

Comparative Study on Gono Gini's Assets Due to a Death according to the Islamic Law and Positive Law

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Abstract

The Common properties (community property) is an asset that the husband and wife acquired during the household life, which both of them is agree that after united through marriage bonds, that the property produced by one or both of them will be common property. It shows, that if there's an agreement between husband and wife before marriage (did not to unify their property), then the property produced both will not become a joint treasure. Thus, if a husband or wife dies, or divorces, then the property owned by both of them can be distributed in accordance with their respective shares, another case when the two couples are not making an agreement, then the property gained during marriage bonds can be divided into types of communal property. In Islamic law, this kind of treasure is not contained in the Qur'an or Sunnah. Nor in Islamic jurisprudence. However, Islamic law legalizes the existence of common property as long as it is applicable in a society and the benefit in the distribution of such property. In contrast to the positive law, this property types have been regulated and described in the Marriage Law, as well as the Islamic Law Compilations, which became the legal restriction in the affairs of marriage in force in Indonesia. In this study, the author tries to compile the existence of common property according to the Islamic law reviews and positive law.

Keywords: *community property, comparative study, due to death, Islamic law, positive law*

Studi Komparatif tentang Harta Kekayaan Gono Gini Akibat Meninggal Dunia Menurut Hukum Islam dan Hukum Positif

Abstrak

Harta bersama (community property) adalah harta yang diperoleh suami dan istri selama berumah tangga, yang keduanya disepakati setelah disatukan melalui ikatan perkawinan, bahwa harta yang dihasilkan oleh salah satu atau keduanya akan menjadi harta bersama. Hal tersebut menunjukkan, bahwa jika ada kesepakatan antara suami dan istri sebelum menikah (tidak menyatukan harta mereka), maka harta yang dihasilkan keduanya tidak akan menjadi harta bersama. Dengan demikian, jika suami atau istri meninggal, atau bercerai, maka harta benda yang dimiliki keduanya dapat dibagikan sesuai dengan bagiannya masing-masing, lain halnya ketika kedua pasangan tidak bersepakat, maka harta yang diperoleh selama ikatan perkawinan bisa dibagi menjadi jenis properti komunal. Dalam hukum Islam, harta karun semacam ini tidak terdapat di dalam Alquran atau Sunnah. Juga tidak dalam yurisprudensi Islam. Namun, hukum Islam melegalkan keberadaan harta bersama selama itu berlaku dalam masyarakat dan bermanfaat dalam pembagian harta tersebut. Berbeda dengan hukum positif, jenis properti ini telah diatur dan dijelaskan dalam UU Perkawinan, serta Kompilasi Hukum Islam yang menjadi batasan hukum dalam urusan perkawinan yang berlaku di Indonesia. Dalam penelitian ini, penulis mencoba menyusun keberadaan harta bersama menurut tinjauan hukum Islam dan hukum positif.

Kata-kata Kunci: *harta masyarakat, studi komparatif, akibat meninggal dunia, hukum Islam, hukum positif.*

INTRODUCTION

Being a happy family is the ideal and expectation of all human beings. Therefore, carrying out marriage is the gateway to achieve that desire. Allah has established marriage for Muslims and made it a necessity, for there were countless benefits and a glorious degree. Marriage can be a bastion to keep away from satan's temptation, channeling the pent-up longing, preventing brutality of lust, maintaining sight, and keeping the genitals. Marriage is also soul-winning through the union of husband and wife who make each partner as a soul mate and motivate to always worship because basically, the human soul is inclined to get the truth (QS al-Rūm 30:21).

Marriage loops were a respected institution in the Islamic view. Islam has provided a clear rule about marriage. So, marriage is not *an sich* ritual, but also the institutionalization of an honest relationship between men and women. Abu Sulaiman al-Darani (Abdul Hamid Kisyik, 1995: 7-18) argues that a right partner is concerned with the world's affairs and the afterlife, such as sacrifice to nurture and organize the household as well as the fight against lust.

In the middle of the road, on the marriage, sometimes find the stumbling block that eventually separates the husband from the wife. Either because of death or divorce (talaq). Someone who split up because of death is separated because it has completed the Creator's allocation of life. Separate spouses also exist because of divorce. Various things that caused couples to divorce are economic problems, there is no match, because of responsibility Etc. The Religious Courts identified 13 factors that led to the divorce, i.e., unhealthy polygamy, moral crisis, jealousy, forced marriage, economy, no responsibility, underage marriage, persecution, punishment, biological, political, the third-party distributions and there was no harmony (Syarifuddin, 2006)

Many married couples who build a household from scratch, such as material sides, owning the treasures (property) during their marriage results from both contributions, regardless of both earning income or just one. From the content side, over time, the couple will have the treasure has cultivated. When a divorce has occurred, either by death or divorce, they desired their own possessions to be possessed. Islamic teachings do not prevent a person from regaining his rights, provided they are done in beneficial ways. In His decree Allah Almighty confirms that they deserve something from what they have earned (QS al-Nisā 4:32).

According to A. Hasan (2003: 123), Indonesian custom, before the inheritance is distributed, it was taken 1/3 of the property. This treasure is part of the wife outside the estate. This practice continues until now, and this applies, both to working wives who were only ordinary housewives.

