

THE DIVISION OF *HARTA SEPENCARIAN* OF MUSLIM CONVERTS UPON CONVERSION IN MALAYSIA

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ABSTRACT

Harta sepencarian refers to the ownership of the property acquired during the period of marriage by husband and wife, including spouses who convert to Islam. The main question related to the claims of *harta sepencarian* among Muslim converts is often which court shall have jurisdiction to hear the case, whether the Shariah Court or the Civil Court. This issue arises because it involves parties of different religions, who are governed by two different applications of law in Malaysia particularly in cases where only one party converts to Islam. Therefore, this article will discuss the position and practice of the division of *harta sepencarian* among Muslim converts in Malaysia. This article uses a descriptive-analytical approach based on content analysis of the data from previous studies. This article examines various aspects related to *harta sepencarian* and matrimonial property and their differences, the types of Muslim convert spouses and the different processes of claiming *harta sepencarian* according to Malaysian law. The findings of this article show that the Muslim convert and his/her spouse (whether converted to Islam or not) also have the right to claim the division of *harta sepencarian* in the event of a divorce or death. However, to determine which court has the jurisdiction to hear the cases related to *harta sepencarian* claims among Muslim converts and their spouses depends on the law of their marriage, whether it is registered in the Law Reform Act (Marriage and Divorce 1976) or act/state enactments of family law.

Introduction

Malaysia is a country with a multiracial society made up of various ethnicities, nations, and cultures. History has shown that the British colonial policy of bringing foreign workers to Malaya has shaped Malaysia as a country with a multiracial society consisting of Malays, Chinese, Indians and the natives of Sabah and Sarawak. In this context, Malaysia not only encompasses a diversity of ethnicities and nations but also has a variety of religions and cultures. The Federal Constitution of Malaysia has recognised Islam as the official religion, succinctly stipulated under Article 3 of the Federal Constitution, while also recognizing the practice of other religions. However, cultural assimilation and daily life multiracial society have emerged as significant factors contributing to the expansion of Islamic propagation in Malaysia (Omar & al-Qudsy, 2016) up to the point that Muslim practices based on religion and Malay cultures are recognised by the society at large. In the administration context of Muslim convert under Malaysian legal system, a non-Muslim is still not considered as a “*proper/legal Muslim*” upon pronouncing the testimony of faith unless and until the registration of conversion has been accomplished in accordance with the processes and procedures outlined by the local Islamic authorities (Al-Qudsy & Hamidi, 2022). Thus, only upon fulfilment of the procedures and processes, is the conversion of a non-Muslim to Islam considered conclusive and distinguished as a Muslim convert in Malaysia.

Nevertheless, there are often issues among Muslim converts, inter alia, disputes over the property after the divorce and death of the former non-Muslim partner, struggles regarding the Muslim converts’ deceased body where the conversion was unknown to the family, dispute over their children’s conversion (Hasmuri & Hussin, 2022), registration of conversion to Islam using false information (Al-Qudsy & Hamidi, 2022), and claims for *harta sepencarian* from a spouse who covertly embraces Islam (Al-Qudsy & Hamidi, 2022). Since Malaysia practices a dual legal system, disputes and conflicts over the jurisdiction of courts are among the arising issues that concern society, particularly in the area of family law. In many circumstances, the existing law still remains a “*grey area*”, particularly involving family issues and disputes between Muslim and non-Muslim couples (Mohamad, 2018), including the issue of the division of *harta sepencarian* among Muslim converts. Therefore, this study is specifically conducted to highlight the division of *harta sepencarian* among Muslim converts in Malaysia. Hence, before further discussion, it is important to gain insight into the concept of *harta sepencarian* and matrimonial property in the Malaysian legal context.

Harta Sepencarian in Malaysia

In Malaysia, the term of *harta sepencarian* customarily refers to the property of Muslim spouses acquired during the marriage. Meanwhile, the property of non-Muslim couple is commonly known as matrimonial property or matrimonial assets in civil law. Generally, *harta sepencarian* is the property acquired throughout the period of marriage (*inter-vivos*) either the property are obtained through joint effort of both parties or by the sole effort of one party (Sahari & Zin, 2016). In the Malaysian context, the property is recognized as *harta sepencarian* if it is acquired or refurbished during the duration of a marriage (Bosheya, 2021). In other words, without marriage, the law shall not recognize the existence of *harta sepencarian*. It must involve the effort from both parties i.e. husband and wife either directly or indirectly. This matter aligns with the interpretation of “*harta sepencarian*” in the Islamic Family Law enactments of the states. Article 2(1) of Islamic Family Law (Federal Territories) Act 1984 (Act 303) defines “*harta sepencarian*” as follows:

“*Harta sepencarian*” means property jointly acquired by husband and wife during the subsistence of marriage in accordance with the conditions stipulated by Hukum Syarak.

