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RESEARCH ARTICLE

SIGNIFICANCE OF PROVISION FOR *HARTA SEPENCARIAN* IN POLYGAMY IN ISLAMIC FAMILY LAW OF MALAYSIA

Md Yazid Ahmad¹, Nor Faizah Zakaria¹, Ezad Azraai Jamsari², Mohd Izhar Ariff Mohd Kashim^{1,3}, Nurul
Ilyana Muhd Adnan¹ and Noorsafuan Che Noh⁴

1. Research Centre for Sharia, Faculty of Islamic Studies, Universiti Kebangsaan Malaysia, 43600 UKM Bangi, Selangor, Malaysia.
2. Research Centre for Arabic Language and Islamic Civilization, Faculty of Islamic Studies, Universiti Kebangsaan Malaysia, 43600 UKM Bangi, Selangor, Malaysia.
3. Institute of Islam Hadhari, Universiti Kebangsaan Malaysia, 43600 UKM Bangi, Selangor, Malaysia.
4. Faculty of Islamic Contemporary Studies, Universiti Sultan Zainal Abidin, Gong Badak Campus, 21300 Kuala Nerus, Terengganu, Malaysia.

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Abstract

Polygamous practice is permissible in Islam, subject to the condition of fairness (economically and socially) between the wives. Thus, associated with the practice of polygamy in Islam is the issue of fairness relating to the right to *harta sepencarian* (matrimonial property) for already existing wife or wives in a polygamous marriage, whether they have the right to *harta sepencarian* only upon divorce or demise of the spouse, whereas the duration of marriage with the wife or wives differ. The issue arising in this matter concerns the significance of a legal provision for *harta sepencarian* in polygamy. Hence the main objective of this article is to study the significance of a legal provision for *harta sepencarian* in polygamy in Islamic family law in Malaysia and its enforcement by the Shariah Court. This is a qualitative research based on content analysis method and the results are descriptively presented. Research finds that a legal provision to order division of *harta sepencarian* before the Court approves an application for polygamy is a significant approach to preserve the *maslahah* (benefit) of the couple in a marriage, particularly, to ensure the welfare of the wife or wives.

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Introduction:-

Generally, *harta sepencarian* (matrimonial property) was adopted as local customary law in Malay society and later recognised by Shariah law through principles found in Islamic legal methodology, namely, *al-'adah al-muhakkamah*, meaning customary usage recognised by Islamic law. It does not contradict Shariah from the point of ensuring justice and welfare of married couples, particularly women, and removes harm.

Since long ago, the polemic about polygamy in Muslim society in this country has frequently been the focus of mass media and, currently, social media, particularly touching on the status of a wife's right to property acquired during marriage. Hence, the issue of *harta sepencarian* between a husband and wife is very important matter that needs to

Corresponding Author:- Md Yazid Ahmad

Address:- Research Centre for Sharia, Faculty of Islamic Studies, Universiti Kebangsaan Malaysia, Selangor, Malaysia.

be resolved with fairness. *Harta sepencarian* may be claimed not only during marriage or upon divorce or the death, but also while the marriage is ongoing, namely, when there is an application for polygamy or when polygamy has occurred, and even upon *murtad* (religious conversion) of one of the parties in a marriage (Ahmad et al. 2014). Regarding polygamy, the Court has the jurisdiction to order for division of *harta sepencarian* whether the Court gives permission for the polygamy or not. However, a claim for *harta sepencarian* by a wife in a polygamous marriage contracted without Court permission (contracted abroad) may only be done if the polygamous marriage is registered and the existing wife's right to *harta sepencarian* in a polygamous marriage is not lost by the fact that the polygamous marriage was contracted abroad (Berita Harian 2013).

In line with this, the existing wife or wives in a polygamous marriage may make a claim of *harta sepencarian* in the *masalah* (interest) of herself or themselves and their children. *Harta sepencarian* plays the role of ensuring a husband and the wife or wives get their rights to their respective contributions made in the duration of their marriage. Other than that, it is to ensure their lives will be better, both the polygamous husband and especially the wife, particularly when divorced by her husband.

Brief Discussion of the Term *Harta Sepencarian* in Malaysia:-

Harta sepencarian has long been recognized as part of Malay custom (Hajah Lijah bte Jamal lwn. Fatimah binti Mat Diah [1950] MLJ 63) was later accepted by Islamic law (Noor Bee lwn. Ahmad Shanusi [1981] 1 JH [2]; 63) based on the opinions of scholars through *fiqh* (Islamic jurisprudence) books and ultimately made legally effective by incorporating it as a provision of the respective Islamic family law state enactments (Kamar Ainiah 2003; Siti Zalikah 1996).

