

THE RIGHTS OF THE WIFE TO CLAIM ON A DIVISION OF MATRIMONIAL PROPERTY AFTER DISSOLUTION OF MARRIAGE: MALAYSIAN PERSPECTIVE.

By
Dr. Norliah Ibrahim
Assistant Professor
Ahmad Ibrahim Kulliyah of Laws
International Islamic University Malaysia

1.0 Introduction

Matrimonial property disputes are one area of law which is daily litigated before the registrars and judges. It is observed that apart from maintenance and custody of children, division of the matrimonial property is also one of the ancillary claims which are frequently invoked by the wife after dissolution of marriage. Although the ownership of matrimonial property, which is generally referred to as property which is acquired during the marriage by both parties may arise also during the course of a marriage such as when one of the parties has been declared as bankrupt,¹ more often than not, at that particular time the couple may not anxious to distinguish the ownership of property since at that time they were sharing the benefit together. However upon divorce, both parties start to distinguish the ownership of property and desire it to be returned to the original owner or to be sold and the proceeds to be divided between them. Some divorces are concluded smoothly and amicably but in other cases both parties fight over practically everything especially their rights in matrimonial property.

Since the Family Law in Malaysia is governed by two separate legal system that are for Muslim and non Muslim, the claim for such division can be made by the non Muslim parties under the Law Reform (Marriage and Divorce) Act 1976 (hereinafter referred to as the LRA) while for the Muslim parties, such claim can be made to the Syariah Court based on the governing provisions under the Islamic Family law Enactment which is applicable to each states in Malaysia.²(For the purpose of discussion, reference is only made to the Islamic Family Law (Federal Territories) Act 1984, which is the model followed by almost all the states in Malaysia – hereinafter referred to as the IFLA). Thus, the paper discusses the rights of wife to claim on the division of matrimonial property by examining the application of the provision relating to the division of the matrimonial property in Malaysia.

¹ Please refer to the case of *Overseas Investment Pte. v. Anthony William O' Brien*, [1988] 3 MLJ 332 at p.335 where Shankar J. emphasised that the spouse's ownership over matrimonial property prevails throughout the marriage and it would be absurd and illogical to contend that the spouse's title only arises upon divorce or death.

² For example, for those who are residing in the Federal Territories, they are governed by the Islamic Law Federal Territories Act, 1984.

2.0 Provisions on matrimonial property

2.1 Provisions for the Non Muslim

Section 76: Power for court to order division of matrimonial assets

“(1) The court shall have power, when granting a decree of divorce or judicial separation to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties any proceeds of sale.

(2) In exercising the power conferred by sub-section (1) the court shall have regard to-

- (a) the extent of contributions made by each party in money, property or work towards the acquiring the assets;
- (b) any debts owing by either party which were contracted for their joint benefit; and
- (c) the needs of the minor children (if any) of the marriage,

and subject to those considerations, the court shall incline towards equality of division.

(3) The court shall have power, when granting a decree of divorce or judicial separation to order the division between the parties of any assets acquired by them during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties any proceeds of sale.

(4) In exercising the power conferred by sub-section (1) the court shall have regard to-

- (a) the extent of contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family;
- (b) the needs of the minor children (if any) of the marriage;

and subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the court think reasonable; but in any case the party whose effort the assets were acquired shall received a greater proportion

(5) For the purpose of this section, references to assets acquired during marriage include assets owned before the marriage by one party, which have been substantially improved during the marriage by the other party or by their joint efforts.”

2.2 Provisions for the Muslims

The provision relating to the division of matrimonial property is governed by section 58 of the IFLA. The section provides a similar provision except for the words "matrimonial property" being substituted by *harta sepencarian* while "divorce and judicial separation" are replaced with the words "*talaq* and when making the order of divorce". Thus, it is observed that the provisions on the division of the matrimonial property for the Muslims and the non Muslims, except the use of certain terms, are the same.

3.0 Definition of matrimonial property

Matrimonial property has been generally referred to as property acquired during the marriage either by the joint effort or the sole effort of the parties. However, the statutes in Malaysia are silent as regards to the definition of the matrimonial assets or matrimonial property. Even though the Married Women Act (Revised 1990) is the law which deals with the married women's property, no reference is made to the term matrimonial property. The LRA also leaves the term undefined and this failure has led to uncertainty in deciding what should and should not be included in the division. Section 76 of the LRA mainly divides the property into two categories; that is property acquired by joint efforts and property acquired by the sole effort of one of the parties to the marriage.³

For the Muslim, the concept of *harta sepencarian* has been long recognised under Malay customary law and has now been given statutory recognition in the Islamic IFLA and its equivalent enactment in other states.⁴ The Islamic Family Law Enactments of each state⁵ do define the word *harta sepencarian* in their definition section. The IFLA for example, defines *harta sepencarian* as "property jointly acquired by husband and wife during the subsistence of marriage in accordance with the conditions stipulated by *Hukum Syara'*."⁶ The Islamic Family Law Enactment of Selangor on the other hand, offers a wider definition. *Harta sepencarian* is referred to as "property jointly acquired by husband and wife, whether directly or indirectly, during the subsistence of marriage in accordance with the conditions stipulated by *Hukum Syara'*."⁷

The insertion of the words "directly or indirectly" suggests that the property acquired by the husband and wife will be regarded as *harta sepencarian* regardless of whether the effort put in is direct or not. Thus, this is parallel with the idea that a wife who is

³ Section 76(1) and (3) of the LRA.

⁴ Salleh Buang, *New frontiers in harta sepencarian*, Nordin & Salleh, Kuala Lumpur, 1988, p. v.

⁵ Except for the state of Kedah where no definition can be found either in the Islamic Family Law Enactment 1979 (No.1 1984) or Administration of the Islamic Law Enactment 1962 (No.9/1962).

⁶ Section 2 of the IFLA. The same definition also can be found in section 2 of the Islamic Family Law Enactment of Malacca (No. 8/1983), section 2 of the Islamic Family Law (State of Penang) (No.12/1985), section 2 of the Islamic Family Law Enactment of Johore (No.5/1990), section 2 of the Islamic Family Law Enactment of Perlis (No.4/1992), section 2 of the Administration of Islamic Family Law Enactment of Terengganu (No.12/1985), section 2 of the Islamic Family Law Enactment Sabah (No. 15/1992) and section 2 of the Islamic Family Law Ordinance, Sarawak (No. 5/1991).

⁷ Section 2(1). Section 2(a) of the Islamic Family Law Enactment of Negeri Sembilan (Amendment) (No.4/1991) also follows the same definition as provided by the Selangor Islamic Family Law Enactment.

only a homemaker is still entitled to a share of the property that the husband may have acquired during their marriage.

The absence of such an important definition of matrimonial property in the LRA has received much criticism from those in judicial circles. Referring to the same situation in Singapore, Leong remarks that “the section does not define the exact basket of assets which the court has the power of division” without explaining why the legislation refuses to provide details.⁸ Shankar J. in the case of *Ching Seng Woah v. Lim Shook Lin*⁹ offers a better justification on why the definition of matrimonial property is not included in any of the statutes by suggesting that the task should be left to the judge to decide. Thus, he decides;

“...the expression refers to the matrimonial home and everything which is put into it by either spouse with the intention that their home and chattels should be a continuing resource for the spouses and their children to be used jointly and severally for the benefit of the family as a whole. It matters not in this context whether the asset is acquired solely by the one party or the other or by their joint efforts. Whilst the marriage subsists, these assets are matrimonial assets. Such assets could be capital assets. The earning power of each spouse is also an asset.”¹⁰

The above definition clearly indicates that matrimonial property should cover anything that is acquired during the marriage. The definition is wide enough so as to cover the earning power of the spouse even though the quantification of the amount may lead to another dispute. The above finding corresponds to the decision of Lord Denning in the case of *Wachtel v. Wachtel*¹¹ where matrimonial assets should refer to those things, which are acquired by one or the other or both of the parties. This must be coupled with the intention that it should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole. The judge divides the matrimonial assets into two parts; assets “of a capital nature” such as the matrimonial home and its furniture and “revenue producing nature” which include the earning power of husband and wife. The finding of Lord Denning conforms with the decision of Lord Diplock in the case of *Pettit v. Pettit*¹² where matrimonial property or family assets means “property whether real or personal, which has been acquired by either spouse in contemplation of their marriage or during its subsistence and was intended for the common use and enjoyment of both spouses or their children”.¹³ The above cases show that the English courts by using the word “family assets”, describe matrimonial property as property in which both spouses should have

⁸ Leong Wai Kum, “Division of matrimonial property upon termination of marriage”, 1 *Malayan Law Journal*, p.xiii, at xiv.

