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Resolving Hibah Disputes Involving Shared Property*

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Abstract
In the Islamic legal context, hibah has both worship and economic aspects. However, its practice often leads to problems when one or more terms determined by Islamic teachings are ignored. Among the violations in grant practice is granting hibah from property not fully owned by grantor. This paper aims to examine issues in resolving disputes on hibah (property granting) involving a shared property owned by a husband and wife. This study focuses on the examination of two judicial verdicts issued by the Religious Court (Verdict No.354 /Pdt.G/2022/PA.Pt) and the Appellate Religious Court (Verdict No. 222/Pdt.G/2022/PTA. SMG) on hibah dispute where hibah property contains shared property. This study finds that there are two approaches used by the judges in dealing with the issue. First, in the first instance court considered hibah void and revoked hibah. Similarly, the appellate court annulled hibah transaction but considered some part of the property to be rightful for grant. This is because hibah is taken from the property owned by grantor, which has been separated by his wife's property.
Keywords: Hibah; Disputes; Shared Property

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Penyelesaian Sengketa Hibah yang Melibatkan Properti Bersama

Abstrak
Dalam konteks hukum Islam, hibah memiliki aspek ibadah dan aspek ekonomi. Namun, praktiknya sering menimbulkan masalah ketika ketentuan hibah yang ditentukan oleh ajaran Islam diabaikan. Di antara penyimpangan yang dilakukan dalam praktik hibah adalah pemberian hibah dari harta yang tidak sepenuhnya dimiliki oleh pemberi hibah. Tulisan ini bertujuan untuk mengkaji permasalahan dalam penyelesaian sengketa hibah yang melibatkan harta bersama yang dimiliki oleh suami istri. Fokus penelitian ini adalah menganalisis dua putusan pengadilan yang dikeluarkan oleh Pengadilan Agama (Putusan No.354/Pdt.G/2022/PA.Pt) dan Pengadilan Tinggi Agama (Putusan No. 222/Pdt.G/2022/PTA. Smg) tentang sengketa hibah dimana objek hibah hibah bercampur dengan harta bersama suami istri yang telah bercerai. Studi ini menemukan bahwa ada dua pendekatan yang digunakan oleh hakim dalam menyelesaikan masalah tersebut. Pertama, pengadilan tingkat pertama menganggap hibah tersebut batal dan mencabut hibah tersebut. Demikian pula, Pengadilan Tinggi Agama membatalkan transaksi hibah tetapi menganggap beberapa bagian dari properti menjadi objek hibah. Hal ini karena hibah diambil dari harta yang dimiliki oleh pemberi hibah yang telah dipisahkan dengan harta istrinya.
Kata Kunci: Hibah; Sengketa; Harta Bersama

Разрешение споров хиба, касающихся общего имущества

Абстрактный
В исламском правовом контексте хиба имеет как религиозные, так и экономические аспекты. Однако его практика часто приводит к проблемам, когда игнорируется один или несколько терминов, определенных исламским учением. Среди нарушений в практике предоставления грантов – предоставление хибы из имущества, не находящегося в полной собственности лица, предоставляющего право. Целью данной статьи является рассмотрение вопросов разрешения споров о хибе (предоставлении имущества), связанном с совместной собственностью, принадлежащей мужу и жене. Настоящее исследование посвящено рассмотрению двух судебных приговоров, вынесенных Религиозным судом (Приговор № 354/Pdt.G/2022/PA.Pt) и Апелляционным религиозным судом (Приговор № 222/Pdt.G/2022/PTA. SMG) по спору хиба, когда собственность хиба содержит совместное имущество. Исследование показало, что судьи используют два подхода при решении этого вопроса. Во-первых, суд первой инстанции признал хибу недействительной и отменил хибу. Аналогичным образом, апелляционный суд аннулировал сделку хиба, но посчитал, что некоторая часть имущества имеет право на дарение. Это связано с тем, что хиба берется из имущества, принадлежащего праводателю, которое было отделено от имущества его жены.
Ключевые слова: Хиба; Споры; Общая собственность

A. INTRODUCTION

Hibah is one of many ways of transferring wealth in Islam. It has a strong legality and is thus encouraged by Sharia for its dimensions of worship, vertically and horizontally. In addition to said dimension, hibah also has a social dimension that contains economic value. The economic value of hibah often induces a dispute even if the goals of the grantor are noble ones. (Idia Isti Murti, 2017) The Practice of Hibah, which is not carried out in accordance with the actual rules and deviates from the sense of justice, also led to such disputes. As happened in the practice of hibah in verdict No.354/Pdt.G/2022/PA.Pt. and Verdict No. 222/Pdt.G/2022/PTA. Smg.

These verdicts discuss the hibah case, with one of the reasons being submitted by the plaintiffs being that part of the object of hibah, which is in the form of joint property between the grantor and his ex-wife (plaintiff I), was only given to one of his children, while the other children were not given. These verdicts are interesting to study, as both state that the certificate of hibah and the certificate of ownership, in this case, are null and void, thus losing their legal force. However, different legal arguments induce different legal consequences. Verdict No.354/Pdt.G/2022/PA.Pt rules the object of hibah to be returned to its original state, which lawfully belongs to the grantor *(almarhum),* so that it becomes an inheritance that must be distributed to his heirs in accordance with the Islamic law of inheritance, and joint property remains in its status as joint property which must be divided in accordance with the said law, one half of it becomes the inheritance and the other half belongs to plaintiff II (the ex-wife of grantor). In contrast to the legal consequences arising from Verdict Number 222/Pdt.G/2022/PTA.Smg, the defendant still legally owns 1/3 of the 165 M2 and 1/3 of half of the joint property. 2/3 of the land object in addition to 2/3 of joint property, which was voided by the panel of judges in the Verdict Number 222/Pdt.G/2022/PTA.Smg turned into inheritance which will be divided among the heirs, including the defendant/appellant. Such different consequences lead to injustice and thus deviate from the purpose of the law.

It is necessary to examine this verdict thoroughly to find out: 1) the judge's argument in cancelling the certificate of hibah involving joint assets in Verdict Number 354/Pdt.G/2022/PA.Pt. and Verdict Number 222/Pdt.G/2022/PTA.Smg. 2) Review of legal justice in the settlement of hibah objects involving joint assets in verdict No.354/Pdt.G/2022/PA.Pt. and Verdict Number 222/Pdt.G/2022/PTA.Smg.

In addition to this verdict being new (ruled in 2022), the scarcity of such studies on the verdict of the Religious Courts regarding the annulment of hibah

involving joint assets in the object of hibah becomes the reason why this paper is of importance. The study of hibah verdicts can also be used as "binoculars" to see the law in the reality of das sollen and das sein. The urgency of this study is becoming more apparent as an effort to create quality verdicts. The more verdicts being studied, the more judges will create quality verdicts based on their awareness as their verdicts will be reviewed and researched by others.

B. METHODS

This paper uses normative legal research methods with secondary data in the form of primary and secondary legal materials. Primary legal materials consist of legislation and verdicts of Religious Court judges. Secondary legal materials are books and articles related to the themes discussed. Data collection is done through literature studies. The analysis was carried out with a qualitative method.

This study uses data derived from the decisions of the religious court, consisting of decision number 354/2022/PA.PT and decision number 222/Pdt. G/2022/ PTA SMg. Such decisions are chosen as inconsistencies regarding the cancellation of hibah in the *aquo* case by the panel of judges are found. This data is analyzed normatively to find out the arguments and the legal basis used by the panel of judges within both

C. RESULTS AND DISCUSSION

1. Rules of Hibah in Islamic and Positive Law

a. Rules of Hibah in Islamic Law

Hibah is a contract made with the intention of transferring one's property to someone else while still alive with no compensation. Hibah does not contain an element of reciprocal giving. Hibah is different from alms and gifts. Alms aim to get the reward of the hereafter. The purpose of gifts is to love and strengthen relationships, while the purpose of hibah is to make the recipient of said hibah able to utilise the object. For example, someone gives a piece of land to another person without demanding anything in return. Such is called hibah. If he wishes for a reward in the afterlife, it's called alms. If he wants to win someone's heart, it's called a gift. (Shaykh Muhammad bin Salih al-Ushaimin, 2008, P. 105)

In another reference it is stated that hibah, gifts and alms are very close in meaning. They all contain the act of giving ownership of something while still

alive without any compensation. They all are called the act of giving ('athiyah), as the name of 'athiyah covers everything, both alms (zakat) and gifts included. However, the two are not the same. It is because the Prophet did not eat alms and gifts; he said when Barirah was given meat, it became alms for Barirah (zakat), while the same meat became a gift for him. Thus, it is understood that if someone gives something to a person in need with the intention of *taqarrub* to Allah, it is alms (zakat). If he intends to get closer to him out of love for him, it is a gift. Everything is Sunnah and thus encouraged according to the words of the Prophet which means "Give each other gifts, then you will love each other." (Abdul Aziz Muhammad Azzam, 2010, p. 437)

All acts of giving aim at taarab to Allah from the aspect of the hereafter. But they all have a different purpose in a social context. Gifts are intended as appreciation and sympathy, hibah are intended as love, while alms are intended as empathy for people in need so that their needs are fulfilled.

