial asset is suggested to be widely practised when dealing with the division of matrimonial assets to prevent a costly and lengthy litigation process. Serious attention should, therefore, be given to reform the existing provision in order to make possible a just and equitable division of matrimonial assets.

ملخص البحث

إن تقسيم ممتلكات الزواج عادة ما يترافق مع عدم إنصاف للأطراف المعنية وذلك نتيجة لفشل التشريع الحالي في توفير وسائل مناسبة ومنصفة يتم استخدامها خلال التقسيم. ولا يبدو أن التشريع الحالي يتسم بالعملية حيث أنه يؤدي بالحكمة إلى تبني تأويلات مختلفة في تخصيص الحصص المخصصة للأطراف المعنية. إن قانون الأسرة الماليزي للمسلمين ينظم - ضمن تنظيمات أخرى - حق الزوج والزوجة في التقدم بطلب لتقسيم ممتلكات الزواج، الأمر الذي يمكن المطالبة به عادة بعد الطلاق أو وفاة أحد الزوجين، بما في ذلك حالة تعدد الزوجات. ويهدف هذا التشريع إلى حماية مصلحة الزوجة والأطفال. ونظرًا لذلك، فلقد تم إجراء هذه الدراسة لاختبار فعالية القانون في تقسيم الممتلكات من خلال الإجراءات المتبعة في المحاكم. وبالنظر إلى هذا الهدف، فلقد تم إجراء الدراسة وفقًا لأسلوب نوعي من خلال استخدام البحث المكتبي بالإضافة إلى العمل الميداني من أجل جمع البيانات. لقد تم إجراء التحليل على عينة تم انتقاؤها بعناية قوامها ٢١٥ قضية تم الحكم فيها خلال الفترة بين ٢٠٠٠م-٢٠١٢م، ولقد تم جمع البيانات من ست مناطق تمثل المحاكم الشرعية في ماليزيا. ولقد تم تحليل البيانات اعتمادًا على عدة متغيرات كنوع الملكية الزوجية، والعوامل المأخوذة بعين الاعتبار، وكذلك نسبة تقسيم الممتلكات. تظهر العينات أن منحى التشريع يبرز مساهمة الزوج أو الزوجة على أنه العامل الفاصل الوحيد عند تقسيم الممتلكات مما يؤثر الربية ويشجع على عملية التقاضي. تبين الدراسة أن وجود مسودة فضفاضة للتشريعات قد تسبب في تناقضات متعددة في تطبيق القانون، هذا وتتضمن المشكلات الأخرى الغموض المحيط بتعريف نطاق ممتلكات الزواج وأيضًا دور ربة المنزل، الأمر الذي لم يتم معالجته بشكل جيد كذلك. ولهذا، فإن هذه الدراسة تقترح أن تسعى المحاكم لمزيد من الاجتهاد عند التعامل مع قضايا التقسيم، وأن تأخذ أيضًا بعين الاعتبار العوامل والاعتبارات العامة مثل فترة الزواج، ورخاء الأطراف، وأشكال المساهمة الأخرى غير أوجه المساهمة المادية. كما يقترح أن يتم توظيف الصلح كأسلوب من أساليب تقسيم ممتلكات الزواج بشكل موسع، وذلك للحيلولة دون تكلفة وطول عملية التقاضي. ونتيجة لذلك، فإنه يجب منح اهتمام خاص بإعادة صياغة التشريع الحالي من أجل الوصول إلى تقسيم صحيح ومنصف لممتلكات الزواج.

APPROVAL PAGE

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DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. I also declare that it has not previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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The thesis is dedicated to my beloved husband, Ahmad Rizal Afendi and all my six sons: Dzulqarnain, Zoheerul, Ziyad, Fiqar, Fawwaz and Zainul Atif.

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LIST OF ABBREVIATIONS

A.C	Law Reports Appeal Case
C.L.J	Current Law Journal
C.PF	Central Provident Fund
E.P.F	Employees Provident Fun
ed.	Edition/editions, edited by
etc.	(et cetra) : and so forth
F.L.R	Family Law Reports
Fam.	Law Reports Family Division
Fam. Law	Family Law. 1971-
Fam.L.Q	Family Law Quarterly
FT. Arct	Islamic Family Law (Federal Territories) Act 1984
Ibid.	(Ibidem) : in the same place
Id.	(Idem) : the space
Ins.	Inside
J.H	Jurnal Hukum
JMBRAS	Journal of the Malayan Branch of the Royal Asiatic
LQR	Law Quarterly Review
LRA	Law Reform (Marriage & Divorce) Act 1976
MLR	Modern Law Review
MLJ	Malayan Law Journal
n.d.	no date
n.p	no place: no publisher
p.	page
pp.	pages
SLJS	Singapore Journal of Legal Studies
SLR	Singapore Law Report
Trans	Translator, translated by
v.	(versus): against
v. /vv.	Verse / verses
vol. /vols	volume / volumes

TABLE OF TRANSLITERATION

Table of the system of transliteration of Arabic words and names used by the
International Islamic University Malaysia.

b = ب	z = ز	f = ف
t = ت	s = س	q = ق
th = ث	sh = ش	k = ك
j = ج	ṣ = ص	l = ل
ḥ = ح	ḍ = ض	m = م
kh = خ	ṭ = ط	n = ن
d = د	ẓ = ظ	h = ه
dh = ذ	‘ = ع	w = و
r = ر	gh = غ	y = ي