⁹ [1997] 1 MLJ 109.

¹⁰ *Ibid*, at p. 122.

¹¹ [1973] Fam. 72, at p.90.

¹² [1970] AC 777.

¹³ *Ibid*, at p. 819.

some interest either because of the way in which it was acquired or because of the manner in which it was used.¹⁴

It is clear that the absence of an exact definition of matrimonial property has led to the difficulty in defining the term. Due to this, judges have exercised their discretion in defining the term liberally where normally the courts could simply work from the premise as decided in the Singaporean case of *Shirley Koo v. Kenneth Mok Kong Chua*.¹⁵ In this case the assets acquired during the marriage comprised of an apartment, a semi-detached house, membership of Serangoon Garden Country Club and cash balances in the husband's accounts with various banks. Counsel for the husband suggested that only the semi-detached property was available for division and that the others were not. The court rejected the suggestion and held that all four assets are matrimonial property as it was acquired during the marriage.

In contrast, the task of a judge in defining *harta sepencarian* may not be that difficult in the Syariah court. Other than the term being defined in the Islamic Family Law Enactment or the Administration of the Islamic Family Law Enactment, the cases also illustrate what the term means. In the old case of *Hujah Lijah binti Jamal v. Fatimah binti Mad Diah*,¹⁶ Briggs J. defined *harta sepencarian* as "property acquired during the subsistence of their marriage by a husband and wife out of their resources or by their joint efforts. The "acquisition" referred to may be extended to cover enhancement of value by reason of cultivation or development."¹⁷ Thus, there is no reason for the wife, being a lawful widow, not to get one-half of the property bought originally from the savings which accumulated from a piece of land inherited from her parents even though it was registered in the name of the deceased husband. In the case of *Yang Chik v. Abdul Jamal*,¹⁸ the learned Kadhi said to the effect: "the concept of *harta sepencarian* is of the property that is acquired during the marriage with both the husband and wife contributing by their efforts or money to acquire the property."¹⁹

Harta sepencarian is not only confined to both their efforts in acquiring the property but extends further to cover their contribution whether formal or informal. This principle is best illustrated in the case of *Piah binti Said v. Che Lah bin Awang*²⁰ where the Kadhi Besar of Penang defined the term as;

"Property acquired jointly during the subsistence of the marriage as a result of joint efforts of the parties. This would arise in cases where the parties were either employed in similar occupations or otherwise and whether the

¹⁴ See the English Law Commission (Family Property Law), the Law Commission Published Working Paper, No. 42, para 0.24 at p. 15.

¹⁵ [1989] 1 MLJ 109.

¹⁶ [1930] 16 MLJ 63.

¹⁷ *Ibid*, at p. 63.

¹⁸ (1985) 6 JH. 146; [1989] 2 MLJ xxix.

¹⁹ *Ibid*, at p. 154.

²⁰ (1983) 3 JH 220.

contributions by the parties were formalised or not, and irrespective of whether there was a clear division of functions or otherwise.”²¹

From the above definitions it is clear that *harta sepencarian* is basically based upon a “recognition of the part played by a divorced spouse in the acquisition of the relevant property and improvements done to it (in cases where it was acquired by the sole effort of one spouse). It is due to this joint effort or joint labour that a divorced spouse is entitled to a share in the property.²² Thus once it is proven that a property was acquired (during covertures) or that the claimant has assisted in the working of it, the law presumes that the property was *harta sepencarian* and it therefore falls on the other spouse who denies the claim to rebut the presumption.”²³

3.1 Property acquired during marriage

Both the LRA and the IFLA provide that property acquired during the course of the marriage is a matrimonial asset and liable to be divided. Thus, for the wife to have a share in any of the disputed assets under both laws, it is necessary to prove that the property has been acquired during the course of the marriage. They have to show that the acquisition resulted from the individual efforts of the husband or the wife or by both husband and wife jointly, which subsequently gives rise to a rebuttable presumption that the property is matrimonial property. The case of *Shirley Koo v. Kenneth Mok Kong Chu*²⁴ suggests that all assets acquired during the marriage including a semi-detached house, an apartment, club membership and cash balances in the husband’s accounts with various banks are liable for division since they are acquired during the marriage. In another situation, lottery wins during a marriage or a period of cohabitation also regarded as a joint effort property and subject to division.²⁵

The above judgement confines the division of property based upon the contribution of both spouses during the marriage. It connotes the understanding that the acquisition of the property before and after the marriage in the absence of any contribution made by the other spouse is not subject to division.²⁶ However the law allows for a property to be divided even though it was acquired before the marriage provided that it has been substantially improved after marriage by the other spouse or both spouses jointly.²⁷

A similar principle is adopted in a Muslim divorce. The party will not be entitled to any share in a property which is acquired after the *ĪalĒq* is pronounced due to the absence of any contribution towards the acquiring of the assets. The principle has been

²¹ Ibid, at p. 223.

²² Ahmad Ibrahim, *Family Law in Malaysia*, 3rd. Ed., Malayan Law Journal, Kuala Lumpur, 1997, p. 308.

²³ Ibid.

²⁴ [1989] 2 MLJ 264.

²⁵ See the case of *Tan Chong Kiat v. Kwan Ah Soh &Anor* [1998] 5 CLJ 760.

²⁶ The above implication will also result if the provision is read literally – “Assets acquired during the marriage”.

²⁷ See section 76(5) of the LRA and 58(5) of the IFLA.

clearly applied in the case of *Ningal@Yang Chik bte Hashim v. Jamal bin Abdul Rahim*.²⁸ The wife in this case claimed a share of a house and a motorcar as *harta sepencarian*. However the husband proved that he purchased both properties after he had pronounced the divorce. The claim was therefore dismissed. Similarly, the learned *QÉÏË* dismissed the claim made by a divorced wife as there was no evidence to show that the property was acquired during the marriage.²⁹

The discussion shows that success in proving that the property is acquired during the marriage is very substantial to the plaintiff's claim. The time of acquisition of the property is very significance for the purpose of determining the existence of contribution. Thus, since both the civil and the Islamic law put a great emphasis on the contribution of both parties, it automatically excludes property acquired after the marriage is terminated in which the parties' contribution is absent.

3.1.1 Joint effort and sole effort property

In dividing the acquired property, the law, both in civil and Islamic jurisdictions, separate the property into joint effort and sole effort. Such separation however appears to discriminate against the party who did not directly contribute to the acquisition in the sense that it fails to appreciate the partnership view of marriage. This is because marriage has been viewed as a sanctimonious union of two persons jointly in holy matrimony.³⁰ Thus, since the relationship of both the husband and wife should be regarded as an economic partnership, the property accordingly cannot be said to have been properly acquired by the sole effort of one spouse.³¹

This view is further supported by the claim that the performance of husband and wife in their respective roles makes a positive contribution towards the acquisition of matrimonial property.³² Accordingly there is no reason why the property should be divided into the sole effort and joint effort. The differentiation is impracticable and makes little sense.³³ The above arguments result from the literal interpretation of the law, which allows the division of the matrimonial property to be made solely on the basis of their contributions. The emphasis on contribution alone disregards the essence of marriage, which is based on a union or partnership. However, for the purpose of this research, the two terms that determine the division of the matrimonial property are analysed to identify their strengths and weaknesses in dividing the property.

