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ISLAM AND ADAT

Considering the wife’s moral contribution in the division of harta sepencharian in Malaysia

The concept of harta sepencharian, a derivative of the Malay cultural custom (literally, adat) in Malaysia is now considered an integral element of shari’a secondary sources of ‘Urf (customary laws). This concept — harta (Malay: property), sepencharian (Malay: jointly acquired) is the recognition of a married partner’s share (both husband and wife) in property acquired during the material time of the marriage, regardless of whether the party in question (usually the wife) appears not to have contributed financially to its purchase or development, or even if the marriage ends through the death of either party. The article explores the evolution of the legal process that validates and promotes harta sepencharian to the level of ‘Urf through the analysis of locally decided cases in both civil and shari’a court systems. This development signifies that the substantive and procedural dynamism of shari’a itself, and the uniqueness and applicability of Malay customary laws, transcend temporal and spatial differences. They particularly challenge the assumption that the local laws, including Islamic law, are passive.

Muslim women in Malaysia: a brief analysis

According to Jamilah Ariffin (1992), in pre-British Malaya the Malays were divided into two groups: the ruling elite/aristocracy and the peasantry. Within this social structure, the roles of women were determined according to the social stratum. The women of the nobility were not physically involved in any economic activities outside their palaces although many were known to have invested their wealth in the business sector through intermediaries. As such, some women appeared to have had their own independent income at the time (Jamilah Ariffin 1992). The peasant women were more actively involved in economic activities outside of their homes, such as engaging in property-owning activities provided for them through Islamic- and adat-endorsed agricultural

The modern Malay spelling is sepencarian, but in this article the older form sepencharian has been used as it has become a standard term in Malaysian legal practice.
and trading activities. Even in a patriarchal society such as feudal Malaya, the rights of women to own property were assured (Roziah Omar 1994).

Firth (1966) describes Malay women on the East Coast as enjoying more economic freedom since they also controlled the market place, being predominantly involved in small-scale economic activities. Today, women constitute more than half of the Malaysian labour force and more women are now educated. Jamilah Ariffin (2000) also adds that the side effect of the ‘revolution of rising expectations’ among educated women plays a part in encouraging more women to educate themselves and seek better employment opportunities that promise financial stability and independence. A study done by Tan Be Tuan (Tan 198: 70) illustrates that women who were involved in economic activities or who undertook employment outside the home did so for two reasons: firstly, to supplement family income and secondly, to improve the standard of living of the family. Now that Muslim women are empowered in the public sphere, the issue of ownership of wealth and property is even more imperative. The concept of harta sepencarian both endorses and enables the right of property ownership.

**Muslim women’s status in property ownership**

A tradition of the Prophet stated that ‘Women are the twin half of men.’ The Qur’an made it very clear that both Adam and Eve were tempted, both sinned, that Allah pardoned them both after their repentance, and that Allah addressed them jointly. The Qur’an states thus (3: 195):

> And their Lord has accepted (their prayers) and answered them (saying): ‘Never will I cause to be lost the work of any of you, be it male or female; you are members, one of another.’

Even though the rights and responsibilities of men and women are equal before Allah, they are not necessarily identical. When Islam enjoins the seeking of knowledge, it makes no distinction between men and women. Muslim women are entitled to as much freedom of expression as Muslim men and have participated in intellectual discourses with the Prophet himself and other scholars (Qur’an, 58:1–4). According to Islamic family law, what the wife earns is never the right of the husband; it is hers to dispose of as she herself deems appropriate. Women also have the full right and freedom to transfer or to form any contract over what she possesses (Ahmad Hidayat Buang 2001). There are many provisions in the Qur’an that clarify Islam’s admonishment of those who believe that women are inferior to men (Qur’an, 16: 57–69, 62; 42: 47–50; 43: 15–9; 53: 21–3).

In Islam, the husband is obligated to provide for the family, the wife is not. Even if she has money of her own, she is not obligated to spend it for the sake of the family, although the Qur’an promises her a reward for doing so. The Qur’an states that (4: 34):

> Men are in charge of women, because Allah hath made the one of them to excel the other, and because they spend of their property (for the support of women).

It is worth noting that Islam has legal provisions for women with regard to the right of inheritance as well as property ownership. The Qur’an (4: 7) states that:
From what is left by parents and those nearest related there is a share for men and a share for women, whether the property is small or large . . . a determinate share.

The general rule is that the female share is half that of the male’s except in such cases where the mother receives equal share to that of the father. What really transpires in the majority of Muslim societies however, is something that is removed from the basic teachings of the shari’a. The intermingling between the true practice of Islam and the prevalent social custom according to Riphenburg (1998) could have been the real issue behind the alleged oppression of Muslim women, especially in a custom where patriarchy holds strong.

In addition, the negative portrayal of Muslim women does not help the situation. These are evident from western Orientalists’ writings that apologetically claim ‘woman’s privileges over the man’ (Hjarpe 1983: 16) based purely on an interpretation of certain rituals where women are faced with various prohibitions such as not being allowed to pray and fast during their menstrual period. The basis of the criticism (Esposito 1982; Hjarpe 1983; Khoury 1995) is that the shari’a is in essence patriarchal in nature and thus Muslim women are considered inferior to men, and dependent on close male relations in matters concerning maintenance, divorce as well as guardianship (Esposito 1982: 48; Hjarpe 1983: 15).