In short, *harta sepencarian* can be defined as the property acquired during the marriage of a husband and his wife derived from their sources or joint effort and is governed by the conditions determined by Islamic law as in the case of *Hj Ahmad bin Bubong v Habidah bt Hj Awang Layeh* (2016) 1 SHLR 96. In this case, the parties are a former couple who were married on June 30, 1977, and later divorced on November 16, 2009. The *harta sepencarian* claim presented by the Plaintiff involved a house located in Kampung Telisai Tutong. The plaintiff argued that the defendant did not make any contribution towards the house, and therefore, it cannot be considered as *harta sepencarian*. Despite this, at the decision stage of the case, the Court ruled that the disputed house is included in *harta sepencarian* according to Shariah law and the

Islamic family law of Brunei Darussalam. The defendant was found to have contributed indirectly to the *harta sepencarian*. Consequently, the court ordered that the defendant was entitled to a third of the disputed house price as an indirect contribution to *harta sepencarian*. *Harta sepencarian* in Malaysia is associated with the customs practiced by the Malay community based on the legal maxim '*Al- 'Ādah Muḥakkamah*,' which indirectly explains that custom is arbitral and does not contradict Shariah (Mohd Tahir et al., 2021). Based on Shariah law, '*Al- 'Ādah Muḥakkamah*' is a legal maxim derived from the principle of *urf*, and is literally defined as a custom that can be used as law (Urus et al., 2021). This implies that a societal custom can serve as a legal principle in a country, provided it aligns with Islamic principles (Bosheya, 2021). In the context of *harta sepencarian*, the legal maxim '*Al- 'Ādah Muḥakkamah*' is found to coincide with the practice of matrimonial property, as it has been a tradition for so long that it later became part of the legislation in this country (Bosheya, 2021).

Consequently, the distribution of *harta sepencarian* has been widely exercised by the Malay community particularly in the archipelago, resulting in emergence of various terms. Other terms used within the same context are *carian laki bini* (known among the Malay community in Negeri Sembilan), *pencaarian* (known among the Malay community in Sarawak), *Gono-gina* (known among the Javanese community), *hareuta sihreukat* (known among the Acehnese community) and *Harta Suarang* (known among the Minangkabau community) (Hussin et al., 2023). Moreover, the practice of *harta sepencarian* is also implemented by the natives of Sabah and Sarawak (Mat Hussin & Daud, 2020) as a recognition to the women's contribution on their efforts and energy in acquiring property during the period of marriage. In general, the division of *harta sepencarian*, particularly within the Muslim community in this country, falls under the jurisdiction of the Shariah Court. The court determines the rate of division by considering factors such as contributions and debts by the parties, as well as the needs of minor children in the marriage. Article 58(2) of Islamic Family Law (Federal Territories) Act 1984 (Act 303) explains as follows:

- (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 in money, property, or labour towards acquiring of the assets;
 - (b) any debts owing by either party that were contracted for their joint benefit;
 - (c) the needs of the minor children, of the marriage, if any, and, subject to those considerations, the Court shall incline towards equality of division.

In Malaysia, it is commonly known as *harta sepencarian* or *harta syarikat* (partnership property) based on the landmark case decided before the independence of Malaya. In the case of *Hujjah Lijah bt Jamal v. Fatimah bt Mat Diah* (1950) MLJ 63, Briggs J decided on *harta sepencarian* as:

“...acquired property with the specialized meaning in this context of property acquired during the subsistence of their marriage by a husband and wife out of their resources on their joint efforts. The acquisition referred to may extend to cover mere enhancement of value by reason of cultivation or development.”

This definition encompasses any property acquired during the subsistence of the marriage if it is obtained through joint efforts or resources. This also includes the contribution in the form of refurbishment of that property. Therefore, *harta sepencarian* can be described as any movable or immovable property acquired by a couple of husband and wife directly or indirectly during the subsistence of a valid marriage.

The practice of *harta sepencarian* recognizes the status and role of women in Malay society (Urus et al., 2021). It is not newly introduced, but has been a well established tradition and cultural practice among the Malay society for a long period of time. The existing studies found that there is no exact date regarding the commencement of this practice, but it is absolutely certain that the practice of *harta sepencarian* division is inherently ingrained in the Malay Archipelago society (Zanariah Noor et al., 2023). The socio-cultural aspects of the Malay Archipelago society particularly in Malaysia which differ from the Arab society in the Middle East, may reasonably be a factor to the existence of *harta sepencarian* practice. Due to this reason, studies found that there is no discussion pertaining to the division of *harta sepencarian* in the classical Islamic fiqh books written by Middle Eastern scholars (Mohd Tahir et al., 2021).

Furthermore, in the past, it was not a common practice in the Arab society to allow women to engage in work as breadwinners.