According to Hooker (1976) *harta sepencarian* is defined as property jointly acquired by a husband and wife during their marriage, or property from the joint efforts between husband and wife since living life after marriage, including property they originally acquired before marriage which later was developed and enhanced in value during their marriage (Suwaid 2007).

Harta sepencarian is legally defined as jointly acquired property in the duration of their marriage in accordance with the conditions determined by Shariah law. For example, in Section 2, Islamic Family Law Act (Federal Territory) 1984 (Act 303), *harta sepencarian* is interpreted as: "property jointly acquired by a husband and wife during the subsistence of their marriage in accordance with the conditions stipulated by *Hukum Syara*".

Hence, it may be summarized that *harta sepencarian* comprises of all the assets, moveable and immoveable, acquired through the joint efforts of husband and wife (Zailan bin Abas *dan Tiga Yang Lain lwn. Zaiton binti Abdullah* [2006] 22 JH [2] 279) whether through direct contribution or sole effort by a husband with an element of indirect contribution from the wife (Norayah Bakar lwn. Mohd Adnan Mohd. Amin [2006] 21 JH [1] 81) during their marriage, including assets owned before marriage which were developed or substantiated during the marriage (Hajah Lijah bte Jamal lwn. Fatimah binti Mat Diah [1950] MLJ 63).

Property included in the definition of *harta sepencarian* can be claimed by rightful parties, namely during or after a polygamous marriage, after death and on religious conversion or *murtad* (apostasy) of one of the parties to a marriage

Significance of Provision for Division of *Harta Sepencarian* in Polygamy:-

Various studies have been conducted and discussions held regarding *harta sepencarian* with the goal of the welfare and benefit of both parties, namely wife and husband, particularly to protect the wife after divorce or her husband's death, so that she may get proper advocacy or adequate protection (Miszairi & Akmal Hidayah 2010; Ahmad 2010; Suwaid 2007). This issue is frequently the focus of mass media and social media, particularly, the matter touching on the position of the wife vis-à-vis matrimonial property. Hence, is the wife's right to *harta sepencarian* protected in a polygamous marriage? Are her sacrifices recognized in Islamic family law in the matter relating to its division?

Actually, the woman's position in Islamic family law is recognised with the incorporation of the legal provision on *harta sepencarian* in polygamy in the Islamic family law of states in force. The most significant issue frequently debated regarding legal provisions relating to polygamy is from the point of its ability to defend, preserve and enforce the right directly against the parties, whether the husband or wife involved.

Nevertheless, various polemics arose in debating the issue when the Amendment Bill was presented in Parliament. Some women's associations and NGOs questioned the proposed new provisions in the Bill which they described as unfair to women. One of the discriminatory elements submitted is the right of the husband to get part of the wife's assets in a polygamous marriage in Section 23(9). It was argued that this provision may be manipulated by men, in view of their ability to marry again and gaining more freedom to divide the proceeds from the sale of the existing wife's matrimonial home (Pertubuhan Pertolongan Wanita 2013).

Many parties, especially NGOs, who champion women's rights severely criticised this provision. A memorandum was submitted 21st December 2005 to the Dewan Negara (Senate) to review the Amendment Bill. When it was debated in the Dewan Negara on 22nd December 2005, some women senators disputed some of the proposed provisions, including the provision on *harta sepencarian* in polygamy in section 23(9) on the ground that they contain elements of discrimination and oppression against women.

Najibah (2015) stated that the provision was created following the arising issue of neglect of a wife's rights when she has consented to her husband taking another wife, particularly the right to *harta sepencarian*. Noor Aziah (2006) in casting her view on the provision in Section 23(9) on *harta sepencarian* in polygamy, explained that this polygamy law is more organized compared to the previous law as in every application for permission to marry another woman, the Court shall summon the existing wife, the wife to be, guardian and other concerned parties. In the same tone, Norliah (2007) added that the purpose for creating the provision in Section 23 is solely to protect the wife's welfare through her rights in marriage as existing wives can also claim maintenance besides the right to *harta sepencarian*, to avoid disputes due to mixing of property.

According to Noor Aziah, the proposed amendment is part of the process of standardizing Islamic law which, all the while, differ according to the different State Enactments. She added that the Amendment Bill takes into account factors beneficial to all parties involved (Utusan Malaysia 2005). The legal provision for *harta sepencarian* in polygamy is actually to facilitate proper practice of polygamy and make a husband more responsible. The purpose of the Amendment Bill is also to recognize the provision for *harta sepencarian* in polygamy and to control polygamy through application for the Court's written permission to enter into polygamous marriage, registration and keeping of proper records.