Hibah is prescribed and encouraged based on the word of Allah in surah al-Baqarah verse 177 and the hadith. The pillars of the hibah consist of (1) the grantor, (2) the recipient of the hibah, (3) the assets that are donated, and (4) the sight *(ijab-qabul).* (Wahbah az-Zuhaili, 2011, p . 525-526) The Grantor is required to have full power over the property to be donated, be able to act alone, and be mature and not forced. (Satria Effendi, 2005, p. 475-479) Hibah affects the ownership of things, and thus the objects donated must be wholly owned by the grantor. Donating objects that do not belong to the grantor is void.

Hibah can be given to anyone desired: heirs, relatives who are not heirs, and even other people who are not relatives. The recipient must be present at the time hibah is given for it to be considered valid. If the recipient is underage or considered insane, the guardian may receive the object hibah in his place. The assets that are donated are required to be present at the time of hibah and wholly owned by the grantor. It is not valid to give something that was not there at the time of akad (contract), (Muhammad Ajib, 2019) and it is not legal for it to be the property of others.

Akad (contract) is one of the pillars of hibah. Hibah is considered valid in the presence of *akad.* The existence of akad is marked by *ijab* and *qabul. Ijab,* in this case, is an expression of giving from the giver; *qabul,* in this case, is an expression of receiving from the recipient. For example, "I give (hibah) this land to you, while the second person said: "I accept". The first phase is called hijab, while the second one is called Kabul. Hibah is also considered valid with the act of giving that shows the existence of hibah. Thus, the way to give hibah is 2, the first is by speech while the second is by action. The way of speech is *ijab-qabul*

while the way of action is the act of giving something that shows hibah. (Syaikh Muhammad bin Shalih al-Ushaimin , 2008, p.112)

Scholars have different opinions about the firmness of *ijab-qabul* in the implementation of hibah. Most of the scholars who follow the school of Syafi'iyah and Imam Malik presuppose the ability of speech by both the grantor and the recipient so they may perform *ijab* and Kabul for hibah to be valid. The law of hibah is applied after the grantor verbally expresses hijab and the recipient verbally expresses *qabul.* Verbal acceptance by the recipient is to ensure his willingness to accept hibah. Thus, as long as a grantor and the recipient are able to express *ijab-qabul* orally, they cannot be replaced by a written one. Meanwhile, a different opinion comes from the scholars of Hanabilah and some of the Hanafi. According to them, the firmness of *ijab-qabul* is not a requirement for the validity of hibah. Hibah is considered valid as long as the deed is done. (Effendi, 2005, p. 475-479) There are those who argue that *qabul* must be pronounced immediately after akad as the ownership is given at the time of life. (Azzam, 2010, p. 442) Similar to the one done on the sale and purchase contract. However, there are also those who argue that a time lag is permitted.

Hibah is considered valid and binding if the object of hibah has been handed over (Shafi'iyah and Hanafiyah scholars). (Az-Zuhaili, 2011) Therefore, even if the contract has been made while the object has not been handed over and the grantor dies, the object remains as the property of the grantor and thus becomes an inheritance. In contrast to the Maliki school of thought, hibah is considered valid if the contract has been done even though there has not been a handover. The Hambali School, in this case, distinguishes the object of hibah that is measured by weighing, said object is considered valid if it has been handed over. Meanwhile, hibah of the object that can't be weighed or measured is considered valid, even if the only thing that has been done is a verbal contract without a handover. (Luthfi, 2020) Permission is required from the grantor when taking the object of hibah, as the grantor still has the right of khimar before it is handed over. He may choose to hand it over to the recipient or not. Therefore, receiving hibah before permission is given from the grantor is valid and considered void. (Azzam, 2010, p. 449)

Hibah are different from wasiyat (last will). It is valid for hibah to be given to heirs or non-heirs alike while wasiyat is not as such. Wasiyat should not be given to heirs according to the hadith of the Prophet "Indeed Allah has given everyone their respective rights, thus there is no will for heirs". It can be understood that hibah can be given to the child of the grantor. Hibah to children must be done fairly. Unfair hibah to children is a form of injustice. Most of the

scholars are of the opinion that fairness in hibah to children is to equalize the share of hibah to boys and girls. In contrast, according to Ahmad bin Hanbal, the fairness of hibah to children is such as the Islamic law of inheritance, in which the share of boys is twice of the girls. (Luthfi, 2020, p.56) In addition, hibah demanding a reward is invalid as it opposes the principle of hibah, the act of giving without the condition of being rewarded. This is the opinion of the majority of scholars and syafi'iyah school of thought. Meanwhile, Imam Ahmad bin Hambal argues that hibah demanding reward is valid, as long as said reward is definite. Such Hibah is also considered as an act of exchanging things, with the law of trade as the appropriate law to be applied instead of hibah. This opinion is also held by some Hanafiyah scholars. (Effendi, 2005, p. 478)

Regarding the maximum limit of hibah, according to the majority of scholars, a person can donate all his assets to others. However, Muhammad Ibn al-Hasan and some of the Hanafi school of thought are of the opinion that it is illegal to donate all assets even if it is for a good purpose. They consider those who do this as stupid, whose actions must be limited as they are not capable of legal action. (Sabiq, p.181) In contrast to wasiyat, which expressly stipulates that the maximum limit of assets that can be passed on is 1/3 of the total assets owned.

b. Rules of Hibah in Positive (Normative) Law

Provisions regarding hibah in positive law are found in: (1) KHI (Compilation of Islamic Law) Article 171 letter G, articles 210 to 214, (2) KHES (Compilation of Sharia Economic Law) Chapter IV on Hibah, Articles 685 to 727, (3) Law on Religious Courts (Law number 7 of 1989 as amended first through Law number 3 of 2006 and second amendment through law number 50 of 2009 concerning Religious Courts), explanation of article 49 letter (d), (4) the Civil Law, regulated in Book III, articles 1666 to 1693, (5) Government Regulation of the Republic of Indonesia Number 24 of 1997 concerning Land Registration, articles 37-38, (6). Government Regulation of the Republic of Indonesia Number 37 of 1998 concerning Position Regulations for Land Deed Maker Officials, article 2-3.

Article 171 letter (g) of the Compilation of Islamic Law states that hibah is "an act of giving something voluntarily and without compensation from someone to another person who is still alive to be owned". Explanation of Article 49 letter (d) of the Law on Religious Courts defines hibah as "giving an object voluntarily and without compensation from a person or legal entity to another person or legal entity to own". From this definition, it is understood that the elements of a hibah consist of: first, the grantor, a person or legal entity; second,

the object of the hibah, it is given voluntarily by the grantor; third, the recipient of the hibah, a person or legal entity. The definition of hibah is also found in the KHES and the Civil Law. Article 668 point 9 KHES states that hibah is an act of ownership transfer of an item to another person without any compensation.

From the definitions of the various legislations mentioned, it is understood that hibah is a means of transferring ownership rights on assets that do not contain a reciprocal element as a reward from the recipient of hibah. The deed is done by only one party, the grantor, and is carried out while he is still alive. Hibah has legal consequences. The grantor is obliged to submit and transfer the goods that are donated to the recipient.

The pillars of hibah in Article 685 of the KHES consist of: (a) *wahib*/grantor; (b) *mauhub* lah/recipient; (c) mauhub bih/object that is donated; (d) iqrar/statement; and (e). *qabd*/submission. Furthermore, Article 686 paragraph (1) stipulates that "the akad of hibah can occur in the presence of an ijab/statement. Paragraph (2) stipulates 'Ownership becomes valid as the objects of hibah are received by the recipient of hibah'. Paragraph (3) "*Ijab* in hibah can be expressed verbally, in writing, or by gestures, which contains the agreement to transfer of ownership of an object for free"

The terms of hibah, according to the KHI, are found in Article 210. Paragraph (1) of this article stipulates that a person who is at least 21 years of age and has sound sense without coercion can donate a maximum of 1/3 of his property to another person or institution before two witnesses to be owned. Furthermore, paragraph (2) article 210 states that the property that can be donated must be the property of the grantor.

