AN ANALYSIS OF JUDICIAL APPROACHES ON MATRIMONIAL ASSET DIVISION IN MALAYSIAN SYARIAH COURTS

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ABSTRACT

contribution in matrimonial asset division to assess the proportion of sole effort assets. This contribution is assessed concurrently with other indirect contributions such as the homemaking contribution in taking care of the welfare of the family. The law of division of matrimonial asset concentrated too much on the contribution of parties that caused the parties taking a long time for settlement. Proving the contribution requires adequate evidence and lacking it caused difficulties for courts to reach a decision. This study investigate the effectiveness of the law through examining the judicial approaches particularly in assessing the indirect contribution of a spouse to determine the spouse's appropriate share of the assets. The study adopting qualitative method where data from reported cases and unreported courts cases from the year 2000-2012 were collected and analysed. Specific variables such as matrimonial property, considerable factors and proportion of share were analysed. The findings reveal that the Court expanded the application of indirect contribution to financial contributions of a working wife who used her salary for family expenditure. Therefore, this study suggests that willingness to widen the scope of considerations in dividing sole effort assets to the length of marriage is more practical in dividing the asset.

Keywords: Matrimonial Property, Judicial Approaches, Indirect Contribution, Malaysia, Syariah Court

Introduction

The law empowers the Syariah courts to divide matrimonial property acquired by husband and wife during their marriage, this could be done after divorce or upon the death of either spouse or upon application for polygamous marriage (sec 122 of State Islamic Family Law Enactments). The matrimonial property, customarily known as *harta sepencarian* is defined in section 2 of States Family Law Enactment as a property jointly acquired either directly or indirectly by a husband and wife and its acquisition made by both parties during the course of their marriage. The provision requires the court to take into account several factors in determining the share of the matrimonial property in order to attain a fair division to the divorced spouse. Besides, the law also differentiate the considerable factors required by referring to the way the parties acquire the assets; either directly or indirectly. For instance, to determine the proportion of asset from direct contribution, the parties need to prove that the acquisition of an asset is directly contributed from their finance, property and labour. However, in determining the share of parties who indirectly contributed to the acquisition of the asset, the parties...
are required to prove that the contribution was derived from a duty of taking care of family or any financial contribution for family expenditure. On top of that, the court is also required taking into consideration the interest of minor children and spouse's debt in acquiring the asset. Some interpretations of the terms "contribution", which is categorized in three forms such as money, property or physical work which have been directly or indirectly used for the acquisition of asset as well as in the case of improvement on the asset value need to be fine-tuned. The effort in the form of views, advice and moral support should also be considered (Siti Zalikha, 1996). The general law provides that the Syariah court evaluate the extent of contribution by both parties in acquiring assets (Norliah Ibrahim, 2009).

However, in practice, the assets were not properly assessed as the court need to differentiate whether they could be categorized as sole or joint effort assets. Generally, if a wife had made a direct contribution, she is entitled to a half share of the assets. However, if the wife has made indirect contributions, she receives only one-third of the assets (Nik Noraini, 1998). This fact indicates that there has been inconsistency in the court’s decision in deciding a homemaker’s portion of assets. Her contributions have been mainly viewed based on the physical aspect of completing and doing household chores (Kamar Ainiah, 2002). Financial contribution for family expenditure is one of the aspects that is measured by the court as an indirect contribution. It is significant when the court considers the contribution in assessing the proportion of sole effort assets.

This contribution is assessed concurrently with other indirect contributions such as the homemaking contribution in taking care of the welfare or the need of the family. Apart from that, the law of division of matrimonial asset concentrated on the parties’ contribution as sole criteria in determining the share. This resulted in the parties taking a long time to settle the dispute. Insufficient evidence to prove the parties’ contribution resulted in the difficulties for the courts to reach a decision. However, the inaccuracy of the provision caused difficulties to the Malaysian Syariah Courts in actual mode of practice of division due to the law concentrates only to the contribution as the sole criterion for determining the share.

