

DIVISION OF MATRIMONIAL PROPERTY IN MALAYSIA: THE LEGAL HISTORICAL PERSPECTIVE

Norliah Ibrahim
Nora Abdul Hak

Abstract

Matrimonial property under the Malaysian family law refers to the property that is jointly acquired by husband and wife during the marriage. Under the present law, in dividing the matrimonial property upon divorce, the court will look at the parties' contribution either through direct or indirect contribution. The article focuses on the development of the law governing the division of matrimonial property from the historical context. The discussion concentrates on majority of races living in Malaysia i.e., Malay, Chinese and Indian which were previously governed by their customs. It is interesting to see whether customs practised by different races in Malaysia play any role in the development of law concerning the division of the matrimonial property. It will look at how these customs and practices evolved into the present legal provision.

Introduction

A claim on the division of matrimonial property is one of the ancillary rights, which are frequently invoked by the parties especially after the dissolution of marriage. Even though it has been emphasized that the spouse's ownership over matrimonial property prevails throughout the marriage,¹ it is hardly raised during the subsistence

of the marriage since the couple normally may not be anxious to distinguish the ownership of the property at that time. Generally, the reason is mainly due to the fact that they were sharing the benefits together. However, upon divorce or judicial separation they start to distinguish the ownership of the property and desire it to be returned to the original owner or to be sold and the proceeds to be divided between them. The same applies after the death of one of the parties. Some divorces are concluded smoothly and amicably but in other cases, both parties fight over practically everything especially their rights in matrimonial property. In Malaysia, the family law is governed by two separate legal systems 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 & Divorce) Act 1976² (hereinafter referred to as the LRA 1976), 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 in each states in Malaysia.³

The Historical Background of the Malays

The characteristic of family law in Malaysia stems from the diversity in the components of its population,⁴ which basically comprises several distinct ethnic groups, including the Malays, Chinese, Indians and a number of smaller immigrants and aboriginal groups.⁵ It is noted that in this area of law, Malaysians are treated differently based on their race, religion and custom which resulted from the history and the development of the society itself.⁶

Historically, the Malays are predominantly a rural people.⁷ Although they are randomly distributed around the country, they are mainly found in the rural areas. Ooi's study showed that most of the Malay population lived in the countryside where its rural character is claimed to be reflected in their occupational pattern. Most of them were engaged in padi cultivation, rubber plantation, other forms of agriculture, fishing, mining and forestry.⁸ Raymond recorded using of 1931 census, there were over 36,000 Malays employed in fishing, and this figure does not include a large number of men who divide their time between fishing and agriculture, nor the considerable body of fishermen's families, dealers, retailers and carrier of fish who depend on the industry for a livelihood. In 1938 there were 26,500 fishermen in the Straits Settlements and in Federated Malay States alone, nearly 14,000 of these being Malays and 10,500 being Chinese.⁹ It is undeniable fact that in the customary peasant family law, both men and women participate in productive work.¹⁰ The division of labour within the family was a very basic division which based on

differences between the sexes.¹¹ The most important means of production i.e., land, has been jointly worked together by the husband and wife. Swift in his research pointed out that the women in Negeri Sembilan for example, often worked in the rice fields despite the fact that her main work is primarily in the house.¹² The same also has been well established by Heather in his study where he noted that among Malays of the East-Coast, women have engaged on production of rice for generations. Both of them cooperated in the cultivation of both wet and hill rice where men cleared or prepared land and repaired bunds around lowland plots while women planted or transplanted and harvested both type of rice. On the hillsides too, women did all the weeding while men assumed most of the responsibility for putting fertilizer in the lowlands plot.¹³

More active participation from women can be found particularly in the state of Kelantan and Terengganu where Raymond in his research pointed out that "not only they exercise an important influence on the control of family finances..., they also engage in independent enterprises, which has directly increase the family supply of cash."¹⁴ Thus, it is very obvious that in traditional Malay family, both men and women did the same work in planting, maintenance of the land and harvesting of the paddy crop.