On the other hand, this treasure's existence is difficult to separate because it is mixed, so it needs to be arranged to avoid a prolonged dispute if at any time happen unwanted things like divorce. Regarding the gono gini's property (community property), is a joint

treasure obtained from the marriage until the end of the marriage ended (divorced). In determining this kind of stuff, there are rules about the rights of husbands and wives and their respective sections. In general, the decision of the Religious Courts is by a ratio of 1:1. But it can also refer to the history of the collected property, who is dominant, by husband or wife. The division for husband and wife's joint property is the same right, but physically can either party be greater than the other part.

In the archipelago, public comprehensions, community property (gono gini's treasure), are believed to be Sharia in Islamic teachings. This is as it is found in the Religious Courts, which has the authority to accept and decide. Based on Law No. 3 of 2006 on Religious Courts, 9 cases are in control, namely (1) Marriage, (2) Inheritance, (3) Testament, (4) Grant, (5) Wakaf, (6) Zakat, 7) Infak, (8) Sadaqah, and (9) Sharia Economics. And, the common property is part of the marriage

But in the source of Islamic law wasn't found *naşş* or the argument based on four sources of Islamic law (Qur'an, sunnah, ijma and qiyas) which clearly and clearly explain a community property. With no argument found in Islamic law, it does not mean that this issue is not legal (can be practiced) in Islamic law. An *uşûl fiqh* expertise suggests a standard method that can enact the customs (customs) of a society permissible by Islamic law. Even if it does not become a community habit, but if this problem provides benefits to the community, the use is not contrary to Islamic law rules, then it can be legalized by Islamic law.

METHOD

This study focuses on sharing community property (gono gini's treasure) in the review of Islamic law and positive law. To obtain a complete study result, the author uses several literature sources, both primary and secondary data. The primary legal material studied and reviewed is the provision of community property in Islamic law, excavated from the Qur'an, Sunnah, ijma', qiyas, and other methods of extracting Islamic law. Also, positive law, both from the Compilation of Islamic Laws and the Marriage Act of 1974, as well as the rules relating to common property.

The secondary materials are books on fiqh which relevant to the topics covered. From the works of scholars and Muslim law experts want to know his opinion about the common property (gono gini's treasure), mainly related to the number limitation, way and position of community property. The view of these scholars and legal experts supports the analysis in the case of community property. To keep the two materials, refer to the supporting materials in dictionaries and articles related to the topic discussed.

In this study, the authors use a qualitative method in the research. Because its research method is based on post-positivist philosophy, which is used to examine natural objects' condition (as opposed to experiments) where researchers are as a critical instrument, data collection techniques performed in triangulation (combined), data analysis is

inductive/qualitative. The results of qualitative research more emphasize the meaning than generalization. (Sugiyono, 2006).

To support a qualitative method, the steps that used by the author in this method is a comparative study approach. Comparative study means comparing two different objects, which are reviewed from several factors. Comparative study means formulating problems that guide researchers to reach between social contexts or domain one compared to others (Sugiyono, 2006). This approach aims not only to compare but also to search for differences in the study object, which seeks the meaning or benefit of the difference's existence. Arikunto (1992) says comparative means comparing two or more phenomena. In his research, researchers tried to find similarities and differences in the object of the problem. Furthermore, researchers look for meaning or benefit from the existence of similarities and differences.

RESULTS AND DISCUSSION

1. Community Property (Gono Gini's Treasures) Cognitions

The treasure/property (*al-mâl*) is anything that pleases humans and is nourished, both in material form and benefits forms. Humans have a nature for having wealth, whether moving or not moving. wealth was be believed to improve one's social status. Allah Almighty in His Word (commandment) has affirmed the humanity of someone who loves-even possesses and wants to earn a lot of wealth, women, shelter, and vehicles. Being beautiful matters in the men's eyes on love for what is desired: women, children, riches of gold, silver, horses of choice, cattle, and fields. That is the joy of living in the world, and in the sight of Allah is the place of good return (heaven). (Q. S. Ali' Imrân3: 14)

wealth/treasure is always attempted man to have it. Fiqh scholars differ in defining wealth. Madhab Hanafi scholars define it as something that humans love and can be presented when needed or anything that can be owned, stored, and utilized. *Jumhūr' ulamā'* argued that what is meant by the property is anything that has value and is compensated for the person who damages or eliminates it. From this definition can be understood, the treasures not only material but also something useful. (Encyclopedia of Islam, 1999).

Along with Hanafi's madhab, the cleric considered his predecessors' treasure definition as not comprehensive and less accommodative. The ulama of the *muta'akhirîn* (contemporary) generation, Hanafi's madhab, tends to use a property definition in which *jumhūr* cleric mentioned above property is related to the issue of customs, situation, and condition of society. (Encyclopedia of Islam, 1999).