The provision should focus on distributing the asset on a fair and equitable basis and address holistic needs of all parties involved. It is hoped that the findings could provide some suggestions on resolving issues related to the division of matrimonial property particularly in assessing the indirect contribution. This study examined the effectiveness of the law through analyzing the courts’ decision particularly in assessing financial contribution for family expenditure which is considered as an indirect contribution and as criteria in determining the share of sole effort asset.

Statutory law on Matrimonial Property Division

Section 122 of Islamic Family Law Enactment/Act which embodies the principle of division provides that:

1. The Court shall have power, when permitting the pronouncement of talaq or when making an order of divorce, to order the division between the parties of any assets acquired by them during their marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of the sale.

2. In exercising the power conferred by subsection (1), the Court shall have regard to-
   a. The extent of the contributions made by each party by money, property, or labour toward acquiring the assets;
   b. Any debts owing by either party that was contracted for their joint benefit;
   c. The needs of minor children of the marriage and, subject to those considerations, the Court shall incline towards equality of division

3. The Court shall have power, when permitting the pronouncement of talaq or when making an order of divorce, to order the division between the parties of any assets acquired 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 of the proceeds of sale

4. In exercising the power conferred by subsection (3) the Court shall have regard to-
   a. The extent of contributions made by the party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family:
   b. The needs of minor children of the marriage, if any, and, subject to those considerations, the Court may divide the assets or the proceeds of sale in such proportions as the Court deems reasonable, but in any case, the party by whose efforts the assets were acquired shall receive a greater proportion.
(5) For the purpose of the section, references to assets acquired during a marriage by one party include assets owned before the marriage by one party that has been substantially improved during the marriage by the other party or by their joint efforts.

The above provisions clearly embodied the rules to the power of the court to order the division of matrimonial assets acquired during marriage upon granting a pronouncement of talaq. For a division of joint effort asset the court shall grant equal proportion. However, the division is subject to several consideration such as the extent of each party’s contribution in acquiring the asset and the contribution must be in the form of money, property or work. In addition, the court also considered any debts owed by either party which was contracted for their joint benefit and the needs of minor children, if any.

Sole effort asset on the other hand, the court may divide the assets in a reasonable proportion provided that it fulfils certain factors. The court shall consider those who did not acquire the assets by the extent of their contribution to the welfare of the family such as looking after the house or caring for the family. The court will also consider the need of minor children from the marriage. For the party who acquired the asset by his effort shall receive a greater proportion.

Thus, the contribution to the acquisition of asset acts as a significant proof of the existence of joint and sole effort of parties which made possible the rights for entitlement to the share of assets. This certainly clarifies that the existence of marriage do not by itself constitute matrimonial assets and therefore, liable to be divided after divorce (Suwaid, 2001).

However, the section appears very general thus inviting the judge to use his discretion while evaluating and deciding the reasonable proportion to the parties. For example, sec. 122(3) states that in dividing sole effort assets, the court shall regard the extent of either party’s contributions in safeguarding the welfare of the family by looking after the home or caring for the family. The section provision invites more discretion of the court to divide the assets especially when the contribution involves financial for the family expenditure but not for acquiring the assets.

The Enactment also embodies the definition of harta sepencarian as in section 2 of Enactment (Islamic Family Law Enactment (State) which reveals that harta sepencarian is referred to as property jointly acquired either directly or indirectly by a husband and wife and its acquisition was made by both parties during the course of their marriage. A judicial decision in most cases elaborates the definition of harta sepencarian in sec. 2 of the IFLA whereby the provision should be read together with section 122 of the IFLA. Section 122(1), (3) and(5) has highlighted the term ‘assets of joint effort’, ‘assets of sole effort’ and ‘assets acquired before marriage and improved by joint effort after marriage’. Although, Section 122 has not specifically stated the word ‘harta sepencarian’; by virtue of sub-sec. (1), (3) and(5) of sec 122 of IFLA, the definition of harta sepencarian can be understood in three situations. Firstly, the assets jointly acquired by the effort of the husband and wife during marriages. Secondly, assets jointly acquired by the husband and wife during the subsistence of their marriage through the effort of one of the parties to the marriage and finally, assets owned by one party before marriage which have substantially been improved by joint effort from both parties during their marriage (Hawa Binti Embong v. Ahmad bin Muda). Thus, assets which are liable to be divided are the assets which were acquired through the direct effort of both parties, the direct effort of one party but the indirect effort of the other and sole or joint efforts to improve the value of the assets which are owned by one party before marriage. Thus, the effort of both parties is pertinent to constitute the legal right to claim harta sepencarian. The effort also determines the right for the proportion of division of the assets.

