

The Essence of Property Obtained Between Husband and Wife during Marriage

Zahrowati¹ Anwar Borahima² Nurfaidah Said³ Hasbir³

1. PhD student at Postgraduate Hasanuddin University and a Lecturer at Faculty of Law, University of Haluoleo, Kendari, Sout East Sulawesi

2. Professor on Legal Science, Faculty of Law, Hasanuddin University and as a Promotor

3. Senior Lecturer on Legal Science, Faculty of Law, Hasanuddin University and as a co-Promotor

Abstract

Marriage is a physical and spiritual bond between a man and a woman as husband and wife, having the purpose of establishing happy and lasting family founded on the belief in God Almighty. it is 3 (three) marriage aspects regarding the Islamic Law – namely legal, social, and religious aspects. A man and a woman who bond to a marriage as a husband and a wife has rights to decide upon the marriage with divorced way based on the divorce law. However, either man or woman must have its own legal reasons to divorce and must be conducted in front of the Court after the Court has failed to peace the parties. In the Law on Marriage and the Compilation of the Islamic Law, the concept of sharingcommunity property is husband and wife respectively has rights equally (50 : 50) out of the community property when it is dissolved divorce or death. The concept of the community property will be different to the concept of livelihood property as governed into the Law on Marriage and the Compilation of the Islamic Law. The concept of livelihood is the giving of the husband to the wife during the marriage in form of “material property” to fullfill the wife’s needs in which the property is not the community property and the property then will become the own of the wife.

Keywords: Property, Husband-Wife, Marriage.

1. Introduction

Marriage is a physical and spiritual bond between a man and a woman as husband and wife, having the purpose of establishing happy and lasting family founded on the belief in God Almighty.¹ It is lawful when the marriage is entered with the law of respective religions and beliefs of the parties. The marriage in the Islamic Law means strongly concensuses between a man and a woman (*mitsaqon ghaliza*) to obey and to implement the order of the God Almighty. The purpose of it is to create housewifery *sakinah, mawaddah* dan *rahmah*.²

In point of View of Asaf A.A. Fyzee³, it is 3 (three) marriage aspects regarding the Islamic Law – namely legal, social, and religious aspects. In terms of the legal perspective, it is an agreement and is not a sacrament. As the agreement, the marriage has to be conducted with the concerned of the parties,⁴ and to be conformed with the statutory regulation on the violation of it. In the social’s perspective, the Islamic Law posites a woman in the highly social position after the marriage and to limit the customary of doing poligamy in the society. In the religious perspective further, the marriage is recognized as a fundamental aspect in the society to show that it is a holy agreement. According to the Islamic Law, “a temporary marriage” is prohibited because as an institution the marriage is aimed to elevate the dignity of human beings and to continue the human beings’ s life. Therefore, a husband-wife is ordered to respect and love each other.

A man and a woman who bond to a marriage as a husband and a wife has rights to decide upon the marriage with divorced way based on the divorce law. However, either man or woman must have its own legal reasons to divorce and it must be conducted in front of the Court after the Court has failed to peace the parties.⁵

Arising problem after divorce is property matter, especially related to share property community. Basically, the Law governs a joint freedom to the parties to act to the property. According to article 37 of the Law on Marriage, when a marriage is dissolved by divorce, the community property shall be settled in accordance with the respective laws. Therefore, the Law on Marriage gives freedom to govern sharingcommunity property based on the religious law, the customary law, and otherlaws.

2. Research’s Method

The research’s type is normative⁶ and empirical⁷ of legal research. The legal normative applies *Statute*

¹ See article 1 the Law No. 1 of 1974 on Marriage.

² See article 2 and 3 the Predential Instruction No. 1 of 1991 on the Compilation of the Islamic Law.

³ See Asaf A.A. Fyzee, p. 271.

⁴ See Muh. Syaifuddin, 2013, *The Divorce Law*, Sinar Grafika, Jakarta, p. 3.

⁵ See article 39 the Law No. 1 of 1974 on Marriage.

⁶ See Soerjono Soekanto and Sri Mamudji, 1995, *Legal Normatice Research*, PT. RajaGrafindo Persada, Jakarta.

⁷ See Bambang Sunggono, 1997, *Method of Legal Research*, PT. Raja Grafindo Persda, Jakarta.