From the historical view of the Malay society, there was no apparent gender discrimination in doing any chores since gender differences were perpetually viewed in a positive perspective (Mat Hussin & Daud, 2020). Each gender in the Malay society performs their respective roles, which in turn contributed towards a harmonious society, in which everyone fulfills their responsibilities rightfully. Malay society in earlier times had defined the significant roles of women within the family and household by adhering to traditional statuses as wives, daughters, younger or elder sisters (Mat Hussin et al., 2023). As they reach adulthood, the social status of women undergoes a transition from daughter, elder or younger sister to wife and mother. In fact, socialization patterns within the Malay society had to some extent prepared girls to assume their roles as wives and mothers (Swift, 2021). Girls were involved in household activities and were raised to assist their mothers in domestic chores such as cooking, washing, housekeeping and taking care of younger siblings. These upbringing and education were actually aimed at preparing girls as future wives and mothers to enable them in managing their respective families properly and assisting their husbands who work for the family's livelihood.

Sons, like daughters, were also raised to play the appropriate roles as brothers, defenders of family and in furtherance serve as husbands and fathers once they step into the realm of marriage. Men were considered as the pillars and breadwinners for their family. Even in Islam, a son is responsible to sustain the family including his elderly parents. In the Malay society structure, sons as the pillar of the family were assigned substantial roles and responsibilities, including being leaders or heads. The task distribution between men and women in Malay society was very clear and distinctive. They play their respective roles without causing any conflicts or disputes in fulfilling their duties and responsibilities (Mat Hussin et al., 2023). This simultaneously refutes the allegation that assigning women with household domestic chores was an oppression against women. The notion is further substantiated by the absence of disputes regarding their respective roles in fulfilling familial responsibilities in the existing social structure. Accordingly, Malay women would not be highly regarded if they were found to be incapable of managing household affairs when they reach adulthood and a man's status in the eyes of society will be vitiated if he was irresponsible in seeking livelihood and unable to defend his family.

Nevertheless, this structure has undergone changes in corresponding with societal transformation. This transformation is driven by various factors such as educational advancement among Malay women, economic pressure and the desire to assist husband in maintaining livelihood (Mat Hussin & Daud, 2020). These factors have led to a transition in Malay women from merely playing a role in the household domestic sector to the economic sector outside home. Malay women traditionally engaged in agricultural work and trading in markets alongside men prior to the advent of colonialism and these economic activities subsisted even after the development in agriculture, rubber tapping and poultry farming (Swift, 2021). According to Firth (2021), although Malay women are Muslims, they were not restricted from a significant role in the economic sector, particularly engaging in business and agricultural activities outside the home.

The role played by Malay women is increasingly evolving, and at present Malay women have occupied important positions in the economic sector by working in the public sector, private sector and owning their own businesses. Currently, government policy has targeted 30% representation of women as policy-makers in the public sector (Ministry of Women, Family and Community Development, 2010), aside from encouraging women to venture into business with various incentives and facilities provided by the government and private agencies. According to the latest data released by the Department of Statistics Malaysia, the rate of women's labor force participation in Malaysia has increased by 55.6% (Ministry of Women, Family and Community Development, 2019) in 2019. Although this percentage is still low compared to other developed countries, it is a positive indicator of the participation of Malaysian women in the workforce. This demonstrates the social changes in Malay society that have been gradually developing which led to the recognition of practice of *harta sepencarian* division in accordance with Islamic law in Malaysia. In the current context, the evolution of society's culture today is seen to have become increasingly open to acknowledging the important role played by women in contributing to the wealth aspect for the family and society (Urus et al., 2021). As a result, this cultural shift has significantly

affected the legal landscape surrounding *harta sepencarian* in the country, ensuring that women receive more equitable treatment in matters of property, particularly in the area of *harta sepencarian*.

Hence, with reference to historical facts and the role of women and men in the social structure of the Malay society since ancient times, it is unsurprising to find that the responsibilities towards family and community have been recognized through the practice of *harta sepencarian*, which gave rise to the concepts of direct and indirect contribution in the division of *harta sepencarian*. Direct contribution involves financial aspects such as partnership capital, monetary contribution and joint efforts of the parties in acquiring assets. It also includes the contribution of ideas and time spent by each party to obtain the assets during their marriage. On the other hand, indirect contribution involves contributions which subsequently enables the acquisition and accumulation of assets such as household care, advice, the use of the spouse's good name to gain advantages in business (Aziz et al., 2019). It can be understood from available literature (Serji et al., 2021) that claims for *harta sepencarian* among Muslims in Malaysia can be made in three circumstances, namely:

- i. When the court has allowed and issued a divorce order between husband and wife;
- ii. Upon the court's approval of husband's application for polygamy;
- iii. Upon the death of either the husband or the wife during the subsistence of a valid marriage.