Methods
Using data from 31 unreported cases, the study examined the effectiveness of the law through examining the approach and practice of the courts in assessing the financial contribution of spouse for family expenditure in order to determine the spouse's appropriate share of the assets. The law provided in section 122 of the enactments governing the principles, application, and interpretation of the law in the division of matrimonial asset, in particular was referred as a based on assessing the courts' practices. Case law analysis was conducted to show the extension of the law for improvement of statutory provisions. The discussion is particularly narrowed to factors and variables that the court commonly applies when dividing the share of the asset. Variables such as contribution, proportion determination, and type of matrimonial assets were examined. The study analysed data from unreported cases which were carefully selected from six zones to represent the states in Malaysia. The zones are namely Shah Alam Syariah Courts, Penang Syariah Courts, Johor Bahru Syariah Courts, Kota Baru Syariah Courts and Sarawak Syariah Courts).
Results and Discussion

Findings on the practice of the Syariah courts in dividing the matrimonial asset are discussed as follow:

Financial Contributions for Family Expenditure

Usually, when both husband and wife earn their own salary, the earnings are used not only to purchase matrimonial assets and personal items but also to cater for family expenditure. In many instances, the working wife spends her money on family expenditure to reduce the husband's financial burden in the acquisition of assets or other expenses. Financial contribution to the family expenditure is described as money paid for water and electricity bills, home utensils, children's clothes, drink, food, and others.

Financial contribution for family expenditure is measured by the court as an indirect contribution which is significant when the court considers this contribution in assessing the proportion of sole effort assets. This contribution is assessed concurrently with other indirect contributions such as the homemaking contribution in taking care of the welfare or the need of the family. This contribution is substantiated with other indirect contributions and the court only grants 1/3 of share to the wife. In Mat Sharie Bin Taakub v. Che Mas Binti Abdullah ((2005) 19(i) JH 109) the appellant husband appealed against part of the decision of the Kuala Terengganu trial court relating to the appropriateness of 1/3 division out of the total value of the assets which involved a matrimonial home situated at Marang. Payments of the asset were made by mortgage instalments by the husband. The undisputed fact remained that the appellant was a teacher while the respondent was a housewife. From 1989, the respondent took over a retail business and at the same time carried out her responsibilities in the household chores as a wife and mother. While managing the shop, she used the business profits for family expenses. The dispute against the appropriateness of the share was made on the basis that the respondent made no contribution at all in the acquisition of assets. However, the court agreed with the appellant's allegation that the respondent made no monetary contributions in acquiring the asset, but she did put in an effort to maintain the needs of her family from money made via the business. In addition, the monthly instalments for payment of the said house from December 1988 until October 1998 were done at the time where the respondent carried out the business. The court held that the decision of trial court be maintained that the house and the land valued RM125, 000 are deemed as matrimonial property between the respondent and the appellant. The court ordered the appellant to pay RM29, 184.35 for 1/3 share of the value of the matrimonial property to the respondent.

The court also expanded this application to financial contributions of a working wife who used her salary for family expenditure. However, the court strictly categorized this contribution as indirect. Although the wording in the statutory was silent as regards to the position of financial contribution to the family expenditure, the provision directly states that the only financial contribution to the acquisition of the assets could be categorized as a direct contribution. The financial contribution for family expenditure made by a homemaker including that of a working wife is a significant contribution where the court takes into account as a contribution to assist and facilitate the husband in family expenditure made by a homemaker including that of a working wife is a significant contribution where the court takes into account as a contribution to assist and facilitate the husband in family expenditure. This contribution is assessed concurrently with other indirect contributions such as the homemaking contribution in taking care of the welfare or the need of the family. This contribution is substantiated with other indirect contributions and the court only grants 1/3 of share to the wife. In Norayah Binti Bakar v. Mohd Adnan Bin Mohd Amin ((2006) 21 JH 81) the plaintiff claimed against a matrimonial home on a land situated at Rembau to be declared as the matrimonial property. The Plaintiff was working as a nurse with a monthly income of RM1, 600 whereas the defendant worked as a supervisor and his last salary before divorce stood at RM1, 995. The fact showed that both parties agreed that the said land had been acquired during their marriage at a price of RM17, 000 after refinancing a car and a family loan. The car was originally registered under the defendant's name purchased in 1984 and had been refinanced under the plaintiff’s name. The house has been constructed in 1992 through financial loans registered under the defendant’s name.