Approach¹ and Conceptual Approach.² The site of the research was conducted in South Sulawesi and South-East Sulawesi Provinces, as well as the High Islamic Court in Makassar, Kendari, and Sungguminasa. The number of respondents of the research from those research places were 20 persons (judges) in South Sulawesi and South-East Sulawesi, as well as 20 couples (husband-wife) who have “divorced-problems”. The data then was analyzed by applying content analysis technique quantitatively to find out those references or theories related to sharingcommunity property.

3. The Property Obtained between Husband-Wife during the Marriage

3.1 Joint Property

In the Law on Marriage and the Compilation of the Islamic Law, the concept of sharingcommunity property is husband and wife respectively has rights equally (50 : 50) out of the community property when it is dissolved divorce or death. Based on interviewed to one of judges in the Kendari High Islamic Court,³ it stated that basically a husband and a wife respectively will get equally (50 : 50) for sharingcommunity property. For this concept, the Islamic Law provides legal certainty for both husband and wife in which all their properties obtained during the marriage will be shared equally without questioning those properties are registered to the name of the husband or the wife. However, this law will be fair if both the husband or the wife plays his/her roles properly neither as the household leader nor the people who take care to household activities.

According to the researcher, to ascertain the value of justice substantively in terms of sharingcommunity property, there are some factors to be considered, as followings:

1. The existence of the community property.

The community property is an accessor to legal marriage. It means that without the legal marriage, there is no “joint property”. As we know that Marriage is a physical and spiritual bond between a man and a woman as husband and wife, having the purpose of establishing happy and lasting family founded on the belief in God Almighty.

To embody the concept of ideal marriage pursuant to the Islamic Law – called “*sakinah, mawaddah, and warahmah*” - it would be depending on how each party (husband and wife) paly his/her role in right way. Therefore, the marriage is not only conducted to fullfil the order of the God Almighty, but also it is a contract between a man and a woman (a civil relationship) that creates rights and duties between the parties.

The sharing ofcommunity property equals to the husband and the wife will be conducted as long as both the parties are respect to his/her rights and duties to unite their household’s commitment when the marriage is established. In this context, the consideration of getting equally to the community property between the parties is based on the role play of the parties as a partner in the household to keep and preserve the marriage.

The meaning of “role played by the parties” is not based on the gender perspective in which the husband is interpreted as a person who is responsible to look for “a wage” and the wife is represented as a person who takes care to the household. In terms of the husband does not work, he still has a role to keep the unity of his family such as taking care the household, driving and picking up his children or wife, shopping, and providing some foods. For that situation as mentioned, it can be concluded that the husband is eligible to obtain his rights related to the community property, eventhough he does not work and his wife does.

However when the wife does work and the husband does not play his role properly to do the household activities, the husband can not obtain the community property equally as mentioned in the Law on Marriage and the Compilation of the Islamic Law. It is not accordance with the principle of justice. For this situation, the sharing property for the wife must be more than the husband has. For this case, the principle of “*sakgendong sakpikul*” can be adopted as an alternative choice in which the wife will get 2/3 (two-third) more than the husband (1/3 – one-third) for the community property. Even during the marriage the husband is being an extravagant, a drunker, and/or a gambler, the husband is inappropriately to acquire the rights to get sharingcommunity property.

Based on the research’s data from 20 the desicion court of the Islamic Court, – 5 desicion of the Islamic Court in Kendari, 5 desicion of the High Islamic Court in Kendari, 5 desicion of the Islamic Court in Sungguminasa, and 5 desicion of the High Islamic Court in Makassar, - it showed that most of the Desicion of the Islamic Court prove that judge tends to prioritize the legal certainty principle than the principle of justice and expediency. This tendency is basically not excessive particular if it is seen from the process of the examination in front of the Court that is limited to 2 aspects: (1) when the property is formed whether in or out the marriage?; (2) where the source of the property whether it is from joint efforts or from an inheritance, a grant, or a gift? From the two examination as mentioned, both of them prove the join property will be shared directly by the judges to the husband and the wife.

¹ See Peter Mahmud Marzuki, 2011, *Legal Research*, Kencana Prenada Media Group. Jakarta, p. 96.

² *Ibid.* p. 137.

³ Interviewed with Tarmizi who a judge in the Kendari High Islamic Court on 28 Agustus 2015.

The judges in fact do not examine carefully the level of the examination process on: (a) how the parties play the role in the household to build and strengthen it; and (b) to what extent the husband and the wife play this/her role in it. The fundamental consideration of it is article 35 of the Law on Marriage in which it states that the property acquired during the marriage shall be “the community property”. Article 1 (f) of the Compilation of the Islamic Law states furthermore that the property during the marriage (*syirkah*) either obtained individually or jointly shall be “the community property” without questioning the property registered by whom the husband or the wife. Article 97 of the Compilation then stipulates that a widow or a widower respectively has the rights $\frac{1}{2}$ out of the community property as long as does not decide in the agreement of the marriage.