This matter is in line with the provisions of Practice Direction No. 5, Year 2003, which explains as follows (Sulaiman et al., 2023):

Practice direction regarding the time to make a claim for *harta sepencarian* are allowed either during the divorce application, after the divorce, or after the death of either party. The court, in this regard, may accept any claim for matrimonial property made after the death of any party in the claim, and reference shall be made to any case that has been decided by a higher court.

The claim for *harta sepencarian* for Muslims must be brought before the Shariah Court as vested by the law (Ngspar & Hussin, 2023). In this regard, the Civil Court does not have jurisdiction over matters related to claims by Muslims as the Federal Constitution has clearly enunciated the jurisdiction of the Shariah Court and the Civil Court. Article 121(1A) of the Federal Constitution provides further explanation on this matter:

(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

Therefore, if the claim for *harta sepencarian* is filed by a Muslim in the civil court, the claim will be dismissed by the civil court due to jurisdictional clauses stipulated by the Federal Constitution.

Matrimonial Property for Non-Muslims in Malaysia

In general, matrimonial property is the term used referring to the assets acquired by non-Muslim couples during the course of their marriage. Nonetheless, in civil law, it is known by various names such as *harta pencarian*, *carian laki bini*, marital assets and family assets (Suhor, 2007). However, these terms refer to the same context, which is the matrimonial property acquired during the period as husband and wife. Matrimonial property and claims for those assets shall be brought before the civil court as set out under section 76 of the Law Reform (Marriage and Divorce) Act 1976. This section, among others, emphasizes on the court's jurisdiction and power to order the division of matrimonial assets after the issuance of divorce decree or judicial separation (Aziz et al., 2019). In other words, the court that issues a divorce decree also has the jurisdiction to issue an order for the division of matrimonial property.

A contract of marriage is commonly referred to as life partnership. On this assumption, in principle, anything that is created, owned, and acquired during the period of partnership is considered as shared property (Suhor, 2007). This shared property will ultimately be claimed as matrimonial property should the divorce occur during the marriage period, as well as due to the death of the parties. The property acquired during the subsistence of the marriage will be determined by the court to be distributed according

to the principles of division of matrimonial property. The parties will be entitled to the assets, whether the assets were acquired by the sole effort or joint effort between them. In a similar way to the practice of the division of *harta sepencarian* among Muslims, the court will assess the respective contributions before determining the distribution ratio among the disputing parties (Aziz et al., 2019). The contributions that will be evaluated by the court include both direct and indirect contributions. The principles applied in both types of contributions are similar to the principle in the division of *harta sepencarian* in the Shariah Court. In fact, the provisions regarding matrimonial property in the civil court were enacted prior to the provisions of *harta sepencarian* in the Shariah Court (Aziz et al., 2019).

Similar to *harta sepencarian*, no specific date is found with respect to the commencement of the practice of matrimonial property division. Under English common law, a married woman had no right to any ownership of assets whereas the husband had full rights to the matrimonial property and the wife herself was included as part of the husband's property (Suhor, 2007). In other words, under the English common law system, a married woman had no right to own or manage such assets. Therefore, the concept of matrimonial property did not yet exist at that time. However, there are also opinions asserting that in the matters of asset ownership under the common law system, the husband and wife have separate rights to their respective assets (Hussin et al., 2023).

However, despite the different perspectives concerning the ownership and management of assets among women under the common law system, the Federal Constitution still guarantees the rights of every individual to own assets regardless of gender. The Federal Constitution states that:

Article 13- Rights to Property.

No person shall be deprived of property save in accordance with law.

No law shall provide for the compulsory acquisition or use of property without adequate compensation.

These provisions clearly guarantee the rights of individuals in owning assets, including both husband and wife (Hussin & Jamaludin, 2016). In other words, a husband and wife are entitled to the assets they have acquired. Ownership of assets under Malaysian law does not discriminate gender, race, or ethnicity. Each person has the right to own assets provided that the ownership is conducted in accordance with the law.

Matrimonial property in civil law is usually associated with tangible or intangible items jointly used by the family members. It signifies connotation of “*sharing*” which construe the assets as *harta sepencarian* (Suhor, 2007). Marriage and sharing are the two fundamental keys for an asset to be recognized as matrimonial property in civil law. Assets such as houses, cars, properties, dishes, pets, and so forth are correspondingly utilized to support family life throughout the duration of the marriage. Since “*sharing*” is the substantial factor in this matter, hence, personal belongings or individually owned assets that are not used for the benefit of any other family member shall not be considered as matrimonial property (Aziz et al., 2019).