The content of article 210 of the KHI described that hibah must meet five conditions for it to be considered balod; (1) the grantor is of sound mind, (2) the grantor is at least 21 years old, (3) the grantor is not in a state of compulsion when making hibah; (4) The property that is donated is the property of grantor himself; (5) the assets donated may not exceed 1/3 of the assets owned, and (6) that hibah must be witnessed by two witnesses.

Regarding the objects to be donated, article 1667 of the Civil Code stipulates that hibah can only be made on existing objects, hibah are declared void on objects that will only be available in the future. Furthermore, Article 1668 of the Civil Code stipulates that "Grantor may not make a promise that he/she remains in power to sell or give, to another person, the object that is included in hibah, thus said hibah considered null and void". Therefore, the grantor may not

make a condition that he still has the right to sell and give the object to another person, as this is contrary to the nature and purpose of hibah.

The provisions of hibah may not exceed 1/3 of the assets owned by the grantor in article 210 of KHI, aiming to protect the rights of the heirs and also to provide justice to the heirs, as well as to maintain the integrity of the family so that it does not break after hibah pledged by grantor. Even Article 211 of the Compilation of Islamic Law stipulates that hibah from parents to their children can be counted as inheritance, if it turns out that hibah exceeds the provisions of Article 210 of the Compilation of Islamic Law. Therefore, the submission of hibah that exceeds 1/3 of grantor's assets is not legal according to the law and so it can be canceled.

Article 210 of the KHI does not state that the handover of hibah must be made in front of a notary. It was only mentioned that it was done in front of 2 witnesses. The provision of hibah, which requires 2 witnesses, has led to act of ensuring the strength and security of the object of hibah shall a dispute over the object of hibah arise in the future. (Murni, 2017, p. 83) The procedure for hibah in KHES can be oral, writing and gestures; this means that according to KHES, hibah can be made orally or in writing. This means that according to KHI and KHES, verbal hibah is legally permissible. In contrast to hibah procedure in the Civil Code with Article 1682 of the Civil Code, the property that is donated must be made in front of a Notary with a legal certificate while the original is kept by a Notary. However, the Circular of the Supreme Court of the Republic of Indonesia Number 3 of 1963 states that Article 1682 of the Civil Code is no longer valid. Circular of the Supreme Court of the Republic of Indonesia No. 3 of 1963 is a legal breakthrough made by the Supreme Court, which happened to ascertain underhanded hibah as legal. However, if the object involved in hibah is happened to be a land and to be registered for the transfer of rights, the registration can be done by means of a certificate made by PPAT authorized according to local legislations, or using a certificate not made by PPAT but acknowledged by the Head of the Land Office as sufficient for registering the transfer of the right in question (Article 37 of Government Regulation of the Republic of Indonesia Number 24 of 1997 concerning Land Registration). Furthermore, Article 38 (1) of the Government Regulation of the Republic of Indonesia Number 24 of 1997 concerning Land Registration states that the making of a certificate as referred to Article 37 paragraph (1) is attended by the parties who carry out the legal action concerned and witnessed by at least 2 (two) witnesses who are qualified to act as witnesses in the legal action.

Article 211 of the Compilation of Islamic Law, states that hibah and wasiyat toward heirs can be counted as inheritance. The word "can" in the article above does not mean imperative (must), but means alternative, meaning that it can be chosen (to be counted as inheritance) in order to resolve inheritance disputes. Thus, if the heirs do not question hibah that has been received by some of the heirs, then the remaining inheritance that has not been given as hibah can be distributed to all heirs according to their respective shares. However, if there are some heirs who question hibah given to some other heirs, then hibah can be counted as inheritance, which must be reduced if it is in excess of the proper share. (Zainuddin, 2008, p. 25) For example, a father gave 150 m2 of land to one of his sons (A) as hibah. The father has two sons, A and B. When the father died, besides leaving 2 sons, he also left 50 m of land. With respect to hibah in this case, B objected and questioned it, then in accordance with article 211 KHI, the 150 m2 land that has been granted to A is considered an inheritance because the share of inheritance of A and B is defined as '*Ashobah bin nafsi*', and both get the same. Therefore, A only gets 100 m of land, while the remaining 50 m of the original 150m of hibah is given to B so both of them get 100 m each.

Article 212 KHI, stipulates "Hibah cannot be withdrawn, except for parental hibah for their children". A similar provision is also found in Article 714, paragraph (2) of the KHES, which states that if a parent gives hibah to his child, he has the right to withdraw said hibah as long as the child is still alive. This is in line with Article 720 of the KHES which states that in the event that grantor or recipient dies, hibah cannot be withdrawn. This is different from the provisions of Article 1688 of the Civil Law, which states that hibah cannot be cancelled by the parent or the Plaintiff except in the following cases: (a). If the terms of hibah are not met by the recipient. (b). If a person who is given hibah is guilty of committing or participating in an assassination attempt or some other crime against the grantor. (c). If the grantor falls into poverty, the recipient of hibah refuses to provide for him. In another article, it is stated that "hibah can be withdrawn in the event that grantor has died and the inheritance is not sufficient to fulfill the absolute portion (legitime portie) that should be obtained by the heirs" (Article 924 of the Civil Law). Article 1086 of the Civil Code states that hibah given by a grantor to his child/heirs to the bottom line must be re-entered into the calculation of the inheritance of the grantor.

Article 213 of the Compilation of Islamic Law stipulates that hibah given when the grantor is sick and close to death must obtain the approval of the heirs. From this article, it is understood that if the grantor is sick or ill, but the illness is not close to death and can still carry out activities properly, he does not need to

get approval from the heirs if he wants to give his property as hibah to other people.

2. Overview of Joint Assets

The concept of joint property comes from Indonesian customary law and is then made into written law. In the books of fiqh, there is no discussion of joint property. There are those who argue that joint property may be alluded to *syirkah,* as the wife can also be counted as a working partner, even if she is not doing the joint work for real. Provisions regarding joint property in positive law are contained in Chapter VII Articles 35, 36, and 37 of Law No. 1 of 1974. Chapter I Article 1 Letter f and Chapter XIII Articles 85 – 97 of the Compilation of Islamic Law (KHI). Civil Law (KUHPer).

Article 35 paragraph (1) of Law No. 1 of 1974 states that property acquired during marriage becomes joint property. Paragraph (2) states that the innate property of each husband and wife and the property obtained by each as a gift or inheritance, are under the control of their own as long as the parties do not specify otherwise. Article 36 paragraph (1) regarding joint assets, the husband or the wife is able to act with the approval of both parties. Paragraph (2) regarding the innate property, each husband and wife have the full right to take legal actions regarding their property. Article 37 if the marriage is dissolved due to divorce, the joint property shall be regulated according to their respective laws.

Elucidation of Article 35 "The joint property is regulated according to their respective laws when a marriage is broken. On Elucidation of Article 37 also states that "What is meant by "the law of each" is religious law, customary law and other laws." These provisions ruled the existence of the Compilation of Islamic Law to regulate the distribution of joint property for Muslims.

Provisions regarding joint property in the Compilation of Islamic Law Article 1 letter f stipulates that assets in marriage or *syirkah* are assets obtained either individually or together by the husband and wife during the marriage bond and hereinafter referred to as joint assets, without questioning whether they are registered in the name of anyone. Article 85 explains that "the existence of joint property in marriage does not rule out the possibility of property belonging to each husband and wife. Article 86 paragraph (1), there is no mixing between the husband's property and the wife's property due to marriage. Paragraph (2) stipulates that the wife's property remains the right of the wife and is fully controlled by her, as well as the husband's property remains the right of the husband and is fully controlled by him. Compilation of Islamic Law Article 96

paragraph (1) states that: "In the event of a death divorce, half of the joint property become the possession of the living spouse. Paragraph (2) states that the joint property of a spouse with a missing significant other shall be suspended until their fate (death) is clarified, either by a true death or considered as death by the decision of religious death. Paragraph (97) states that that the divorced widow or widower is each entitled to one-half of the joint property as long as it is not specified otherwise in the marriage agreement.