However, Schacht (1964: 126), a prominent western scholar of Islamic law describes the position of women in Islam as ‘not unfavourable’ in that although women were considered inferior to men in religious duties, evidence, inheritance as well as marriage, they however, have an equal position with men with regard to the law of property and obligations. Schacht also describes how women, like slaves and non-Muslims, are ‘second class citizens’ (1964: 124–33) as they remain inferior socially, religiously, legally and politically. Another scholar, Anderson (1967: 221) demonstrates that patriarchy is a feature of Islamic family law as shown in permission granted by the Qur’an for men to contract polygamous marriages. Moreover, the wife is obliged to obey her husband. Her disobedience will forfeit her maintenance. In addition, natural guardianship rests upon male descendants. This guardianship is always vested with a woman’s father although upon divorce a mother has the right to custody. Finally, women receive less than their brothers in terms of inheritance. Anderson (1967: 221) chose to discuss the features of Islamic family law that are intended to be patriarchal to mean ‘the type of family which has been typical of Islamic Law throughout almost all the centuries of its development’.

Clearly, the opinions of earlier scholars such as Schacht and Anderson, may be illustrative of some Muslim communities, but cannot be said to be entirely representative in its contextual application for all Muslim societies. Many contemporary western scholars refute the oversimplification of such observation. Moors (1999) for example argues that Islam is not exclusively patriarchal. She bases her argument on what the Islamic jurists discuss in terms of a woman’s power in certain areas of Islamic law. For example, a woman is able to contract her own marriage under the Hanafi school of law. Furthermore, she can include or insert certain conditions in her marriage contract such as prohibiting her husband from a polygamous marriage.

Many Islamic exegetes argue that the word *qiwwam* provided in the Qur’an (4: 34) implies physical and intellectual advantage of a man over woman (al-Maraghi 1998; al-Qurtubi 1993; al-Razi 1993; Ibn Kathir 1969; Zuhaili 1991). Al-Jalalayn (1954) for instance has stated that the dominance and leadership mentioned in the verse
include wisdom, religiosity and credibility as witness. Raihanah Abdullah and Soraya Khairuddin (2009) note that some of these interpretations affect the societies’ perceptions on the position of women in Islam. These interpretations have been refuted by Muslim feminists such as Aziza al-Hibri (1982), Karmi (1996) and Amina Wadud-Muhsin (1992) among others who claim that these interpretations are inconsistent with Islamic teachings. Al-Hibri (1982: 218) strongly opposes such interpretations because ‘there is no reference in the passage to male physical or intellectual superiority’. Karmi (1996: 82) maintains that patriarchal structures have been perpetuated in Arab society and not by the shari’a per se, and that ‘Islam has been exploited by patriarchal society to legitimize its discrimination against women’. Amina (1992: 70–2) has suggested more ‘liberal re-interpretations’ for verse 34 whereby ‘men’s responsibility for women only applies to family support’ due to socioeconomic changes within the society. This argument is parallel to the commentary of contemporary Muslim scholars such as Al-Tabari (1968), Syed Qutb (1982), and Faisal Othman (1993).

Theoretically, references to Islamic primary sources as well as western and Muslim scholarly works, point to the enabling environment for Muslim women to own property. Muslim women can claim ownership of property at every stage of her life either through her capacity as a mother (inheritance, gift), daughter (inheritance, gift), sister (inheritance, gift), and wife (dower, maintenance, inheritance, and gift) (Zaleha Kamaruddin and Raihanah Abdullah 2008) as well as a career individual (salary). Harta sepencharian is another facet to the property ownership of Muslim women that occurs during the course of the lifetime of the woman (upon her divorce from her husband) and is provided for under adat.

**Adat and Islamic law during British Malaya**

The current civil law in Malaysia was established incrementally during the British colonial period with British intervention into local politics and trade in the 19th century. However, it has been argued that for at least the first 50 years prior to the advent of the civil law system, adat and Islamic law had existed as parallel and corresponding systems documented in various acts, administrative minutes, law books and reports. M.B. Hooker (1972: 212) states:

These [adat and Islamic law] provide materials upon which conflict is possible, but they do not in and of themselves generate conflict; after all, those Malays who are subject to adat are also Muslims and they have an interest in minimizing conflict situations in so far as this is possible.

Before British intervention, there was no uniform system of law in the country although a set of practices referred to as the Malay Legal Codes existed and were applied in some parts of the country (e.g. Melaka and Perak). These practices were premised on aspects of the shari’a, but with many variants depending on which type of adat prevailed. Adat is most often translated as Malay cultural customs and traditions, including moral value systems. Hooker (1972: 2) provides the widest range of possible meanings of the term, and these include manners and etiquette, land tenure, law in the sense of
rules, legal usages and technique, the natural order of things (e.g. rivers running downhill), and what is proper or correct decorum. There is no single system of adat, and even its codification into two distinct systems in peninsular Malaya is inaccurate for customs vary from district to district. Most texts define two types of adat that influence the Malay community in Malaysia, namely, adat perpatih and adat temenggong. Anthropologist Wazir Jahan Karim (1992: 62) describes the differences:

*Adat perpatih* was based on an elaborate code of written law, derived from the Minangkabau principle of exogamous matriliny where women maintained control over rights of succession to land and other forms of immoveable property. *Adat temenggong* was more closely associated with existing rules of social organization of the Malay-speaking communities in Palembang, Sumatra. The latter set of adat was patrilineally structured in their provisions of Malay Kingship.