3.1.1 Property acquired by joint effort

The property is said to be jointly acquired when both husband and wife contribute to the acquisition of the property. The necessity to define the term "joint effort" is due to

²⁸ [1989] 2 MLJ xxxix.

²⁹ *Zarah v. Zaidon* (1983) 3 JH 225.

³⁰ See the judgement given by Kamalanathan Ratnam JC. in the case of *Usha Rani a/p Sivanajaratnam*, [1993] 2 MLJ 30, at p. 34.

³¹ Leong Wai Kum, "Division of matrimonial property upon termination of marriage", at p.xv.

³² Kevin J. Gray, *Reallocation of property on divorce*, Professional Books, Abingdon, 1977, p. 28

³³ Above note 31.

the fact that the law differentiates between assets that are acquired by joint effort of the parties and those acquired by a sole effort.³⁴ Another reason is contributed by the term itself, which connotes a broad meaning. However no attempt as yet has been made to define this term.³⁵

In the case *Koh Kim Lan Angela v. Choong Kian Haw*,³⁶ the judge pointed out that it is not certain whether the phrase “by their joint efforts” should be strictly confined to a direct financial contribution or it carries a wider meaning so as to include any indirect contribution made by the other spouse. Then the main issue here is whether joint effort merely means direct financial contribution or if it also includes indirect financial contribution.

(a) Direct financial contribution

Literally, the term joint effort is mainly confined to the direct financial contribution of both spouses. Where a direct financial contribution is made, in the absence of contrary evidence it is assumed that the parties intended that property to be jointly owned. The issue has been raised in the case of *Nagapushani v. Naseratnam*³⁷ where both spouses made a direct financial contribution to the purchasing of the house and land in Lot 3 Road 3A, Petaling Jaya. Raja Azlan Shah J. (as he then was) made the remark that when spouses contribute to the purchase of a house, it is presumed that they want to have some interest in the property.³⁸

The view of the High Court in the above case is influenced by the finding of the English case of *Gissing v. Gissing*³⁹ where it was unanimously agreed that where a direct financial contribution is made to the purchase price or to the repayment of the installments, this would result in the person making such a contribution accruing a beneficial interest in the property.⁴⁰ Therefore, the wife spending some £220 on furniture, laying a lawn and paying for her own and the parties’ son’s clothes gave her no interest in the house bought in the husband’s name and paid for by a loan to him and a mortgage which he alone repaid. The same principle also has been applied in the case of *Burns v. Burns*⁴¹ where the plaintiff failed to establish any beneficial interest

³⁴ B.C. Crown, “Property division on dissolution of marriage”, 30, *Malayan law Review*, 1988, p.34, at p.44.

³⁵ The (then) Deputy Minister of Law viewed that the joint effort of the husband and wife is where they work together. They both contribute money and together they buy property or in cases where the husband contributes money and the wife works with the husband in the office and helps him to save money- See the speech of Datuk Athi Nahappan, the then Deputy Minister of Law in the Second – Third Reading of the LRA Bill, Malaysia, Parliamentary Debate, Dewan Negara, Fourth Parliament First Session, Vol. 1, Julai 1975 – Jan.1976, Col. 2314 on 6 January, 1976.

³⁶ [1994] 1 SLR 22, at p. 28.

³⁷ [1970] 2 MLJ 8.

³⁸ *Ibid*, at p. 10.

³⁹ [1971] AC 886.

⁴⁰ *Ibid*, at p. 896.

⁴¹ [1984] Ch. 317; [1984] 1 All ER 244, CA.

in the defendant's house by decorating, buying household goods, paying bills, bringing up their two children, and carrying out other domestic duties.

Thus, as the emphasis is on the financial contribution of the spouse, it certainly deprives the rights from a wife whose activity is solely confined in the house unless she financially contributes to acquiring the assets. This approach is manifested in the decided case of *Re Heng Peng Hoo*⁴² where the acknowledgement made by the respondent husband that the petitioner wife had brought up and looked after their four children and had contributed to the welfare of their family was not sufficient to entitle the petitioner wife to claim a share. It clearly shows that in construing the words joint efforts, the indirect contribution is insufficient to prove that the property is jointly acquired.

The decision of the above case was followed in *Lim Beng Cheng v. Christopher Lee Joo Peng*.⁴³ The issue to be decided by the court was whether the matrimonial home, which was acquired by the petitioner and the respondent during the marriage is a joint effort or sole effort property. After carefully considering the oral evidence from both parties, the affidavits and the various exhibits in the two bundles of documents, the judge found that once it is proven that only one party contributed to the installment of the matrimonial home, the property cannot be categorised as joint effort property. Therefore, in such a case, the wife's proportion is determined on the basis of sole effort property. The judge in this case was reluctant to expand the meaning of joint effort for the reason that the contribution made by the petitioner to the welfare of the family cannot displace the greater proportion to be accorded to the party by whose effort the assets were acquired.⁴⁴

The above discussion shows that only a direct financial contribution made to the purchase of the property will be taken into account in categorising it as a joint effort property. Therefore, analysis on the extent of the contribution is important to determine whether the spouse is entitled to claim a share under either the joint effort property or the sole effort property. In interpreting the provision on the extent of the financial contribution, the court decided that a contribution, even though in a small amount, could be taken into account.⁴⁵ The test that is applied by the court is to look mainly at the financial contribution. This test is highlighted in the case of *Shirley Koo v. Kenneth Mok Kong Chua*⁴⁶ where the fact that the wife's contribution to that particular asset is small does not bar her entitlement completely. The same approach has been adopted in another Singaporean case of *Koh Kim Lan Angela v. Choong Kian Haw*⁴⁷ where the judge said that, "the fact that the wife's effort was small in comparison to the size of the asset does not bar her claim; it only limits her quantum."⁴⁸

⁴² [1989] 3 MLJ 103.

⁴³ [1996] 1 AMR 1096.

⁴⁴ *Ibid*, at p. 1103.

⁴⁵ See *Shirley Koo v. Kenneth Koo Mok Chua* [1989] 2 MLJ 264.

⁴⁶ [1989] 2 MLJ 264.

⁴⁷ [1994] 1 SLR 22.

⁴⁸ *Ibid*, at p. 31

The above cases elaborate that the financial contribution alone is an important element for consideration in dividing the joint effort property regardless of the quantum. However, the amount that the party will get depends on the contribution made in acquiring it.

(b) Indirect financial contribution

In contrast to the discussion on the direct financial contribution, the court is placed in a difficult situation if the contribution made by the spouse is indirect. Indirect contribution arises when the couple agrees, for example, that the husband should pay the monthly installments on the house while the wife mainly contributes to the payment of the utility bills. The same thing applies even though there was no prior arrangement made by the couple. This assumption is based on the fact that without the wife's payment of the utility bills the husband would not have been able to pay the mortgage installment. In other words, the wife's payment of other household expenses would enable the husband's contribution to be directed towards the acquisition of the asset. On this basis, it seems reasonable to say that in such cases the wife's payments are part of the joint effort made towards the acquisition of the property.⁴⁹ This view seems contradictory to the literal interpretation of the provision where the indirect financial contribution would not seem to be considered as a contribution since the provision⁵⁰ speaks of assets acquired by joint effort. Thus the contribution made must be directly referable to the acquisition of the property.