Article 119 of the Civil Law states that "when the marriage takes place, the creation of total joint property takes place legally as long as there is no other rule saying otherwise regarding this matter in the agreement of said marriage. Article 128 states that "after the divorce, the joint property shall be divided in half between each, regardless of who obtained it." As long as the marriage contract does not specifically agree to the separation of assets, the assets obtained during the marriage become joint assets, excluding inheritance or hibah. If a dispute arises regarding the joint property, it shall be distributed equally between husband and wife according to the positive law.

3. Hibah Dispute in the Verdict

a. Verdict No.354 /Pdt.G/2022/PA.Pt

Case Chronology

This verdict discusses the lawsuit for annulment of hibah filed by Plaintiff 1 and Plaintiff 2 to the Religious Court Class 1 A Pati. The legal relationship between the parties is that Plaintiff II is the mother of Plaintiff I and the defendant. Plaintiff I is the son of Plaintiff II and the younger brother of the defendant. Co-defendant I is a notary/PPAT who made the certificate of hibah on the object in dispute. Co-defendant II is the head of BPN Pati. Plaintiff I and Plaintiff II have appointed a lawyer as their attorney, based on a special power of attorney on December 14, 2021, hereinafter referred to as the Plaintiffs (Verdict No.354 /Pdt.G/2022/PA.Pt, p. 1-3). (The narrative in the next mentions within this article will use the term plaintiffs). The lawsuit for the annulment of hibah in the verdict was submitted to the Religious Court in Pati, not to the Religious Court in the area of the defendant's residence (Jayawijaya Regency, Papua Province). The court is chosen as the object in dispute is located under the jurisdiction of the Religious Court in Pati. It all based on paragraph 118 letter (3) HIR asas forum rei sitae which states that if the object of dispute is a fixed object, it shall be submitted where the object is located.

The Reasons for the Annulment of Hibah by the Plaintiffs

The reasons for the annulment of hibah made by the plaintiffs (Verdict No.354 /Pdt.G/2022/PA.Pt, p. 2-7) are as follows:

The late Mr. xxx, ex-husband of Plaintiff II, father of Plaintiff I and Defendant II had donated a plot of land covering an area of 165 square meters (innate property) along with a house that stood on it covering an area of 87 square meters (joint property with Plaintiff II) to the defendant during his life. The hibah is done before a Notary/PPAT named xxx (Co-Defendant I) as stated in the certificate of hibah Number: xxx. Then, certificate number xxx has been issued by the Pati Regency BPN (Co-Defendant II). Plaintiff II felt that the actions of her ex-husband were unfair to her two other children. As their biological mother, she felt responsible to straighten out the deed so that her two children received the same justice by filing for the annulment of hibah made by her ex-husband. In addition, the plaintiffs also argued that the action of the late Mr. xxx, who donated an object that did not belong to him, was contrary to the provisions of Article 210 of the KHI, Supreme Court Verdict No. 1425 K/Pdt 1985 and Supreme Court Verdict No. 332 K/AG/2000. Furthermore, the plaintiffs also argued that the grantor had donated more than 1/3 of his assets, and this was contrary to Article 210 paragraph 1 of the KHI, which stipulates the maximum limit for hibah is 1/3 of what he owned. The deed is deemed as a violation of the legitimate rights of other heirs, and such is contrary to Article 931 of the Civil Law and the verdict of the Supreme Court of the Republic of Indonesia Number: 198 PK/Pdt/2019.

Plaintiffs' petition

As stated in the case in this verdict, the demands of the plaintiffs in the petitum section are their request towards the Religious Court in Pati (Verdict No.354 /Pdt.G/2022/PA.Pt, p. 7-8) to (1) Completely grant the Plaintiffs' claim, (2) confiscate the collateral (conservatoir Beslaag) on the object of hibah, (3) declare the invalidity of hibah from the late Mr. xxx (4)declare that hibah Number: xxx dated on July 29, 2021 made by the late Mr. xxx made before a Notary/PPAT named xxx (Co-Defendant I) is not legally binding; (5) Stating the Certificate of Ownership Number xxx issued by the BPN of Pati Regency (Co-Defendant II) has no legal force; (6) Charge court fees according to law. Or: If the Panel of Judges has a different opinion in the judgement of this case, the Plaintiff request for a fair verdict to be done (Ex Aquo et Bono).

Court process

In accordance with the trial day that has been determined by the panel of judges, the plaintiffs and defendants have been present at each trial, but both co-

defendants I and II have never been present at the trial even though they have been properly and officially summoned. In accordance with the steps of the trial, the panel of judges has tried to reconcil the parties, but to no avail. Furthermore, the parties also carried out mediation with the appointed mediator, but the results were still nil. It then continued to the examination process of reading of the lawsuit and hearings from the defendant.

At the hearings, the defendant filed an exceptio regarding; (1) the claim of lack of parties (plurium litis consortium), the claim of escaping (obscuur libel), the lawsuit of the wrong party (error in persona). Therefore, the defendant claimed that, according to the 3 mentioned points, the lawsuit became blurred and requested the Religious Court to reject it, or at least to state that the lawsuit does not meet the formal requirements and shall be declared unacceptable. The defendant then answered as follows: first, the defendant rejected all the arguments of the lawsuit, unless justified. Second, the object of hibah belongs to the late Mr. xxx. The defendant also stated that the object of hibah is not the only object Mr. xxx had. Third, the reason for said hibah is the violence done by the plaintiff I towards Mr. xxx in his lifetime. (Verdict No.354 /Pdt.G/2022/PA.Pt, p. 9-12)

Against the defendant's answer, the plaintiffs submitted a reply (replica), which essentially rejected the defendant's answer. The defendant then submitted a response (duplex) against the plaintiff's reply, which rejected the plaintiff's claim in its entirety. Furthermore, the examination process continued to prove the claim. The defendants submitted written evidence coded P1-P10 and witnesses consisting of 2 people. Likewise, the defendant submitted their evidence consisting of the letter coded T1-T6 and 3 witnesses.

One of the defendant's witnesses was an employee of the notary where the late Mr. xxx made the certificate of hibah. Among what the witness said was that the defendant had taken care of all his daily needs, and such is the reason for hibah to be given. According to the witness's testimony, the Notary/PPAT has stated that hibah cannot be carried out without the presence of all of the heirs, but Mr. xxx still asked PPATto process his intention for hibah. At last, PPAT made the certificate of hibah signed by xxx in front of PPAT witnessed by 2 witnesses from the PPAT office in the Pati Regency. This certificate serves as the basis for applying the ownership transfer of the land toward the BPN of Paty Regency. Said application is needed in order to publish a certificate of ownership issued on the basis of hibah. The second witness stated that he was the person who escorted the late Mr. xxx to the notary/PPAT. Mr. xxx came to the notary accompanied by the witness as the defendant (prospective recipient) did not

come before the notary/PPAT as he lived in Irian Jaya. The other 2 children who did not receive the hibah were not invited by the late Mr. xxx either. According to the testimony of the witness, Mr. xxx told him that it was his son I (the defendant) who paid for his life. The third witness is the witness who was present and came to court on an assignment from the National Land Agency Office in Paty Regency based on the request of the defendant's attorney. He stated that the land on behalf of xxxxxx with the certificate of ownership number xxxx based on the content of the letter (warkah) is the only piece of land owned by Mr. xxx which has been given to his son named xxx by hibah. (Verdict No.354 /Pdt.G/2022/PA.Pt, p. 25-26)

Subsequently, a local examination (decente) was carried out on the object of dispute based on the interim verdict No.354/Pdt.G/2022/PA.Pt. The conclusions are then drawn from both parties, each of which basically sticks to their arguments.