It can be concluded from the discussion as mentioned above that the community property is governed to the Law on Marriage and the Compilation of the Islamic Law in which the parties shall play his/her roles appropriately. The parties must consider to his/her position to keep and build his/her household. In terms of the marriage’s case, the judges shall consider carefully to the Decision he/she takes as stipulated to article 229 of the Compilation. The Decision should base on living law and shall consider the feel of the justice before deciding the sharing of the community property (50 : 50).

2. *The Scope of the community property*

Basically, the property owned by the husband and the wife can be classified into:

(1). Individual property consists of:

(a) husband’s property means property owned by the husband individually without owner of the wife to his property.

- The property owned by the husband before the marriage; and
- The property obtained after the marriage.

(b) wife’s property means property owned by the wife individually without owner of the husband to her property.

- The property owned by the husband before the marriage; and
- The property obtained after the marriage.

Owning of the property of the husband-wife in the Law on Marriage is stipulated in article 35 verse 2. It states that property brought into the marriage by the husband and the wife respectively and property acquired by either of them as a gift or inheritance shall remain under their respective control, unless otherwise decided between the parties. Article 36 verse 2 further explains that husband and wife shall full right of disposal of the property brought by them into the marriage respectively.

Owning of the property of the husband-wife in the Compilation of the Islamic Law is governed into article 85, 86, and 87. Article 85 states community property in the marriage could be possible to have their own property. Article 86 then explains basically there is no mix-property between the husband and the wife due to the marriage done. Article 87 furthermore states that the property brought by the husband and the wife respectively and the property obtained respectively as a gift or an inheritance under their control, unless otherwise decided between the parties. Both the husband and the wife has his/her rights to act legally to gifted, inherited, and other properties.

(2) Joint property means the property owned by the husband and the wife jointly.

The property can be owned jointly if it is obtained together. For the property is bought by the money of the husband and the wife jointly, it will be the community property, including the property acquired from a gift, a grant, or an inheritance. It also includes the property owned by the husband and the wife that is given voluntarily to be the community property.

The Islamic Law governs sharing system of the property of the husband and the wife, unless the laws decided. It also gives leniency to the parties for making the marriage agreement in accordance with the interest of the parties in which the agreement finally bind them.

The Islamic Law perspective segregates the property owned by the husband and the wife either the community property or the brought property. The segregation is aimed to make clearly the property come from when divorce takes place. The regulation of it according to the Islamic Law is still enacted until the end of the marriage or one of the parties passes away.

Regarding to the community property pursuant to article 35 verse 1 of the Law on Marriage, it states that property acquired during the marriage shall be community property. Article 1 (f) of the Compilation of the Islamic Law further states that property obtained during the marriage (*syirkah*) is the property acquired either individually or jointly between the husband and the wife without questioning the registration of the property on behalf of whom.

Based on an interview to a judge in the High Court in Makassar,¹ all revenue of the husband and the wife during the marriage, except to the brought property and/or the gifted property, will be the community property without questioning whether the wife is working actively or not; and/or whether

¹ Interviewed with Umami Salama, a judge in the Islamic High Court in Makassar on 28 September 2015.

the wife is only working to take care the household and children while the husband is working actively. When divorce is taking place, the community property will be governed pursuant to its laws. According to article 97 of the Compilation of the Islamic Law, a widow or a widower has rights $\frac{1}{2}$ of the join property, unless decide in the marriage.

The procedure of the community property is governed by article 37 of the Law on Marriage. It states that when a marriage is dissolved by divorce, the community property will be settled in accordance with its respective laws. Article 96 verse 1 of the Compilation of the Islamic Law states that if the divorce is caused by the death of one of the parties, $\frac{1}{2}$ of the community property will be the rights of one of the parties who lives longer. Article 97 of the Compilation then stipulates that a widow or a widower respectively has the rights $\frac{1}{2}$ out of the community property as long as does not decide in the agreement of the marriage.