The jurists divide property types and their legal consequences to some kind, i.e., (1) Based on the development or not development, either by human effort or by itself based on Allah's creation. For this problem, fiqh scholars divide it into *al-mâl al-aşl* (origin) and *al-mâl al-thamr* (developed). The treasure of *al-aşl* is the treasure that produces, like the

house, the land, the trees, and the animals. The meaning of *al-thamr* is made from essential assets, such as rental houses, fruits from trees, milk from goats or cows. (2) Based on the owner. Besides, private property is free to take advantage of stuff as long as it does not harm others. There is also the public property that is utilized for all people. Joint possession may change the private property if it has been taken and adequately maintained by a person. Instead, personal property status may turn its ownership into a shared property. the alteration of private property to the common property may be occurred through; (a) self-will to be preached, or (b) a common will as much as the needs of audiences to make public roads or public facilities. (Encyclopedia of Islamic Law, 2001).

From the description above, the different types of assets and their relations to each kind properties' law. Such as treasures apply thoroughly in the world to Muslims. Also, various types of property are known in the archipelago, especially related to family property. The kind of family property known in Indonesia is, first, the treasures earned before marriage by the parties because of their respective endeavors, in Bali called for the rich, in South Sumatra called the celibacy if produced by virgins (girls), this kind of treasure is a right and controlled by each party (husband or wife), in Minangkabau known celibacy treasure, according to Article 35 paragraph (2) of Law no. 1 of 1974, remains under the supervision of each party

Second, the treasures/property that at the time they were married where been given to the two brides might be business capital, or home furnishings, or house of residence for their spouses. In the event of a divorce, the property is returned to the parent (family) who gave the original, in Minangkabau known origin treasures. (Firdaus Tahir, 2006). Third, the property acquired after they are in a marriage relationship takes place on both of them or the business of one of them or called a livelihood. (Thalib Sajuti, 1974).

According to Law No. 1 of 1974 article 35 paragraph (1), this kind of treasure becomes a community property, which states that acquired during the marriage becomes common property. (Mohd Idris Ramulyo, 1994). Fourth, the treasures gained during the wedding take place. Still, because of the grant or inheritance of their parents or their immediate family, in Central Java, East Java, and Yogyakarta are called the treasure property, Jakarta business goods, Banten temperature goods, West Java goods objects or goods of origin). In Aceh known as hareutatuha (the treasures of heritage or heirlooms), in Ngaju Dayak known as pambut while in Minangkabau known with high treasure. (Ismuha, 1977).

a. Community Property (Gono Gini's Treasure) Based on Islamic Law

In the Qur'an, there was no provision on community property in marriage, but affirms that women and men are equally entitled to seek and to obtain sustenance from their respective businesses, (For) for men there is a part of on what they earn. For women there is part of what they earn ... (QS al-Nisā' 4:32). Hazairin, in his opus (1975), asserted something which not regulated in the Qur'an and is also not handled in the hadith as the further implementation of a Qur'anic verse. That is not yet clear enough for the ummah,

which becomes the autonomous right for every Islamic society to regulate it jointly in the context of deliberation (*syūrā baynahum*). (QS. al-Shūrā 42:38).

Similarly, in the old literature of Islamic jurisprudence in the field of marriage, there was no discussion of common property. Islamic Fiqh tends to let this problem impress the absence of the wife's role in family coaching, including financing. According to Satria Effendi's (1995) analysis, this may be due to society's circumstances and conditions when Islamic jurists wrote the books had not found this problem because the problem is custom and custom in each region.

Nevertheless, Satria Effendi asserts (2004) that there was a problem of sharing community property in every Muslim country. Such questions are only possible in a society that recognizes community property's meaning or term in marriage. The existence of common property in a household is based initially on 'urf or custom. In a country that does not separate between the husband's property and the wife's property, common property is not found in Islamic societies whose traditions divide between the husband's property and wife's properties in a household.

Some traditional scholars discussed the *shirkah* issues (fellowship or partnership). However, the discussion is not intended for common property. This discussion concerns business transactions. Therefore, the Shirkah discussion or Sharia according to Shafi'i and his followers such as Nawawi and Syarbaini or in other books such as the writings of Ibn Hajar al-'Asqalani, Muhammad Ibn Isma'il al-Shan'ani, and others, found in the trade books, not in the marriage book (law).

From this cooperation system, some experts of Islamic law make the existing reference of common property. This fact means that the origin of the cooperation (*shirkah*) issue is regarding the arrangement of associations or engagements in trade or service delivery. Then also applied into a community property husband and wife in talking about marriage. Sayuti (1986) asserted that because of the element of similarity in the fellowship or partnership in marriage, the common property in Islam. Probably, the principle of the analogy used by law experts, given the similarity and similarity in a legal method

b. Community Property (Gono Gini's Treasure) According to The Positive Law

The Law no. 1 of 1974 stated meaning of community property is the property that belongs to the husband and wife after the marriage. It is outlined in Chapter VII of Law No. 1 of 1974, articles 35, 36, and 37, which states that property acquired during the marriage becomes common property. As for each husband and wife's inherent property, and the property received respectively as a gift or inheritance is under the control of each of the parties' recipients as long as it does not specify otherwise. Article 36 regulates the status of property gained by each husband and wife. Article 37 explained that if marriage is terminated because of divorce, the community property is handled according to its respective laws

In the Compilation of Islamic law described the position of husband and wife property from Article 85 to Article 97, this Act stated that does not close the possibility of community property in the marriage, nor does it cover the likelihood of property owned each between husband or wife. But basically, there is no mixing between husband's property and wife's property due to marriage. The wife's property remains a wife's property and is fully controlled by it, so also the husband's property remains his rights and wholly owned by it. (Hazairin, 1975).