The High Court had the opportunity to decide this matter in the case of *Teh Eng Kim v. Yew Peng Siong*.⁵¹ The court adopted a wide interpretation in defining the words "joint efforts". The property in dispute was a piece of land in Lot 927, Mukim 8, N.E.D., containing the premises No. 77 Tanjong Bungah park, Penang. The land was purchased for approximately RM43,000 for which a down-payment of approximately RM5,000 was paid.⁵² The husband borrowed a sum of RM1,000 from the wife's mother and paid the remainder himself. The balance was loaned by Penang Port Commission who was then his employer. The said land was to be registered in joint-ownership but the loan arrangements necessitated the registration of the said land in the name of the husband. It was the understanding between them that the husband pay the monthly installments on the loan and the wife paid to maintain and upkeep the house and pay for other household costs. To this end the husband contributed RM35 weekly and RM100 towards the monthly accounts. The wife also paid for the furniture and fittings for the house, the initial renovation, the costs of building a garage and repainting the house two years later. The expenses for all this amounted to approximately RM6000. It was decided by the court that the land should be sold and the proceeds therefore divided equally between the parties on the basis that both are working and have agreed to share in the purchase and running of the matrimonial home. The judge in this case relied on two English decisions. In the case of *Gissing v Gissing*,⁵³ Lord Pearson said that;

⁴⁹ See B.C. Crown, "Property division", at p. 48.

⁵⁰ Section 76(1) of the LRA and section 58(1) of the IFLA.

⁵¹ [1977]1 MLJ 234.

⁵² The wife paid RM1,000 towards the down-payment.

⁵³ [1970] 2 ALL ER 780.

“contributions are not limited to those made directly in part payment of the price of the property or to those made at the time when the property is conveyed into the name of one of the spouses. For instance, there can be a contribution if by arrangement between the spouse one of them by the payment of the household expenses enables the other to pay the mortgage installments.”⁵⁴

In the case of *Fribance v. Fribance*⁵⁵ Lord Denning decided that:

“The title of the family assets does not depend on the mere chance of which way round it was. It does not depend on how they happened to allocate their earning and their expenditure. The whole of their resources are expended for their joint benefit – either in food and clothes and living expenses for which there was nothing to see or in the house or furniture which are family assets – and the product should belong to them jointly. It belongs to them in equal shares.”⁵⁶

Thus, the above quoted cases prove that the law does not limit the amount contributed by the spouse to claim the division of property under the joint effort. What is material is to look at whether financial contribution was made by the claimant. The court in *Teh Eng Kim v. Yew Peng Siong*⁵⁷ appears to have adopted a more liberal approach where if an indirect financial contribution is made, property acquired from such a contribution are to be shared equally between the spouses.

The Syariah court also applies the same principle in determining a joint effort property. The presence of a direct financial contribution from both the husband and wife appears to be very significance in constituting a joint effort property. This is best illustrated in the case of *Haji Abdul Rahim v. Isngaton*.⁵⁸ The court decided that since there was sufficient evidence of the wife’s financial contribution in purchasing the land as well as working on it, her claim for a half share of the land as *harta sepencarian* was therefore allowed.

However, there has been no discussion on the words “joint effort” to determine whether it should only be confined to a direct financial contribution or if it should be extended to the indirect financial contribution as well. However, from the decided cases it can be traced that the judge’s attitude differs from one case to another. Some of them require a strict requirement in the sense that there must be a direct financial contribution to constitute joint effort property. Others are more flexible in recognising the indirect contribution of the wife, for example in taking care and caring for the family as “works” towards the acquiring of the asset and the property will be then considered as jointly acquired. The point has been discussed in the case of *Haminah*

⁵⁴ Ibid, at p. 788.

⁵⁵ [1957] 1 ALL ER 357. In this case the wife went out to work and used her earnings to help run the household and buy the children’s clothes, whilst the husband saved.

⁵⁶ Ibid, at p. 360.

⁵⁷ [1977] 1 MLJ 234.

⁵⁸ (1980) 2 JH 264.

Bee v. Shamsudin.⁵⁹ The wife claimed a share *inter alia* in a house, motorcar and household furniture. The court found that the wife without assistance by a servant had looked after the house and also the children of the husband from his former wife. Thus, in deciding that the house should be divided equally, the Chief *QÉIÈ* said that:

“Haminah bte Hassan throughout her marriage with Shamsuddin bin Hassan has acted as a wife and performed the duties usually performed without getting any assistance from a servant and because of that it can be inferred that the assets acquired during the marriage were acquired by their joint efforts. The work that is done by a wife who is not assisted by a servant has at least relieved the burden of the husband at least to the extent of one-third of his burden.”⁶⁰

It is crystallised in the above quotation that the court has agreed to interpret the provision leniently by recognising the domestic work of the wife as effort towards acquiring the assets results in the property being regarded as a joint effort property.

3.1.1.2 Property acquired by sole effort

Property acquired by sole effort refers to property acquired entirely by the effort of one spouse where the other spouse has not made any financial contribution either directly or indirectly. For the purpose of the study, property acquired by the sole effort of one spouse will exclude situations where the other spouse uses his or her money towards the expenses of the household since this has already been considered to be joint effort. However it should be noted that despite the property is the sole effort property, the other spouse, usually the wife who did not directly contribute to its acquisition, will still get a share considering her contribution to the welfare of the family by looking after the home and caring of the family as well as the needs of the minor children from the marriage, if any.⁶¹

In a Muslim divorce, the same principle is applied. The property is considered to be a sole effort property if the other spouse’s direct contribution is absent. For example in the case *Tengah v. Ibrahim*,⁶² the court held that the house in this case was a sole effort property since it was built using the husband’s salary but the wife’s assistance in looking after the household and the family also was considered in dividing the property.

3.2 Property owned before marriage

As has been discussed earlier, matrimonial property is confined only to assets acquired during the marriage. However, it is undeniable that either or both parties may own property before marriage. In order to accommodate these circumstances, the law provides that assets acquired before a marriage, which has been substantially improved during the marriage by the other party or by their joint efforts will subject to

⁵⁹ [1979] 1 JH (2):71.

⁶⁰ *Ibid*, at p. 74.

⁶¹ Section 76(4) (a) and (b) of the LRA. Discussed in detail at pp. 191-197.

⁶² (1979) 2 JH 300.

division.⁶³ The above requirements have been clearly illustrated in the case of *Shi Fang v. Koh Pee Huat*.⁶⁴ The wife in this case claims a share in a matrimonial house, which has been acquired by the husband long before the marriage. The Court of Appeal took the view that the only way the wife could be entitled was to prove that the property had been substantially improved by her or by their joint effort. It was decided in this case that none of the matters which she said she did, whether taken singly or together, could constitute a substantial improvement of the house. All the contribution, assuming they had been made, were *de minimis* and accordingly, the wife was not entitled to any share in the house.⁶⁵

3.2.1 Substantial improvement

The above discussion clearly proves that property acquired before the marriage becomes a matrimonial asset if the other party or both parties have substantially improved it during the marriage. With such substantial improvement, a spouse or both spouses converted the property into marital partnership property and, thereby, matrimonial assets⁶⁶ However, the problem arises in determining the words 'substantial improvement'. A very narrow interpretation can be seen in the case of *Hoong Khai Soon v. Cheng Kwee Eng*.⁶⁷ In this case, the wife claimed a share in the husband's property (Soon Heng Restaurant) but was rejected by the court on the grounds that the wife had not made any substantial contribution to the restaurant, which is also the requirement under section 106(5) of the Women Charter.⁶⁸ The wife in this case contributed by doing all the domestic chores and looking after the husband's family following the father-in-law's heart attack and also helped out as a cashier in another coffee shop owned by the father-in-law. However it was decided that all those things are not substantial for the purpose of the claim. The reason is merely because they were not direct contributions to the business.⁶⁹ The judgement of the trial judge was affirmed on appeal. Thus, the case illustrates that substantial improvement requires heavier burden on the housewife to prove a direct financial contribution. The judge commented that if she could prove that she worked at that restaurant, the claim would have been successful.