Elements of adat are now part of the legal source of Malaysia, though limited in scope. This article’s exploration of *harta sepencharian* or joint rights to property acquired during a marriage also provides detraction from the commonly held perception that Islam and especially shari’a is entirely patriarchal. Such a perception does not take into consideration the evolution of Islam in other cultural contexts as in Southeast Asia, where elements of Malay culture that do not contradict fundamental principles of Islam have been assimilated into shari’a. A more historical perspective would include a British colonial strategy that relegated Islam to personal law so as to marginalise and contain it. However, a perspective that is least explored in studies about Islamic law in Malaysia, is the way that pre-Islamic Malay customs or adat prevail in the evolution of shari’a. One of the hallmarks of the integration of the indigenous Malay local customs into Islam is the advancement of the legal concept of *harta sepencharian* as a source of Islamic law in Malaysia.

**Islamic law, adat and application in contemporary Malaysia**

Malaysia practises a federalist, parliamentary governance system that is secular, modelled on the Westminster system. While it can never be assumed that all Malays are Muslim, a Malay in Malaysia is constitutionally defined under Article 160 (Federal Constitution, 1963) as

... a person who professes the religion of Islam, habitually speaks the Malay Language, conforms to Malay custom.

Islam enjoys a special status as the religion of the ethnic majority, and the Constitution further cements the status through Article 3, Clause 1 as follows:

Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.

Muslims in Malaysia are currently subject to two systems of law and two separate court systems: Islamic law for domestic and family (personal) matters such as marriage,
divorce, maintenance, guardianship and inheritance through the shari’a courts; and common law (also variously described locally as civil law) through the civil courts. The dual system of civil law and Islamic law were formulated during the period of British Malaya, mainly as a compromise between British economic interests and the Malays’ hereditary and customary rights (including religious matters). These negotiations later formed the foundation upon which the multi-ethnic nation was built and emerged after independence from the British.

Islamic personal laws govern Muslims in Malaysia, and are a matter regulated by the individual state and therefore administered by the state shari’a courts (Mehrun Siraj 1994). Interestingly, the source of power for shari’a courts was also derived from the Federal Constitution through Item 1 of the State Lists which expressly provides that:

Except with respect to the Federal Territories . . . Islamic law and personal and family law of persons professing the religion of Islam, including Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; 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, Malay customs; Zakat, Fitrah and Bai’ulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Syariah Courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of ANY of the matters included in this item, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic Law and Malay customs.

The Federal Constitution provides for the creation of a separate court of judicature system, which clearly does not include the shari’a courts as Islamic law is a State matter and not a Federal concern. The hierarchy of courts in Malaysia is divided into the superior courts and the subordinate courts (Kumar 2005). On the other hand, the shari’a courts in each state have limited jurisdiction (Nor Aziah Mohd. Awal 2003) pertaining to personal matters only (Raihanah Abdullah 2003). Raihanah Abdullah (2003: 153) further observes that the shari’a courts (also known as the Qadi court) were perceived as ‘second class courts’ compared to the civil courts although there have been efforts made to reform the Shari’a courts as evidenced by the 1988 amendment of Article 121A of the Federal Constitution that confer the Shari’a courts with exclusive jurisdiction over the civil courts.

As it stands, the sources of Malaysian law are illustrated as in Figure 1.

The sources of law recognised by Malaysian courts, including the shari’a courts, include written and unwritten laws as well as Islamic law and customary laws of the major ethnic groups in Malaysia. With regard to adat laws’ applicability, it is categorised under Islamic law (primary and secondary sources).
Adat in practice: an analysis of court decisions on harta sepencharian matters

As stated earlier, Islamic family law in Malaysia has incorporated some customary practices of traditional Malay cultural custom or adat on matters concerning the distribution of property acquired during the spouses’ conjugal life. This concept of property ownership is widely known among the Malays in Malaysia as harta sepencharian, a term which originated from the matrilineal system of the state of Negeri Sembilan and which is also known in Indonesia as carian laki bini. Both terms denote a similar concept, i.e. a division of any assets acquired by the husband and wife during their marriage through their joint efforts, or by sale of any such assets and the division of the proceeds between the parties at the time of the dissolution of marriage (Ahmad Ibrahim 1968). Property — either movable or immovable — may be claimed by either party as long as they can produce evidence of the said property as harta sepencharian. What follow is an analysis of divorce proceedings and court (civil and shari’a) decisions on property distribution matters that authenticate the acceptance of adat as a source of Islamic law.

Cases of harta sepencharian being decided in civil courts

(i) Tijah v. Mat Ali (1888 4 Kyshe 124) – harta sepencharian recognised by civil law

One of the most important early studies on jointly acquired property during marriage was by colonial officer E.N. Taylor (1937), in his article ‘Malay family law’. Cases cited by Taylor were all decided by English judges based on the enactments passed during the colonial period. Furthermore, they all show how adat and in particular harta sepencharian configured legal judgments. In the 1884 case of Tijah v. Mat Ali (4 Kyshe 124), both husband and wife had jointly rented land and planted it with padi and nipah (palm) sugar. They sold their produce and they
used the money received from their efforts for their daily expenses. At the same
time the husband retained the balance for himself. Upon divorce, the wife
claimed RM50 from the balance as harta sepencharian. The court called the Kathi
(or Qadi – judge) to give evidence on matters relating to Muhammadans
(Muslims). The Kathi argued that according to Islamic law, upon divorce a wife is
entitled to a half-share of the property acquired during their matrimonial union.
However, the husband appealed and the appeal judge ruled that the wife was not
entitled to a half-share of the property. The judge argued that ‘the joint earnings
of husband and wife during covertures were, according to English law, clearly
the property of the husband and such it must be even among Muhammadans
here, unless the Muhammadan Marriage Ordinance provided otherwise’.