In decided court cases, if a spouse can prove the method of acquisition or element of their contribution, the term matrimonial property is also expanded to include funds from the Employees Provident Fund (EPF), trust schemes, savings plans, retirement plans, insurance, and other assets that need to be distributed as matrimonial property (Nadarajan & Kamaruddin, 2020). In sum, anything brought into the marriage and shared by family members will be considered as matrimonial property regardless of the source in obtaining those assets. Any gifted, granted and inherited property received by one party is also considered as matrimonial property in civil law. This means that the divorced couple has the right to claim those assets after the divorce. In conclusion, the matrimonial property can be consolidated as follows, including (Suhor, 2007):

- i. Any assets acquired during the marriage;
- ii. Any assets brought into the marriage and subsequently used as joint property;
- iii. Any presents received by the couple as wedding gift or on the ground of marriage for mutual interest;

- iv. Any assets received by one party and brought into the marriage;
- v. Income and savings received or acquired during the marriage.

The claim over matrimonial property for non-Muslims must be brought before the civil court (Samuri & Khan, 2020). The Federal Constitution has outlined a clear separation between the jurisdiction of the Shariah Court and the civil court regarding the right to claim *harta sepencarian* and matrimonial property by a Muslim and non-Muslim (Samuri & Khan, 2020).

Differences between *Harta Sepencarian* and Matrimonial Property in Malaysia

There is no significant difference between the practice of *harta sepencarian* in the Muslim society and the division of matrimonial property among non-Muslims (Aziz et al., 2019). The assets recognized in both types of practices still revolve around the property acquired during the period of the couple’s marriage (Hussin & Jamaludin, 2016). This means that marriage is the basis for the existence of both *harta sepencarian* and matrimonial property. The entitlement of property based on direct and indirect contributions is also one of the similarities between both these practices (Aziz et al., 2019).

Apart from the difference in court jurisdiction, a study has found that the distinction between *harta sepencarian* and matrimonial property also involves the source of acquisition (Hussin & Jamaludin, 2016). In respect of *harta sepencarian*, assets purchased or acquired through the efforts of the parties such as the purchase of property, shares, vehicles, and so forth are considered as *harta sepencarian*, provided that these assets were acquired during the duration of the marriage (Serji et al., 2021). However, assets acquired without the contribution of the parties for instance inherited assets, gifted assets, wills and so forth are not considered as *harta sepencarian* even if they are jointly used by family members. These assets will only be considered as *harta sepencarian* if the other party can prove to the court of their contributions to the enhancement of those assets (Serji et al., 2021).

The situation is different with matrimonial property. In civil law, any assets acquired during the marriage period and jointly used by the family members are considered as matrimonial property (Samuri & Khan, 2020). This practice applies regardless of whether the assets were received through inheritance from someone else to one of the spouses or whether they were gifts from someone. In the concept of matrimonial property, the sharing of assets for the benefit of the family is a requirement to be considered as matrimonial property (Suhor, 2007). In the event of divorce, these assets can be claimed and the court will consider the contribution made towards those assets to grant an order for division. The differences between *harta sepencarian* and matrimonial property in Malaysia can be summarized as per Table 1 below:

<i>Harta Sepencarian</i>	Matrimonial Property
The division of <i>harta sepencarian</i> is practiced among Muslims.	The division of matrimonial property is practiced among non-Muslims.
Under the jurisdiction of the Shariah Court.	Under the jurisdiction of the civil court.
Only assets purchased or acquired through the efforts of the parties are considered as <i>harta sepencarian</i> .	Any assets acquired during the marriage period and jointly used by the family members are considered as matrimonial property.
Similarities:	
<ul style="list-style-type: none"> • The assets recognized in both types of practices still revolve around the property acquired during the period of couple marriage. • The division entitlement of property based on direct and indirect contributions. 	

Table 1. Differences between *Harta Sepencarian* and Matrimonial Property in Malaysia

Division of *Harta Sepencarian* for Muslim Convert According to Malaysian Law

As previously explained, marriage serves as a fundamental requirement in construing the property as *harta sepencarian*. Thus, the marriage status of a Muslim convert needs to first be identified. This is due to the reason that in the division of *harta sepencarian*, the court only recognizes a marriage conducted in accordance with the provisions of the Islamic Family Law Act/Enactment (Samuri & Khan, 2020). In

other words, a marriage which is not in compliance with the law shall not be valid and this will entirely repudiate the parties' rights to claim for *harta sepencarian*. Therefore, the previous marriage of a Muslim convert which is registered under the 1976 Act cannot be dissolved by the Shariah court (Aziz et al., 2019).

In Malaysia, the conversion to Islam by one party in a non-Muslim marriage will effectuate several legal implications (Sukri et al., 2020). When a person embraces Islam, it involves not only a change in belief or faith but also a change in the applicable laws governing them. According to Malaysian law, personal laws are divided into two, personal laws for Muslims and personal laws for non-Muslims (Sahari et al., 2018). This is in consequence of the dual legal system practiced in Malaysia, whereby civil law is applicable to non-Muslims, and Islamic law, particularly in the Shariah Court, is applicable to Muslims (Sukri et al., 2020).

