

## The Justice of Parents in Giving or Canceling Gifts (Hibah) From Their Property (Study on Supreme Court Decision Number 702K/Ag/2017)

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### ABSTRACT

Hibah is a gift given from one person to another who is still alive voluntarily and without compensation. A hibah is a one-sided agreement with obligations but without rights. In Islamic law, it is forbidden to take back property that has been donated. Based on Pasal 212 of the Compilation of Islamic Law, hibah cannot be retracted, except for the hibah of parents to their children. But what about the annulment of the hibah deed based on the Supreme Court's decision no. 702K/Ag/2017? Based on the decision, the hibah deeds given by parents to their children have been declared null and void. This study aims to explain how the cancellation of hibah for biological children is reviewed according to Islamic law. This research used normative juridical with a legal approach (statue approach), a conceptual approach, and a case approach. The results of this study show that in Islamic law, the cancellation of hibah from parents to biological children is allowed based on the provisions in the Hadith, Ijma', and the Compilation of Islamic Law. In the case of the cancellation of a parent's hibah to his biological children, it is permissible if it is demonstrated that the hibah contains terms that are opposed to the provisions of the Qur'an, Hadith, and the Compilation of Islamic Law.

**Key Words:** Cancellation, Hibah, Biological Children, and Islamic Law.

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### I. INTRODUCTION

*Hibah* in Islamic law aim to strengthen the relationship between humans and closeness to Allah because the nature of the *hibah* is also closely related to the relationship to Allah as evidence of love for fellow creatures. Based on the words of the Messenger of Allah, "Whoever wants to expand his sustenance and prolong his life, then let him connect the ties of kinship".<sup>1</sup> In Islam, it is highly recommended for everyone to strengthen kinship relations, one of which is by providing *hibah* to families. While the word *hibah* in Indonesian means giving (voluntarily) by transferring the rights to something to someone else.<sup>2</sup> The legal basis of *hibah* in Islamic law has been regulated in the Qur'an and the Hadith of the Prophet Muhammad which means that *hibah* are gifts from one person to another.<sup>3</sup>

The Qur'an "as the main source of Islamic law encourages its people to help each other. One of them is based in the Al-Imran ayat 92 which means "You will never reach goodness, until you spend some of the wealth you love, and whatever you spend, then surely Allah knows it". According to tafsir experts, *hibah* is a practice that is sunnah and encouraged in Islam, especially to the immediate family. This practice is based on the Qur'an and the Sunnah. Among the Qur'an that encourages *hibah* as Allah SWT says in An-Nisa ayat 4, "Then if they give you some of the dowry with pleasure, eat (take) the gift (as food) that is delicious even better". As a result, based on Surah Al-Baqarah ayat 177 which means "...to give the treasure he loves to his relatives..." The Messenger of Allah said "should you shake hands with each other, surely jealousy will disappear. You should give gifts to each other, you will love one another and enmity will disappear."<sup>4</sup>

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<sup>1</sup> Hadis No. 1483 Riwayat Bukhari

<sup>2</sup> Sulchan Yasyin, *Kamus Besar Bahasa Indonesia* (Surabaya: amanah surabaya, 1997).

<sup>3</sup> M. Idris Ramulyo, *Perbandingan Hukum Kewarisan Islam Dengan Kewarisan Kitab Undang-undang Hukum Perdata*, Jakarta, Sinar Grafika., 2004, hlm.116

<sup>4</sup> Hadis No. 1413 dalam Kitab Muwatho Malik.

Hibah which are a form of social relations have been regulated clearly and in detail in the fiqh Muamalah book which is guided by the Qur'an and Hadith and has now been posited in the form of KHI.

In Islam there are several kinds of names for giving, one of which is a *hibah*. *Hibah* can also be interpreted as a positive social concern by helping fellow human beings or as a gift from parents for their children. "In the KHI, a gift is the voluntary and unrewarded gift of an object from one person to another living person to possess.<sup>5</sup> The law does not recognize other *Hibah* other than *Hibah* among people who are living.<sup>6</sup> *Hibah* which means giving or gifts can be said to have a social function in people's lives.<sup>7</sup>

*Hibah* When viewed from the amount of property to be donated, Jumhur Ulama have different opinions, in the compilation of Islamic law applicable in Indonesia, it cannot be more than 1/3 of the assets of the Grantor. The invalidity or cancellation of the property that is donated is separate from the others.<sup>8</sup> However, in Islamic law, a parent's gift to his child can be withdrawn, as the Prophet SAW said, "It is not lawful for a Muslim to give a gift and then withdraw it, except for a father who takes back what was given to his child".<sup>9</sup> According to the Fuqaha, revoking the *hibah* (al I'tishar) is permissible, Malik and jumhur Ulama are of the opinion that it is permissible for the father to revoke the gift he has donated. Thus the provisions in the KHI. Cases of cancellation of *hibah* can occur because the recipient of the *hibah* does not meet the requirements, such as a person who is at least 21 years old, has common sense and without coercion, can donate as much as 1/3 of his property to another person or to an institution to own. The *hibah* made in the presence of two witnesses and the property donated must be the property of the donor.<sup>10</sup>