In explaining about the Malay family law, E.N. Taylor observed that the Malays marry early and it is very common for these young couple to start their life with few possessions. By the sweat of their brows both of them cleared a patch of jungle to grow their own rice or make their little plantation of rubber or coconuts without neglecting their main obligation of bringing up their children.¹⁵ Even though in economic undertakings, there still seems to be a clear division of labour between male and female where household chores like cooking, washing dishes and clothes, or looking after babies are the responsibility of a wife while the husband is looked at as the breadwinner, the one who will support the family economically and financially, there are however exceptions to this where husband and wife work together to make a living especially found in rice growing where males and females are involved in the whole process of production.¹⁶

For rural Malays engaged in land-based economic activities, inheritance is the primary means of access to productive resources. They may be inherited during the marriage or prior to the marriage where both of them will work together on it throughout their marriage. Some will save money from its produce and from that saving more land was bought and again it was worked by both of them. And it was found later that these properties will be focused on

by the married pair once the marriage end.¹⁷ In fact, Taylor emphasised that it is practically impossible to deal with a question of divorce without going into facts which relate to a dispute about property.¹⁸ Thus, the distribution of property among the Malay families was found by several writers to be strongly influenced by the Malay custom of matrilineal origin where generally gives to the divorce wife a share of all land acquired during the marriage in which she has assisted to cultivate it.¹⁹

Harta Sepencarian and the Influence of Malay adat

Harta sepencarian or jointly acquired property basically refers to the property acquired by the joint effort of the husband and wife during their marriage. Historically, the concept of *harta sepencarian* which has long been recognised under the Malay customary law forms its root from the custom of the Malays specifically practiced in the state of Negri Sembilan and in the Naning district in the state of Malacca which follow the matriarchal *adat perpatih*.²⁰ The rights as actually conceded in the other Malay States approximate very closely related with the *charian laki bini* of the said matrilineal or *perpatih* tribes. The wife, in case of dissolution of the marriage has given a right to claim a substantial share of land acquired during the marriage.²¹

According to *adat perpatih*, acquired property is sharply divided into two categories based on its origin. The first refers to the property acquired by the unmarried person, which is known as *charian bujang*²² while the other one addresses to the property acquired by the married couple, *charian laki bini*, which refers to the property acquired by the joint effort of the husband and wife during covertures.²³ Briefly, all the marriage property²⁴ including the *charian laki bini* will be divided upon the dissolution of marriage. The property will be divided equally between the husband and wife upon divorce irrespective of who is to blame for divorce, and irrespective of the wife's adultery or of number of children. This is however done after the payment of all debts.²⁵ The rule of equal division on divorce however is not applicable in case of *taa'lik*²⁶ divorce where in such a case the wife retains the whole of the property.²⁷

In the other parts of the States of Malaya and in the Borneo States, the same right was also recognised where the wife's claim is allowed on the basis that she has assisted the husband to cultivate the land where in such a case she is entitled to one-half of the property while in other cases to one-third of the property depending on the contribution and facts and circumstances of the case.²⁸ In relation to this, it has been observed that,

In districts where it is the custom for the wife to assist the husband in his employment, the property accumulated during the marriage by their respective toils is in the event of a divorce is divided in equal shares between the man and the woman of their respective heirs. Where one of the two dies, the survivor obtains, in addition to this half-share, his lawful portion of the heritable property to which the other half of their common earnings is regarded as belonging. Thus, we find in Aceh the same peculiarity that exists in Java and Madura and most Malayan countries, viz. that is where the woman is the fellow-worker of her husband there gradually grows up a kind of partnership between the two.²⁹

Thus, it is crystallised from the above quotation that the wife's entitlement basically arises from her contribution in assisting the husband in acquiring the property particularly in cultivating land at that particular time. The distribution of property which has been widely practiced by the Malays was later accepted and absorbed as part of the law when the Malays became Muslim where at first, the property was described as *harta sharikat* or partnership property. Nevertheless, it was decided later that *harta sepencarian* is different unless there is either a written or verbal agreement to that effect.³⁰ The Muslim jurists appear to derive the same principle in Islamic jurisprudence on the basis that a wife who has no obligation to perform all the household duties including looking after the children is entitled to compensation for any work she performs during the marriage, if she so desires. In view of this, any housework done by a wife is recognised in Islam as productive work where she is therefore entitled to remuneration for the services rendered.³¹

Thus, the Malay custom of the division of the *harta sapencarian* on divorce, which applied throughout Malaya, has been accepted and judicially recognised. The proportion of division, which is fundamentally based on the parties' contribution and circumstances of the case might also be determined by other factors. In the state of Perak for example, apart from the contribution and circumstances of the case, the proportion of the division is also based on arrangements by the two families and the *ketua kampong*; ³² if the woman assisted in the actual cultivation of the land, she can claim a half; if she did not work on the land she received a smaller share – perhaps one third. If a man is a government servant who earned a salary and the property is bought out of his earnings the wife's share is one-third.³³ Similarly in the state of Selangor, the court decided that a divorced wife is entitled to a half share claim as *harta sepencarian* of immovable property jointly acquired by both the husband and wife during their marriage.³⁴

The same proportion of division is basically adopted by the other states as well.³⁵