In the discussion regarding the marriage status of a Muslim convert, there are several conditions that must be observed before determining the division of *harta sepencarian* for the convert. There are three situations that need to be observed, namely both husband and wife jointly embrace Islam within the same period of time; one party embraces Islam while the other party refuses to; and one party embraces Islam and marries a Muslim woman/man. The clarifications in respect of the above are elaborated as follows:

(i) Both husband and wife jointly embrace Islam within the same period of time

For marriages in category (i), no significant issue arises as both parties will directly be subjected to Islamic law and the Shariah Court. Section 2 of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) states that:

"Muslim" means--

- (a) a person who professes the religion of Islam;
- (b) a person either or both of whose parents were, at the time of the person's birth, Muslims;
- (c) a person whose upbringing was conducted on the basis that he was a Muslim;
- (d) a person who has converted to Islam in accordance with the requirements of section 85;
- (e) a person who is commonly reputed to be a Muslim; or
- (f) a person who is shown to have stated, in circumstances in which he was bound by law to state the truth, that he was a Muslim, whether the statement be verbal or written.

Although their marriage was conducted under civil law, their conversion to Islam requires them to register their marriage under the Islamic family law enforceable in Malaysia. No new marriage contract is required if both of them jointly embraced Islam within the same period of time or before the expiration of *iddah* for the wife. Majority of jurists have expressed the view that their marriage remains valid without the need for annulment or remarrying (Mufti of Federal Territory's Office, 2019).

In the event of divorce, the right of *harta sepencarian* over property acquired by the couple is subject to the jurisdiction of the Shariah Court. Section 58 of the Islamic Family Law (Federal Territories) Act 1984 (Act 303) states 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 the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.

Therefore, the trial proceedings and decisions related to their claim for *harta sepencarian* are subject to the Shariah Court as in the same manner as other Muslims in Malaysia.

(ii) One party embraces Islam while the other party refuses

The second situation is pertaining to one of the spouses converting to Islam while the other refuses to perform the same. There are various opinions among jurists regarding the status of such marriage. The majority of jurists such as Imam Malik, Imam Syafie and Imam Ahmad ibn Hanbal are of the opinion that the divorce of a couple where one party converts to Islam while the other party refuses to embrace Islam will take effect after the expiry of the wife's *'iddah* period (Mat Hussin et al., 2023). If the husband embraces Islam before the wife's *'iddah* period ends, the marriage is still recognized and their status as husband and wife remain valid. Therefore, in the circumstances where either husband or wife refuses to embrace Islam, the marriage will be considered invalid after the end of the appropriate *'iddah* period for the wife. However, Malaysian law does not "permit" for such automatic dissolution of marriages to come into effect (Samuri & Khan, 2020). In other ways, there are procedures that the couple must follow to dissolve their marriage on the ground of religious differences. There are two sets of laws that address this issue; the Islamic Family Law (Federal Territory) Act 1984 (Act 303) and 1976 Act (Sukri et al., 2020).

Since the Shariah Court has jurisdiction to determine the validity of a person's conversion to Islam, it also has jurisdiction to determine whether the person is still a Muslim or has abandoned Islam as a religion. The same provision is also stated in the Islamic Family Law (Federal Territory) Act 1984 (Act 303), which can be literally interpreted that when a person who originally was not a Muslim and subsequently converts to Islam, they are automatically deemed to be subjected under Islamic law and be heard in the Shariah Court (Sukri et al., 2020). The Islamic Family Law Act also stipulates that a marriage will be dissolved when one of the spouses apostatizes or renounces Islam, as provided under section 46 of this Act.

- (1) The renunciation of Islam by either party to a marriage or his or her conversion to a faith other than Islam shall not by itself operate to dissolve the marriage unless and until so confirmed by the Court;
- (2) The conversion to Islam by either party to a non-Muslim marriage shall not by itself operate to dissolve the marriage unless and until so confirmed by the Court.

These provisions indicate that the status of different religions shall not be a ground for the marriage to dissolve by itself, but instead needs to be confirmed by the Shariah Court (Sukri et al., 2020). The provisions in the Islamic Family Law (Federal Territories) Act 1984 (Act 303) have affirmed that the marriage dissolution of a convert spouse can only be done with the official confirmation of the Shariah Court. However, it should be noted that the conversion of one party does not automatically dissolve a marriage conducted and registered under the 1976 Act. The dissolution of such marriage must be settled in the civil court (Aziz et al., 2019). In the case of *Kok Lee Kian v Kumuthan a/l Balachandran* (2018) MLJU 1168, the petitioner filed a unilateral divorce petition on March 5, 2018, citing grounds that the marriage cannot be restored and the respondent had converted to Islam, necessitating the dissolution of the marriage under Section 51(1) of the Act 1976. The parties were blessed with a child during the marriage. Alongside the divorce petition, the petitioner applied to the court for an order regarding the custody of the children and also claimed at third of the value of the immovable property as matrimonial property. In this case, the court has jurisdiction over a civil marriage, even though one of the parties had converted to Islam. The court, in its decision, granted the dissolution of the marriage but rejected the petitioner's claims for custody of the children and matrimonial property.