The Law on Marriage gives leniency to the procedure of sharing the community property based on their own laws either the religious law, the customary law, or other laws agreed by the husband and the wife. The procedure of it according to the Compilation is stated $\frac{1}{2}$ (equally 50 -50). According to the customary law, the community property - called as "*harta gono gini in Bahasa*" – has meant the property resulted from the parties during the marriage legally. The property is known as "harta suarang" In Minangkabau, "barang berpantangan" in Kalimantan, "barang Cakkara" in Bugis, and "Gono Gini" in Java.¹ "The property of gono gini" becomes the community property eventhough the fact shows that only the husband who work in "paddy field", the wife only takes care to the household activities. Therefore, for the concept of the property of gono gini in the customary law enacts some laws, as followings:²

1. The property of gono gini become the community property. If they divorce, the property must be shared equally;
2. If the property is inherited to the children, the sharing to the property must be equaled between the son and the daughter;
3. In forming of the property of gono gini is necessity to consider the age of the marriage of the parties;
4. If the husband has more than one wife, he must consider to the sharing property of his the first wife, second wife, and so on;
5. The customary law allows to put the bacis laws on the forming of the marriage's property and its sharing patterns, but it is depending on:
 - The discussion and the agreement of the parties;
 - The leader patter of the husband as the leader of the household; and
 - Adaptive attitude means that openness attitude of the customary community to other culture out of its culture.

The form of the property of gono gini is decided basing on the feel of justice of the parties properly, not referring to time consequences. If referring to the time, it will create injustice. For example, a couple husband and wife has been married since 1 years and does not have an occupation regularly, it is inappropriate if they have many the property of gono gini.

In the customary of Tolakinese,³ the community property is called "*hapo hapo menggena*". It is the property acquired and collected by the couple (the wife is taking care to deal with the household and the children. She is deemed also working as the husband does outside the household). Concretely, the obtained property will become the community property of the husband and the wife, as well as the children. Each parties is able to act legally to the property, but it must be discussed and decided jointly. If divorce is happening, the community property will be given to the children to fund their lifes. If the parties do not have the children, the property will be shared equally by the husband and the wife.

In terms of the customary of Buginese, the community property is called "Cakkara's property". If divorce is taking place, the property acquired during the marriage will be shared peacefully. If the husband initiates divorcing, the community property will be submitted totally to the wife and the children to finance their life.⁴

If one of the parties passes away, the property like "the property gono gini" will be controlled and managed by the party who is still alive as if during the marriage. Indeed, the party, who is alive, can

¹ Dominikus Rato, 2015, *The Law of Marriage and The Law of Inherintace in Indonesia*, LaksBang Pressindo Yogyakarta, p. 84.

² *Ibid.*, p. 85.

³ Interviewed to Pabbitara (one of the Older of the Customary of the Tolakinese), on 16 April 2016.

⁴ Abdul Kadir Ahmad, 2016, *The System of the Marriage in South Sulawesi and South East Sulawesi*, Indobis, Makassar, p. 147.

use the community property for the purpose of his/her life including his/her children who are still immature (infant and baby). If the need of his/her children is good enough to take care of his/her life, the community property can be given to inheritance of the husband. If they have a child, the community property will be inherited to the child where the property is coming from.¹

If the husband passes away, the community property will be under the control of the wife and can not be shared as long as the widow has not married. In the Decision of the Supreme Court Reg. No. 189K/SIP/1959 on 8 of July 1959, it states that as long as the widow has not married yet, the community property will be under control of the widow for the purpose of the widow's life. If they do not have a child, the property then legally can be submitted to family of the husband and the wife in the same portion or if one of the parties families deems enough for their portion, they can give their portion voluntarily to other parties who is poor based on the principle of appropriateness.²

The term of "*gono gini*" is not familiar to the Islamic Fiqh Law. If the definition of "*gono gini*" is the community property, it is categorized as "*syirkah*". Its term is owner of "*syirkah*" (*syirkah milk/syirkah amlak*), which means joint ownership to the property amongst two persons or more. The joint ownership can happen due to a sell-buy, a grant, an inheritance, or mixture of difficult property to be separated and differed.

Based on some explanation as stated above, the community property must be clear to be jointly or segregated from the husband and the wife property respectively. There is some consideration to be prepared prior before the property is shared.

1. The need of the household's economy is responsible of the husband.

After the marriage is taking place, a man status will be a husband and the head of the household. All things related to the need of his wife in the household will be his responsibility. The laws of it can be seen in The God Almighty (Allah SWT) order, as followings:

- ❖ QS. An-Nisa verse 4, which states that "and give the women (on marriage) their dower as a free gift".
- ❖ QS. An-Nisa verse 34, which states that "men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means".
- ❖ QS. Al-Baqarah verse 233, which states that "...provided pay (the mother) what offered on equitable terms..."
- ❖ QS. At-Talaq verse 6, which states that "let the women (in iddah) in the same style as you live, according to yours means: annoy them not, so as to restrict them..."
- ❖ QS. At-Talaq verse 7, which states that "let the man of means spend according to his means: and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what He has given him, after a difficulty, Allah will soon grant relief".