Judgment

The panel of judges then determines the verdict after considering the answers, Replies (replica), responses (duplex), evidence and conclusions of the parties. Of the several petitions requested by the plaintiffs, almost all of them were granted. However, one petition was rejected. Namely, the application for confiscation of collateral on the object of confiscation was the one petition rejected. The contents of the verdict are (Verdict No.354 /Pdt.G/2022/PA.Pt, p. 43) : Regarding the Exception: - Rejecting the exception of the Defendant; In the main case: (1) Granted the Plaintiff's claim; (2). Determined hibah pledge with the certificate of hibah number xxx which was carried out by Xxx before the Certificate of Land Ownership Making Officer (PPAT) Xxx (Co-Defendant I) null and void; (3) Declared that the certificate of ownership of land number xxx issued by the Pati Regency BPN (Co-Defendant II) on behalf of Xxx (Defendant) based on the certificate of hibah as dictum verdict number 2 which is declared null and void, has no binding legal force as well as all of the legal consequences attached to it; (4). Determined that the application for confiscation of collateral by the Plaintiffs was unacceptable; (5). Charged the defendant case fees arising for the result of this case amounting to Rp. 3.845.000,-

b. Verdict Number 222/Pdt.G/2022/PTA.Smg

Case position

The Defendant/Appellant was dissatisfied with verdict No.354/Pdt.G/2022/PA.Pt, therefore, the defendant filed an appeal to the

Religious High Court of Semarang. The position of the parties in the verdict Number 222/Pdt.G/2022/PTA.Smg is as follows: the appellant, who was the defendant; Appellate I, who was Plaintiff I; and Appellate II, who was originally Plaintiff II. Then Co-appelant I who was co-defendant I. Co-appellant II wo be originally co-defendant II.

Memorandum of Appeal

The memorandum submitted by the appelant relates to the exceptio and also the subject matter of the case. In the exceptio, the appellant stated that the he objected to the vericts of the first-level judges' assembly, regarding the absolute authority of the Pati Religious Court in judging this case. Furthermore, the appellant also objected the verdict of the panel of judges regarding the less party claims (plurium litis consortium), lawsuits on the wrong parties (error in persona), and fugitives (obscuur libel). The memories of appeal on the subject matter of the case are as follows: first, the appellant objected to the verdict of the judges at the first trial regarding "the hibah exceeds 1/3 (one-third) of the total assets of the grantor". Second, the appellant objected to the verdict of the judges at the first trial "without the approval of the former wife of the grantor". Third, the appellant objected to the verdict of the judges at the first trial regarding the "hibah pledge did not made before the Certificate of Land Ownership Making Officer. (Verdict Number 222/Pdt.G/2022/PTA.Smg, p. 4-10)

Counter Memorandum of Appeal

The Appellate objected and firmly rejected all the arguments put forward by the Appellant through his Memorandum of Appeal; the Appellate stated that the verdict of the Pati Religious Court Panel of Judges dated April 27, 2022, was a valid verdict based on evidence supported by witnesses and facts. Therefore, the memorandum of the appellant related to his objection to the verdicts of the judges at the first trial on the exceptio and the subject matter submitted by the appellant/defendant must be rejected.

Judgment

The panel of judges at the Appeal level differs in deciding the case for annulment of hibah in verdict Number 354/Pdt.G/2022/PAPt. It was stated that (Verdict Number 222/Pdt.G/2022/PTA.Smg, p. 30-31): the formal appeal submitted by the Appellant can be accepted. The Council of High Religious Judges overturned the verdict of the Pati Religious Court Number 354/Pdt.G/2022/PA Pt. by deciding to judge the case themselves: regarding exception - Rejecting the exception of Defendant I. Regarding the main case: (1) Granted a part of the Plaintiff's claims, (2) To stipulate that 1/3 (one-third) of the

land given as hibah is valid. The object is the land as wide as 165 M^2 with boundaries of xxxx (3). Canceling hibah of 2/3 (two thirds) of the land given as hibah in dictum number 2 (two); (4) Determined that the house on the land in dictum number 2 (two) with 87 M2 (6 M wide and 14.5 M long) is the joint property of Plaintiff II (xxx) and Mr. xxx; (5). Establishing a valid hibah of 1/3 (one third) of (half) or 1/6 (sixth) of the house building in dictum number 4 which was made by Mr. xxx; (6). Canceling hibah of 2/3 (two thirds) of (half) or 5/6 of the house building in dictum number 4 (four) made by Mr. xxx; (7). Declaring that the Certificate of hibah Number xxx and the Certificate of Property Rights have no legal force.

4. The argument of the judges in annulling the certificate of hibah involving their joint property in Verdict No.354/Pdt.G/2022/PA.Pt. and Verdict Number 222/Pdt.G/2022/PTA.Smg.

Certificate of hbah and other certificates arising from the said certificate in Verdict No.354/Pdt.G/2022/PA and Verdict No. 222/Pdt.G/2022/PTA.Smg was annulled by the panel of judges due to several reasons: 1) the object of hibah was mixed with their joint property. 2) the recipient was not present at the time the hibah pledge was made. 3) Hibah exceeds 1/3 of the total assets of the grantor. The reasons for the annulment of the hibah were made by the plaintiffs, among others, is the existence of joint properties between the grantor and Plaintiff II among the objects included in the hibah. Said Property is in the form of a house covering an area of $87M^2$, which was on the land that was granted by the grantor (deceased).

In the legal considerations of this verdict, the panel of judges stated that "based on the statements of the Plaintiff's witnesses, the statements of the Defendant's witnesses and the results of the local examination on the object of hibah, it was proven that the of $87m^2$ was a joint property. Such is based on Article 35 paragraph (1) of law number 1 of 1974 as amended by Law Number 16 of 2019, furthermore, the panel of judges stated that in accordance with the provisions of Article 36 paragraph (1) of law number 1 of 1974 as has been amended by law number 16 of 2019 "the consent of both parties is a must for an action to be taken regarding the joint propery of husband and wife".The panel of judges also stated that according to the provisions of Article 97 of the Compilation of Islamic Law in Indonesia, the divorced widows or widowers are each entitled to one-half of the joint property as long as it is not specified otherwise in the marriage contract. (Verdict No.354 /Pdt.G/2022/PA.Pt, p.39)

Similar considerations are also found in verdict No. 222/Pdt.G/2022/PTA.Smg, the panel of judges in this verdict is of the opinion that the house located on the land that is the object of hibah is a joint property between the grantor and the plaintiff II (Article 35 of Law No. No. 1/1974). Therefore, according to the High Religious Courts judges, each one gets 1/2 of the building. In fact, the verdict declaratively stated that the building of a house covering an area of 87m^2 which was on the land of the object of hibah was the joint property of Plaintiff II and Mr. xxx (Verdict Number 222/Pdt.G/2022/PTA.Smg, p. 31). It seems that the panel of judges is trying to legally determine the position of some disputed objects that are claimed as joint property, even if the case in the verdict that is the object of discussion is a lawsuit for the annulment of hibah. The plaintiffs did not ask the judges to determine the house as joint property in their petitium. They only asked the judges to annul the certificate of hibah and certificate of property rights arising from the certificate of hibah by stating the house being a joint property between the grantor and plaintiff II as one of the reasons. The provisions of civil procedural law prohibit judges from making verdicts on cases that are not prosecuted or granting more than what is demanded. This is regulated in Article 178 paragraph (1) and Article 184 HIR, article 189 paragraph (1) RBg and Article 25 of Law Number 48 of 2009 concerning Judicial Power. In fact, this provision was violated in Verdict Number 222/Pdt.G/2022/PTA.Smg

In accordance with the legal considerations of the judges at the first trial as well as the appeal, the house is determined to be a joint property as it was built during the marriage between the grantor (the deceased) and the plaintiff II. This is in accordance with the provisions of Article 35 paragraph (1) of Law No. 1 of 1974, which states that property acquired during marriage becomes joint property. The same provisions are found in the Compilation of Islamic Law Article 1 letter f. "Wealth in marriage or syirkah is properties obtained either individually or together between husband and wife during the marriage bond and hereinafter referred to as joint property, without questioning whether it is registered in anyone's name" The same thing was also found in the Supreme Court Verdict dated July 30, 1974 No. 806 K/Sip/1974; "The issue of whose name used to register the property is not a factor that invalidates the validity of an asset becoming an object of joint property. As long as the property in question can be proven to have been obtained during the marriage and paid using what comes from the joint property, it shall be included as an object of joint property.

