

DISTRIBUTION OF MATRIMONIAL PROPERTY  
UPON DISSOLUTION OF MARRIAGE

DUAL ASPECTS OF  
MUSLIM FAMILY LAW AND ADAT CUSTOMARY LAW

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## ABSTRACT

The matrimonial relief provided for under the Muslim Law includes the distribution of Sepencarian Property. Under the introduction chapter of the paper we shall see the other matrimonial relief available to the spouses and we shall also see the confusion with regard to terminology of the word Harta Sepencarian and Harta Syarikat. In this respect it shall be seen that the confusion is not really with the terminology but rather under which legal system it applies. In Chapter Two of the paper we shall see a discussion of Sepencarian principle from the viewpoint of Adat Customary Law. Here we shall see the distribution under the Adat Perpatih as well as under the Adat Temenggong. It shall be noticed that Charian Laki Bini and Harta Sepencarian is not very much different from each other. As a matter of fact, Harta Sepencarian is said to be originating from Charian Laki Bini concept. In the third chapter, we shall discuss another set of principles on the same point from Islamic viewpoint. In this chapter we shall attempt to show its relevancy to our modern society and an explanation of a proposition of Law on that point. In the fourth chapter we shall discuss the present practices of Syariah Court relating to the distribution. From the interviews and reports of cases we shall see that the principle of distribution is not strictly followed by the Syariah Court, rather they would look at the facts of each and every case before making the distribution. The

## TABLE OF CONTENTS

	<u>Page</u>
Forewords and Acknowledgement	i - ii
Abstract	iii - iv
Table of Contents	v - vi
List of Statutes	vii
List of Cases	viii - ix
List of Abbreviations	x
Chapter One - Introduction	
A. Matrimonial Relief Provided for Under Muslim Family Law	
B. Confusion as to Terminology	
C. Definition of Matrimonial Property	
Chapter Two - Concept of Matrimonial Property from an Adat Viewpoint	
A. Adat Perpatih	
B. Adat Temenggong	

## INTRODUCTION

### CHAPTER ONE

#### A. Matrimonial Relief Under Islamic Family Law.

Generally, under the Muslim family law, upon dissolution of a marriage, a woman has the following rights bestowed upon her. A woman may ask for maintenance during the period of Eddah. This period of Eddah is short and is not a permanent maintenance but lasts only during the period of Eddah. The divorced women during such period cannot contract valid marriage to any man. Such a period is essentially a 3 menstrual flow (about 3 months 10 days). Incidentally, Muslim law does not recognise the principles of Alimony. Shafie<sup>1</sup> adopted the doctrine that a wife's maintenance is obligatory only if she puts herself at her husband's disposition and not by virtue of contract of marriage. Although the principles of Alimony is not recognised in Muslim family law, there is however another relief provided for the Muslim women in the form of Mutaah. Mutaah is a sort of compensation paid by the husband to the wife for example for the loss of womanhood or for loss of consortium. Koranic injunction in Surah Al-Ahzab:49 provides: 'Please their heart with suitable gifts and let them go in kindness'.

Here gift means 'voluntary gift' on the part of the husband. However, legislation had given statutory effect to the Koranic injunction and the gift can now be ordered to be paid by the court. Further, the divorced wife could also claim mahr, if it has not been paid yet by her husband. Last but not least, the divorced wife may also claim Harta Sepencarian, the subject of our discussion in this paper.

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#### B. Confusion as to Terminology

As far as distribution of matrimonial property is concerned, we can see that the terminology of Harta Sepencarian, Harta Syarikat as well as Harta Carian Laki-Bini has been used interchangeably. Hooker<sup>2</sup> for example had used the confusion between Harta Sepencarian and Harta Syarikat to explain the relationship between the three legal systems at present affecting the Malay peasant. This perhaps may be the reason for such confusion, bearing in mind that interpretation of each word will connote a different meaning, as in English legal system, as it would be under Islamic law and not forgetting the Customary law on the point. Again, Hooker<sup>3</sup> had traced the word "Sepencarian" from the word cari - to seek or to search, therefore Pencarian is a source of a livelihood. Sepencarian therefore literally means 'one's earnings'. The word Harta Syarikat on the other hand derives its term from Syarikat which is partnership. Under common law, the word partnership usually means a business venture