Each husband and wife's congenital property and the property gained by each as a gift or inheritance are under their control. They have the full right to take legal action on their property in the form of grants, sadaqah, or others.

However, if there was a dispute between the husband and wife concerning a common property, then the dispute's settlement shall be submitted to the Religious Court. For the widow or divorced divorce, each life shall be entitled to one-half of the common property as long as it is not specified in the marriage agreement. Similarly, if it's divorce occurred died before being distributed heirs, first taken as shared property (gono gini's treasure).

Subekti and J. Tamara (1965) describe that the common property's treasures concerning their livelihoods as the Supreme Court decree dated September 7, 1956, no 51 / k / Sip / 1956 states that, according to law, all property acquired during marriage, gono gini. However, it may be just the result of the husband's activities alone. Thus, livelihoods are generally intended to all husbands and wives together during marriage bonds.

In some of his studies in various regions, Soewandi (1978) noticed that husband and wife's livelihoods in the parental family, with parallel marriage apart from the original property as a treasure that can be divided by divorce or by inheritance. In Minangkabau, if a divorce occurs, husbands and wives, Suarang are divided into two. As concluded by the seminar on inheritance law and land law in Minangkabau organized by the Faculty of Law of Andalas University in 1968, which among others stated, the meaning of livelihood is half of the wealth obtained by a person during the marriage coupled with his own luggage

in the Javanese family gono gini is *sraya ne wong loro* i.e.; both of the two people result from work. Therefore, duweke long loro is owned by two people, and the marriage is not broken then gono gini (common property) is undivided property.

From here, it can be understood, according to the custom, all income or income of husband and wife during the marriage bond follows the origin of the property. Besides the origin and or the property of the gift, it is the husband and wife's livelihood. It is not a question of whether the wife participates actively in work or not, even if the wife only stays at home and takes care of the household and children, while who works the only husband. But the work of the husband is the result of livelihood with husband and wife. If their marriage is terminated, then as the Supreme Court's decision of April 9, 1960 120 K / Sip / 1960 should be divided equally between husband and wife. But if the wife secretly leaves her

husband, then the treasure is not necessarily in for the two. As the Supreme Court decree dated September 7 1956 no 51 / K / Sip / 1956 said, "In customary law there is no rule that when a wife secretly flees from her husband, the wife is no longer entitled to gono gini (common property) with her husband". In the traditional review, Ismuha (1977) states that a community property (gono gini's treasure) is a livelihood with husband and wife. They produce gono gini or *sihareukat* and so on. It is included the *shirkah abdān* (*abdān* cooperations) / *mufāwāḍah*. Most of wives in Indonesian society work together. They work hard and earned a living every day. They also become a treasure for their old age, and then to relic among their children later after their death.

Traditionally it can be concluded that community property is the search result during marriage bonds. Thus, Hilman Hadikusuma (1983) asserted that what a husband and wife can be together during the marriage is the result of a husband and wife's livelihood. This property can be increased from the gifts that a couple received during their marriage. This everyday livelihood can prevent the wife's right to share what happens when his wife is expelled and divorced without the right to bring something because of committing adultery.

2. Community Property (Gono Gini's Treasure) According to Indonesian Legal Expert

Indonesian legal experts have different views on common property. Is this common treasure indeed is derived from the Islamic Sharia or did not? There are two opinions on this issue. The first opinion was unknown community property in Islamic institutions except in *shirkah*/ cooperations (partnership or union). Regardless, it is a treasure in the family or outside the family.

In contrast to the Western civil law system (BW) in Islamic law is not known mixing of wealth between husband and wife by marriage. The wife's property remains the wife's property and is fully controlled by the wife, as well as the husband's property remains the property of the husband and fully controlled by the husband. Thus, married women are still considered to be allowed to act without husbands help in any matter, including taking care of the community's property. (Latif Djamil, 1982). Latif affirms his opinion with God commending; which reads:

"... And her husbands are entitled to refer to it in that waiting period if they (husbands) desire an *iṣlāḥ*. And women have a right that is equal to their obligations in a way that *ma'ruf*. Husbands, however, have a degree of strength over their wives. Allah is Mighty, Wise. (Q.S.al-Baqarah 2: 228).

Besides, based on the KUHP BW, article 119n explains the beginning of the marriage is held for the law of unity; the union between the husband and wife property, just about it with the marriage agreement has not held another provision. During the marriage, the rule should not be abolished or altered by an agreement between the husband and wife. All debts and losses during the marriage must be taken into account by mutual

understanding (article of the Criminal Code of Burgerlijk Wetboek). (Tjitrosudibio R Subekti, 1960).

Thus, the Islamic view's common property does not exist because the family's property owner is returned to each husband or wife. As for if there is an agreement between husband and wife, it is another problem.