At present, the custom of the division of *harta sepencarian*, which has long been judicially recognised has been now codified in the Islamic Family statute, which is applicable in the states of Malaysia. The codification made in the 1980s according to Nik Noriani connotes the continuing importance of the role of *adat* or custom in the development of Islamic law.³⁶ The civil law provision concerning the matrimonial property also has been enacted which appears to be the same as in the Islamic Enactments.³⁷

Early History of the Chinese Settlement in Malaysia

The earliest Chinese settlement in Malaysia can be traced back to the time of Malacca Sultanate in the fifteenth century³⁸ even though large numbers actually began to arrive only in the mid-nineteenth.³⁹ Yew Ching observed that their settlement during the period from the end of the eighteenth to the first decade of the twentieth century can be divided into three patterns i.e the urban port settlement which began with the small trading community in Malacca Sultanate in the fifteenth century, but grew rapidly after the British founded Penang in 1786 and then Singapore in 1819. The second one is the mining settlements which began with the gold-mining centre in Bau, Sarawak in the early nineteenth century where the miners then opened up the tin mines at few other places such as Lukut, Sungai Ujung, Larut as well as Kuala Lumpur. While the last one which refers to the Chinese agricultural settlement developed later in response to the development of the cash crop industry in the second half of the nineteenth century.⁴⁰

It has been pointed out that the reason for Chinese immigration to Malaya was the desire to better their economic status. Most of them originated from south-eastern China, from the provinces of Fukien, Kwantung and Kwangsi and the island of Hainan south of Kwantung where the natural resources of these regions were limited. There was extreme pressure of population on available cultivated land, which eventually forced many to seek a better livelihood overseas. Malaya, among the countries which offered the best prospect to migrants, not only because of the opportunities for trade and mining, but also because of the policy of active encouragement followed by the British who, having acquired the Malay States, realized the development would be seriously hampered in this sparsely people land without cheap and plentiful labour.⁴¹ This is the main reason why from the start they have not concerned themselves with subsistence agriculture, which was the basis of their livelihood

in China, but rather involved with all types of occupations which brought in monetary rewards such as initially tin-mining, trade and commerce, and later with cash-crop agriculture.⁴²

The Chinese immigration to Malaya has greatly increased after the foundation of Penang in which Captain Francis Light formally took possession on 11 August 1786.⁴³ This is fundamentally triggered by the British policy in gaining profit by their industry for their new territory. However, it has been observed that there has been a little interference as to their way of life as the Chinese expressed their desire to be tried and governed by their own laws in which Captain Light has appointed a headman or *Capitan* for each Chinese community.⁴⁴ This *Capitan* acted as a link between government and community and administered the laws and regulations of each community.⁴⁵ Apart from that, there were secret societies which basically have their systems of internal regulations.⁴⁶ This scenario has led to the absence of any laws which practically applicable to the Chinese migrant workers until 1877 where the Chinese Immigration Ordinance was introduced which then replaced by few other ordinances with the principal objectives of safeguarding the employment and livelihood of residents.⁴⁷

Despite the fact that it is noted that the Chinese community were very much preferred to regulate their own affairs by the *Capitan China* and secret society, this 'autonomy' was short-lived when the British colonial administration began to exert more direct control over the affairs of the local inhabitants by the introduction of the Charters of Justice in 1907.⁴⁸ Although it has been identified that basically the main purpose of introducing the First Charter of Justice which was then followed by the Second and the Third Charter in 1826 and 1855 respectively, was to introduce the English law, in the areas of marriage and divorce "Chinese family law" is still applied by the court.⁴⁹ The justification of this policy has been clearly emphasized in the case of *Chulas v. Kolson*⁵⁰ where Maxwell R. said that English law "are not applicable to such races, when intolerable injustice and oppression would be the consequence of their application."⁵¹

As regard to the Chinese in the Federated Malay States, the English Common Law was introduced by the passing of the Civil Law Enactment No. 3 of 1937.⁵² Therefore, it is understood that although English Law was introduced, the law is subject, in its application to the various alien races, to such modifications as are necessary to prevent it operating unjustly and oppressively on them.⁵³ In this respect, it is very clear that in addition to the provisions in the Charters, Chinese law and custom has received a basis for its application through the use of private international law principles⁵⁴

where the Chief Justice in the case of *Chulas v. Kolson*⁵⁵ clearly states that;

their own laws or usages must be applied to them on the same principles and with the same limitations as foreign law is applied by our courts to foreigners and foreign transaction.⁵⁶

Thus, in certain areas of law such as cases involving adoptions, legitimation as well as polygamous marriage, Chinese custom was applied.

Division of Matrimonial Property under the Chinese Custom

As to property rights, the court in the Straits Settlements decided that although the Common Law gave certain specific rights to the husband over the wife's property, the husband in the case of *Lim Chooi Hoon By Her Next Friend Koh Sin Yew v. Chok Yoon Guan*⁵⁷ was conferred no marital rights with respect to the wife's property and she therefore was entitled to recover.