Short: a = اَ ; i = اِ ; u = اُ

Long: a = آ ; I = إ ; u = و

Diphthong: ay = آي ; aw = آو

CHAPTER ONE

GENERAL INTRODUCTION AND RESEARCH METHODOLOGY

1.0 INTRODUCTION

The need for a fair distribution in dividing matrimonial assets has been the subject of debate in family law disputes. This scenario is common in Malaysia too. This is greatly due to the impractical methods employed in the division of assets, especially when the element of consideration is considered as a sole criterion in dividing the assets. There are four aspects in the distribution of assets which require serious examination: the inadequacy of the current legal provisions to assist parties in getting a fair share of the matrimonial assets to ensure that the law provides continued support to the wife and children, the current method of distribution where contribution of parties is the main criterion for distribution, the inconsistency of the present distribution practices with stipulated provisions in the enactment and the rigidity of legal provisions which provide for a specific portion of 1/2 and greater proportion. Based on the above concerns, the law pertaining to division of matrimonial assets is in need of a review in order to assess its practicality in the present legal setting. Furthermore, there are significant developments in extending the scope of matrimonial property and its division for a fair distribution of assets.

1.1 BACKGROUND OF STUDY

Division of *harta sepencarian*¹ in Malaysian Syariah Courts involves several processes and stages subjected to the specific provisions in the Islamic Family Law

¹ According to section 2 of Islamic Family Law (Federal Territory) Act 2003 *Harta sepencarian* is defined as property jointly acquired by husband and wife during the subsistence of marriage in accordance with the conditions stipulated by Hukum Syara'.

Enactments.² It involves determination of contribution in acquiring matrimonial assets which are subject to division and in determining the just portions of shares to divorced spouses. Despite the existence of the enactments, fair and equitable divisions of assets in terms of fulfillment of interest of parties and children as well as other factors have not been highlighted as part of the considerations in the practice of the distribution. As a result, the parties encounter difficulties, especially so, when the only assets available are those acquired during the marriage. This is further aggravated when divorcing spouse fail to settle the distribution either through *sulh* proceeding or other forms of settlement outside the court.³ Based on the above difficulty, the definition of matrimonial property needs to be expanded to encompass tangible and intangible properties which have not been studied in a systematic manner despite the fact that the subject matter of claim includes capital assets, business assets and other forms of property rights.

Under the current practice, the court has the power to divide matrimonial assets by taking into account past monetary and non-monetary contributions of both parties either via family joint efforts or sole effort to facilitate the judges' task of dividing the assets. In disposing the power, the courts face difficulties in deciding the extent of contribution in many cases.⁴ This complicated issue is due to the fact that the terms of joint effort and sole effort in the Islamic Family Law Enactments require the court to differentiate these assets separately. Therefore, when a spouse has actively contributed in acquiring the asset, the presumption is that both are entitled to equal

² Section 122 of Islamic Family Law (Federal Territory) Act 2003 was equivalent sections with other States Enactments. Previously, it was under s. 58 which has been repealed. However, the current provision remains the same.

³ Daud Mohamad, "Harta Sepencarian dalam Hukum Syarak" in *Isu-isu Mahkamah Syariah, Harta Sepencarian, Prosiding ex-parte dan Perintah Injunksi*, edited by Tajul Aris Ahmad Bustami, Farid Sufian Shuaib and Mohd Hisham Mohd Kamal (Kuala Lumpur: Law Centre, IIUM, 2002), 46.

⁴ For example see the case of *Wan Mahatan v. Hj Abdul Samad* (1937) 15/1 J.M.B.R.A.S. 20; *Rokiah v. Mohamed Idris* (1989) 7JH 111.

proportions of this asset. On the other hand, if breadwinner is the main contributor, the homemaker wife will be given a lesser proportion. However, in actual practice, there are other circumstances that are significantly related to the acquisition of assets. For example, the homemaker's contribution despite equally contributing to the financial support for the family has not been given due consideration in the law and in court decisions as direct contribution and joint effort.⁵

The focus in division of matrimonial assets in the Malaysian Syariah Courts practices is confined to the existing practice of division, current methods of division, particularly on elements of contribution and the present rule of division in subsistence of marriage viz. during polygamy or after the breakdown of marriage where the marriage is dissolved on the ground of divorce or the death of spouses. Discussion on these issues would mainly involve an application of related statutory provision and case law, which is directly related to the law of division of matrimonial assets after termination of marriage.

The rigidity and loose draft provisions have caused multiple and varied understandings on the application of the law and have led to the misinterpretation by the courts in the practice of the division of assets. Some interpretations on the terms such as "contribution", which is categorized in three forms such as money, property or physical work which have been direct or indirectly used for acquisition of asset as well as in the case of improvement on the asset value need to be fine-tuned. Effort in the form of views, advices and moral support are also considered.⁶ The contribution must also include sole and joint effort as stipulated in specified provisions. For

⁵ Currently, the financial contribution made by working wife to support the husband in providing for the family's expenditure is substantial especially to finance the education of children, buying food and groceries. These financial supports decrease the husband's financial burden and facilitate him to acquire the assets for the family.

⁶ Siti Zalikha Md. Nor, *Pemilikan Harta dalam Perkahwinan Islam* (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1996), 16.