Pasal 212 stipulates that "*hibah* cannot be withdrawn except for the *hibah* of parents to their children. In addition, Pasal 211 stipulates that *hibah* from parents to their children can be counted as inheritance.<sup>11</sup> Furthermore, according to Pasal 210 of the KHI paragraph (1), it is stated that a person who is at least 21 years old, has a sound mind without coercion can donate a maximum of 1/3 of his property to another person or an institution in front of two witnesses to own it." Furthermore, "paragraph (2) states that the property that is donated must be the rights of the donor.

Regarding parental *hibah* to biological children, there is a case of cancellation of *hibah* to biological children based on the decision of the Supreme Court Number: 702 K/Ag/2017." The issues in this case are as follows: That this lawsuit occurred in 2013 which was submitted to the Syar'iyah Court of Banda Aceh number 0206/Pdt.G/2013MS.Bna. This lawsuit began where after the death of Alm. Machmud bin Nyak Bugeh (*Hibah* giver) and the late. Hj. Nurtifah binti Husen. That after the death of Machmud bin Nyak Bugeh and Hj. Nurtifah binti Husen, her inheritance which is her joint property has never been *Faraidh* to the heirs who are entitled to receive it, namely the plaintiffs and defendants. The inheritance is the joint property of the late. Machmud bin Nyak Bugeh and Hj. Nurtifah binti Husen.

From the entire inheritance, a Deed of *hibah* has been made by Hj. Zahara Pohan Notary/PPAT in Banda Aceh, "where the Hibah giver is Mr. Machmud and the *hibah* is Mr. Aslianto (Defendant I). Because the assets that are donated are joint assets, in accordance with Pasal 35 paragraph (1) of Law Number 1 of 1974 concerning Marriage, it is stated that assets acquired during the marriage period are called joint assets. The provision of *hibah* obtained from joint assets must be approved by the wife or husband of the party who gave the *hibah*, but in this case the *hibah* is carried out without the approval of the deceased. Hj. Nurtifah binti Husen as the wife of the late. Machmud bin Nyak Bugeh.

Thus, that the *hibah* is illegal, because the object of the *hibah* is the joint property of the late. Machmud bin Nyak Bugeh and the late. Hj. Nurtifah binti Husen. Furthermore, the *hibah* also exceeds 1/3 of the joint property left by the late. Machmud bin Nyak Bugeh and the late. Hj. Nurtifah binti Husen which should be the inheritance for the applicant and the Respondent. It is best for the Grantor not to give more than 1/3 of his wealth, because as the Messenger of Allah said from Ibn Abbas radhiallahu'anhuma said: "If people want to reduce it to a quarter, because the Messenger of Allah said: "A third and a third is a lot or a big one."<sup>12</sup> Based

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<sup>5</sup> Pasal 171 Huruf G Kompilasi Hukum Islam

<sup>6</sup> subekti, *Kitab Undang-Undang Hukum Perdata* (Jakarta: Pradnya Paramita, 2004).

<sup>7</sup> Herlien Budiono, *Kumpulan Tulisan Hukum Perdata Di Bidang Kenotariatan* (Bandung: citra aditya, 2008).

<sup>8</sup> Abdul Rahman Ghazaly, *Fikh Muamalat*, Jakarta: Kencana, 2010, hlm. 162.

<sup>9</sup> Hadis No. 956, Riwayat Ahmad dan Imam Empat, Hadis Shahih menurut Tirmidzi, Ibnu Hibban dan Hakim.

<sup>10</sup> Abdul Aziz Muhammad Azzam, *Fiqih Muamalah* (Jakarta: Sinar Grafika Offset, 2010), 435

<sup>11</sup> eman suparman, *Hukum Waris Indonesia, Dalam Perspektif Islam, Adat, Dan BW* (Bandung: rafika aditama, 2005).

on the hadith, that it is forbidden to will more than a third of the property. Thus the prohibition in the hadith also applies to *hibah*, because "this *hibah* is the same as a will in terms of harm to other heirs."