The second opinion states there is a community property between husband and wife in Islamic law. (Saleh Wantjik, 1976). Saleh argues that what is regulated by law regarding the joint property in accordance with the will and/or aspiration of Islamic Law. It is reinforced by his decree (Allah SWT) as follows. For a men, there was a part of what they earn, and for women there was part of what they earn, and invoke to Allah some on His gifts. Allah is Knower of all things. (Q. S. al-Nisā' 4 34)

The opinion that states the common property existence, also based on Law No. 1 of 1974, contained in chapter VII chapters 35, 36, and 37, on the property in a marriage that, property acquired during the marriage becomes common property. As for the common property of husband and wife can act on the agreement of both parties. Therefore, if the marriage is terminated due to a divorce joint property is regulated according to their respective laws.

An opinion that believes on community property (gono gini's treasure) existence in Islam also argues with the presence of a union system that has been in effect at the Prophet's time. In Islamic law, because the wife's marriage becomes *sharia al-rajūl fī hayātih* (an allied partnership of a husband in serving the ark of life, then between husband and wife can occur *sharikah' abdān* (unlimited induction). In this case, including wealth also united because of *shirkah* (counseling) (Siddiqy Al-Hasbi, 1971).

3. Urf (Society Habitual) and Maslahah

Having a discovered the exposure on common property, the author finds the treasure obtained during the marriage, which is called the common property. It is based on custom or custom, which in the term of *uṣūl fiqh* jurist is called '*urf*', i.e.; a habit that prevails in a society. Besides adat (culture), goodness applies to society and is not contrary to the Islamic Sharia. It was based on '*urf*' (habitual society) and goodness (*maṣlaḥat*) that justifies the existence of common property

Society habitual (Urf) and culture included two words discussed in the Ushul Fiqh literature. The word '*urf*' is derived from the word '*arafa-ya'rifu-urf*' which means al-mar'ûf, which is known. In a word expressed *fulānun awlā fulānan' urfan* (fulan is better known than the other fulan). The sense is known, more recognized and known than others. The word '*urf*' can also be found in the word of God

خُذِ الْعَفْوَ وَأْمُرْ بِالْعُرْفِ وَأَعْرِضْ عَنِ الْجَاهِلِينَ

Be ye forgiving and have men do the good, and turn away from the ignorant. Q. S. Al-A'râf 7: 199

The synonym 'urf is custom/habit. Custom is derived from the root of the word '*āda-ya'ādu-'ādatan*; this sentence has a meaning meaningful repeating *tikrārūn*. Therefore something newly done one time does not include custom. Then how many times can something be said custom? According to the author, something that is often and repeatedly done by the community is said to be customary.

The scholars of *uṣūl fiqh* exist that distinguish between 'urf and adat, their views are simple in determining both, i.e. from the point of view repeatedly and from a known point of view. Custom is done frequently, as for 'urf in terms of the available and not. But in this case, there is actually no difference in principle because the two words have the same meaning, that is an act that has been repeatedly done to be recognized and recognized by the crowd; on the contrary, because the Act is already known and recognized by the public, then the action was done people repeatedly. (Amir Syarifudin, 2005)

From the exposure above, it can be concluded that custom has a neutral and general meaning. There is excellent and good custom and lousy custom. Muhamad Abu Zahrah (2005), formulates the notion of *adat* or habitual as follows

مَا عَتَدَاهُ النَّاسُ مِنْ مُعَامَلَاتٍ وَاسْتَقَامَتْ عَلَيْهِ أُمُورُهُمْ

Something that is accustomed to by a group of people in their daily lives is consistent in their behavior (affairs).

It is these habits that are at stake, whether they are good or bad. Similarly, the custom has broad meaning, both personal problems such as one's habit in sleeping, eating, and consuming certain types of food. According to Nasrun Haroen (2003), custom also occurs in general problems, whether related to humans or nature, such as plants and animals.

As with the 'urf, this word is used by looking at the quality of the deed done. Acknowledged, known, and accepted by many people. Thus 'urf contains a good connotation. It can be known in the use of the word 'urf with the meaning of *al-ma'rūf* in the Qur'an of al-A'rāf verse 199. In line with this understanding, the jurist of *uṣūl fiqh* interpret 'urf as follows

مَا عَتَدَاهُ جُمُهُورُ النَّاسِ وَالْقُوَّةُ مِنْ قَوْلٍ أَوْ فِعْلٍ تَكَرَّرَ مَرَّةً بَعْدَ أُخْرَى حَتَّى تَمَكَّنَ أَثَرُهُ فِي نَفْسِهِمْ وَصَارَتْ تَتَلَفَّاهُ عُقُولُهُمْ بِالْقَبُولِ.

What people are accustomed to and followed by many people, whether in speech or deed. it is repeatedly done to imprint in their souls and be accepted by their reason. (Nasrun Haroen, 2001).

Of these two understandings, the red thread can be drawn that 'urf has a narrow meaning, which is a good habit according to the sense that there is in a society. As for custom, it has a broader meaning. Mushthafa Ahmad al-Zarqa '(1968) says that 'urf is custom because the tradition is more common than 'urf. The conclusion, based on a definition,

عَادَةُ جُمُهُورٍ قَوْمٍ فِي قَوْلٍ أَوْ فِعْلٍ.