The court took into account the joint efforts by both parties in catering to family expenditure and in the effort of taking care of the family. However, by referring to the husband income, the court was in the opinion that the husband's expenditure was done according to his affordability. The husband's ability to provide for family's need became the wife’s responsibility. This cooperation between both parties was seen not only related to daily expenditure but also in their efforts to purchase land and construct their home. The defendant agreed that the land and the house's monthly instalments are paid by the defendant out of the balance of salary and if insufficient the plaintiff would help with the payment. As regards to the plaintiff's contribution to family expenditure, the court looks into account both parties' joint efforts and cooperation in their roles to contribute to the family and household. This cooperation was clearly derived from the wife's monetary contribution to support the husband's income in
providing for family expenditure. Therefore the court held that the house and the land were declared as matrimonial property with a proportion of 1/3 share to the plaintiff and 2/3 to the defendant.

With regards to a husband's financial contribution for family expenditure, similar consideration is given by the court where his contribution entitles him to a lesser proportion of share of assets which were acquired solely by the wife. It was illustrated in the case of Murshida Bte Mustakim v. Hassim Bin Abdullah ([2006] 4 ShLR 46) where the court held the decision of the trial court to be sustained that the husband deserved for 1/3 of the share of assets. In deciding on the disputed properties, the court was in the opinion that the respondent had given money to procure the said houses by spending money for the prosperity of the family including the personal expenses of the appellant by using his income where the money was derived from a joint account under both parties. The fact showed that the appellant admitted that the money kept by the respondent in the joint account was utilized for food and family expenditure. The court, however, viewed that the respondent had indirectly contributed financially to obtain the said property by spending money for the prosperity of the family and for the appellant herself. With regards to husband's share, the court highlighted that the person who contributed more financially to obtain the property be given a greater share. Thus, the financial assistance indirectly contributed by the husband does not go to the extent that would allow him to attain the larger amount as received by the party who made the financial contribution directly to the acquisition of assets.

An actual contribution either direct or indirect in acquiring assets is pertinent to be assessed in determining the share of each party. This was the opinion of a judge in the case of Noridah Bt. Ab Talib v. Hishamuddin bin Jamaluddin ([2009] 4 ShLR 115) where the court held that it would consider the mechanism of determining the division of assets and the contribution of parties, either directly or indirectly, once it is proved and this would determine the proportion of each party. The court also highlights that the determination of the proportion via presumption or automatic, either 1/3, 1/2 etc must take into consideration the actual contribution, direct or indirect, of both parties in acquiring matrimonial assets. The court also emphasize on the contribution of parties as for priority because it is much more precise for the requirement of a just division. This is a way to prevent the taking away of other’s property inappropriately, which was prohibited in Islam.

The preceding discussion shows that actual contribution either in the form of direct or indirect efforts to the acquisition of assets is the eminent mechanism which the judge used in determining the appropriate share of each party and a precise consideration to ensure a fair and just division. By doing so, it may prevent unjust division which is prohibited by Islamic law.