It is noted that even though property has been a subject of discussion in Chinese customary law, it was only dealt with in certain areas such as property in inheritance, intestacy and charitable trust.⁵⁸ Pertaining to the distribution of matrimonial property, no information can be traced on this particular issue as if the matrimonial property is not recognised in their custom. The reason can basically be found by looking at the position of women in their traditional society. Yew Ching-hwan in his research proved that the Chinese women have been considered as among the most oppressed groups which had low social status within the family, clan and community.⁵⁹ Under their custom, they were deprived of the right to inherit family properties, to divorce as well as to education. Since their roles were primarily confined to child-bearing, domestic work, and family responsibilities, they were therefore found to be financially and socially dependent upon their husband. In fact, the traditional remark that 'women without talents are virtue' has been claimed to summarise the attitude towards women.⁶⁰ In pursuant to this scenario, they consequently have no right to acquire any property and it is then rightly claimed that matrimonial property does not recognised in their custom. Whatever property acquired during the marriage is thus belong to the husband and his family.⁶¹

However, decided cases proved that before the introduction of the Law Reform (Marriage and Divorce) Act 1976, in which a specific provision is made as to the division of matrimonial property once the court granted the decree of divorce or judicial separation, the

parties may seek a declaration from the court pertaining to the title or possession of property by virtue of Section 11 of the Married Women Ordinance 1957. Thus, in case there is any doubt pertaining to the title to or possession of property, either party may apply by summons or otherwise in a summary way, to any judge of the High Court or where the value of the property falls within the jurisdiction of a sessions court to the session court judge.⁶² In the case of *Chin Shak Len v. Lin Fah*,⁶³ the wife brought an action under section 11 of the Married Women Ordinance for the purpose of determining the title to or possession of an undivided interest in a piece of land. The court decided that since he has contributed one-fourth of the purchase price the husband was only entitled for one-fourth of the piece of the said land while the remaining portion of the land was belonged to the wife by reason of resulting trust arising in her favour.⁶⁴

The case *Teh Eng Kim v. Yew Peng Siong*⁶⁵ also dealt with a property dispute between the husband and wife. Since both of them are working and thereby agreed to share in the purchase and running of the matrimonial home, the proceeds of sale of the matrimonial home therefore was ordered to be equally divided by the Federal Court. Thus, from the discussion, it is clear that even though matrimonial property is not recognised under the Chinese custom, before the enforcement of the LRA, the parties can rely on the provision provided for under the Married Women Ordinance should there be any property disputes between the parties.

Reasons for the Migration of the Indians

The Indians mass migration was the result of specifically European political and economic needs. Unlike the spontaneous migration of the Chinese, it was planned and directed by the colonial authorities. Consequently, the structure of Indian society in Malaya, especially in the plantation sector of the west coast, was determined by the structure and needs of the European sector of the colonial economy. Begun on a small scale for public works and the European estates in the nineteenth century, the influx of Indian labour became a flood with the rubber boom after 1905, continuing at a high level until 1938. There had been a small spontaneous migration of South Indian labour to the Straits Settlement since the establishment of Penang in 1786, and spontaneous migration continued alongside the mainstream of planned migration throughout the period before the Japanese occupation in 1941. However, 80% of the migrants from India were unskilled labourers, almost all of them directly or indirectly recruited by European enterprise.⁶⁶

Distribution of Property under the Hindu Customary Law

Unlike the Chinese law, the Hindu customary law is said to be easier to ascertain in the sense that it has been formulated by the courts upon the basis of authoritative texts.⁶⁷ Commentaries or the great Indian treatises of the nineteenth century such as Mayne, Jolly, Mulla, Gour and Gupta are considered as authoritative texts of the substance of Hindu law that will be referred without any hesitation, by the court.⁶⁸ Even though, in principle there are two main schools, namely *Mitakshara* and *Dayabagha*,⁶⁹ different commentaries is said to have given rise to several schools of Hindu law, which then lead to the problem in determining which school of law the Hindus in this country are belong to.⁷⁰ This is mainly contributed by the great diversity of Hindu customary practices in India which was then followed in Malaysia in certain areas of laws such as marriage, divorce, inheritances as well as distribution of property.⁷¹ Thus, the cases proved that the courts have never seriously question the application of Hindu law which was practiced in India for the purpose of deciding the case in Malaysia.⁷² Therefore, reference to Hindu law as emphasised by Hooker should be made relevant if there is any issue arises in relation to property rights in Malaysia.