However, in another case, the wife's contribution in purchasing kitchen cabinets, crockery, pots and pans and the payment of servant's salary, food in grocery bills were all added up as her contribution which is regarded as substantial to a semi-detached

⁶³ Section 76(5) of the LRA.

⁶⁴ [1996] 2 SLR 221.

⁶⁵ The wife in this case claimed that she made non-monetary contributions, either on her own or jointly with the husband, *inter alia*, she conceptualised the renovation, in particular she chose the design, the colour of the tiles and the walls, she arranged for repairs of many things in the house, etc. *Ibid*, at p. 234.

⁶⁶ Leong Wai Kum, *Principles of Family Law in Singapore*, p. 926.

⁶⁷ [1993] 3 SLR 34.

⁶⁸ *In pari materia* with section 75(5) of the LRA.

⁶⁹ Above note 67, at p. 38.

terrace house.⁷⁰ In the case of *Ching Seng Woah v. Lim Shook Lin*,⁷¹ the court recognised that buying the furniture and looking after the house does amount to ‘substantially improving’ the house itself. The judge in this case ruled that: “once the house became the matrimonial home, its increase in value for the duration of the marriage is an asset acquired by their joint efforts”.⁷² From these cases it shows that the court is now adopting a more liberal approach in acknowledging the other party’s contribution in improving the matrimonial property. However, the above quoted cases appear to suggest that the improvement should be of a financial nature.

The IFLA also requires the same criteria for property acquired before the marriage to be included in a division. However, it appears that the court is not that strict in ensuring that the property is improved by the other party who does not acquire the property or by their joint effort. As long as the property is improved, then the court will divide the property.

4.0 Jurisdiction of court

Before the court can proceed with the case, the first thing that it will do is to decide whether it has jurisdiction or not to deal with the division of the matrimonial property. The determination of the court’s jurisdiction is done by looking at the registration of the marriage and domicile of the parties. The law provides that;

“(1) Nothing in this Act shall authorize the court to make any decree of divorce except-

- (a) where the marriage has been registered or deemed to be registered under this Act: or
- (b) where the marriage between the parties was contracted under a law providing that, or in contemplation of which, marriage is monogamous; and
- (c) where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia.⁷³

The above quoted provision explains that the marriage must have been registered under the LRA for non-Muslims while Muslim marriages are according to the respective states’ Acts and enactments.⁷⁴ Apart from the requirement of registration, domicile of the parties is another important criteria. The parties have to prove to the court that their domicile is in Malaysia at the time of presenting the petition for divorce. In the Sarawak case of *Melvin Lee v. Amy Anak Edward Sumek*,⁷⁵ the

⁷⁰ *Shirley Koo v. Kenneth Mok Kong Chua* [1989] 2 MLJ 264.

⁷¹ [1997] 1 MLJ 109.

⁷² *Ibid*, at p. 124.

⁷³ As for the judicial separation, the relevant provision is section 48(2) of the LRA.

⁷⁴ Refer to section 5 of the IFLA.

⁷⁵ [1988] 2 MLJ 338.

husband, originally from the United States did not succeed in proving to the court that at the time of presenting the joint petition for divorce he had acquired a domicile of choice in Malaysia. Despite his intention to make Malaysia his permanent home, the court discovered that he had neither bought for himself any property nor made any actual investment here. Therefore, the court had no power to entertain their joint petition for divorce.

In the case of *Ang Geck Choo v. Wong Tiew Yong*,⁷⁶ the respondent husband filed a preliminary objection where the issue raised was the legality of the divorce petition filed by the petitioner wife. He claimed that the petitioner was not able to fulfil the requirement of a place of domicile as required by the law. The judge however said that;

“Perusing the facts without the applicant even having to adduce evidence of her domicile status, I am convinced that when she was in Malaysia she already had exercised her choice by making Malaysia her place of domicile. Furthermore, I am not convinced that merely by her remaining a Singaporean and seeking employment in Singapore during the temporary period she had abandoned Malaysia as her place of domicile. In other words the respondent had failed to impress her changed status on me.”⁷⁷

From the above quotation it shows that proof of change of domicile requires strong evidence, which lies on the asserter. Therefore, since the husband had not succeeded in proving the petitioner’s change of domicile, the objection was accordingly dismissed. Thus, clear evidence is required to establish a change of domicile, in particular to displace the domicile of origin to domicile of choice. The standard of proof goes beyond a mere balance of probabilities. In relation to this, it is said that:

“...the intention to make the residence permanent need not be in existence at the time of his first arrival in the country where the domicile of choice is alleged to be acquired. It may be, and often is, formed after residence has been continued for sometime. But as soon as that intention is formed then the acquisition of domicile of choice is completed and no subsequent change of mind, or doubts arising as to the wisdom of the termination, can by themselves affect the domicile so acquired.”⁷⁸

Thus, it is clear that in Malaysia, the court can only pronounce a decree of divorce if both the husband and wife are Malaysian domiciled when the petition is presented. However, difficulty may arise if the husband is not in the country at the time when the petition is presented, for example when he has had to go to another country to work where in such a case, reference can be made to section 49 of the LRA which provides additional jurisdiction given to the wife.⁷⁹

⁷⁶ [1997] 3 MLJ 467.

⁷⁷ *Ibid*, at p. 47.

⁷⁸ Per Chua J. in the Singapore case of *Joseph Wong Phui Lun v. Yeoh Loon Goit*, [1978] 1 MLJ 236, at p. 238.

⁷⁹ Please refer to section 49 of the LRA.

Section 45 of the IFLA clearly provides that the court is empowered to make an order of divorce or an order pertaining to a divorce or to permit a husband to pronounce a *talaq* if the marriage has been registered or deemed to be registered under this Act: or the marriage was contracted in accordance with Hukum Syara'; and where the residence of either of the parties to the marriage at the time when the application is presented is in the Federal Territories.⁸⁰ Thus, Suwaid in his study claimed that in Islamic law, the domicile of the parties is irrelevant. The court in determining whether they have jurisdiction or not will not take into account the parties' domicile but instead, emphasised on their residence which means permanently or ordinarily living in a particular area as defines in section 2 of the IFLA.⁸¹ This statutory basis of jurisdiction, as noted by Zaleha Kamaruddin, facilitates either party to the marriage to petition for divorce and has no discriminating effect.⁸² However, the requirement of domicile clearly provided for in the Kelantan Family Law Enactment in making an order relating to divorce.⁸³

The claim is made either in the Syariah Subordinate Court or the Syariah High Court.⁸⁴ The Act confers the jurisdiction to both the Syariah Subordinate Court as well as the Syariah High Court to try cases in relation to the claim of *harta sepencarian* in their civil jurisdiction.⁸⁵ With that power, the Syariah Subordinate Court shall in its civil jurisdiction, hear and determine all such actions and proceedings as has been authorised to Syariah High Court if the *harta sepencarian* claimed is less than RM50,000 or is not capable of estimation in terms of money. If the amount is more than that, then it is under the jurisdiction of the Syariah High Court.⁸⁶ However, if the property involved is land, even though the case was dealt with by the Syariah court, the title and its division will still be done by the Land Office.⁸⁷ Therefore, in order to recognise the power of the Syariah court in ordering or directing the Registrar or any Land Administrator to do all such things that are necessary to give effect to any judgement or order given or made in any proceedings relating to land, the National Land Code was amended. The amendment, which took effect on the 1st January 1993 specifically, provides that for the purposes of section 417⁸⁸ and section 420,⁸⁹ the

⁸⁰ Please refer to section 45 (a), (b) and (c) of the IFLA.