A majority habituals of a people either in word or deed

According to Syathibi (in Nasrun Haroen, 2001), all the imam schools of thought (mazhab/sect) agreed to accept and make 'urf as the *shara'* prove in establishing the law, if there were no texts explain the law of a problem encountered. Even for a mujtahid in deciding a fatwa, he must know and examine the customs that prevail in the local community so that the law set does not contradict or eliminate the community's welfare. (Al-Qarâfi, 1344 the justification of 'urf as the theorem in establishing the law in the cleric view is supported by strong evidence (*naşş*). Among the evidence :

Anyone who sells and sells greetings into dates then should be determined amount, the dose, and the grace period. (related on Bukhari hadith)

This hadith, revealed by the Prophet when witnessing the practice of buying and selling greetings (orders) made by residents of Medina. Strictly speaking, this information strengthens and legitimizes the buying and selling habits among the people of Medina. Ibn Mas'ud also states his opinion as follows:

مَا رَأَى الْمُسْلِمُونَ حَسَنًا فَهُوَ عِنْدَ اللَّهِ حَسَنٌ

Every matter which considered as a good thing by the Muslims, then it's also good in God's sight

The acceptance of '*ulamā'* against the 'urf as a proposition in establishing a law that aims to realize the benefit and meet human needs. In other words, it does not accept '*urf* when it comes to the danger matters.

Muhamad Abu Zahrah (2005) strongly emphasizes the fiqh scholars to know and explore the habits and '*urf* that apply to the community. Because in the determination of Islamic law to promote a benefit and minimize mashaqqah (distress) and a dangerous thing that against humans. Such as Some principles such as *takhfif* (lightening), *taysir* (ease), *daf'u al-ḍarar wa al-fasād* (avoid/refuse misconduct and destruction) are the principles of Islam for the creation of a good and obedient society.

In the giving instruction, Shafi'ite is known by his term, which is called *qawl al-qadīm* (old opinion) and *qawl al-jadīd* (new opinion). *Qawl al-qadīm* was his opinion when he was in Iraq, while *qawl al-jadīd* was his opinion when he was in Egypt. The method used by Shafi'i shows the attention of region customs with the result on its effects in summarized a law. The alteration of Shafi'ite '*ulamā'* (fatwa) became an ultimate '*ulamā'* benchmark in determining law and become the method that always referred to.

Besides 'Urf, as one of the methods used by *uṣūl fiqh* scholars in summarizing law evidence is goodness (*maṣlaḥah*), i.e., a benefit which is not found in detail *naşş* (evidence) which supports it terms and also there was no nash that rejected, and so does there was no ijma that helped, but a number of texts supported this benefit through *istiqrā'* way.

Imam al-Ghazali (in Nasrun Haroen, 2001), argues that in principle, *maṣlaḥah* is taking benefits and rejecting harm to preserve the aims of *shara'*. Therefore, welfare must be in line with the aims of *shara'*, even if contrary to human purposes, because man's benefit is not based on the will of *shara'*, but often based on the will of lust.

In this connection, the Syathibi priest (2003) says that the ultimate benefit is the benefit that nourishes *maqāṣid al-sharī'ah* (*shara'* goals), ie in the form of maintaining religion, soul, heredity, wealth and mind. Therefore, the benefit is not distinguished between the benefit of the world and the benefit of the hereafter. Because these two benefits are aimed at maintaining the five *maqāṣid al-sharī'ah*, it is included in the concept of *maṣlaḥah*. Thus, the benefit of the world to be achieved must aim for the hereafter benefits.

In the benefit reasons, the scholars agree that *maṣlaḥah al-mu'tabarah* can be made as a reason (*ḥujjah*) in establishing Islamic law. Such as benefits are included in the *qiyās* method. And setting *al-maṣlaḥah al-mulghah* cannot be used as a reason in establishing Islamic law because it is not found in the *shara'* practice'. In connection with *al-maṣlaḥah al-mursalah*, the scholars accept its existence and become a provision in Islamic law.

In this case, Abdul Wahab Khalaf (1978) requires that *al-maṣlaḥah al-mursalah* be acceptable if, first, the essence of his benefit is under *maqāṣid al-shari'ah* (*shara'* goals), not the use of advancing lust. Second, the services received are the benefits of the majority that provide help to many audiences. Third, this benefit should not conflict with the main source of law, the Qur'an, sunnah and Ijmā'.

Abu Zahra (2005) specifies the extent of *al-maṣlaḥah al-mursalah*, he states there are four views in this matter, firstly rejecting *al-maṣlaḥah al-mursalah*, which does not originate from the principal (*aṣl*) of the Qur'an and sunnah, then if based on *aṣl*, this *maṣlaḥah* including *qiyās*. Secondly, *al-maṣlaḥah al-mursalah* is acceptable as long as it is following *maqāṣid al-sharī'ah* and not contradicting the permanent source (*tsābit aṣl*). Thirdly, *al-maṣlaḥah al-mursalah* is acceptable when approaching means of a permanent source (*aṣl al-thābit*) (the primary authority of the Qur'an and the sunnah). Fourthly, *al-maṣlaḥah al-mursalah*; if it becomes a definite need.