As in the case of Chinese law, it is observed that apart from the application of Hindu law primarily centered on family matters such as marriage and divorce, it has also been applied in other subject such as distribution of property.⁷³ Thus, in this respect, the court in the case of *Pootoo v. Valee Uta Taven & Anor*,⁷⁴ decided that according to Hindu Law, a wife's property, real and personal is considered as her separate property unless in a stress circumstances in which the husband has a right to take possession and to deal with it as his own without being liable to his wife. In deciding the case, Wood J., said that;

I hold as a fact that according to Hindoo Law, the jewels and the land was the wife's separate property. On these facts, I am of opinion that the parties being Hindoos, and married under Hindoo Law or Madrasse custom and law, it must be taken to be understood between them, as a matter of agreement, that the wife jewellery, as well as land, should be hers,- only subject to being taken by the possession of by the husband, under stress of circumstances, which has not arisen here...⁷⁵

The above quotation signifies that the court by relying on the principles of Hindu custom decided that the husband in this case was not entitled

for the wife' realty and personalty possessed during the covertures since it was regarded as her separate property.

A similar principle was followed in the case *Nagammal v. Suppiah*⁷⁶ where it was found that the judgement was passed based on the principles in Tamil Hindu customary laws. Thus, by relying on such custom that applicable in the Straits Settlements, the court decided that the Tamil husband of a Tamil wife who had left him was entitled to retain all the jewellery he had given to such wife upon their marriage.

Another area that is considered as the most distinctive feature of Hindu Law to be found in Malaysia is the institution of Hindu joint family property.⁷⁷ The judgement of Aitken J. in the case of *The Estate of T.M.R.M. Vengadasalam Chettiar deceased*⁷⁸ evidenced that Hindu Law relating to joint Hindu family property was applicable in the Straits Settlement without argument.

From the above discussion, it is observed that Hindu customary law in Malaysia is a continuation or developed from the Hindu custom as practiced in India. It is known and judicially accepted here on the basis of authoritative Indian authorities. Treatises or commentaries of people such as Mayne, Jolly, Mulla, Gour and Gupta have very much assisted the court in Malay States as well as the Straits Settlement in formulating their own judgment in the Hindu Law and customs. Even though, property has been the subject of discussion, unfortunately nothing can be found as regards to the division of the matrimonial property among them. The reasons are found to be similar to the Chinese where it is basically based on the status of the woman in the custom. Once they got married, they are subservient to the husband and the family for life and were economically and socially dependent on the husband. Thus, consequently, they have no right to acquire any property and should they be a divorce, the question of division of matrimonial property is not relevant since like the Chinese, anything accumulated throughout their marriage is owned by the husband accordingly.⁷⁹

However, before the introduction of the LRA, in case of any property disputes between the husband and wife, as the Chinese, the Indian also, was governed by the Married Women Ordinance 1957.⁸⁰ It is noted that the court in deciding the case will sometimes refer to common law as well as equitable principle which has been clearly highlighted in the case of *Nagapushani v. Naseratnam*.⁸¹ The High Court referred to common law principle when dealing with the question of gift between the husband and the wife. The equitable principle was also applied in this case where the court held that since

both parties contribution cannot be ascertained, it would be equitable then to divide the property equally between them.

The Current Provisions on Division of Matrimonial Property

The law on the division of matrimonial property for the non-Muslims in Malaysia is currently contained in the Law Reform (Marriage and Divorce) Act, 1976 which was brought into force on 1 March 1982. The provision that deals with the division of matrimonial property is reproduced below for a better understanding of the provision. Section 76 states:

- (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 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 sub-section (3) 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 thinks reasonable; but in any case the party by whose effort the assets were acquired shall received a greater proportion.

For the purposes 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.⁸² The Law Reform (Marriage and Divorce) Act 1976

The legislation relating to Islamic Family Law in Malaysia has recognised *harta sepencarian* as a matter of Islamic law although it was originally based on Malay custom. The Islamic Family Law (Federal Territories) Act, 1984 has specific provisions on the division of matrimonial property, which is provided for under section 58 of the Act. It is observed that the provisions on division of the matrimonial property for the Muslims and the non-Muslims, except the use of certain terms, are the same.

Conclusion

In term of ownership of property, both Civil and Islamic law recognise an individual right to own property regardless of their status, married or non-married. The Common law at the early stage denied such right to married women. It is interesting to note that the Common law position was not to recognize matrimonial assets or any special rules governing family property or assets. Thus, if a husband buys property for the common use with his wife, it will not create any interest or title for the wife to the property. However, there has been an encouraging development in the middle of nineteenth century, allowing the married women to enjoy the same right to acquire, own, hold or dispose of any property of their own. Upon divorce or dissolution of marriage, the acquired property is subject to division depending on the contribution of the parties. The law has recognized the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family.