⁸¹ Suwaid Tapah, "Elemen sumbangan dalam amalan pembahagian *harta sepencarian* di Malaysia", Ph.D. Thesis, Universiti Malaya, (1996) pp. 431-435. See also section 4 and section 45 of the IFLA and the case of *Sharifah Laila v. Abdul Latif* (1992) 9 JH 11.

⁸² Zaleha Kamaruddin, Islamic Family Law in Malaysia, *Islamic Family Law Issues*, IIUM Press, Kuala Lumpur, 2001, p. 15.

⁸³ Please refer to section 31 of the Kelantan Islamic Family Law Enactment, 1983.

⁸⁴ Section 47 (2) (b) of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505).

⁸⁵ Section 47(b) and section 46(2) (b) (iv) of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505), respectively.

⁸⁶ Above note 84..

⁸⁷ Siti Zalikha Md. Nor, *Pemilikan harta dalam perkahwinan*, Dewan Bahasa dan Pustaka, Kuala Lumpur, 1996, p.33.

⁸⁸ Section 417 of the National Land Code provides for the general authority of the court.

⁸⁹ Section 420 of the National Land Code deals with a registration of vesting orders.

word 'court' includes the Syariah court.⁹⁰ However, the amendment is general in terms of its application. Hence, a practice direction has been issued by the Department of Islamic Judiciary Malaysia which specifically authorizes the Shariah High Court to try cases of harta sepencarian which involve immovable property such as land, regardless of value.⁹¹

5.0 Principles of division

Generally the laws in Malaysia provide some guidelines on how the matrimonial property should be divided. Generally, for the joint effort property, the court should incline towards equality division while for the sole effort property, the acquirer will get a greater proportion. However, there are certain factors need to be considered by the court before the division can be made.⁹²

In applying the law, it is noted that the attitude of judges differ. Some of them chose to adhere strictly to the available provision, clearly emphasising the necessity to interpret the provision literally with a fear that it might cause injustice to either party.⁹³ Others prefer to be more flexible by looking into various possible ways in order to come out with a fair and equitable division of the property. This approach is in conformity with the purpose of the law, which aims at providing a just and equitable division of the matrimonial property between the spouses.⁹⁴ Hence it gives an opportunity for judges to include other possible factors depending on the needs and circumstances of the parties, though it is not stated in the provision.

5.1 Division of joint effort property

The word 'joint' literally connotes contribution from both parties. However, looking at the provision itself, despite the fact that the property has been clearly categorised as a joint effort property, the court shall take the proportion of contribution as the main factor in determining the ratio of division. If this is unsuccessful, only then will the court incline towards equality of division. However, in doing so, the court is subject to the listed factors in section 76 of the LRA, such as the extent of the contribution made by each party in money, property or work towards acquiring the assets, any debts owing by either party which were contracted for their joint benefit and the needs of the minor children.⁹⁵ This approach is illustrated in the case of *Wang Shi Huah Karen v. Wong King Cheung Kevin*.⁹⁶ The petitioner wife in this case claimed a half share of

⁹⁰ Section 421A of the National Land Code.

⁹¹ Please refer to a Practice Direction No.2 of 1002 issued by the Department of Islamic Judiciary Malaysia.

⁹² See section 76(2) and section 76(4) of the LRA.

⁹³ *Wee Ah Lian v. Teo Siak Weng* [1992] 1 SLR 688.

⁹⁴ The point was emphasised by the Court of Appeal in the case of *Ng Hwee Keng v. Chia Soon Hin William* [1995] 2 SLR 231.

⁹⁵ See section 76 (2) (a), (b), (c) of the LRA.

⁹⁶ [1992] 2 SLR 1025.

the net proceeds of the sale of the matrimonial property at 27 Shelford Road Singapore which was purchased by the parties as joint tenants. The respondent husband however maintained that the net proceeds of sale should be divided in the ratio of 70% to himself and 30% to the wife.

The court in deciding the case examined the proportion of each party's contribution as required by the law under section 106 of the Women's Charter. In this case, since the wife's financial contribution was known, her claim for the joint effort property to be equally divided was therefore rejected. Considering the length of the marriage, which was less than three years, Michael Wang JC. decided that he could not give significant recognition to the wife's non-financial contribution mainly because there was less wifely or motherly contribution to consider as well as the fact that the actual financial contribution was likely clear. Therefore it was decided that 35% was a fair amount to attribute to the petitioner for her contribution.⁹⁷ It has been pointed out in this case that equality of division can only be entertained if the actual contribution is indeterminable.

Thus, from the above case it is obvious that in the case of joint effort property, the proportion of contribution by each party is the main factor in determining the ratio of the division. If the financial contribution of the spouses is undisputed and determinable, the court will examine the efforts of both and will consider the extent of the contribution made by each party in money, property or works towards the acquiring of the assets. This especially refers to the dual career couple where both make the financial contributions towards the purchase of the property where division along the proportion of contribution, therefore, may well be fair enough.⁹⁸

In the case of *Ng Kim Seng v. Kok Mew Leng*⁹⁹ the husband's argument to divide the property equally was rejected by the court as it was clear from the facts that the husband only contributed 1/5th of the purchase price of the matrimonial home. The Court of Appeal affirmed the trial's court decision, which divided the property in the proportion 4/5th to the wife and 1/5th to the husband.

In the case of *Chan Yeong Keay v. Yeo Mei Ling*,¹⁰⁰ the parties married in 1968 and had three children born in 1970, 1973 and 1978. The wife worked as a teacher while the husband was a pastor. Throughout their more than ten years marriage the husband did all the household chores while the wife submitted that she was the sole breadwinner. The husband who was the 'house-wife' in this case petitioned for divorce and claimed, *inter alia* for a declaration that the matrimonial flat be sold and the net proceeds be distributed equally. The court rejected the argument and claimed that a fair division of the matrimonial property cannot be achieved if the husband was given 50% of the value of the property. Looking into the facts of the case the judge felt that he had to take the proportion of contribution as the main factor in determining the ratio of the division. Thus, based on the proportion of the contribution made by both parties the husband was only entitled to approximately one-third, and not 50% of

⁹⁷ Ibid, at p. 1026.

⁹⁸ Leong "Division of matrimonial assets", at p.385.

⁹⁹ [1992] 2 SLR 872.

¹⁰⁰ [1994] 2 SLR 541. This case also referred to the case of *Wang Shih Huah Karen v. Wong King Cheung Kevin*. [1992] 2 SLR 1025.

the total assets. In case of a short marriage with the property built up by the couple from a sizeable capital base created by others, while at the same time the husband's contribution is disproportionately larger, then definitely equality of division would amount to an injustice to the parties.¹⁰¹

The court's inclination towards equality of division can be seen in the case of *Lim Bee Cheng v. Christopher Lee Joo Pang*.¹⁰² Even though the property in this case was a sole effort property where the respondent was entitled to a greater proportion of the proceeds of sale, yet the respondent in his evidence volunteered that he was nonetheless prepared to accept equality of division. The judgement of this case proves that the court will not always exercise its power exactly as conferred by the provision. Prior consent of both parties may determine the proportion of division.

From the above discussion it is noted that the main concern of the court is to ensure that justice is preserved. In other words the court will not incline towards equality of division unless it will not cause injustice to either of the parties. Otherwise, the court would rather order the property to be divided according to the proportion that each has invested in it. It has been suggested that there are probably two situations where it would be considered fair enough to divide the property according to the proportion of contribution.¹⁰³ The first situation is where the marriage is brief and there is no long term or lingering effect on either spouse. In such a case the extent of contributions is still clear and there is not much indirect contribution that need to be considered.¹⁰⁴ The second situation refers to a case where it is the homemaker wife who has made a larger contribution by way of gifts from her own family.¹⁰⁵ A clear example can be seen in the case of the husband who continued his career and did not contribute as much as the homemaker will not get a share of the wife's property where the property came from her generous parents.¹⁰⁶ It shows that the court still places a demarcation line between gifts and efforts. The property which needs to be divided must come from the efforts of each party.