It becomes obvious therefore that in the Muhammadan Marriage Ordinance of
1880 all settlements and dealings with property between a Muhammadan husband
and wife shall be governed by the provision of English Law. In his commentary, Taylor
argued that ‘having regard to the evidence of the Kathi who must have been familiar
with local custom and practice it may fairly be inferred that up to 1880, at any rate,
it was usual for joint earnings to be shared upon divorce’. He then predicted that if
the case of Tijah who had failed to claim for harta sepencharian in the High Court of
Penang, had been brought to Malacca or Negeri Sembilan in which adat perpatih was
practised by the Malays, she would have probably succeed provided that she pleaded
the custom.

(ii) Teh Rasim v. Neman (1919 Perak Supreme Court Suit No. 232) – harta
sepencharian as claimable by the defaulting party in divorce

Although adultery and fornication are offences under shari'a, a wife’s claim for harta
sepencharian is unrelated to the grounds of divorce even if it is proved that it was for
adultery. Teh Rasim v. Neman illustrates the survival of Malay customary law
regarding the division of matrimonial property where the court held that the
woman was entitled to one-third of the land. In this case the parties were
married about the year 1900. They had five children and the plaintiff did all the
house chores. The parties then acquired from the government a piece of land
which they planted with rubber. Four years later they sold the land for about
RM1,100. The husband then bought another piece of land and the wife jointly
undertook in cultivating it. The wife was divorced after 18 years of marriage.
She then claimed one-third of the property as harta sepencharian. The court
sought advice from Raja Chulan (who was a Malay chieftain or Raja Di-Hilir in
the state of Perak and regarded as an authority on Malay customary law) and
then ordered the defendant to transfer one-third of the land registered in the
name of the husband to his wife. An interesting remark by Taylor on this case
was that ‘the woman’s claim was not on any right of a wife as such but on the prin-
ciple of remuneration for work done’. The court affirmed the harta sepencharian in
favour of the wife although she had been convicted of adultery or fornication and
was the defaulting party in the divorce proceedings.

This appears to be in conflict with the Islamic legal position on a disobedient
wife or what Islam would term a nashiza. In Islamic classical texts such as al-
Hidaya (Al-Marghinani 1870) and Minhaj al-Talibin (al-Nawawi 1914), a nashiza is
a wife who rebels against the marital authority of the husband. Jurists give examples of a nashiza as a wife who leaves her matrimonial house without lawful cause or without the husband’s permission, or who refuses conjugal relations. On this account the wife will lose her right to maintenance. Once she gives up being disobedient, she is entitled again to maintenance. However, if she refuses to fulfil her marital obligations as her dower (mahr) has yet to be paid or due to her husband’s cruelty, the maintenance in the above situation is not suspended. This is because her refusal to fulfil her marital obligation is pursuant to her rights and therefore she does not forfeit her right to maintenance. Clearly, in the case of Teh Rasim, under Islamic law, the adulterous wife would not be able to uphold her right to maintenance let alone property ownership. Another observation worth noting is that in these earlier cases, the Kathi was usually referred to by the court pertaining to the division of harta sepencharian according to Malay custom and Islamic law. This is because the Kathi was believed to be a person of authority in giving legal rulings in matters concerning Muslims. Otherwise reference to experts in Malay customary laws (such as Raja Chulan, the Malay chieftain) would be an alternative as the facts of the Teh Rasim case attested.

(iii) Re Elang (Deceased) (1927), Re Kulop Degor (Deceased) (1928) and Lebar v. Niat (1920) (Lower Perak Distribution Suits Nos. 11, 42 and Land Suit No. 3) – variation of calculation in the distribution of property rights

In the case here, the court had differentiated the division to which the wife was entitled by basing it on her contribution in acquiring the property. Taylor (1937: 1) argued that ‘If the woman assisted in the actual cultivation she can claim half. If she did not work on the land she receives a smaller share – perhaps one third. If a man of this class earns a salary (e.g. as a Government servant) and property is bought out of his earnings the wife’s share is one third.’


The concept of harta sepencharian which was decided upon in earlier cases has been continuously upheld by the court. In Boto’ v Jaafar (1985 MLJ 98), the court held that harta sepencharian is a ‘legal recognition of the part played by a divorced spouse in the acquisition of the relevant property and in improvements to it. 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 property was harta sepencharian and it therefore falls on the other spouse who denies the claim to rebut the presumption’. In this case the husband owned a fish business which flourished during their marriage. The wife did not play any major part in carrying out the business; however she always accompanied her husband on many of his business trips. The court held that the fact that the wife accompanied her husband on his business trips and gave up employment for the sake of their marriage would be regarded as her joint effort in the acquisition of their marriage properties. She was thus entitled to one-third of her husband’s properties acquired during their marriage although these properties were registered under her husband’s name.
Cases of harta sepencharian being decided in shari’a courts

We have seen in the earlier cases where the civil courts upheld the decisions that recognise the validity of harta sepencharian as a source of Malaysia law. The next set of cases was decided by shari’a courts that upheld the validity of harta sepencharian as a source of Islamic law.

(i) Tengku Ainun Zaharah v. Dato Dr Hussin (1989 3 JH 125) – recognition of moral part played by spouse in property acquisition

In this case, the husband had acquired considerable property amounting to five pieces of land and five shops during his marriage. The properties were acquired by his sole effort and his wife had made no financial contribution towards the property. Of the wife’s claim for harta sepencharian, the Selangor shari’a court held that although the wife had not made any financial contribution, she had made moral contributions wherein the husband had been rapidly successful in the business and gained public confidence that he had enjoyed by virtue of his wife’s status as a member of a royal family. Because of her, he was also conferred the title of Dato’. The court then gave the wife a half-share of one of the pieces of land that was acquired by the husband. The court took into account the moral contribution of the wife, whereby she had taken care of the welfare of the family and the household.