The Prophet Muhammad SAW states then that:

- ❖ One person ask the Prophet Muhammad SAW: "the Prophet, what is the rights of one of us (wives)?, the Prophet then answers that "you have to feed your wives if you are eating and you have to clothe them when you are clothing; do not hit her face, do not evil and expel her except inside the house. (HR. Abu Daud).
- ❖ "one dinar (money in middle east) you pay to war in the path of Allah and one dinar you pay to your wife, the greatest is what you give to Allah." (HR. Bukhari Muslim).
- ❖ "While your wives rights to the husband is acting the greatest things in terms of clothing and feeding them." (HR. At-Tirmidzi dan Ibnu Majah).

Those reasoning as mentioned above both to Allah's order and the Prophet are fundamental reasons of the husband to fulfill his wife(s) needs. The duties of the husband to feed the wife(s) can not be felt even though the wife(s) is a rich woman or she has her own revenues. The property of the wife either her own property or her husband giving then still has been had by the wife(s), except the community property.

2. The husband does not allow to re-ask his property that has been given to his wife. It can be said in QS. An-Nisa ayat 20, which states that:
"But if you decide to take one wife in place of another, even if you had given the latter a whole treasure for dower, take not the least bit of it back: would you take it by slander and a manifest wrong?"
3. If the wife is rich, her own revenue, and funding her own household, the wife's wealth will be

¹ Dominikus Rato. *Op.cit.* p. 92.

² *Ibid.*

owned by the wife individually. If the wife has a business to earn property, the revenue of it will own the wife. The reason of it is because the responsibility to fulfill the household's needs will be taken by the husband. However, if the wife would like to participate voluntarily to fulfill the household's need, she is able to do it. What the wife do will be deemed as "*shodaqoh*" and is allowed according to the Islamic Law. The Allah states that "and give the women (on marriage) their dower as a free gift; but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with good cheer."

Firman Allah

By considering those the property of the household as stipulated above, the sharing of the community property will be commenced with separation of the property for the husband and the wife respectively. Indeed, it is needed an honest of both parties. If the property has been decided clearly then the property can be shared.

Article 97 of the Compilation then stipulates that a widow or a widower respectively has the rights $\frac{1}{2}$ out of the community property as long as does not decide in the agreement of the marriage. To avoid discrimination either to the husband or the wife, article 37 of the Law on Marriage then states that when a marriage is dissolved by divorce, the community property will be settled in accordance with its respective laws. The "respective laws" means that the religious law, the customary law, and other laws according to the Islamic Law.

1. Sharing the community property – in the Islamic Law (fiqh) – called *syirkah* done by calculating the percentage of the property earned by the husband and the wife jointly to buy or to acquire the property jointly. For example, both parties are buying a house in which 70 % of the money to buy it comes from the wife property and 30 % comes from the husband's. If the house is bought and then sold it, the husband and the wife will get equally based the percentage when the house is bought.
2. The community property in *syirkah* is done by "*ash-shulhu*" (settlement). In QS. An-Nisa 128, "*ash-shulhu*" means the wife's willingness to surrender her rights partly for avoiding the divorce. An interpretation of "QS. An-Nisa 128" is based on the Prophet's statement (Hadith) regarding Saudah who is one the Prophet's wives. She worried to be divorced by the Prophet, she gave one nights of her rights to Aisyah who is also the Prophets' wife.

"if a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best; even though men's soul are awayed by greed. But if you do good and practise self-restraint, Allah is well acquainted with all that you do" (QS. An-Nisa 128).

"*Ash-shulhu*" in the context of "*syirkah amlak*" is peacefully settlement to be done through an agreement between the husband and the wife regarding to the acquired property of them to share their own property voluntary. For example, by considering that the child is taken care by the wife, both parties agrees to share their property, 30 % for the husband and 30 % for wife. Another example, if both parties buy one car jointly (50:50). When the sharing of the property after divorcing – the car is sold -. Due to the wife has her property, a rich women, and is voluntary to give her rights on car, she will say that she only would like to get 25 % out of the selling car, 75% out of it will be obtained by husband. As stipulated to (QS. An-Nisa 128) that "...and such settlement is best; even though men's soul are awayed by greed...".