5.2 Division of sole effort property

In dividing the sole effort property, different principles are adopted where the emphasis is given to the effort of one party only. The law provides that the court is directed to divide the property or the proceeds of sale in such proportions, as the court thinks reasonable. Nevertheless, subject to certain factors, the court is required to ensure that the acquirer shall get a greater proportion.¹⁰⁷ Since the emphasis is on the party's contribution thus, those who gave their effort most will be entitled to a larger

¹⁰¹ *Koh Kim Lian Angela v. Choong Kian Haw* [1994] 1 SLR. 22.

¹⁰² [1996] 1 AMR 1096.

¹⁰³ Leong Wai Kum, "Division of matrimonial assets", at p. 387.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ng Kim Seng v. Kok Mew Len* [1992] 2 SLR 872.

¹⁰⁷ Section 76(3) of the LRA.

share without denying the right of the other party to claim his or her share over the property.¹⁰⁸

This is particularly true for example, in dividing the Employee Provident Fund (EPF) contributions and the gratuities payments which are accumulated during the marriage. Since they are obviously acquired by the sole effort of one party, the acquirer will therefore get a greater proportion.¹⁰⁹ Similarly the Singapore equivalent, the Central Provident Fund (CPF), which is also referred to by Malaysian courts in deciding cases, is regarded as a sole effort property which gives greater proportion to the acquirer.¹¹⁰

The literal approach can also be seen in *Ng Hwee Keng v. Chia Soon Hin William*.¹¹¹ The wife sought an equal division of the total amount of the matrimonial property, but the court rejected the application. It was decided that the matrimonial property was acquired solely by the effort of the husband. Therefore, the division must be made according to section 106 (3) of the Women's Charter which only entitled her to 40% of the proceeds of the sale of the Euonos Road Flat and 20% of his CPF account, shares, cash in his bank account, car and jewellery.

In applying the law, the judge in the Malaysian case of *Lim Bee Cheng v. Christopher Lee*,¹¹² emphasised the need to follow the provision strictly. Once it was proved that the husband solely acquired the property, the court had no discretion but had to make the apportionment strictly in accordance with section 76(4) of the LRA. But, surprisingly when it came to the judgement, the court decided that the husband's consent and willingness towards the division would also determine the proportion. Thus, the court held that the property should be divided equally since the husband agreed to accept equality of division despite the fact that he solely acquired the property. The judgement obviously shows that the court in this case slightly deviated from the original principle, which allocated a greater proportion to the acquirer in dividing the sole effort property. The judgement also suggests that the law as provided under section 76 (4) of the LRA may only serve as a guideline in dividing sole effort property. However, the facts and circumstances of the case may be considered in determining the proportion of division.

Pursuant to that, there is a tendency to believe that the provision which separates property into joint effort and sole effort may no longer be relevant. The approach which views the marriage as an 'economic partnership' claims that acquisition of the property by the sole effort of one party, is impossible. No matter how they perform

¹⁰⁸ See the case of *Re Heng Peng Hoo* [1989] 3 MLJ 103, where the court established that since the matrimonial property was a sole effort property, it was decided that section 76 (3) and (4) of the LRA will be applied accordingly, which warrant that the acquirer should get a greater proportion.

¹⁰⁹ Refer to the case of *Lim Kuen Kuen v. Hiew Kim Fook & Anor*, [1994] 2 MLJ 693 and *Ching Seng Woah v. Lim Shook Lin* [1997] 1 MLJ 109.

¹¹⁰ Refer to the case of *Ong Ching Ngoh v. Lam Chin Kian* [1992] 2 SLR 414.

¹¹¹ [1995] 2 SLR 231.

¹¹² [1997] 4 MLJ 35.

their roles, both the husband and wife each make their own positive contribution towards the acquisition of the property.¹¹³ This observation has been long established in English law where a remark has been made on matrimonial duty of husband and wife:

“men can only earn their incomes and accumulate capital by virtue of the division of labour between themselves and their wives. The wife spends her youth and early middle age in bearing and rearing children and in tending the home; the husband is thus freed for his economic activities. Unless the wife plays her part the husband cannot play his. The cock bird can feather his nest precisely because he is not required to spend most of his time sitting on it.”¹¹⁴

The above quotation indicates that there is no property that can be claimed as sole effort property. Apart from that, the differentiation between joint effort and sole effort property also make little sense as such separation does not make obvious differentiation.¹¹⁵ A clear example can be seen from a Singapore court decision in the case of *Ong Chin Ngoh v. Lam Chin Kia*.¹¹⁶ The court, in awarding to the wife the amount of \$100,000 in the form of 35% of the matrimonial home, highlighted that the differentiation is insignificant. The reason is mainly because in joint effort property the homemaker may receive up to 50%, while in property acquired solely by the breadwinner, the homemaker may still receive up to 49% taking into account the facts and circumstances of the case. Thus, it is impractical for the court to consider details of the entire property in order to determine whether the property is jointly or solely acquired by tracing the contribution made by each party if the end result is almost similar.¹¹⁷ It is noted that this fact has influenced the Singapore legislators to delete the word ‘joint effort and sole effort’ in their present provision.¹¹⁸

The Syariah court, in most cases, has not specifically determined whether *harta sepencarian* is jointly or solely acquired by one of the parties. Despite the fact that the IFLA expressly provides for different proportion of division depending on whether it is joint effort or sole effort property, the practice of the court, subject to certain factors is to look mainly into the contribution of the parties. If the wife has directly contributed to the acquisition she is entitled to one half of the property. However, if her contribution is in an indirect form, then she is entitled to one third of the property only.¹¹⁹ A clear example can be seen in the case *Boto’ Bt. Taha v. Jaafar Bin*

¹¹³ Leong Wai Kum, “Division of matrimonial property upon termination of marriage”, at p. xv.

¹¹⁴ Burge, *Colonial and Foreign Laws*, London, 1838, 211ff, 230 as quoted by Kevin J. Gray in *Reallocation of property on divorce*, at p. 34.

¹¹⁵ Leong Wai Kum, “Division of matrimonial property”, at p. xv. The same point also has been argued by B.C. Crown, “Property division”, at p. 44.

¹¹⁶ [1992] 2 SLR 414.

¹¹⁶ *Ibid*, at p. 418.

¹¹⁷ Leong Wai Kum, “Division of matrimonial property”, at p. xv.

¹¹⁸ See section 112 of the Women’s Charter.

¹¹⁹ Nik Noriani Nik Badlishah, *Marriage and divorce under Islamic Law*, International Law Book Services, Kuala Lumpur, 1998, p.132.

Muhammed,¹²⁰ where the court decided that the wife was entitled to a one-third share of all the property, which was registered in the name of the husband. The evidence showed that the wife, even though taking no direct part in the husband's business, had indirectly contributed by accompanying him on his business trips.¹²¹

Similarly in *Rokiah v. Mohd Idris*,¹²² the Federal Territory Syariah Board of Appeal, taking into consideration the wife's indirect contribution awarded her a one-third share in the house, land and certain investments of the husband.¹²³ For the wife who has directly contributed to the acquisition of the property, such as by providing financial contribution, the cases prove that she will be entitled to a one half share of the property. This is best illustrated in the case of *Wan Junaidah v. Latiff*.¹²⁴ Upon divorce the wife claimed her ancillary rights including the *harta sepencarian*. Since the land in this case was jointly acquired by both of them, the Syariah court ordered the husband to pay to the wife a half share of the sale of the land to the amount of RM57,130. Thus, she was entitled to one-half of the net proceeds which amounted to RM28,565. In *Haji Abdul Rahim v. Isngaton*,¹²⁵ the court ordered the husband to register the wife's half share of the land as she had not only contributed to the welfare of the family but also to the purchase of the land.