In addition, *hibah* are given at the time of death, Achmud bin Nyak Bugeh (the Grantor) is in a state of illness and is carried out without the consent of the other heirs. Based on Pasal 213 of the KHI states that *hibah* are given "when the Grantor is in a state of illness close to death, it must obtain the approval of other heirs", but in this case the *hibah* is carried out without the approval of the other heirs. In fact, Aslianto (Defendant I) wants to control the estate of the late. Machmud bin Nyak Bugeh and the late. Hj. Nurtifah binti Husen alone with the aim of eliminating the rights of the other heirs. Then this dispute was filed with the Banda Aceh Syar'iyah Court, but the decision of the Banda Aceh Syar'iyah Court in this case rejected the cancellation of the *hibah* submitted by the plaintiff.

After the plaintiffs' claims were rejected by the Banda Aceh Syar'iyah Court, the plaintiffs objected to the legal considerations and the decision of the First Level Panel of Judges. Then filed an appeal to the Syar'iyah Court of Aceh with lawsuit Number 115/Pdt.G/2016/MS.Aceh with the result that the plaintiff claim was declared unacceptable because it contained formal defects because it had accumulated two kinds of lawsuits that were not closely related. namely the inheritance dispute lawsuit is cumulated with a *hibah* cancellation lawsuit.

Based on the decision of the Aceh Syar'iyah Court, then the applicants filed a cassation request to the Supreme Court with lawsuit Number 702 K/Ag/2017. In its Decision, the Supreme Court gave a decision namely that the Deed of *hibah* Number 21/May/III/1980, dated 27 May 1980, Number 22/May/III/1980, dated 27 May 1980, and Number 23/May/III/1980, 27 May 1980, on behalf of Aslianto, null and void and the deed arising from it has no legal force. Based on the background above, this study aims to explain how the cancellation of *hibah* to biological children is reviewed according to Islamic law.

## II. METHOD

This research is a "normative juridical type of research that analyzes the law, both written in the book (law in book) and the law decided by the judge through the judicial process".<sup>13</sup> "The approach used is the legal approach, the conceptual approach and the case approach. The approach used is the legal approach, the conceptual approach and the case approach. The source of legal data used in this research is secondary data source which is data obtained from library materials. The data taken from library materials include primary legal materials, namely binding legal materials,<sup>14</sup> the two secondary legal materials are materials that provide an explanation of primary legal theory,<sup>15</sup> the third is tertiary legal theory, namely theories that provide instructions and explanations of primary and secondary legal theory.<sup>16</sup> The method steps taken to be able to obtain as much data as possible in research, in this research the data collection method is carried out by studying documents or theory by collecting secondary data, which consists of primary legal theories, secondary legal theories and tertiary legal theories. then the legal theories are processed by going through several stages, namely: editing, systematization and description.

## III. RESULTS AND DISCUSSION

### A. Cancellation of *Hibah* to Children

#### 1. Cancellation of *Hibah* to Biological Children in the Qur'an and Hadith

According to the Islamic view, essentially all property ownership on earth and even in the sky belongs to Allah SWT. Giving some of our property to our family or relatives is a virtue for Allah SWT because basically ownership of property is only a trust and deposit that must be used for good. This is as contained in the word of Allah SWT in the Qur'an Surah Al-Baqarah ayat 177 which means: "The virtue is not turning your face towards the east and west, but the virtue is who believe in Allah, the Last Day, the angels, the al-quran, and the prophets and give his beloved property to his relatives, orphans, the poor, those on the way (travelers), beggars, and to free slaves, establish prayers, and pay zakat, and who keep their promises when they promise, and who patient in adversity, suffering and in war. They are the ones who are true (in faith), and these are the ones who are pious arising from third parties.

Disputes that often occur in the *hibah* are the cancellation of the *hibah* or the withdrawal of the *hibah* property that has been *hibah*. In fact basically something we have given to others we can not take back. The

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<sup>12</sup> Hadis No. 2538, Riwayat Bukhari .

<sup>13</sup> Zainal Amiruddin dan Asikin, *Pengantar Metode Penelitian Hukum* (Jakarta: raja grafindo persada, 2008).

<sup>14</sup> Soerjono Soekanto and Sri Mamudji, *Pengantar Penelitian Hukum* (Jakarta: Universitas Indonesia Press (UI-Press), 2010).

<sup>15</sup> Loc.,Cit.