As the grantor has divorced Plaintiff II, each of them shall receive half of the house covering an area of 87 square meters according to the law. This is in accordance with the provisions of Article 97 of the Compilation of Islamic Law:

"that the widow or widower is each entitled to one-half of the joint property as long as it is not specified otherwise in the marriage contract. The fact that Mr. xxx had given away the joint assets without the consent of his ex-wife (plaintiff II) is contrary to the Constitution. According to Article 36 of the Constitution No. 1/1974, a husband or wife who wants to take legal action on an object of joint property must obtain the approval of both parties. (Tengku Erwinsyahbana, et.al.", 2017) This provision is also regulated in article 92 of the KHI. Therefore, the transfer of joint property without the consent of both the husband and wife is null and void. (Agustina Dewi dkk, 2019) In addition, the hibah made by Mr. xxx also deviated from the provisions of Article 210, paragraph 2 of the KHI, as the grantor had donated objects that were not wholly his. It's also stated in some references that one of the conditions for the object to be given as hibah in Islam is the full ownership of it. The property. The full requirements for the object to be given away as hibah are as follows: 1) the object to be donated is present when the contract takes place, 2) the property belongs to the grantor in its entirety, and 3) the assets are valued according to the Sharia. 4) The assets have a certain value (benefits). 5) According to Hanafiah, if the item is in the form of a house, it must be intact even if the house may be divided. But the Maliki scholars, Shafi'iyah, and Hanabilah allow hibah in the form of half of the house. For example, if there is a person who gives a part of his house to another person as hibah, even though the house belongs to him and another person accompanying him, the house shall then be handed over to the recipient and so it becomes the joint property between the recipient of hibah and other people who own it besides the grantor. 6) The substance can be owned, meaning that the object is something that is usually owned, the object can be received, and can be transferred from one hand to another, 7) the property that is given away as hibah is separate from the others, not related to other assets or rights (Abdul Rahman Ghazali dkk, 2010, p. 161-162)

5. The recipient of hibah is not present when hibah pledge is made

One of the verdicts stated that the hibah made by the late Mr. xxx to the defendant with a certificate of hibah was declared null and void, and the certificate had no binding legal force. (Verdict No.354 /Pdt.G/2022/PA.Pt, p.42) is because the prospective recipient was not present when Mr. xxx the certificate on July 29, 2021 before PPAT. According to the panel of judges, in Islamic law, one of the conditions that must be met when the hibah pledge is pronounced in front of the PPAT as the maker of the certificate is that the prospective recipient absolutely must be present to receive the purpose of hibah from a grantor (Kabul

on hibah pledge). As such, the hibah pledge made by Mr. xxx without the presence of a prospective recipient cannot be justified, as well as the PPAT's actions which issue the certificate of hibah based on the application without the presence of the recipient, which is considered to be lack of the principle of prudence in making and issuing a certificate of hibah, resulted in the certificate of hibah being invalid. (Verdict No.354 /Pdt.G/2022/PA.Pt, p.40)

The contract (akad) is one of the pillars of hibah according to Islamic law. Hibah is considered valid in the presence of a contract. The existence of the contract is marked by ijab and qabul. Ijab, in this case, is an expression of giving from the giver, while qabul, in this case, is an expression of receiving from the recipient. Scholars differ on the firmness of ijab and qabul in the implementation of hibah. Most of the scholars who follow the Syafi'iyah and Imam Malik school of fiqh require that both the grantor and the recipient of the hibah are able to speak to confirm the hijab and Kabul as the validity of the hibah. So the law of hibah applies after the grantor verbally expresses consent and qabul spoken by the recipient of hibah. In contrast to Hanabilah and some of the Hanafi scholars, the firmness of verbal ijab and qabul is not a requirement for the validity of hibah. There are those who argue that qabul must be pronounced immediately after the contract as it is a gift of property rights at the time of life. However, therea are those who argue that that a time gap may be permitted. (Abdul Aziz Muhammad Azzam, 2010, p.442)

When referring to the fiqh theory mentioned above, it seems that the panel of judges in the aquo case refers to the opinion which states that hibah law applies if the grantor has spoken verbally and qabul by recipient is also done verbally. Qabul must be pronounced immediately after the contract as the same as buying and selling.

The judge's consideration regarding the prospective grant recipient was not present when the hibah pledge was made, which became one of the memories submitted by the appellant/defendant at PTA Semarang. According to the appellant/defendant "That in fact, the recipient and grantor came before PPAT and confirmed by PPAT itself on the truth of the transfer of rights (Verdict Number 222/Pdt.G/2022/PTA.Smg, p. 10) against this memory the appellants/plaintiffs filed a counter memorandum "what is meant by hibah is not at the time of signing hibah, but regarding hibah process. Grantor and recipient/Comparator only appear at the time of signing hibah". (Verdict Number 222/Pdt.G/2022/PTA.Smg, p. 21)

Hibah pledge, which was not attended by the recipient, was not considered valid by the judges of the Religious High Court. However, it was

stated that "things that have been considered by the Panel of Judges of the First Level that have not been reconsidered by the Panel of Judges at the Appellate Level are considered to have been considered by the Panel of Judges at the Appellate Level. The Panel of Judges at the Appellate Level is an inseparable part of this verdict". However, the author argues that the absence of the recipient at the time of the high pledge is not an issue for the High Religious Court's judges. The judges still ratify 1/3 of the hibah that occurred on the land objects and 1/3 of the house building objects from the hibah made by Mr. xxx, the appellant/defendant. Such is as stated in the verdict. (Verdict Number 222/Pdt.G/2022/PTA.Smg, p. 30-31)

The stance of the panel of judges who did not question the absence of the recipient of hibah at the time of the hibah pledge could be referred to the opinion of Hanabilah and some of the Hanafiyah scholars. Such is the firmness of verbal consent and Kabul is not required for the validity of hibah. Hibah is considered valid as long as the expression of giving and receiving is done. (Satria Effendi, 2005, p.475-479) As mentioned in the counter memorandum of the appellant/plaintiff who acknowledged that Mr. xxx (the grantor) and the recipient of hibah only appeared at the time of signing hibah (Verdict Number 222/Pdt.G/2022/PTA.Smg, p. 21) This means that both grantor and the recipient of hibah have signed the certificate of hibah in the aquo case. The affixing of signatures by the grantor and the recipient of hibah on the certificate of hibah is considered sufficient as a statement that he has handed over the assets of the grantor and as a statement of willingness to accept from the recipient. Thus, the affixing of the signature on the certificate can replace the function of ijab and qabul. (Satria Effendi, 2005, p.478-479)

6. Hibah exceeds 1/3 of the total assets of the grantor.

The provision of 1/3 grant does not exist in the Qur'an or Hadith. However, there are scholars who argue that the 1/3 grant provision is the same as a wasiyat as it has a same nature. The provision for the maximum grant limit of 1/3 in the KHI is confirmed with the maximum limit of wasiyat, which is 1/3. However, there are those who argue that the 1/3 provision in Article 210, paragraph 1 is more inclined towards its benefit rather than qiyas. (Abu Syhabudin, p.33)

The maximum limit of 1/3 in hibah is found in article 210 of the KHI. Article 210 of this KHI is the requirements of hibah. Article 210 paragraph (1) of this article stipulates that a person who has reached the age of at least 21 years, of sound mind and without any coercion can give away a maximum of 1/3 of his

property to another person or institution in the presence of two witnesses. Paragraph (2) of Article 210 states that the property that can be donated must be the property of the grantor.

According to Article 210 of the KHI mentioned above, hibah is valid when it meets five conditions, (1) the grantor is reasonable, (2) the grantor is at least 21 years old, (3) the grantor is not in a state of compulsion when making hibah, (4) the property that is given away is the property of grantor himself; (5) the assets given away may not exceed 1/3 of the assets owned, (6) that hibah must be witnessed by two witnesses.

Hibah that exceed 1/3 are decided by the panel of judges in various ways. For example, the panel of judges in the verdict of the Supreme Court of the Republic of Indonesia Number 492.K/AG/2012 argued that exceeding 1/3 of the assets was against the law. Therefore, the certificate of hibah was legally invalid and had no legal force. (Jainuddin, 2020, p. 175) The implication of a legally flawed certificate of hibah is that the object of hibah shall be returned to the grantor. (Sari & Yunanto, 2018, p.2) This is different from Verdict Number 117/Pdt.G/2011/MS-Bna which in its decree stated that the certificate of hibah has no legal force and instead declaring a valid hibah on 1/3 part of the object of the dispute while declaring that 2/3 of the disputed object is part of the Plaintiff. Then, it charged the Defendant to hand over 2/3 of the object of the dispute to the Plaintiff.