In another instance the court agreed to divide the property equally in the absence of any direct financial contribution if both husband and wife had been working together in developing the property. A clear example can be quoted from cases when the parties during their marriage had been given a piece of land from the government to develop, as in the case *Kalthom bte Wahid v. Nordin bin Othman*.¹²⁶ The parties, during their marriage had been given a piece of land in Sungai Midah, which they both worked on together in clearing and cultivating it. The Government Servants Housing Corporation later acquired the land and the wife applied for half of the compensation to be given to her on the basis of *harta sepencarian*. The court decided that the land was *harta sepencarian* and since both of them jointly developed the land, it should therefore be divided equally. The court in the earlier case of *Mansjur v. Kamariah*¹²⁷ also passed the same decision when the court found that both of the

¹²⁰ [1985] 2 MLJ 98.

¹²¹ The court in this case has developed a new principle relating to *harta sepencarian*. The willingness of the wife to resign from her job in order to accompany the husband in his business trips which significantly contributes to his peace of mind in running his business is considered as 'constructive contribution'. Thus, after divorce, the wife is automatically entitled to get a one third share of the *harta sepencarian* by virtue of their marriage without proving any contribution other than the marriage itself.

¹²² [1989] 3 MLJ ix.

¹²³ See also the case of *Tengah v. Ibrahim* (1979) 2 JH 300.

¹²⁴ (1988) 8 JH 122.

¹²⁵ (1980) 2 JH 264.

¹²⁶ (1990) 9 JH 178.

¹²⁷ [1988] 3 MLJ xliv.

spouses had been working together on the land obtained by the husband during his marriage to the wife.

In other instances, the court agreed to divide the property equally by merely taking into consideration the wife's indirect contribution to the acquisition of the property. A clear example can be seen in the case of *Haminah Bee v. Shamsuddin*¹²⁸ where the court ordered the matrimonial home and the household goods acquired during the marriage to be divided equally. The wife in this case had indirectly contributed to the acquisition of the property by merely being an obedient wife who not only looked after their own children but also the child of the husband from his former wife. Equal division has been made also to the party who has merely made a 'moral' contribution as in the case of *Tengku Anun Zaharah v. Dato' Dr. Hussein*.¹²⁹ The wife, upon divorce claimed her ancillary rights including her share of *harta sepencarian*. The husband however denied the wife's claim by alleging that she had made no contribution either in the form of money or effort. However the court decided that she did contribute in the form of moral support and position in the sense that by marrying her, from a royal family, the husband had received the honour of Dato' and gained public confidence in his business. Thus, the court held that the applicant was therefore entitled to a half-share in one piece of land that had been acquired by the husband.¹³⁰

As practised by the civil court, the Syariah court will also divide the *harta sepencarian* equally if the proportion of contribution of the parties is indeterminable in the absence of sufficient evidence. However, the parties are required to take an oath affirming his or her claim.¹³¹ The principle has been clearly illustrated in the case of *Zainuddin v. Anita*.¹³² The divorced wife claimed her share in the matrimonial home that was acquired during their marriage. The husband alleged that the property was not *harta sepencarian* and accordingly denied the wife's share. However, he failed to prove it and the Board of Appeal decided that where the parties have jointly contributed to the acquisition of the property but fail to determine their contribution, they are required to take an oath. If both of them take an oath then the property will be divided equally. If they refuse to take an oath, the property will be divided equally too. However, in the event that either of them declines to take the oath, the property will be given to the person who takes the oath. Thus, since both parties in this case were

¹²⁸ (1979) 1 JH (2) 21.

¹²⁹ (1980) 3 JH 125.

¹³⁰ However, it has been commented that the "moral" contribution in this case was only based on the particular circumstances of the parties rather than on a general principle that the spouse who made no financial contribution is also entitled to a share of the property acquired during the marriage by looking after the home and caring for the welfare of the family, Nik Noriani Nik Badlishah, *Marriage and divorce under Islamic Law*, ILBS, Kuala Lumpur, 1998, p. 127.

¹³¹ Technically, under Islamic law of evidence, oath refers to a purposive statement over a probable or improbable matter by the invocation of the name of Allah or His attributes. For further details, refer to Mahmud Saedon Awang Othman, *An introduction to Islamic Law of Evidence*, Raden Ahmad Shauki bin Raden Hisam (trans.), Hizbi, Shah Alam, 1996, pp. 86-115.

¹³² (1982) 4 JH 73.

willing to take an oath, the property was divided equally.¹³³ Hence, the parties' consent also determines the proportion of division. In other words, the court will divide the property equally when the parties have reached an agreement to do so. A clear example can be seen in the case of *Bidah v. Abdul Ghani*.¹³⁴ The court ordered the property to be divided equally since during the trial both parties reached an agreement that the properties including the house, buffaloes and money would be equally divided between both of them.

The above discussion proves that there is no clear-cut rule as to definite division of *harta sepencarian* in the Syariah court.¹³⁵ The determination of the proportion of the division is primarily at the discretion of the judge by giving a great emphasis to the contribution of both parties based on the guidelines provided in the governing section.

6.0 Factors taken into consideration in a division of the property

6.1 Statutory factors

Both the LRA and the IFLA outline several factors that should be considered by the court in dividing the property. For the joint effort property, factors include the extent of contributions made by each party in money, property or work towards the acquiring of the assets,¹³⁶ the debts owing by either party which were contracted for the joint benefit as well as the needs of the minor children of the marriage.¹³⁷ In dividing sole effort property the court is to have regard to the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family¹³⁸ as well as the needs of the minor children of the marriage.¹³⁹

6.2 Non statutory factors

The previous discussion proves that the court has to give regard to certain factors before the division of the property is made. In relation to this, B.C Crown suggested that the court should be allowed to take into account factors other than those expressly mentioned in the provision such as conduct, spousal agreement, length of the marriage and other relevant factors.¹⁴⁰ Nevertheless, the statutory factors should be given greater weight than the non-statutory factors. Thus, in practice, both the Civil as well as the Syariah Court, not only emphasize on the factors outlined in the provision but also consider the non statutory factors in dividing the property since will not only

¹³³ The wife took an oath affirming that the property was *harta sepencarian* while the husband took an oath denying that the property was *harta sepencarian*.

¹³⁴ (1982) 4 JH 225.

¹³⁵ Nurhayati Hamzah, "*Harta Sepencarian: A Matter of Malay Adat?*", in Zaleha Kamaruddin (edit.) *Islamic Family Law issue 2000*, p. 354 at p.371.

¹³⁶ Section 76(2) (a) of the LRA and section 58(2) of the IFLA.

¹³⁷ Section 76(2) (b) (c) of the LRA and section 58(2) (b) (c) of the IFLA.

¹³⁸ Section 76(4) of the LRA and section 58(4) of the IFLA.

¹³⁹ Section 76(4)(b) of the LRA and section 58(4) (b) of the IFLA.

¹⁴⁰ For further details refer to B.C. Brown, "Property division on dissolution of marriage, pp.53-58.

consideration of non-statutory factors is important, as it will give an opportunity to the court to invoke any relevant factors, which may lead to a fair division.

7.0 Conclusion

The wife's right to claim on a division of matrimonial property is basically based on the contribution made through out the marriage. By providing a specific provision governing its division obviously evidence that their contribution whether direct or indirect towards acquisition of the property is recognized by the court. In general, the law for division of the matrimonial property for Muslim and non-Muslim parties is comprehensive where the provision clearly provide how the property should be divided subject to the enumerated factors. However, the legislative measures may not serve as the only solution of the division of the matrimonial property. The study has shown that the facts and circumstances of the case may differ depending on the change of time and needs of the parties. Thus, the decided cases proved that the judges may, whenever necessary, exercise their discretion for the purpose of achieving a fair and equitable division.