However, for Hindus and Chinese, the custom does not play an important role in dividing the matrimonial property as compared to the Malays where the custom addressed their rights. As stated, the current laws either for the Muslim or the non-Muslims has recognized the division of property based on the contribution made by the parties to the marriage. This contribution can be either direct contribution or indirect contribution. It is observed that the existing laws on the division of property that is applicable to the Muslims in Malaysia

have been influenced by the custom practiced by the Malays. The custom of dividing the property upon a divorce has been accorded judicial recognition in the various State Enactments. It is also recognized under the civil law by the Courts in Malaysia. It is also believed that although the provision on the division of matrimonial property under the LRA 1976 for the non-Muslims followed the English law principle of matrimonial property, it has indirectly been influenced by the Malay custom.

Notes

- ¹ As emphasized by Shankar J. in the case of Overseas Investment Pte. v. Anthony William O' Brien, *Malayan Law Journal (MLJ)*, [1988] 3, pp. 332- 335.
- ² See, section 76 of the Law Reform (Marriage and Divorce) Act, 1976.
- ³ For example, for those who are residing in the Federal Territories, it is governed by the Islamic Family Law (Federal Territories) Act, 1984, under section 56.
- ⁴ Mimi Kamariah, *Family Law in Malaysia*, Kuala Lumpur: Malayan Law Journal, 1999, p. 2.
- ⁵ Conner Bailey, *The Sociology of Production in Rural Malay Society*, Kuala Lumpur: Oxford University Press, 1983, p.10.
- ⁶ Zaleha Kamaruddin, *A Comparative Study of Divorce Among Muslims and Non-Muslim with Special Reference to the Federal Territory of Kuala Lumpur*, Ph.D thesis, London: University of London, 1993, p.17.
- ⁷ The Prime Minister of Malaysia, Doctor Mahathir has emphasised in his vision 2020 that Malaysia to be a full industrialized country. For further details, please refer to Ahmad Sarji Abdul Hamid, *Malaysia's Vision 2020, understanding the concept, implications and challenges*, Malaysia: Pelanduk Publication, 1993.
- ⁸ Ooi Jin-Bee. *Land, People and Economy in Malaya*, London: Longmans, reprinted 1964, p. 148.
- ⁹ Raymond Firth, *Malay Fishermen: Their Peasant Economy*, reprinted in London: Routledge, 1998, p. 5.
- ¹⁰ *Ibid.*, p. 80.
- ¹¹ Evelyn Hong, *Rural Women in Development*, Evelyn Hong (edit.) *Malaysian Women, Problems and Issues*, Penang: CAP of Penang, 1983, p. 5.
- ¹² M.G. Swift, *Men and Women in the New Asia, The Changing Social Roles of Men and Women in Southeast Asia*, Ward, B.E (edit.), New York: UNESCO, 1963, p. 277 as quoted by Zaleha Kamaruddin, *Comparative Study of Divorce Among Muslims and Non-Muslim with Special Reference to the Federal Territory of Kuala Lumpur*, p. 48.
- ¹³ Heather Strange, *Rural Malay Women, in Tradition and Transition*, New York: Praeger Publisher, 1981, p. 198.
- ¹⁴ Raymond Firth, *Malay Fishermen*, p. 80.
- ¹⁵ E.N.Taylor, *Malay Family Law*, *Journal of the Malayan Branch of the Royal Asiatic Society*, 1937, p. 1.
- ¹⁶ Wan Hashim Hj. Wan Teh, *A Malay Peasant Community in Upper Perak*, Bangi: UKM, 1978, p. 26.
- ¹⁷ E.N.Taylor, "Malay Family Law", *JMBRAS*, 1937, p. 1.
- ¹⁸ *Ibid.*, p. 6.
- ¹⁹ Refer to Ahmad Ibrahim, *The Muslims in Malaysia and Singapore: The Law of Matrimonial Property*, pp. 188-190 in J.N.D. Anderson, *Family Law in Asia and Africa*, London: George Allen & Unwin Ltd, 1968; Ahmad Ibrahim, *Islamic Law in Malaya*, Shirley Gordon, (edit), Kuala Lumpur,