It is a fact In Verdict No.354 /Pdt.G/2022/PA.Pt that Mr. xxx had given away more than 1/3 of the total assets he owned to one of his children. The panel of judges then stated that hibah carried out by Mr. xxx to the defendant with the certificate of hibah is null and void and the certificate has no binding legal force (Verdict No.354 /Pdt.G/2022/PA.Pt, p.42). According to the panel of judges, a hibah exceeding 1/3 of the grantor's property does not meet the requirements of a hibah in Islamic law. In another verdict, the panel of judges also argued that the maximum limit of 1/3 grant in Article 210 is a valid requirement for a grant; if it exceeds 1/3, then hibah is void (Syuhada, 2019). The provisions of giving away as much as 1/3 of the objects owned according to the judge's assembly are aimed at prioritizing the benefit of the property, so that donating the entire property or exceeding 1/3 of it has a negative impact on the family of the grantor, including his descendants and other relatives as his heirs, either economically or other aspects influencing their life thereafter. (Verdict No.354 /Pdt.G/2022/PA.Pt, p.41)

This is different from the opinion of the Semarang High Court judges in the aquo case. The panel of judges is of the opinion that based on the provisions

of Article 210 of the Compilation of Islamic Law, a person can donate as much as 1/3 of the assets he owns. Therefore, the hibah of Mr. xxx to the legal defendant is 1/3 of the land (Verdict Number 222/Pdt.G/2022/PTA.Smg, p. 28). Likewise, the house, which is proven to be a joint property between Appellant II/Plaintiff II and Mr XXX, is then judged, based on the provisions of Article 210 of the Compilation of Islamic Law, that a person can give away as much as 1/3 of his property. The valid hibah of Mr. xxx is determined to be 1/3 of the house or 1/3 of half of the house, or 1/6 of the house. (Verdict Number 222/Pdt.G/2022/PTA.Smg, p. 29)

Based on such consideration, a different verdict than the one made by the first-level judge assembly was born. The Semarang High Religious council even went as far as annulling the verdict of the Pati Religious Court Number 354/Pdt.G/2022/PA Pt. by judging themselves. In essence, among the contents of the verdict is to stipulate that 1/3 of the land of hibah is valid but annul 2/3 of it. Determining whether the hibah is of 1/3 (one-third) of ½ (half) or 1/6 (sixth) of the house and annul 2/3 (two-thirds) of ½ (half) or 5/6 of the house. Declaring that the Certificate of hibah and Certificate of Ownership have no legal force.

It is clear that there are different interpretations of Article 210 of the KHI regarding the implementation of the maximum limit of hibah of 1/3 of the total assets. If the first-level judge includes 1/3 of the property as a condition for the validity of the hibah, it means that when a deviation occurs, the hibah is considered invalid. Meanwhile, the Council of High Religious Judges argue that if it exceeds 1/3, then hibah is not completely annulled. Rather, 1/3 of the assets donated are still considered valid.

The judges at the first trial and the judges at the Religious High Court both agreed that the Certificate of hibah and the Certificate of Ownership born of hibah had no legal force, but the legal consequences arising from these two verdicts were different as stated before by the author. The legal consequence of the annulment of the certificate of hibah at the first-level verdict is that the party who controls the object of hibah returns the object of hibah to its original state before hibah occurs, therefore the object of hibah is in the form of a land area of 164 m^2 and of the house built on the land becomes an inheritance that must be divided to the heirs in accordance with the provisions of inheritance law. Half of he house became the property of Plaintiff (2) as the ex-wife of the deceased. This is different from the legal consequences that arise from the verdict at the appeal level in the aquo case. Only 2/3 of the object of hibah will become the rights of the heirs, including the defendant in this case. Meanwhile, the 5/6 of the house

will become the inheritance which will be divided among the heirs according to the inheritance law.

From these findings, it is revealed that there is legal uncertainty in the rules of hibah, especially in article 210 of the KHI. The article provides opportunities for multiple interpretations in implementing the law in the settlement of hibah cases, especially in the aquo case. As a result of the non-uniformity in the implementation of the article, it gives birth to different and unfair legal consequences, especially for the heirs in the aquo case.

7. Review of Legal Justice in Settlement of Hibah Objects Involving Joint Assets in Verdict No.354/Pdt.G/2022/PA.Pt. and Verdict Number 222/Pdt.G/2022/PTA.Smg.

One of the reasons that brought the lawsuit was the feeling of unfair treatment by Mr. xxx for his actions in giving away his assets covering an area of 165 square meters, on which there was a house being joint assets covering an area of 87 square meters to one of his children, namely the defendant. However, there is no consideration made by the judge that considers hibah of a father to one of his children specifically while he does not give a grant to the other children. The judge only stated that the plaintiff argued the deed done by Mr. xxx was without the approval of Plaintiff II (grantor's wife) and without notification to his two other children (plaintiffs I and Xxxxxx), who did not receive high. Furthermore, the panel of judges conveyed that the defendant, through the arguments of his answer, stated that Mr. xxx did not give hibah to child number 3 (Plaintiff I) as Plaintiff I had committed acts of violence against Mr. xxx when he was still alive. Furthermore, the judge's consideration of a father's grant to one of his children was no longer found. (Verdict No.354 /Pdt.G/2022/PA.Pt)

These facts provide an explanation for why the judge did not question a father's unfair gift to his children. This means that a father may give a gift to one of his children even if he does not do so to the other. If the finding of this research is seen from the perspective of Islamic law, it can be explained that hibah to children is sunnah/encouragement to be fair (Azzam, 2010, p.439). The Hanafi, Shafi'I and Maliki schools of thought are of the opinion that equating among children is sunnah, as an unfair hibah is makruh. If such hibah has been done, the deed is considered as invalid (Sabiq, p.186). This is as the hadith of an-Nu'man stated that the Prophet said: "Look for witnesses other than me." If such was deemed invalid, the Holy Prophet would have explained it and not only told him to look for other witnesses. As for the narrations of Imam Malik and

Dzahiriyyah, fairness in hibah is obligatory. (Hanif Luthfi, 2020,p.55-57) Hibah contract is cancelled in the event of unfairness found in hibah for children. If it has been done, it must be revoked. Imam Ahmad is of the opinion that it is permissible to distinguish between gifts among children if there is a reason to do so, such as a child who is in need for his time or religion, not for others. In contrast to the opinion of Asy Syaukani, which states that equality is mandatory and distinction is haram. (Azzam, 2010, p.440)

The majority of scholars say that fairness in hibah means equality for both men and women. (Luthfi, 2020, p.56) Contrary to the opinion of Muhammad Ibnul Hasan, Ahmad, Ishak, and some of the Shafi'i and Maliki people, that the fairness in hibah is an inheritance, i.e. the male gets 2 parts of the female. (Sayyid Sabiq, p.191)

From these explanations, the judge's stance, who does not consider the unfairness contained within a father's hibah toward his children, tilts toward the opinion that such fairness in giving to children is Sunnah. The uneven hibah toward their children is still considered valid.

If seen from positive law, the Compilation of Islamic Law does not specifically regulate the obligation of parents to be fair in granting hibah. However, Article 211 of the Compilation of Islamic Law states that hibah and wasiyat to heirs can be counted as an inheritance. Because grantor (deceased) has 3 children, whereas only the defendant who was given hibah by the grantor. Such is if 2 other children question the hibah, It shall then be counted as inheritance, which means it must be reduced to the appropriate share if it's in excess, and increased if it's less.

The stance of the panel of judges that do not consider unfairness for children who do not receive hibah from the late Mr. xxx, according to the author, provides an opportunity for parents to not be fair to their children. It certainly could be dangerous, as it has the potential to cause discord and enmity between children. Such is contrary to the intent of the provision of hibah in Islam. Referring to article 211 of the KHI states that hibah and wasiyat to heirs can be counted as inheritance. This article could be related to the quo case due to the fact that plaintiff 1 (child no 3) of Mr. xxx questioned the hibah given to the defendant. Then, 1/3 of the hibah determined by the judges of the High Religious Courts is included in the part that is calculated as an inheritance. Indeed, this can deviate from the ultra petite partial principle as the aqua case is not a case of annulling the cumulative hibah with inheritance claims. However, if there is a Circular Letter written by the Supreme Court (SEMA) that regulates this, for example, the annulment of a grant whose parties consist of a plaintiff who is a child of a

grantor who does not receive hibah and a defendant who is a child of a grantor who receives hibah, then according to SEMA, the panel of judges is allowed to implement Article 211 even though the case is not cumulative and there is no prosecution in the petitum.