(ii) Rokiah v. Mohd. Idris (1989 3 MLJ ix) – recognition of moral part played by spouse in property acquisition

In this case the learned Chief Qadi dismissed the wife’s claim for harta sepencharian as the properties were acquired solely by the husband. The wife appealed to the Shariah Board of Appeal which held with an interesting judgment that the wife’s indirect contribution through looking after the family and household must also be considered before any attempt of division of the property. The court had referred to a classical law text of the Shafi’i School of Islamic jurisprudence, the Kitab al-Majmu’ which argues that it is not compulsory for a wife to do household work such as cooking, washing and cleaning and that the intention of the contract is for the couple to enjoy each other’s company. The judgment held that what the wife did was in fact helping the husband by looking after him and the family for a period of over 35 years, as well as accompanying him on his various business trips. The Appeal court then granted the wife one-third of her husband’s property, which included house, land and her husband’s investments. The one-third share of the property was based on the moral and not financial contribution of the wife towards the property. If, as in the previous case cited, the wife had helped the husband financially in earning the property, then she would be entitled to claim half of the said property.

(iii) Zainuddin v. Anita (1980 JH 73) – variation of calculation in the distribution of property rights based upon evidence

In many other cases, the court relied upon the evidence of the wife regarding her contribution towards the matrimonial property. However, if a dispute occurred between the spouses on the amount of their contribution towards the property, then the court decision would be based on certain evidence given by either
spouse. In the Federal Territory case of Zainuddin v. Anita, (1980 JH 73) the Shariah Board of Appeal of the Federal Territory held that (a) If there is sufficient evidence as to the contribution of the claimant, the value of that contribution would be given to him or her; (b) If the evidence is insufficient as regards the contribution of either of them, they should be asked to take an oath. For example they could take an ordinary oath by saying ‘In the name of Allah, I swear that I have contributed certain amounts to acquire the property.’ If both husband and wife take the oath, then the property will be divided equally between them. If the parties refuse to take the oath, then the property would also be equally divided. If only one of the parties takes the oath, the property would go to him or her. If either of the parties die, the oath will be taken by his or her heirs, if they claim the deceased’s share; (c) If according to traditional Malay custom, either of them contributes more than the other, then the division will be as stated in (a) and (b).

It is clear that the law has guaranteed the right of either spouse in the division of harta sepencharian. However, in determining the quantum entitled by either spouse on harta sepencharian, evidence is indispensable. In this regard both spouses contributed financially in acquiring the property. On the other hand, if it is proven that the wife has no financial contribution, the court would then divide the property with the wife entitled to one-third of the share.

(iv) Roberts @ Kamarulzaman v. Umi Kalthom (1960 1 MLJ 163) – the husband’s right to claim harta sepencharian
Although in many cases the wife is normally the plaintiff who claims for the division of harta sepencharian, it is important to note that adat also recognises claims pursued by a husband towards any properties acquired during the marriage. In an earlier case on the division of harta sepencharian, the husband was entitled to an equal share of the properties acquired during the marriage. In this particular case, the husband’s claim for the division of harta sepencharian was on the house which was registered under the wife’s name. They had bought the house at the price of RM50,000 wherein the husband paid about RM40,000 and the wife contributed RM10,000. The court found that there was no evidence that the house was intended to be a gift to his wife and decided to divide the property equally as agreed by both parties. In this case both the parties finally agreed to divide their harta sepencharian equally without any court interference.

(v) Hajjah Sauda v. Hanafi & others (1993 JH 284) – harta sepencharian claim upon death of one party
There are occasions when the court will grant in favour of a wife in a situation where she survives her husband. Under the Islamic law of inheritance, the wife is entitled to a quarter of the deceased’s property if the deceased has no children and one-eighth if the deceased has children. However, in Malaysia the claim of harta sepencharian is not only upon divorce but also due upon the death of either spouse. In Hajjah Sauda v. Hanafi and others, the plaintiff who was a widow claimed a share as harta sepencharian on four pieces of land registered under her late husband’s name on the grounds that the property was jointly acquired during their marriage. The court held that the four pieces of land were considered harta sepencharian as the properties
were acquired during the deceased’s marriage with the plaintiff. Therefore the property should be divided equally between the plaintiff and the deceased. In this regard, the properties were divided into two parts. One was regarded as *harta sepencharian* and the other part was deemed the estate of the deceased. The part which was the estate of the deceased was divided according to the Islamic law of inheritance. In this case the wife attained a greater share of the deceased properties by way of *harta sepencharian* as well as through the Islamic law of inheritance. She also appealed that the lands registered under her name belonged to her. The Shari’a Appeal Court ordered the wife to take an oath that the properties belonged to her, upon which they were subsequently awarded to her. It is interesting to note that the court did not make any attempt to regard her property as *harta sepencharian*, in which case half of the wife’s property would then be inherited by her late husband’s children from his other marriage.