- Malaysian Sociological Research Institute Ltd, 1975, p. 229 and Salleh Buang, *New Frontiers in Harta Sepencarian*, Selangor: Nordin and Salleh, Sdn. Bhd., 1988, p. 49.
- ²⁰ *Adat Perpatih* is a customary law practiced in the state of Negeri Sembilan and the Nanning district in the state of Malacca. The *adat* which came from Sumatera during the seventeenth century emphasises on the matrilineal system as compared to the patrilineal *adat temenggung* which applied in the other states of Peninsular Malaysia.
- ²¹ Ahmad Ibrahim, *Islamic Law in Malaya*, p. 229.
- ²² *Charian bujang* can be disposed by the owner if it is literally his own earnings. However, if it was acquired by a man's parents and settled on him in childhood, it cannot be disposed of unless with prior consent of his mother's family. However, this property on marriage becomes *harta pembawa* or personal estate of the married man. For further details, refer to E. N Taylor, "The Customary Law of Rembau", *JMBRAS*, 1929, Vol. 7, part 1, pp. 6-38.
- ²³ Ahmad Ibrahim, *Family Law in Malaysia and Singapore*, Singapore: Malayan Law Journal, 2nd. Ed., 1984, p. 257.
- ²⁴ Marriage property is divided into three types that is *harta carian* which is acquired during wedlock, *harta pembawa* refers to property which the husband brought at the time of the marriage and *harta dapatan* which belonged to the wife at the time of the marriage. Upon the termination of marriage, the property which the marriage commenced must be restored to the respective parties where in such a case *dapatan tinggal* – the wife's separate estate remains with her or her tribe and *pembawa kembalik* – the personal estate brought by the man returns to him. Ahmad Ibrahim, *Family Law in Malaysia and Singapore*, p. 257.
- ²⁵ Ahmad Ibrahim, *Islamic Law in Malaya*, p. 233.
- ²⁶ Divorce on breach of some conditions expressly stated in the certificate of marriage or oral pronouncement during the marriage.
- ²⁷ E.N.Taylor, "The Customary Law of Rembau", *JMBRAS*, Vol. 7, part 1, 1929, p. 26.
- ²⁸ Ahmad Ibrahim, *Family Law in Malaysia and Singapore*, p. 252.
- ²⁹ Snouck Hurgronge, *The Achenese*, Leyden, 1906, Vol. 1, p. 365 cited by Ahmad Ibrahim in "The Muslims in Malaysia and Singapore: The Law", p. 189.
- ³⁰ Ahmad Ibrahim, "The Muslims in Malaysia and Singapore: The Law of Matrimonial Property", pp. 188-190.
- ³¹ Faizan Mustafa, "Domestic Work as Work: Recognising Joint Property Rights for Wives", *Islamic and Comparative Law Review*, vol. 25-26, 1995-96, p. 118 at p. 126.
- ³² Head of the village.
- ³³ E.N. Taylor, "Malay Family Law", pp. 55-56.
- ³⁴ *Roberts v. Umi Kalthom*, MLJ, 1966, 1, 163. See also the case of *Boto Binti Taha v. Muhammad*, MLJ xlix, 1985, 23.

- ³⁵ For further details, please refer to Ahmad Ibrahim, *Family Law in Malaysia and Singapore*, pp. 252-257.
- ³⁶ Nik Noriani Nik Badli Shah, *Marriage and Divorce Law Reform within Islamic Framework*, Kuala Lumpur: International Law Book Services, , 2000, p. 129.
- ³⁷ Refer to section 76 of the Law Reform (Marriage and Divorce) Act 1976.
- ³⁸ Yen Ching - Hwang, 'Historical Background' in Lee Kam Hing and Tan Chee-Beng (edits), *The Chinese in Malaysia*, South-East Asian Social Science Monographs, Kuala Lumpur: Oxford University Press, 2000, p.2. The author pointed out that the reason is primarily because Malacca was strategically located in the Straits of Malacca which attracted Chinese traders who remained to conduct their business in exchanging products from China, India and the islands of South-East Asia.
- ³⁹ M.B. Hooker, *Personal Laws of Malaysia*, Kuala Lumpur: Oxford University Press, 1976, p.124.
- ⁴⁰ Yen Ching - Hwang, 'Historical Background,' Lee Kam Hing and Tan Chee-Beng (edits), *The Chinese in Malaysia*, p. 3.
- ⁴¹ Ooi Jin-Bee, *Land, People and Economy in Malaya*, London: Longmans, Reprinted 1964, p. 110.
- ⁴² *Ibid.*, p. 149.
- ⁴³ Victor Purcell, *The Chinese in Malaya*, Kuala Lumpur: Oxford University Press, 1967, p. 39.
- ⁴⁴ *Ibid.*, p. 49.
- ⁴⁵ M.B Hooker, *The Personal Laws in Malaysia*, p.124.
- ⁴⁶ See Leon Comber, *The Traditional Mysteries of Chinese Secret Societies in Malaya*, Singapore: Eastern University Press, Ltd. 1961, pp. 56-59 as quoted by M.B Hooker, *The Personal Laws in Malaysia*, p.124.
- ⁴⁷ For further details, refer to Zaleha Kamaruddin, A Comparative Study of Divorce among Muslims and non-Muslim with Special Reference to the Federal Territory of Kuala Lumpur, pp. 58-59.
- ⁴⁸ Sharifah Suhana Ahmad, *Malaysian Legal System*, Kuala Lumpur, *MLJ*, 1999, p.27.
- ⁴⁹ David C. Buxbaum, "Chinese Family Law in a Common Law Setting, in David Buxbaum, *Family Law and Customary Law in Asia*, Netherland: Martinus Nijhoff, 1968, p. 157.
- ⁵⁰ Leicester's Report, 1867, 462.
- ⁵¹ *Ibid.*, pp. 462-463.
- ⁵² Abdul Monir bin Yaacob, *An Introduction to Malaysian Law*, Bangi: UKM, 1989, p. 99.
- ⁵³ Roland Braddell, *The Laws of the Straits Settlements, A Commentary*, 2nd. Singapore: Ed, Kelly & Walsh, 1931, p. 62.
- ⁵⁴ M.B. Hooker, *The Personal Laws of Malaysia*, p.126.
- ⁵⁵ Leicester's Report, 1867, p. 462.