In this matter, the Court may issue an order for division of *harta sepencarian* when a husband applies for polygamy whether the permission is granted or not. However, a claim for *harta sepencarian* by a wife in polygamy without the permission of the Court (marriage abroad) may only be made if the polygamy is registered. The right of the existing wife to *harta sepencarian* is not lost by reason of the polygamous marriage contracted abroad (Ahmad et al. 2014; Berita Harian 2013). Further, she may also claim her share of immovable assets jointly acquired during marriage even though the asset is registered in the name of the husband or newly married wife.

This provision is clearly to preserve the interest of all parties involved and it is sufficiently important in administration of Islamic law. If carefully examined, this provision gives space for a husband to marry another but in a more transparent manner and this legal provision actually serves to avoid various problems that can arise in polygamy, for example, a marriage out of the Court's jurisdiction without following legal procedure. Many cases of fraud involve marriage in neighbouring countries, whereby the husband involved knows the marriage is not valid and after some time, divorces his new wife, impacting her adversely.

This provision also helps to avoid future problems for parties involved due to mixing of property. In addition, this amendment is a good step to ensure the rights of wives and children are not neglected. This shows that the wife's right to matrimonial property is protected and ensured by the law, besides her right in *faraid* (inheritance law) when the husband dies (Ahmad et al. 2017).

Presently, this Amendment Bill containing the provision regarding *harta sepencarian* in polygamy has already been gazetted and is in force in the States of Malaysia to ensure existing wife or wives are not mistreated (Norliah 2007). Therefore, a claim for *harta sepencarian* in polygamy is presently recognized in the legal provision stipulated in Section 23, Islamic Family Law Act/Enactment of the respective States (except Terengganu and Sarawak). This provision is not for mistreating any party involved with *harta sepencarian* in polygamy nor to hinder a husband from marrying another. It was introduced to guarantee the rights of existing wife or wives to avoid mixing of property and to control polygamy so that it is practised following law and procedure.

The justification for division of *harta sepencarian* in polygamy clearly shows that this provision is to ensure justice and protect the involved parties, especially the wife, consistent with the view of al-Shatibi (1997) who stated that the essence of law as intended by Allah SWT is to gain the *maslahah* (benefits) of this world and hereafter. This is in line with the basic objective of Shariah law, namely to acquiring the benefits and preventing the harms (al-Shatri 1994), with the intention of realizing and preserving human benefits and avoiding harm that can befall humans (Laluddin et al. 2012; Ahmad & Ibrahim 2002).

Provision for Division of *Harta Sepencarian* in Polygamy in Islamic Family Law:-

Prior to amendment of the Islamic Family Law Act or Enactment of the respective states regarding *harta sepencarian* in polygamy, the property could be claimed by a married couple only after divorce. The development of this amendment in the legal provision for a claim on *harta sepencarian* in polygamy is now adopted in the Islamic Family Law Act or Enactment of the respective states in Malaysia, except Terengganu and Sarawak. Nevertheless, in practice, cases involving claims for *harta sepencarian* in polygamy is also implemented in Terengganu based on a Practice Direction issued by the Department of Syariah Judiciary Malaysia.

Hence, in order to preserve *maslahah* and protect the welfare of the wife/wives involved in a polygamous marriage, an amendment was made in the Islamic family law act or enactment of the respective states regarding claims for *harta sepencarian* in polygamy. For example, addition of Section 23(9) in Islamic Family Law (Federal Territory) Act 1984 through Section 6, Islamic Family Law (Federal Territories) (Amendment) Act 2006 approved by the Dewan Negara on 22nd December 2005 and legally effective from 11th January 2006. In Selangor, Section 23 of the Islamic Family Law (State of Selangor) Enactment 2003 by inserting the provision of section 23(10) was approved and gazetted by the Dewan Undangan Negeri Selangor (State Assembly) on 22nd September 2005. The legal provision on division of *harta sepencarian* in polygamy is as provided in Section 23 (10), Islamic Family Law (State of Selangor) Enactment 2003 which states as follows:

(10) Every Court that grants the permission or orders the marriage to be registered under this section shall have the power on the application by any party to the marriage-

1. to require a man to pay maintenance to his existing wife or wives; or
2. to order the division between the parties of the marriage of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division of the proceeds of the sale.

Therefore, with the coming into force of this amendment, claims for *harta sepencarian* may be made and an order for division passed before permission for polygamy is granted by the relevant Court. Regarding division of *harta sepencarian* for the polygamous in Malaysia, the Court takes into consideration some criteria as outlined in the Administration of Islamic Family Law Act or Enactment of respective states in addition to other factors stipulated. Generally, the Court shall make a decision on division of *harta sepencarian* for the polygamous based on the matters below:

1. Property which was acquired or developed in or during marriage.
2. Extent of contributions made by each of the parties in the form of money, property, labour, advice, encouragement and other contributions that add to the property or capital.