D. CONCLUSION

The arguments of the Panel of judges to annul the certificate of hibah involving the joint assets in Verdict No.354m/Pdt.G/2022/PA.Pt, and Verdict Number 222/Pdt.G/2022/PTA.Smg can be seen from several things: First, the object of hibah not entirely the property of grantor. Second, the object of hibah exceeds 1/3 of the total amount of the recipient of hibah's property. Third, the recipient of hibah (defendant) was not present at the time hibah pledge was made. In principle, the 3 points mentioned by both the judges at the first instance and the appeals are the same. They just have a differerent interpretation on the article 210 of the KHI related to the fact that the object of hibah in the a quo case exceeds 1/3 of the total property of grantor. If the 1/3 of the property is considered as a condition for the validity of hibah at the first-level in the a quo court case, the deviation leads to the hibah to be void. In contrast to the Majlis of the High Religious Courts, which is of the opinion that if it exceeds 1/3, hibah is not completely nullified. Rather, 1/3 of the assets given away are still considered valid. The implications of this difference give birth to different legal consequences. In the first-level verdict, the legal consequence is that the party who controls the object of hibah shall return it to its original state prior to hibah, therefore the object of hibah is in the form of a land area of 164 m2 and the house building built on the land becomes an inheritance which must be divided among the heirs in accordance with the provisions of the inheritance law. The house shall then belongs to Plaintiff II as the owner of the joint property (the ex-wife of Mr. xxx). This is different from the legal consequences that arise from the verdict at the appeal level in a quo case.

Legal justice in the settlement of the object of hibah involving joint assets in the verdict No.354/Pdt.G/2022/PA.Pt. and Verdict Number 222/Pdt.G/2022/PTA.Smg. is not fully implemented properly yet. The reasons are: 1) because the panel of judges, both at the first level and at the appeal level in the aqua case, did not consider the unfair gift of a father to his children. Whereas one of the reasons the plaintiffs filed a lawsuit was the feeling of unfair treatment done by the late Mr. xxx, for giving away the object of hibaht to one of his children, namely the defendant. This fact, according to the author, provides an opportunity for parents to be unfair to their children. This is dangerous, as it will

cause discord and enmity between children. Such is contrary to the intent of the provision of hibah in Islam. If referring to Article 211 of the KHI, which states that "hibah and wasiyat among heirs can be counted as an inheritance",. This article is related to the a quo case, due to the fact that Plaintiff 1 (child no 3) of Mr. xxx questioned hibah given to the defendant. In fact, 1/3 of hibah determined by the panel of judges of the High Court of Religion is included in the part that is calculated as inheritance. Indeed, this can deviate from the ultra petitum partium principle as the a quo case is not a case of annulling a cumulative hibah with inheritance claims. However, if there is a Circular Letter written by Supreme Court (SEMA) that regulates this, for example, the annulment of a grant whose parties consist of a plaintiff who is a child of a grantor who does not receive hibah and a defendant who is a child of a grantor who receives hibah, then according to SEMA, the panel of judges is allowed to implement Article 211 even though the case is not cumulative and there is no prosecution in the petitum. 2) There is a legal uncertainty in hibah rules, especially in article 210 of the KHI as the article provides an opportunity for multiple interpretations in implementing the law in the settlement of grant cases, especially in the aquo case. As a result of the non-uniformity in the implementation of the article, it gives birth to different legal consequences and creates injustice, especially to the heirs in the aquo case. The judges' council is allowed to implement article 211 even if the case is not cumulative and there is no prosecution in the petitum. 2) There is legal uncertainty in hibah rules, especially in article 210 of the KHI, because the article provides an opportunity for multiple interpretations in implementing the law in settlement of grant cases, especially in the aqua case. As a result of the non-uniformity in the implementation of the article, it gives birth to different legal consequences and creates injustice, especially to the heirs in the aquo case.

Suggestion

1. The grantor and recipient to actually understand the legal arrangements and consequences that arise from the certificate of hibah to prevent legal conflicts.
2. The notary/PPAT who makes the certificate of hibah to actually educates the parties who come before him to make the certificate of hibah regarding hibah rules.
3. The Supreme Court to issu a Circular Letter of The Supreme Court (SEMA) regarding the implementation of Article 211 in cases of annulment of hibah in which the parties consist of the

heirs of grantor even if it does not cumulate an inheritance lawsuit.

REFERENCES

Ajib, Muhammad. (2019), Fiqih *Hibah dan Waris*, Jakarta, Rumah Fiqih Publishing

Al-Ushaimin, Syaikh Muhammad bin Shalih. (2008), Panduan *Wakaf, Hibah, dan Wasiat Menurut al Quran dan as-Sunnah*, Jakarta, Pustaka ImamAsy-syafii

Azzam, Abdul Aziz Muhammad. (2010), *Fiqh Muamalat: Sistem Transaksi Dalam Fiqh Islam.*

Az-Zuhaili, Wahbah. (2011), *Fiqh Islam WA Adilatuhu*, Penerjemah Abdul Hayyie al Kattani dkk, Jakarta, Gema Insani.

Departemen Agama RI, (2000), Kompilasi *Hukum Islam di Indonesia*, Jakarta, Direktorat Pembinaan Badan Peradilan Agama.

Effendi, Satria. (2005), *Problematika Hukum Keluarga Islam Kontemporer, Analisis Yurisprudensi dengan Pendekatan Ushuliyah*, Jakarta, Prenada Media.

Ghazali, Abdul Rahman; dkk, (2010), Fiqh *Muamalat*, Jakarta, Kencana.

Hidayah, Nur. (2019), *Hibah Harta Bersama Kepada Anak Setelah Perceraian (Studi Kasus Putusan No.436/Pdt.G/2009/PA.Mks)*, Jurnal Al-'Adl, Vol. 12 No. 1, Januari 2019.

Jainuddin, Muhammad. (2020), *Perspektif Hukum Positif Indonesia Tentang Pembatalan Hibah (Studi Putusan Mahkamah Agung Republik Indonesia Nomor 492.K/AG/2012)*, Jurnal Hukum dan Kemasyarakatan Al-Hikmah Vol. 1 No. 2.

Luthfi, Hanif. (2010). *Kitab Undang-Undang Hukum Perdata*, Jakarta: Permata Press.

Luthfi, Hanif. (2011), *Kompilasi Hukum Ekonomi Syariah, Mahkamah,* Mahkamah Agung Ditjen Badilag.

Luthfi, Hanif. (2020), *Hibah Jangan Salah*, Jakarta Rumah Fiqih Publishing.

Manan, Abdul. (2006), *Aneka Masalah Hukum Perdata Islam Di Indonesia*, Jakarta: Kencana.

Murni, Idia Isti. (Juni 2017), *Hibah secara Lisan Dan Kaitannya dengan Pembuktian Di Persidangan*, Varia Peradilan No 379.

Putri, Agustina Dewi. dkk, (2019), Peralihan *Harta Bersama Melalui Hibah Tanpa Izin Salah Satu Pihak Berdasarkan Undang Undang Nomor 1 Tahun 1974 Dan Kompilasi Hukum Islam*, Syiah Kuala Law Journal: Vol 3, No. 1.

Sabiq, Sayyid. Fiqh Sunnah, Volume 14, Ter. Mudzakir AS, Bandung, Al Alma'arif.

Sari, Nila Manda; Yunanto, (2018) *Cacat Hukum Dalam Hibah Sebagai Perjanjian Sepihak Dan Implikasinya*, Notarius, Volume 11 Nomor 1.

Syhabudin, Abu. (tth). *Fiqh Indonesia: Transformasi Dan Sinkronisasi Fiqh Wasiat Dan Hibah Dalam Kompilasi Hukum Islam Di Indonesia*, Almashlahah Jurnal Hukum Dan Pranata Sosial Islam.

Syuhada, Muhammad Fikri. (Agustus 2019), *Pembatalan Akta Hibah Oleh Ahli Waris Setelah Putusan Pengadilan Agama, Jurnal Hukum Dan Kenotariatan*, Volume 3 Nomor 2.

Tim Redaksi BIP, (2017), Undang-Undang Republik Indonesia No 1 Tahun 1974 Tentang Perkawinan, Jakarta, Bhuana Ilmu Populer.

Wahid, Abdul; Sunardi; Mariyadi, (2017), *Penegakan Kode Etik Profesi Notaris*, Jakarta: Nirmana Media.

Zainuddin, (2008), *Pelaksanaan Hukum Waris di Indonesia*, Jakarta, Sinar Grafika.

Zainuddin, Asriadi. (2017), *Perbandingan Hibah Menurut Hukum Perdata Dan Hukum Islam*, Jurnal Al-Himayah Volume 1 Nomor 1.