**Homemaker and Financial Contribution for Family expenditure.**

The contribution of homemaker has been significantly addressed in the distribution of matrimonial asset of 8 decided cases. These cases showed that the court awarded 1/3 share based on purely homemaking contribution; see Zaidah Bt. Md. Zin v. Abdul Razak Bin Khamis 07100-017-0230-07 (Penang), Mohamad Romdon Bin Ariffin v Sa’adiah Binti Abd Rahman 07100-017-0215-06 (Penang), Puten Bt. Sharip v. Ishak Bin Desa 07100-017-0215-07 (Penang), Rokiah Binti Sultan v. Razali Bin Hassan 07100-017-325-09 (Penang), Suharni Binti Samjuddin v. Mohamad Ishak Bin Abdu Hamid 07100-017-197-06 (Penang), Shaari Binti A. Samad 07100-017-49-01 (Penang), see cases Tom Bt Nan v Wan Adib Bin Wan Teh 08100-017-68-2006 (Perak) and Zawiah Bt Aki v. Abu Shukar B. Hj Yeop Wasil 08100-017-0097-2007 (Perak). The data shows that the court recognized the homemaker's right to claim for the matrimonial property after taking into account her duty to take care of the family and the court granted an appropriate amount of share in the division of sole effort assets. It has been highlighted that the extent of homemaker’s contribution is confined to her physical efforts to serve her family chores in taking care of the husband and the family by doing some household activities during a reasonable length of the marriage. In the Sarawak case of Zaiton Binti Enchi Alli v. Hussin Bin Enchi Mat (13100-017-0273-2007 (Sarawak), the facts show that the plaintiff was a full-time housewife and did not directly contribute towards the acquisition of matrimonial assets. The court after considering her homemaking contribution ordered one-fourth of the share of the asset to the plaintiff as her proportion of indirect contribution in maintaining the asset, taking care of the children and for discharging her homemaker's role without any assistance.

For financial contribution in family expenditure such as spending for home furnishing (Faridah Sueiman v. Mohd Noh Othman, mal case no. 86-2000 (Penang), Hasanaah Binti Ini v Nateman Bin Denan 13100-017-0040-2008 (Sarawak) or for groceries (Noraini Abdullah @Rita AK Pagan v. Isnain Bin Abdul Latif 13100-017-0072-2007 (Sarawak); Aimi Nazura Binti Nawi v. Mohamad Sobri Bin Ahmad 03000-017-0010-2007 (Kelantan); Hamimah Bt Othman v. Hamid Bin
Ahmad 08700-017-00011-2008 (Perak), the courts recognize as indirect contribution and significant in dividing the sole effort assets. In the Kelantan case of Aimi Nazura Binti Nawi v. Mohamad Sobri Bin Ahmad (03000-017-0010-2007 (Kelantan), similarly in the case of Intan Salwah Binti Marjani v. Mohamad B Mat Sillah 08700-017-0042-2008 (Perak), the plaintiff as a housewife and part-time direct seller was granted 1/3 share as her proportion to contribution in homemaking. Her business profit was also used for family expenditure the appeal court increased the share of the appellant wife and granted her 1/3 share of the value of the matrimonial home after taking into account her direct and indirect contribution in the acquisition of the home during nine years of marriage. The appellant was formerly a teacher and made monetary contributions to the family expenditure. The court considered the appellant's contribution to the family as a great contribution which gave an opportunity to the respondent to acquire other assets such as a house. Thus, this case signifies that in dividing sole effort assets, it seems that the court takes into consideration the monetary contribution of the wife in family expenditure. The problem associated with the difficulty to identify direct and indirect contribution which resulted in an inconsistency in the court approach especially in considering the monetary contributions to family expenditure. Thus this creates a problem in the interpretation of the contribution due to the rigidity of the provision.

However, the husband is entitled to share of the asset on the basis that his indirect contribution to the acquisition of the asset could be established. This is illustrated in the Perak case of Hasan B. Yeop v. Ramlah Bt Mahmud (08600-017-0039-2005 (Perak), where the plaintiff ran a fruit business and also carried out several other jobs in order to cater for their family expenditure. The defendant wife on the other hand who worked as a bus conductor, bought a house and some other assets using her salary. The court awarded the defendant 2/3 of the share of the house based on her greater contribution in the acquiring the assets.