According to the author, a judge must re-construct and de-construct to legal reform nowadays. If the husband and the wife divorce, the judge must give stately his/her decision to share the husband - the wife property to be given to the wife fairly. If the wife takes over to maintain the child, no working and no revenue, she will get more than the husband. It could be $\frac{2}{3}$ of the community property and the husband gets only $\frac{1}{4}$. However, it does not mean that it is discrimination. The purpose of it is to give well-living to the wife and the child.

a. Livelihood Property

Forming an ideal family with happiness and welfare must be supported by fulfilling all the needs of the parties. Primary and secondary needs including housing and all needs of all parties in the household must be considered. Ignoring to the basic needs means to open possibility of breaking the household. The Islamic law – called *nash* – shows that the economic burden of the family must be in the husband's shoulder. He has an obligation to fulfill it properly based on his ability to fulfill his duties.

According to the Indonesian Positive Law, the matter of revenue is governed by the Law on Marriage in article 34 verse (1) and article 80 verse (2) of the Compilation of the Islamic Law, which state that the husband must protect his wife and give all things related to the household matters based on his capability to fulfill it. In the article 80 verse (4) of the Compilation of the Islamic Law further, it states that the revenue of the husband must deal with to the needs of the wife such as housing, maintaining cost, recovery cost for his wife and the child, as well as educational costs for the child.

Based on interviewing done to a judge in the Kendari Islamic High Court,¹ the revenue is an obligation of the husband to fulfill the wife's needs as long as his wife obeying him – called *nuzyus*. When the divorce takes place, the livelihood acquired by husband and given to his wife has been used during the marriage. Such livelihoods are foods and clothes.

The word of livelihood (*nafkah* in Bahasa) comes from the word “*nafaqah*”. It is not used except for the positive meaning. The plural of “*nafaqah*” is “*nafaqatih*” that means “something produced by the human beings to his burden (family)”.² In the Islamic Law (*fiqh*), Saleh Al-Fauzan states that *an-Nafaqaat* is a plural of *an-Nafaqah*'s word, which means having “money” (dinar) or something is similar to it as part of the property. It can be meant also as fulfilling all things becoming his responsibility properly, either foods, clothes, housing, or something related to it.³

The basic regulation of the livelihood in the Islamic Law can be seen in various *Surah* such as QS. An-Nisa verse 34, which states that “men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means”; QS. Al-Baqarah verse 233 further states that “...provided pay (the mother) what offered on equitable terms...”; and QS. At-Talaq verse 7, which states that “let the man of means spend according to his means: and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what He has given him, after a difficulty, Allah will soon grant relief”. Another regulation of it can be seen in “*Hadith*” released by HR Bukhari and Muslim.

Based on interviewed done by the author with some judges both in the Kendari Islamic Court and in the Makassar Islamic Court on September 2015, it found out that as long as the marriage was legal and valid, the community property matters would refer to the law on Marriage and the Compilation of the Islamic Law, as mentioned in previous page (above). According to the decision of the judges as stipulated in interview, it can be said that the considering of the judges to decide the case is referred to article (f) of the Compilation of the Islamic Law and article 35 verse (1) of the Law on Marriage. Both articles show that qualification to determine the pattern of the community property is how long the marriage takes place. As long as the property has been earned during the marriage, it will be the community property. However, if the property is earned from a gift or inheritance, that property will be owned individually as governed in article 36 verse (1) of the Law on Marriage. If the giving of livelihood of the husband to his wife is purposed to fulfill the need of the wife, that acquired property during the marriage is deemed “finished”.

According to the author, the livelihood giving as found out in the administrative marriage in Indonesia can be separated into 2 types. *First* is the procedure of the livelihood giving “*mut'ah*”. It states that it is an obligation of the ex-husband to give it if the marriage is over due to divorcing (*talaq*). Article 149 verse 1 of the book 1 of the Compilation of the Islamic Law. *Second* is the procedure of the livelihood giving “*madhiyah*”. According to article verse (4) of the Compilation of the Islamic Law, it states that regarding to the revenues of the husband, he is responsible to deal with the wife's needs such as livelihood, *kiswah*, housing, household cost, maintenance cost, and educational cost for the children. Therefore, the concept of livelihood and the community property must be stated. Even though those properties are earned during the marriage, they are different institutionally.