- ⁵⁶ Ibid., p. 463.
- ⁵⁷ 1 Straits Settlement Law Reports, 1893, p. 72.
- ⁵⁸ M.B. Hooker, *The Personal Laws of Malaysia*, pp. 122-140; Ahmad Ibrahim, *Towards a History of Law in Malaysia and Singapore*, Singapore, 1970, p. 55; David C. Buxbaum, *Family Law and Customary Law in Asia: A Contemporary Legal Perspective*, pp. 157; Abdul Munir Yaacob, *An Introduction to Malaysian Law*, p. 32; Sharifah Suhana, *Malaysian Legal System*, pp. 35-36.
- ⁵⁹ Yen Ching-hwang, "Historical Background" in *The Chinese in Malaya*, p. 26.
- ⁶⁰ Ibid.,
- ⁶¹ Information obtained from a conversation made with Tan Ooi Chee, Head of Department of Chinese Studies, University of Malaya, on 16th July 2003.
- ⁶² Please refer to section 11 of the Married Women Ordinance 1957.
- ⁶³ MLJ 418, [1962].
- ⁶⁴ See also the case of *Chow Chee Wah & Anor v. Choo Ah Pat*, MLJ 41, [1978] 2, where the law of trust was also invoked in deciding the property dispute between the deceased and the common law wife.
- ⁶⁵ MLJ 234, [1977] 1.
- ⁶⁶ Michael Stenson, *Class, Race and Colonialism in West Malaysia, the Indian Case*. Queensland: University of Queensland Press, 1980, p. 16.
- ⁶⁷ M.B. Hooker, *The Personal Laws of Malaysia*, p. 147.
- ⁶⁸ Ibid.,
- ⁶⁹ *Mitakshara* and *Dayabagha* are the names of main and popular schools of Hindu law.
- ⁷⁰ Abdul Monir Yaacob, *An Introduction to Malaysian Law*, p. 32.
- ⁷¹ Ibid., p. 34.
- ⁷² M.B. Hooker, *The Personal Laws of Malaysia*, p.148. Please refer to the case of *Pootoo v. Valee Uta Taven & anor*, (1883) 1 Kyshe's Report, 622. *Karpen Tandil v. Karpen* (1895) 3 Straits Settlement Law Report.58; *Nagammal v. Suppiah*. MLJ 119, [1940].
- ⁷³ Abdul Monir Yaacob, *An Introduction*, p. 34; Sharifah Suhana Ahmad, *Malaysian Legal System*, p. 40.
- ⁷⁴ (1883) 1 Kyshe's Reports, 622.
- ⁷⁵ Ibid., p. 623.
- ⁷⁶ MLJ 119, (1940), 9
- ⁷⁷ Joint family property basically refers to property in which co-ownership of a joint family is recognized and it will be presumed to exist until the contrary is proved. S.V. Gupta & G.M. Divekar, *Hindu Law*, volume 1, Third Edition, 1981, All India Reporter Limited, Bombay. For clearer definition, refer to the case of *The Estate of T.M.R.M. Vengadasalam Chettiar deceased*, MLJ 55, [1940], pp.158-159.
- ⁷⁸ MLJ 55, [1940].
- ⁷⁹ Based on information obtained from a conversation made with Prof. Kanthasamy Nallusamy, Head Department of Department of Indian Studies, University of Malaya, on the 22 nd. July 2003, at 3.50 p.m.
- ⁸⁰ Section 11.
- ⁸¹ MLJ 8, [1970] 2.