Section 51 of the 1976 Act provides that:

- (1) Where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce: Provided that no petition under this section shall be presented before the expiration of the period of three months from the date of the conversion.
- (2) The Court upon dissolving the marriage may make provision for the wife or husband, and for the support, care and custody of the children of the marriage, if any, and may attach any conditions to the decree of the dissolution as it thinks fit.

In sum, the provisions of civil family law in Malaysia state that the differences in religion does not automatically dissolve a civil marriage (Malek, 2016). This matter was firmly addressed by the judge in the case of *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* (2018) 1 MLJ 545. Based on the facts of the case, the parties had entered into a civil marriage under the 1976 Act and had three children as a result of the marriage. However, on March 11, 2009, while the parties were still married, the husband converted to Islam. In this case, the Federal Court ruled that when a couple marries under the 1976 Act, the marriage would not be automatically terminated by one of the parties converting to Islam. When entering into a civil marriage, the husband and wife are bound by the 1976 Act, which addresses matters of divorce, custody of the children of the marriage, and other related rights after the divorce takes place. Therefore, in this case, the civil court has jurisdiction over a marriage conducted under the 1976 Act, even if one of the parties has converted to Islam.

In an effort to prevent this matter from continuously becoming a polemic in society, the Department of Islamic Development Malaysia (JAKIM) issued a guideline for the management of Muslim converts, stating that divorce for spouses where one party converts to Islam is subject to confirmation in the civil court (The Department of Islamic Development Malaysia (JAKIM), 2009). This means that for these spouses, the dissolution of marriage must be confirmed by the civil court (Samuri & Khan, 2020). Although this guideline is unenforceable or not legally binding on any party, at least they can provide some guidance on existing conflicts. Nevertheless, in the context of Malaysia, it is necessary to rely on authoritative references particularly regarding to similar decided cases.

When the decision on a marriage is confirmed in the civil court, it follows that all matters arising pursuant to the divorce must also be resolved in the civil court (Sukri et al., 2020). Thus, in the context of *harta sepencarian*, the couple must file the claim in the civil court to procure their rights over respective assets (Samah et al., 2023). Therefore, a couple where one party converts to Islam is subject to Section 76 of the 1976 Act, which states that:

Section 76 of the 1976 Act lays down the law relating to matrimonial property as follows:

- (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 of the proceeds of 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 in money, property or work towards the acquiring of the assets;
 - (b) any debts owing by either party which were contracted for their joint benefit;
 - (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 subsection (3) the court shall have regard to:
 - (a) the extent of 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 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 receive a greater proportion.

(5) For the purposes of this section, references to assets acquired during a 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.

These provisions provide guidance to the Court in making orders for division of matrimonial property, taking into account the contributions of the parties in acquiring such property (Nadarajan & Kamaruddin, 2020). The party with greater contribution is reasonably considered to be entitled for a greater proportion of the property compared to the party with lesser contribution. This section also guides the Court to consider the needs of the minor children before making any orders regarding *harta sepencarian*. In fact, this provision is equivalent to the provision of *harta sepencarian* in the Islamic family law enforced in the respective states (Hussin, 2018). The above discussion clearly indicates that the conversion to Islam does not automatically dissolve the convert's marriage with their spouse who is refusing to embrace Islam. A divorce petition must be filed in the civil court as vested by law following the arising claims derived from the divorce which also need to be decided in the same court (Sukri et al., 2020).

(iii) One party embraces Islam and marries a Muslim woman/man

Basically, this third category also does not carry significant legal issues as the convert's marriage with a Muslim partner will subject them to the Islamic family law enforced in their residing state. If there are any assets from previous marriage, the dispute over those assets will be subject to the same manner as described in paragraphs (i) and (ii). As for their recent marriage with a Muslim partner, the division of assets will be governed by the principles of *harta sepencarian* (Bosheya, 2021). If the assets were acquired before the marriage and not developed after the marriage, they will remain the original owner's property (Hussin & Jamaludin, 2016). However, if the assets were acquired during the marriage or developed after the marriage, then it will be regarded as *harta sepencarian*.