**Case(s) of harta sepencharian being decided in both civil and shari’a courts**

There have also been simultaneous claims made by parties in both civil and shari’a courts with regard to a particular *harta sepencharian* property. In a case that was reported widely in English and Malay newspapers (*New Straits Times*, 8 February 2001) and *Utusan Malaysia* (5 December 2001) a claim for property was brought up in both courts. In 1998, the vice-chairman of Magnum Corporation (a gambling-related company) claimed that he was the beneficial owner\(^2\) of a bungalow house registered under his name. He also asked for the removal of the private caveat on the house entered earlier by his daughters on April 1998. In August 1998, his children filed for declaration of *harta sepencharian* on the said bungalow house at the Federal Territory Shari’a High Court. They claimed the house as *harta sepencharian* on behalf of their late mother who passed away on 20 September 1994 while she was the wife of the vice-chairman. After a few years, their father had remarried. In December 2001 the Shari’a High Court held that the court had the jurisdiction to hear the application made by the vice-chairman’s children to declare the house (valued at RM3.9 million) as *harta sepencharian* and that it was considered the deceased’s property as well. The children claimed that the house was acquired during the marriage of their father and late mother. If the shari’a court under any circumstances declares the property as *harta sepencharian*, it would be an interesting judgment and the discussion would contribute towards the positive image of the shari’a courts, which generally have a reputation for handing down only conservative judgments. It should be noted that the party to the claim is not privy to the joint acquisition of the property, but merely heir to the party in question. The question of whether the children have the *locus standi* to claim the said property as *harta sepencharian* must be determined by the shari’a courts. The case was finally resolved by mutual agreement.

There are also cases where a wife has had to renounce her rights for *harta sepencharian*. This can be seen in cases where the wife decides not to contest the claim to the

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\(^2\) A ‘beneficial owner’ is entitled to the possession and use of land or its income for his/her own benefit regardless of whether the owner pays for it so long as the deeds and title of the land is under his or her name (*A dictionary of law*, Oxford: OUP, 2003, 5th edn).
division of *harta sepencharian* in court. Usually, where the value of the property is small, the wife would renounce her rights on the *harta sepencharian* as the costs in time and money would exceed her claim. In the end, the best choice sometimes is to agree with her husband’s proposal to withdraw her rights on the *harta sepencharian*.

Generally, based on the cases decided in courts, a wife would claim for *harta sepencharian* in a situation where the property is significantly more valuable. One such case reported by local daily newspapers was of a wife’s claim for RM10 million on the property acquired during the marriage with her politician ex-husband (*Utusan Malaysia*, 4 November 1998). In another case, the wife withdrew her claim for *harta sepencharian* a few months after filing it. She had claimed for RM400,000 apart from two luxury cars, a bungalow and a plot of land. It was believed that a mutual understanding was reached between the two parties concerning the division of the *harta sepencharian*, indicating the strength of claims made upon such a premise.

**Adat in practice: the rule of current law revisited**

As evidenced from the case laws, the general rule pertaining to the division of *harta sepencharian* is that the woman is entitled to a share based on the amount of her contribution towards the property. The shari’a courts in early 2000 issued orders to declare property as *harta sepencharian* before the courts grant permission for a husband’s additional marriage. In most cases of permission for polygamous unions, the husband has had to declare to the court any property that was acquired during his previous marriage. By determining that the property is considered as *harta sepencharian* in which the existing wife has shares, the husband is then unable to transfer any of the property either to other persons or his newly-wedded wife. In this context the rights of the existing wife are secured by law.

However, in practice, there are hardly any cases where the court immediately issues an order for *harta sepencharian* when the husband has contracted additional marriages in contravention of Malaysian Islamic Family Law Enactments. In this example, the husband contracted an additional marriage without the shari’a court’s permission. An unfortunate housewife aged 39 with six children lost all her property that had been jointly acquired during the 16 years of marriages when the husband transferred the property to another person (his second wife). The husband had married a 20 year old woman in Kuala Lumpur. When the existing wife finally discovered the truth about her husband’s second wife from her friends, and by the time she got to know of her husband’s second marriage, the property bought by the husband during her marriage had been transferred to other persons. Because there is a *lacuna* (void) in the law, the woman in this case had no protection in matters pertaining to her rights of jointly acquired property.

Islamic family law in Malaysia merely provides that a wife is entitled to the division of *harta sepencharian* upon divorce or death. There is no provision under the law regarding her right to *harta sepencharian* if her husband contracts another marriage except by way of judicial circular in which the court may issue an order pertaining to the division of *harta sepencharian* in case of polygamous unions approved by the court. This circular, issued by the Department of Islamic Judiciary of Malaysia, was in response to organisations (especially non-governmental organisations) advocating women’s issues to protect the existing wife’s right to her share of *harta sepencharian*. Before granting permission to a husband to take another wife, the court may issue an order for any assets acquired during their marriage.
to be awarded proportionately to the existing wife. By the end of 1990s, most shari’a courts in Malaysia would issue an order on the harta sepencharian, and the maintenance of the wife and children together with the permission for a polygamous union.

However, if the polygamous union was contracted in contravention of provisions in the law, the existing wife’s rights to any assets acquired during her marriage are not protected by the law or even by any judicial circular. The law has made it clear that the husband who has contracted another union outside of the Malaysian jurisdiction (for example, in southern Thailand) may register his new marriage provided that the marriage is valid according to Islamic Law of Marriage. Sections 23 (1) of the Islamic Family Law Act 1984 provides that

No man, during the subsistence of a marriage, shall, except with the prior permission in writing of the Court, contract another marriage with another woman nor shall such marriage contracted without such permission be registered under this Act: provided that the Court may if it is shown that such marriage is valid according to Hukum Shara’ [sic] order it to be registered subject to section 123.

In this regard section 123 of the 1984 Act provides that polygamy without the court’s permission is an offence and shall be punished with a fine not exceeding RM1,000 or with imprisonment not exceeding six months or both. However, the point remains that the wife lost the possibility of the court issuing a harta sepencharian order because the polygamous marriage had already been contracted. This is a lacuna that has caused considerable amount of grievance on the part of wives.