The above explains that the court will not incline to award equal division if the asset is acquired by sole effort. Here, the acquirer of the asset should receive a greater proportion. However, in certain cases, it is observed that the court did not follow the general rule strictly, especially after taking into account other considerations such as length of the marriage. In the Penang case of Noraini Binti Abdullah v. Aziz Bin Abdullah (07100-017-0003-03 (Penang), despite the fact that the husband had been paying for mortgage instalments for 13 years before the divorce, the court considered the wife's contribution as a homemaker for 40 years. The plaintiff did assist the defendant in running a business where the income from the business was used for family expenditure that entitled her to a half share. Meanwhile, in the Penang case of Hassimah Binti Said v. Syed Isa Bin Syed Ahmad Al Hady (07100-017-0139-04 (Penang), the plaintiff received 1/2 share of matrimonial property after considering her indirect contribution to the family expenditure by using her salary. This shows that the court had made loose interpretations on the law when it awarded equal division to the homemaker wife while dividing the sole effort assets based on her homemaking service of more than 20 years of marriage.

The above discussion proves that the prescribed proportion of share allotted to homemakers is not an absolute right. The court seems to consider other factors and widens the scope of contribution not confining only to the acquisition of assets but indirectly towards the acquisition of such assets. In these situations, it is observed that the court awarded 1/2 portions. This is observed in many cases decided in Kelantan where the indirect contribution has been loosely interpreted.

With regards to an appropriate share entitled to a homemaker wife, the study shows that at least 1/3 share is awarded to her as entitlement for the homemaking contributions in dividing sole effort assets. It has been noted that the court adopted an automatic approach to grant at least 1/3 share to the homemaker. However, the portion is subjected to the circumstances of the case such as the extent of the homemaking contribution, the length of the marriage and other factors stipulated in the provision. On the other hand, the court has the discretion to decide what proportion is most appropriate to homemaker's contribution for a fair and just division. Beside 1/2 and 1/3 share, other proportions are 1/4, 1/6 and 1/8. In Kelantan, the Court of Appeal gave substantial recognition to a homemaker’s role by granting at least 1/3 share when she successfully discharged her role as a homemaker. In this case, besides homemaking contributions, the court considered her part-time job as a significant contribution as she helped the respondent in family expenses until the later managed to acquire some other assets. The appellant was dissatisfied with the trial court decision that granted 1/3 to the plaintiff as he urged that the respondent agreed not to claim on the said asset. However, the court found no evidence at all and rejected the application and maintained the decision of the trial judge (Jusoh Bin Saman v. Tuan Bidah Binti Tuan Kundra) 03000-017-0003-2012 (Kelantan). In the case of Norhayati Binti Yusoff v. Ahmad Shah bin Ahmad Tahirani (03000-017-0005-2007 (Kelantan), an appeal for an
appropriate proportion to a wife's indirect contribution in the acquisition of asset, the Court of Appeal regarded the contribution as a great effort in order to enable the husband to work peacefully. This contribution was also regarded as partnership due to which the husband was able to purchase a new house and other assets. In another case, the Court of Appeal granted 1/3 share as an appropriate proportion based on the indirect contribution of the homemaker wife (in Ramli Bin Che Amat v. Norina Bt Muhammad 03000-017-0002-2006 (Kelantan), Aimi Nazura Binti Nawi v. Mohamad Sobri Bin Ahmad 03000-017-0010-2007 (Kelantan).

It can be concluded that as long as the parties spend for the acquisition of the assets, the parties would entitle to the share of the matrimonial asset. However, widening the scope of considerations to the length of marriage is more practical in dividing the asset.

Conclusions
As a conclusion, the study proves that actual contribution either in the form of direct or indirect efforts to the acquisition of assets is the eminent mechanism which the judge used in determining the appropriate share to each party and a precise consideration to ensure a fair and just division. In addition, the prescribed proportion of share allotted to homemakers is not an absolute right. The court seems to consider other factors and widen the scope of contribution; not confining only to the acquisition of assets but indirectly towards the acquisition of such assets. In addition, widening the scope of considerations to the length of marriage is more practical in dividing the asset. Thus, the extent of both direct and indirect contributions is an eminent considerations for the division. If the amount of money contributed to the acquisition of assets was not equal, the court would resort to the indirect contributions made to entitle the party for 1/3 portion of the matrimonial property. The study shows that different approaches are adopted by the court in dividing the sole effort assets of the breadwinner husband or wife to determine appropriate proportions of matrimonial assets division.

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