The concept of livelihood pursuant to the author is the giving of the husband to the wife during the marriage in form of “material property” to fulfill the wife's needs in which the property is not the community property and the property then will become the own of the wife. In daily life nowadays, when the husband gives his salary to his wife for purpose of the household, it tends that the salary does not own the wife, the husband and the wife own. Theoretically, the wife must get the special livelihood from the husband out of the need of household. The reason of it is “out of the livelihood of the wife”, the husband still has an obligation to finance all household needs such as foods, clothes, housing, and other households.⁴ Therefore, it can be concluded that the livelihood giving can be segregated into 2 types, namely the livelihood for purpose of the household needs and special livelihood to the wife, out of the household needs.

According to Syaifullah Utan Sumbawa, “a woman has privilege position in Islam. A woman is never either voluntary or compulsory to look for the livelihood for herself. If she has her father, the livelihood will be responsibility of her father. If she has been married then, the livelihood will be taken care by her husband”.⁵ According to HR Bukhari and Muslim (the Prophet's Hadits), “Aisyah radhiyallahu ‘anha

¹ Interviewed with St. Tawaningsih on 27 Agustus 2015.

² Wahbah al-Zuhaili, *al-Fiqh al-Islam wa Adillatuhu*, part II, ed. II, p. 765.

³ Saleh Al Fauzan, *Daily Fiqh*, p.87.

⁴ See article 80 verse 4 of the Compilation of the Islamic Law.

⁵ See <http://www.erasmuslim.com/ustadz/ask/mwr>.

(the Prophet wife) informed that Hindun bintu 'Utbah (the wife of Abu Sofyan) came to the Prophet Muhammad SAW and stated that "her husband – Abu Sofyan – was a greedy person. He did not give me and the child the livelihood, expect I took it impermissible. The Prophet then said that took your husband's property, but just to fulfill your and your child needs".

Therefore, in the context of sharing of the community property, the property basically must be separated into the special property as the compulsory livelihood to the own of the wife (the wife's rights individually) and the property acquired during the marriage (the community property) to be share equally.

b. Personal Property

The marriage is one of the great wordships to unify two persons (men and women) in one legally bond and clearly line of descent. According to QS. Ar-Ruum verse (21), "*and Allah creates amongst men and women into the the bond of the marriage, in which both parties will feel affection and love*". It means that the marriage will create the collection of the property from both sides.

Before entering the marriage, the husband and the wife sometimes have their own property. It comes from their own or their own business, their family property, or inheritance from their parents. The existed property before the marriage if it brings to the marriage, its status is still the same as the "property brought". Article 35 verse (2) of the Law on Marriage states that property brought into the marriage by the husband and the wife respectively and property acquired by either of them as a gift or inheritance shall remain under their respective control, unless otherwise decided between the parties.

Based on interviewed done by the author with one of judges in the Kendari Islamic High Court,¹ he stated that personal property is the property brought and owned by the husband and the wife before marriage. It consists of the property brought before marriage and the property given as a gift of other parties or inheritance acquired by both parties. The personal property of both parties basically could not be mixed between them. The personal property of the wife is still owned by her and the husband is also. Islam itself recognizes stately regarding to the ownership of the personal property, including both husband and wife's property based on their own businesses and activities.² Therefore in one marriage, it could be the personal property that comes from the property brought, granted, or inheritance. Those personal properties are under control respectively.

According to article 119 and 120 of the Indonesian Civil Code concerning on unifying the personal property to be the community property. They state that from the moment of execution of the marriage, it shall arise by law community martial property between to the spouses to the extent that no other stipulations have been made in the pre-nuptial agreement.³ However, since the Law on Marriage has been enacted, the regulation as stipulated in the Indonesian Civil Code have stated invalid.⁴

The acknowledgment of the personal property is governed in article 35 verse (2) and article 36 verse (2) the Law on Marriage. Those article state that the ownership of the spouses property before the marriage is called the property brought or a gift, or inheritance, in which each party has their own control to their own properties, unless otherwise decided the regulation.

According to Wahjono Darmabrata dan Surini Ahlan Sjarif,⁵ the personal property is the property brought each the husband and the wife and is under their own control, unless otherwise decided the regulation. In other word, it is the property owned by each party before the marriage. It consists of:

- 1) the property brought the husband and the wife respectively including some unpaid credits before the marriage conducted.
- 2) the property obtained as a gift of other party, unless otherwise decided.
- 3) the property obtained the husband and the wife respectively as an inheritance, unless otherwise decided.
- 4) the revenues of the property owned by the husband and the wife respectively during the marriage including some credits that are appearing as a result of the personal property.