In addition to this judicial irregularity, the existing wife is not a party when the court permits the husband to register his polygamous union, which was contracted without the shari’a court’s permission. The court will not summon the existing wife to present her opinion or requests to the court, as the law only provides for a summons being served to the existing wife prior to the husband’s application for contracting another marriage. With this particular lacuna, the law seems to give an opportunity to the husband to transfer any assets acquired during his existing marriage. Although some women activists have argued otherwise and blame patriarchal proclivities, the Malaysian government did initiate legal reforms of Islamic family law enactments in 2000 to ensure that justice is done towards women pertaining to their already existing right to their share of harta sepencharian as guaranteed by the law.

Despite the way the incorporation of adat into the shari’a, specifically in the form of harta sepencharian, has enabled the rights of Muslim women, there have been arguments from Muslim women who claim that they have less rights than women who come under the jurisdiction of civil law. ‘Are Muslim women supposed to turn over and play dead while our non-Muslim sisters march forward into the new millennium and enjoy greater spheres of rights as citizens of this country?’ asked Sisters in Islam, the leading Muslim women’s NGO (New Straits Times, 13 September 2002).

The Law Reform (Marriage and Divorce) Act 1976

The Law Reform (Marriage and Divorce) Act of 1976 (henceforth LRA) that came into force in 1982 is the main legislation in civil law governing non-Muslim marriage and
divorce matters. It was the result of a Royal Commission of Inquiry into non-Muslim marriage and divorce laws, which convened in 1970. An excerpt from the parliamentary debate over the legislation is illustrative of the issue. Dr Tan Chee Khoon (Zaleha Kamaruddin 1998: 84) was reported to have commented that

... marriage and divorce first in Malaya and now in Malaysia have been dominated by male chauvinistic thinking and all the odds have been stacked against the women and the wives in this country. The present laws on marriage and divorce are so blatantly unfair to the women that our judges have torn their hair with rage but they are unable to put right the injustice against women of this country in matters of marriage and divorce.

This statement is part of the debate over the legislation that indicates the complex legal framework of laws for marriage and divorce. As Malaysian society comprises different ethnic groups, marriage and divorce were governed by a mixture of personal or customary and statutory laws for non-Muslims, which in turn differed widely depending on the ethnic or religious group. More importantly, the registration of non Muslim marriage was not compulsory.

Marriages contracted outside of the Registrar of Marriages were deemed ‘customary marriages’ and these were most common among the Chinese and Indian populations. Customary marriages according to Chinese cultural custom would include the customary filial tea ceremony to both sets of in-laws, and taking a family photograph. For Hindu Indians, it would include a temple ceremony and the presentation of a sacred string or gold tied around the bride’s neck. The court prior to 1982 generally recognised customary marriages, except when one or both parties wished to have a divorce. These were because customary or religious marriages were potentially polygamous, and were not recognised for the purposes of matrimonial relief by virtue of the provisions of the Divorce Ordinance, 1952. Under the LRA, customary marriages not registered with the Registrar of Marriages in the country’s judicial system, are regarded as void. This development of only recognising marriages registered was in part to formalise unions and enable easier determination for the courts regarding maintenance, custody and other matters. But the LRA also had the elimination of polygamy as an objective. However, the LRA rendered women in customary marriages with few rights beyond not repudiating those customary marriages already in existence when the law came into force, except for a few cases that are discussed below.

While a woman in a customary marriage had no share in the division of matrimonial assets, upon the death of her partner she could make claims for properties or assets held jointly and file dependency claims under the Civil Law Act of 1956. In Joremi Kimin and anor. v Tan Sai Hong (2001 MLJ 1 268) the Court of Appeal upheld the decision that the respondent was entitled to claim for damages for her husband’s death although their customary marriage had not been registered, but added that the validity or otherwise of the marriage was not a concern in that claim. The judges held that if there was a valid marriage subsisting between the plaintiff and the deceased, section 34 of the LRA would validate it. The judges even held that pursuant to section 34 of the LRA, the plaintiff did not even have to show that there was a marriage according to Chinese customary rites so long as there was a marriage. Section 34 of the LRA refers to the existence of ‘any’ marriage but does not define the
term ‘marriage’. Thus, the term ‘marriage’ therein should be given its ordinary everyday meaning. The judges held that the fact that the marriage was not solemnised and registered by a Registrar was of no consequence; it was validated by section 34 of the Act.

Likewise, the decision of Justice R.K. Nathan in Leong Wee Shing v. Chai Siew Yin (2000 CLJ 1 439) was referred. Justice Nathan allowed the application by the respondent for a declaration that her customary marriage to the late Lau Yen Yoon in 1995 was valid. The judge held that pursuant to Section 34 of the Act, the plaintiff does not even have to show there was a marriage validated according to Chinese customary rites so long as there was a marriage. Justice Nathan held that section 34 refers to the existence of ‘any marriage’ and that the word ‘marriage’ is not defined. He looked at the everyday meaning attributed to the word ‘marriage’ as it is understood by an ordinary person. The judge further held that the very act of printing and sending out a wedding invitation to a customary marriage and other ceremonies of such a wedding reflect the act of marriage having taken place. He even held that these ceremonies constituted solemnisation of the marriage as required by section 22 and 24(1) of the LRA because ‘section 34 of the Act takes care of that and validates the marriage’ (2000, CLJ 1, 445: 445). This case is still going through the court process as Lau’s mother appealed the decision, the Court of Appeal dismissed it and the respondent is applying for leave to appeal to the Federal Court.

In contrast to Leong’s case, a couple in Ipoh who had been married according to Chinese customary rites in 1998, decided to petition for a divorce. However, in that case (Yeoh v. Chew, 2001 4 MLJ 373), Justice Abdul Hamid Embong reverted to the position that customary marriages were void unless registered. In his judgment delivered on 29 September 2001, the judge described the union as void ab initio (from the beginning) or a non-event.