4. The Matters Related to The Community Property (Joint Treasure) Due to A Death

When a person dies, the dead will leave the treasure, which before the sharing of the common property in death, there are some things that the heirs must keep in mind. If the dead possesses a treasure, then the appeal is closely related to the four rights, which must be carried out before the estate is distributed; and the four rights are:

a. Cost of Maintenance

The thing that should be done in relation to the dead's property is paying the cost of handling the party. This cost is taken from the dead's property with a reasonable size and not excessive, and not reduced. Because a maintenance cost is an important matter that

is closely related to the right of the dead, guarding the honor of the dead, and the glory of his humanity in his treasure and his grave.

The nursing care in question is everything that a corpse needs from when he dies until it is buried in a grave. These are costs for bathing, dying, carrying, digging graves, and burying them. If the dead do not abandon the property, then the maintenance costs should be borne by the family who became dependent while living. During his lifetime, he bears the expenses of others, and vice versa when he dies. The person who becomes his dependent must do the same.

If the dead do not have relatives or a family who bear the burial fee, and the dead is a Muslim, then the cost is taken from the temple of treasure (charity houses). If the temple of al-mall (charity houses) is not possible, then those who must finance it are capable Muslims, even if there is no bond with the dead. The maintenance cost on the deceased must be first than the cost of the person who bears his livelihood, such as father and son. (see Law of Inheritance p. 70, 2000).

b. Rights Related to the Inheritance

What was meant by rights with inheritance is everything related to promise or transactions of either in the form of obligations with Sharia's implementation or related to human relations, outside of the debt. The responsibility associated with the performance of Sharia such as paying zakat (charity). Paying charity laws is obligatory, the obligation is paid for his property before the treasure property becomes the attraction. The charity treasure is different from the will. Because paying charity (zakat) is a duty to be fulfilled. According to the type of property to be paid from the *niṣab* which has been determined. So, if a person dies and must pay charity, then it must be fulfilled.

c. The Debt

The mortgage to the fellow human beings must be paid off; thus, everything becomes dependent on the dead. Therefore, the human corpse's property may not be distributed to the heirs before the debts are repaid. (H. R. Ahmad). From the words of this Apostle affirms someone who has an obligation, then he dies, then the existence of the debt continues until the heirs pay off. Imam Syaukani (2005) asserted that giving precedence to the debt is necessary even in Al-Qur'an Al-Nisā' letter mentioned before the testament rather than debt. (explanation) in the hadith received by Ali's friend about the precedence of debt rather than testament. That is, debt is related to the fellow matter of human beings. In the holy Qur'an; Allah asserted that the division of the heirs done after settling the mortal remains debts paid (Q S. al-Nisā' 4:11).

In addition to the argument, Uthaimin (2003) states why the debt should take precedence over the testament? Because debt is the dead's obligation to be paid, while the will is merely a compensation from the dead to the desired person. Thus, of course, putting the responsibility is a necessity compared with payment. Further, Uthaimin asserted, there is wisdom contained in the mention of wills precedence from the debt. The understanding

that is *-allāhu a'lam-* that paying its legal debt is mandatory, while the testament is merely a compensation, and sometimes the heirs take it for granted and hard to fulfill a will. Surely this is different from something that the law is obligatory (i.e. debt). In addition, some debt comes to collect it. If the heir is reluctant to pay, the person will not allow it to demand that the debts *mayyit* paid. Therefore, the testament is first mentioned rather than debt.

d. Will (Dying Exhortation)

The last will/testament (*waṣiyyah*) is a form of form to help fellow Muslims, both material and beneficial. Fiqh scholars define a will as the transfer of ownership after death, both material and benefits (see Zuhaili, 2005). Moh. Dja'far (2003) explains that what is meant by a testament is a person's message while still alive so that his or her property is delivered to a confident person or other purposes, which must be executed after the person who ordered it dies.

From this definition, it can be understood that the testament differs from property owners in other ways, such as buying and selling, leasing, pawning, and others. This difference is because the contracts and ownership process is different. In the sale and purchase or lease, the contract is done when both sides are alive. It is also in the transfer of property from both parties while still alive, another case with the testament.

The contract process in the testament is done while still alive, but the transfer of new ownership is valid when the *waṣiyyah* maker (*al-wāṣi*) is dead. Thus, the transfer of ownership of the property-both material and benefits-is valid. It may be possessed by those who received the testament when the one who dies had died. Then how much property is allowed in a will. Here there was a limit to the number of possessions in the testament. When asked by Sa'd ibn Abi Waqas, the Apostle's answer about the many treasured possessions. He replied, "one-third and one-third of this is a lot (enough) to be mandated." (H. R. Bukhari). Salim Ibn' Ied al-Hilali (1999) explains about this hadith that there is a prohibition of entrusting all property or half or more than one third. One-third is the maximum limit in treating property.