Sayuti Thalib says that types of the property of the husband and the wife can be seen in 3 different angles, as followings:⁶

1. the origin of the property. It can classified into 3 groups:
 - a. the property of the husband and the wife respectively has been owned before the marriage, which come from inheritance, granted, or their own businesses – called the property brought.

¹ Interviewed with Muh Amir Razak on 25 August 2015.

² see QS. An Nisa verse (32).

³ R. Subekti and R. Tjiptosudibio, 1980, *The Civil Code*, J. B. Wolters, Jakarta, p. 25.

⁴ see Chapter XIV article 66 the Law No.1 of 1974 on Marriage.

⁵ Wahjono Darmabrata and Surini Ahlan Sjarif, 2004, *the Marriage and the Family in Indonesia*, University of Indonesia Press, Jakarta, p. 96.

⁶ Sayuti Thalib, 1986, *the Indonesian Family Law*, UI Press, Jakarta, p. 83.

- b. the property of the husband and the wife respectively has been owned after the marriage, which come from inheritance, granted, or their own businesses. The property is not obtained from either individual or joint businesses.
- c. the property of the husband and the wife respectively has been owned after the marriage, which obtained jointly or efforted by one of the husband and the wife – called the property income.
2. the use of the property. The property can be used for:
 - a. financing to the household, the family's matters, and shopping for the child.
 - b. other property.
3. the relation of the property amongst persons in the society. The property can be:
 - a. the community property.
 - b. the personal property but bond to the society.
 - c. the personal property and owning by the parties.

According to J. Satrio, the personal property is the owned property of the husband and the wife when the marriage is taking place and the property obtained as a gift or inheritance excluding the community property, unless otherwise agreed. The personal property can be differed more into the property brought, the property obtained by the spouses as a gift, grant, or inheritance.¹ M. Yahya Harahap furthermore states that the personal property is the properti acquired by the husband and the wife in form of a gift, grant, or inheritance either obtained before or after the marriage.² Therefore, it can be concluded that the personal property has its own characteristics as stipulated above.

4. Conclusion

The nature of the property acquired between husband and wife during the marriage can be seen in different ways. The property can be classified as the community property, the revenue property, and the personal property. Those matters of the property are governed by the Law No. 1 of 1974 on Marriage and the Compilation of the Islamic Law. A fundamental regulation of it basically can be found out in the Qur'an and Hadith.

In the Law on Marriage and the Compilation of the Islamic Law, the concept of sharing community property is husband and wife respectively has rights equally (50: 50) when it is dissolved divorce or death. The concept of the community property will be different to the concept of livelihood property as governed into the Law on Marriage and the Compilation of the Islamic Law.

Bibliography

- Abdul Kadir Ahmad, 2016, *The System of the Marriage in South Sulawesi and South East Sulawesi*, Indobis, Makassar.
- Bambang Sunggono, 1997, *Method of Legal Research*, PT. Raja Grafindo Persda, Jakarta.
- Dominikus Rato, 2015, *The Law of Marriage and The Law of Inherintace in Indonesia*, LaksBang Pressindo Yogyakarta.
- J Satrio, 1993, *the Law of the Property*, Hukum Harta Perkawinan, Citra Aditya Bakti, Bandung.
- M.Yahya Harahap, 1975, *the Marriage Law* Nationally, Hukum Perkawinan Nasional, CV Zahir Trading, Medan..
- Muh. Syaifuddin, 2013, *The Divorce Law*, Sinar Grafika, Jakarta.
- Peter Mahmud Marzuki, 2011, *Legal Research*, Kencana Prenada Media Group. Jakarta.
- R. Subekti and R.Tjptosudibio, 1980, *The Civil Code*, J. B. Wolters, Jakarta.
- Sayuti Thalib, 1986, *the Indonesian Family Law*, UI Press, Jakarta.
- Soerjono Soekanto and Sri Mamudji, 1995, *Legal Normatice Research*, PT. RajaGrafindo Persada, Jakarta.
- Wahbah al-Zuhaili, *al-Fiqh al-Islam wa Adillatuhu*, part II, ed. II.
- Wahjono Darmabrata and Surini Ahlan Sjarif, 2004, *the Marriage and the Family in Indonesia*, Universiy of Indonesia Press, Jakarta.

¹ J Satrio, 1993, *the Law of the Property*, Hukum Harta Perkawinan, Citra Aditya Bakti, Bandung, p. 66.

² M.Yahya Harahap, 1975, *the Marriage Law* Nationally, Hukum Perkawinan Nasional, CV Zahir Trading, Medan, p. 117.