Many legal practitioners felt that the two earlier judgments described above conflicted with the 1976 LRA, which had as its primary purpose the clarifying of the codification of marriage and facilitation of divorce through the legal system. ‘The public is now left wondering why the Act should have resulted in such an ambiguous state of affairs’ and are calling for clarification (Sunday Star, 7 October 2001). Some members of the public who were interviewed for the newspaper report wondered why the LRA should have resulted in such disparate decisions by the civil law system.

The problem seems to lie with Section 34: ‘Nothing in this Act or the rules made there under shall be construed to render valid or invalid any marriage which otherwise is invalid or valid merely by reason of its having been or not having been registered.’ Some legal practitioners consulted have argued that Section 34 does not override the clear preceding provisions with regard to registration. They state that Section 34 merely covers specific situations where registration does not confer validity (to a bigamous marriage) and non-registration does not invalidate marriages (such as those contracted abroad for example) in accordance with the law of that country. They hold that the LRA preserves its penal sanctions (prison sentence of up to 3 years and a maximum fine of RM5,000 against non-registration) which indicate that only a registered marriage has validity. Other lawyers point to the terms of reference of the 1970 Royal Commission. The Commission was to determine the feasibility of reform, if any were considered necessary, in particular, in the context of United Nations Convention regarding consent to marriage, minimum age of marriage and the registration of marriage.
marriages. The preamble to the Convention puts forth that all states should take appropriate measures to establish a civil register or other register in which all marriages will be recorded.

Thus, until the issues raised regarding the validity of a marriage are resolved, non-Muslim Malaysian women would appear to face a predicament. Other problems with the LRA include the wording in Section 106(1), which suggests that no party can file a divorce petition unless s/he has referred the matrimonial difficulty to a conciliatory body. As no procedural rules have been formulated under Section 55(1) of the Act for the guidance of these conciliatory bodies, their implementation has at best, been described as haphazard.

However, the problems in the LRA should be seen also within a larger more positive context of a State and its citizens actively increasing the well being of its women. The LRA has made divorce easier to obtain and certainly more civilised because of the inclusion of ‘mutual consent’ (Section 52) and ‘irretrievable breakdown of marriage’ (Section 53) as grounds for divorce. In addition, Malaysia is the first Asian nation with legislation (1994 and 2001) enacted to criminalise domestic violence. Furthermore, the fundamental liberties and rights of the citizens, including women were safeguarded as in Article 3 of the Federal Constitution. In addition, Article 8 was amended to include ‘gender’ in provisions that forbid discrimination.

Concluding remarks

The customary practice of recognising jointly acquired property or harta sepencharian between husband and wife undoubtedly gives certain advantages to Muslim women in Malaysia. Under the Islamic Family Law Enactments in Malaysia, Muslim women can claim harta sepencharian not only at the instance of divorce but also in the event of the husband contracting another marriage or in case of death. Claims for harta sepencharian are no longer in the form of traditional properties such as agricultural land, kampong houses and livestock but have changed into more complex, modern and higher value items such as business shares, stock market shares, houses worth millions of Malaysian ringgit and other movable and immovable properties owned as harta sepencharian. It is also interesting to note, that the utility of harta sepencharian was acknowledged by both court systems in Malaysia as evidenced from the case laws. The uniqueness and applicability of Malay customary laws transcends temporal and spatial differences, and especially challenges the assumption that the local laws, including Islamic law are passive. For the record, harta sepencharian is accepted as a source of law and applied by all the States in the Federation of Malaysia as a matter relating to Islam which is a State Matter under the Malaysian Federal Constitution.3

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3 All the sections are derived from the respective state’s Administration of Islamic Family Law Enactments. The sections, arranged according to the year enacted from the earliest to the most current, are: Section 58 (Negeri Sembilan) 1983; Section 46 (Melaka) 1983; Section 46 (Kelantan) 1983; Section 58 (Federal Territories) 1984; Section 58 (Selangor) 1984; Section 49 (Kedah) 1984; Section 46 (Perak) 1984; Section 57 (Terengganu) 1985; Section 58 (Pulau Pinang) 1985; Section 59 Administration of Islamic Family Law Enactments (Pahang) 1987; Section 58 (Johor) 1990; Section 57 (Sarawak) 1991; Section 58 (Perlis) 1992; Section 60 (Sabah) 1992.
The unique provision of jointly acquired property during conjugal union has significantly assisted divorced women irrespective of their financial backgrounds. In deciding how much the divorced wife is entitled to share in the matrimonial property, the court will take into account the extent of her contribution towards the property. It is interesting to note that the wife is entitled to claim for her share of harta sepencarian upon her divorce or the death of the husband. The law does not limit the types of divorce that may validly claim for harta sepencarian. In this regard, she may even claim if she is being divorced through khulu’ which is a divorce in which the wife gives the husband something or pays him for her freedom. Under Islamic law, the wife will return her mahr or the amount she received from the husband at the beginning of the marriage contract.

In conclusion we do not seek to valorise either shari’a or common law in Malaysia. Indeed, as is obvious in the debate over recent amendments to Islamic family law legislation in the early 2000s, the issue of empowerment for and by Muslim women negotiating shari’a continues. Some of the strongest arguments against Islamic family law legislation invoke the LRA, in a non-critical observation about how non-Muslim women are advantaged by common law in Malaysia, compared to Muslim women. However, shari’a in consonance with adat provides considerable advantage to Muslim women in Malaysia through harta sepencarian.

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