5. Comparative Divisions of community Due to a Death According to Islamic Law and Positive Law

In the comparative analysis in the distribution of community property due to a death, four things will be comparative in this research ie;

First, portion or part for husband or wife in obtaining joint property caused by death. What part, for husbands or wives in sharing common property caused by the death according to the Islamic law and Positive law? The amount or portion earned by husbands and wives in joint property due to death can refer to the source of law in Islamic law and Positive law. In Islamic law is not determined how the portion of husband and wife get this kind of treasure. There are no texts or arguments in the Qur'an and Sunnah or Ijma and Qiyas explained. Similarly, in the study of Islamic jurisprudence is not always can be

found a concrete amount about the size of this treasure. A realistic portion is returned to how much stock (income) is generated by both partners. Thus, if the husband has more income, he is more entitled to get more. Vice versa, if the wife earns more income, then the wife is entitled to get more from his income. It is as in the Qur'an stated. "For the husband to obtain the results he earns, and for women to obtain the results of what he has earned". The portion in the distribution of community property is regulated in the Marriage Law. It also contained in the Compilation of Islamic Law. It stated that due to the death of the husband or wife who became widower or widow, then in the case of community property, each of the two gets half before heirs are distributed.

Second, what is the basis of sharing of common property according to Islamic law and positive law? The basis for which the division of common property in Islamic law is the 'urf' method, which is the prevailing custom in society. *Jumhūr al-'Ulamā'* agree to accept customary tradition, when not contrary to Sharia, in practice handed over to society's prevailing habits. Besides 'urf (custom) which is used as the reason may be sharing of common property it also said as. There are five principles of a goodness in Islamic teachings: keeping religion, nourishing the soul, nourishing the mind, keeping the al-maṣlaḥah al-mursalah of off spring, and keeping the treasure. *Maqāṣid al-sharī'ah* (the purpose of the Sharia) will not be separated from the Ummah's welfare, thus during the benefit of the people gained by the community, and not contrary to the *shara'* law, this benefit can be practiced. The basis of the possible division of common property in positive law is the Marriage Law in articles 35 and 37 of property acquired during marriage into common property. When marriage is interrupted by death, common property is set according to their respective laws. On the distribution of common property for Muslim citizens, it is further reinforced in the Compilation of Islamic Law in article 96 paragraph (1) which states that if a divorce dies, then half of community property becomes the right of the couple who live longer.

Third, a division of shared property due to divorce under Islamic law and positional law? Sharing common property due to a death in the review of Islamic law is not necessary. This is returned to the abandoned partner, if the wife left behind feels possessed of the treasure that she obtains in the marriage bond and is desired to return to her lap, then it is allowed, and vice versa. The principle of deliberation in the sharing of common property becomes the best solution. While in the positive law, the sharing of common property is clearly stated, and the common property rules are clearly regulated. This gives an indication of the existence of, the tendency of citizens who require the sharing of joint property due to death. It is also reinforced that one of the Religious Courts' duties is the settlement of common property. In addition, most societies have this understanding.

Fourth, when the division of common property due to a death according to Islamic law and positive law is implemented? Islamic law does not regulate the time share of shared property is shared. However, if in association with the division of inheritance, then automatically shared treasures distributed to widows or widowers who are alive before

the inheritance is distributed, after the cost of the procession of dead, the rights that must be fulfilled. In the positive law the management of common property divisions is not clearly regulated.

Table-1
List of comparative distributions of common property (gono gini's treasure)
due to the divorce according to Islamic law and positive law

<i>It is a necessity that the division of common property be due to a death according to the Islamic law and positive laws?</i>	
Not a necessity, because there was no argument and strong evidence which regulates the common property. But might and legalize the distribution of common property.	It tends to be imperative, because the law regulates itself and caused of understanding of most societies.
<i>What is the basis for the sharing of assets according to Islamic law and positive law?</i>	
1. Urf or customs prevailing in society. 2. Mashlahah al-mursalah.	1. Marriage Law Article 35-37. 2. ILC article 85-97
<i>How much does the husband or wife share in the division of common property due to a death according to the Islamic law and positive law?</i>	
Unspecified, this is returned to who earns more	The ratio is 50%: 50%
<i>When the division of common property due to death according to the Islamic law and positive law is implemented?</i>	
Prior to the distribution of the estate and after completion, the cost of the dead, the rights related to the dead, the debt and the will	Not regulated, but may be returned to people's habits.

Source: tracking result, processed

CONCLUSION

From the exposure that the author has written, then the implementation of the division of common property in terms of comparative Islamic law and positive law is as follows; *first*, the division of joint property due to death according to Islamic law is allowed by restoring its technical problems to customs and customs by applying the principle of justice, deliberation and benefit; *second*, even if Islamic law is not found in the argument or texts that *qaṭ'ī* (fixed) about the existence of common property, it does not mean it is not practiced in Islamic teachings. Islamic teachings that are in harmony with time, place until the end of the age give freedom of speech to face problems not found in the Qur'an and sunnah, but still have attention on *maqāsid al-sharī'ah* (*shara'*goals), in the form of religious, soul, heredity, mind and property. Positive laws that became the legal reference in the life of the Indonesian people accepted the customary behavior which has become the law of the people; *third*, the magnitude of the common property division for the husband or wife resulting from death in the positive law has been determined that is the ratio 50:50, this is because it adheres to the principle of justice according to applicable

law; and *fourth*, regarding the timing of the division on common property resulting from death, in Islamic law advocate as soon as possible resolved, this is done to cover the future dangers; if it's problem of common property divisions is not immediately resolved, this is analogous to the distribution of inheritance. The positive law does not specify when it should be done, but in the event of a dispute over the distribution of common property it can be settled through the Religious Courts.

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