As discussed in the preceding paragraphs, the division of *harta sepencarian* in this category is subject to the manner of contributions made by the parties to acquire those assets. To determine the proportion of *harta sepencarian* distribution, the main consideration is the form of contribution provided by the parties to acquire the asset, whether the contribution is carried out directly or indirectly (Noor et al., 2023). In the event of divorce between them, the Court usually returns the capital invested by each party and orders the equal division of the assets even if the assets were registered under the name of only one party. This can be seen in many cases of *harta sepencarian*, such as the case of *NAU@RTL v SARSAH* (2020) 4 SHLR 1. This case involved an appeal regarding matrimonial property against the decision at the Syariah High Court level. Based on the facts of the case, the parties were married on January 31, 1989, and then divorced on December 18, 2015. As a result of the marriage, the parties were blessed with three children. On March 7, 2016, the appellant filed an appeal to the matrimonial property claim and requested that the court declare the property in the marriage as matrimonial property, and order an equal division between the appellant and the respondent. At the High Court level, an order was issued, ruling that the appellant was entitled to of 30% of the total property, as the appellant had indirectly contributed to the property. The court found that the matrimonial property was acquired during the marriage through the respondent's sole effort. At the appeal stage, the court rejected the appellant's appeal and upheld the High Court's decision, maintaining a 30% division of marital property for the appellant.

As explained earlier, indirect contribution refers to abstract contributions such as advice, the wife's assistance in household chores and the welfare of the husband (Sahari & Manan, 2019). Based on the cases decided by the court, wives usually obtain a distribution of one-third, one-quarter, two-thirds and other amounts depending on the evidence presented to the Court during the trial. For example, a husband and wife from a less affluent background was granted a business license. The wife did not work, yet she was a devoted wife who managed household affairs well (Mohamad Ali Roshidi Ahmad, 2021). Due to the support of his wife and harmonious family life, the husband succeeded in running the business and became an accomplished businessman. The husband's success indirectly resulted from the contribution of his wife, as she brought happiness and encouragement to her husband in achieving success (Sahari et al., 2018; Sahari & Manan, 2019; Ahmad, 2021).

In the case of *Lcy v Twy* (2018) MLJU 851, this case involved a divorce petition filed by the petitioner, who is the husband, against his wife as the respondent. The parties were married through a civil ceremony on December 23, 2006, and had two children. On December 29, 2015, the respondent embraced Islam. Through the submitted petition, the petitioner, among other claims, applied for the dissolution of his marriage with the respondent, custody of the children, and the division of assets acquired during the marriage. The court decided to dissolve the marriage on the grounds that the respondent had converted to Islam under section 51 of the 1976 Act. Regarding marital assets, the Court determined that the house located in Bukit Jelutong was a matrimonial home, considering that both parties made direct contributions to the property. Although the petitioner purchased the house, the respondent made a direct financial contribution to improve it. Therefore, following the court's finding of direct contributions by both parties to the property, the court ordered the sale of this marital asset at the current market value, with the net proceeds to be divided equally, 50% for each party.

The two cases described have addressed the principles and practices relating to the assessment of contributions adopted in the Shariah Court until today. Although the cases in reference involve judgments from both the civil court and the Shariah Court, the decisions made regarding the rate of division of matrimonial property are generally consistent with a focus on the aspects of direct and indirect contributions of the parties. In general, the judgments issued by the Shariah Court in Malaysia apply the same approach with that of the civil court. Therefore, for the newly converted Muslim who subsequently marries a Muslim, the division of their *harta sepencarian* need to be brought before the Shariah Court by following the principles of division as applied to other Muslims (Sahari & Manan, 2019). The explanation for all the aforementioned situations can be summarized as per Table 2 below:

Type of Spouse	Claim of <i>Harta Sepencarian</i> in Shariah Court	Claim of Matrimonial Property in Civil Court
Both spouses are Muslim converts	✓	
One party embraces Islam while the other party does not embrace Islam		✓
One party embraces Islam and marries a Muslim	✓	

Table 2. Claims on *Harta Sepencarian* of Muslim Converts

Conclusion

When it comes to the division of *harta sepencarian* among Muslim converts in Malaysia, the creation of a valid matrimonial bond serves as a fundamental point of consideration. A previous marriage registered under 1976 Act would require the authority of the civil court resolve any dispute arising from such marriage, including *harta sepencarian*, child custody, maintenance for children. The issues related to familial claims arising from conversion must be addressed wisely and in a manner that preserves the harmony of Malaysian society. In this context, it is essential to review the Islamic family law provisions relating to the dissolution of civil marriages among Muslim converts in the Shariah Court, as well as issues arising after divorce. This study aims to clarify the jurisdiction of both the civil court and the Shariah Court in these matters, ensuring fair treatment of the rights of the parties involved. Accordingly, issues regarding Islam and the Shariah Court remain sensitive topics among the Malaysian society. Hence, continuous tolerance including the resolution of legal issues need to be prioritized by all parties. The court must ensure that the rights of the parties to any existing property in marriage are guaranteed and resolved fairly, even if such cases would not be heard in the Shariah Court.

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