The Court with the jurisdiction to try polygamy case and declare the provision and order division of *harta sepencarian* is the Shariah High Court, based on the provision in Administration of Islamic Religion Act or Enactment of the states, as stated in Section 61 (3) (b) (iv), Administration of the Religion of Islam (State of Selangor) Enactment 2003. Similarly, Practice Direction No. 14, 2006 states that the court with jurisdiction to try cases of polygamy and declaration of provision and division of *harta sepencarian* and other related matters under Section 23 of the Islamic Family Law Act or Enactment of the respective states shall be tried in the Shariah High Court.

Methods of Resolving Division of *Harta Sepencarian* in Polygamy in Shariah Court:-

Most cases of division of *harta sepencarian* are resolved by mutual agreement of parties or through *sulh* (conciliation) and *ijtihad* (independent reasoning) by judges who preside over the trial in the Shariah High Court. *Sulh* or conciliation is by peaceful means through acknowledgement and surrendering of property ownership to the other party or the value of the property agreed upon, to be divided according to mutual agreement, reached out of court or before a conciliation officer and later endorsed by a Court order. While the Court is in session, the Judge will usually give the opportunity to both parties to achieve mutual consent. This agreement will then be endorsed as

a Court order. *Sulh* or conciliation is an alternative method of resolving a case of *harta sepencarian* whereby the husband wishes to be polygamous. An example is the case of Muhammad Syukur Abdullah *lwn.* Aisyah Binti Abdullah [05200-011-0259-2014] at the Negeri Sembilan Shariah High Court, plaintiff applied for permission for polygamy under Section 23, Islamic Family Law Enactment (Negeri Sembilan) 2003. In his application, plaintiff stated his declaration and willingness to divide the *harta sepencarian* equally and the defendant agreed. After hearing testimonies from all parties, the Court decided and approved the plaintiff's application for polygamy.

Settling division of *harta sepencarian* by mutual agreement may also be done by taking the approach of sealing a written agreement between husband and wife so that the welfare and rights of respective parties are ensured, as in the case of Zaher Rudin bin Mokhtar *lwn.* Saripah Binti Nordin [05100-011-0168-2013] tried at Negeri Sembilan Shariah High Court. In this case, plaintiff submitted an application for polygamy. The case was settled through *sulh* (conciliation) by division of *harta sepencarian* between the parties based on a documented and sealed mutual agreement.

Further, other than division for existing wives, agreement can also be achieved through inserting the names of children upon surrendering ownership of property. This means that part of the property ownership is transferred to the wives and children, for example, in a case at Melaka Shariah High Court, in the case of Hasbulah bin Selah @ Salim *lwn.* Norhayati Ibrahim Dan Noraziah Nordin [04200-011-0305-2016]. In this case, plaintiff in his claim declared *harta sepencarian* with the defendant, namely, 8 cars, 4 motorcycles and two pieces of land and a house, and agreed to surrender part of the *harta sepencarian* in polygamy to his existing wives as well as his children. Through a claim on *harta sepencarian* in polygamy, a wife is given recognition to get her share of matrimonial property during the marriage. Thus, the Court may request a husband to discuss and determine division of *harta sepencarian* with his existing wife or wives. However, if after that, the existing wife or wives disagree and wish to file an objection, then a separate trial for division will be conducted based on the new application in the claim for *harta sepencarian*.

Conclusion:-

It can be concluded that claims for *harta sepencarian* can be made during or after divorce, or death, and in a polygamous marriage. A claim for *harta sepencarian* in a polygamous marriage may be claimed not only by the wife during her husband's application for polygamy but also during the polygamous marriage itself. This shows that *harta sepencarian* may also be claimed without divorce and dissolution of marriage. The right to *harta sepencarian* in polygamy needs to be understood by parties in a marriage in order to give space and confidence to them, particularly the wife. The wife need not worry about justice, welfare and maintenance needs in the marriage. Proposals from the husband and mutual agreement regarding *harta sepencarian* in polygamy facilitates the application process for polygamy in the Shariah Court. Besides that, division of property is to avoid mixing of properties that makes it difficult to accurately determine ownership and contribution of the parties toward the property and can complicate division in the future. Thus, disputes between an existing wife or wives and the new wife can be avoided at once. A claim for *harta sepencarian* in polygamy also constitutes a legal reform through *Siyasah Shar'iyah* approach (Shariah-oriented public policy) by the authorities (judges or leaders) for the *maslahah* (benefit) of parties in a marriage and to avoid harmful consequences in the future, by its incorporation into the Islamic Family Law Act or Enactment of the respective states, (except the States of Terengganu and Sarawak). This provision is an initiative to improve legal provisions regarding polygamy in order to fulfill the aspiration to empower and dignify the rights of women in polygamous marriage.

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