<sup>16</sup> Loc.,Cit.

contained in the words of the Prophet Muhammad that "it is not lawful for a Muslim to give a gift and then take it back, except for a father who takes back what was given to his "child".<sup>17</sup> and also in another hadith the Messenger of Allah, said: "The example of those who give alms of their property, then withdraws their gift, is like a dog that vomits, then eats its vomit." (HR. Bukhari)<sup>18</sup>

Furthermore, it was narrated by the owners of the chain, from Ibn Abbas and Ibn Umar that the Prophet SAW said: through another sanad "had told us Musaddad, had told us Yazid namely Ibn Zurai', had told us Husen al-Mi'allam from 'Amr bin Shu'aib from Thawus from Ibn Umar and Ibn Abas from the Prophet said: It is not lawful for a man to give a gift or give a gift, then he takes back the gift, except if the gift is a gift from a parent to his child. The parable of the person who gives a gift and then refers to it (withdrawing his gift), then he is like a dog that eats, then when the dog is full he vomits, then he eats his vomit again.<sup>19</sup>

Based on the hadiths mentioned above, it is clear that basically it is not lawful for someone to take back what has been donated. Even in the hadith is also given a parable about this, which is like a dog that eats until it is full, then it vomits and then eats back what it has vomited. The parable above is indeed classified as harsh and despicable, but behind the severity of the parable there is something very great and full of wisdom, namely about how despicable the behavior of someone who withdraws a gift has been. Allah SWT is the most just and wise One, which although strictly forbids the withdrawal of *hibah* that have been given to others, but Allah SWT also gives exceptions to certain circumstances to be allowed to withdraw the *hibah* that have been given. The ability to withdraw the *hibah* that has been given is the giving of a parent's *hibah* to his child.<sup>20</sup> The ability to withdraw a *hibah* is intended so that parents in giving *hibah* to their children take into account the elements of the values of justice. Rasulullah SAW very firmly ordered the Grantor to withdraw the *hibah*, "if there are other children's rights, the *hibah* is not given. In other words, if the *hibah* is only controlled by one of the children, then with that there is no element of benefit from the *hibah* of the *hibah*.

## 2. Ijma'

### a. According to Imam Hanafi

According to Imam Hanafiah, the donor may withdraw the *Hibah*, if the *Hibah* is not accompanied by a reply or is not received in return, even though the *Hibah* is received by the person who is being given a *Hibah*. Imam Hanafiah as scholars also said, there are things that prevent the withdrawal of *Hibah*, namely:

1). "If the *Hibah* gives compensation to the *Hibah* and the Grantor receives in return for the *Hibah*, then the *Hibah* in this condition cannot be withdrawn."

2). "If the reward is meaningful, not property, such as a *Hibah* to expect a reward from Allah."<sup>21</sup>

"Besides these two things, there are also other things that hinder the withdrawal of *Hibah*, namely:"

1). "The person who is given has added to the item he received as a gift, or the gift item has increased with an addition that is integrated with his gift item, just as someone has been given a thin female goat, and he feeds it until the goat becomes fat, then in this condition the giver of the *Hibah* may not withdraw the gift, even if at other times the goat becomes thin as before."

2). "The death of one of the two people who made the *Hibah* contract after receiving it."

3). "There is a relationship or a husband and wife relationship."

4). "There is a relationship of kin, if someone gives something to his relative, even though he is an unbeliever or disbeliever in *musta'man*, it is not valid for him to withdraw his gift." Then if a person "gives something to his father, or son, or sister or uncle, or *muhrim* and other lineages, the right for him to withdraw his gift is null and void."

5). "Because the items that have been donated or given have been damaged. Therefore, if the person who has been given admits that the item that has been given to him is damaged, then the acknowledgment is justified without an oath, which means if the person given the gift says that the item that has been given to him has been damaged, the giver has no right to ask for compensation."<sup>22</sup>

### b. According to Imam Maliki

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<sup>17</sup> Hadis No. 956, Riwayat Ahmad dan Imam Empat, Hadis Shahih menurut Tirmidzi, Ibnu Hibban dan Hakim.

<sup>18</sup> Hadis Riwayat Bukhari Nomor 6460

<sup>19</sup> Hadis Riwayat Al-Tirmidzi Nomor 3541

<sup>20</sup> ahmad rofiq, *Hukum Perdata Islam Di Indonesia* (Jakarta: Rajawali Pers, 2015).

<sup>21</sup> Nasrun Harun, *Fiqh Mu'amalah* (Jakarta: gaya media pratama, 2000).

<sup>22</sup> Abdurrahman Al-Jaziri, *Fiqh Empat Mazhab, Jilid IV, Terj. Muhammad Zuhri, Dkk* (semarang: as-syifa', 1994).

The Maliki scholars say that the Grantor does not have the right to withdraw the Hibah, because the Hibah is a permanent contract. However, some of the Maliki scholars explained that the Hibah was considered perfect and fixed by merely having a contract. So for the perfection of the Hibah there is no need for a statement of acceptance. This is the popular opinion, If there is no acceptance, the Hibah cannot take place and the Grantor has the right to withdraw the Hibah. <sup>23</sup>

Imam Maliki said several problems that caused the cancellation of Hibah, including:

- 1). Postponement of "receipt of Hibah because the Grantor has a debt."
- 2). The giver "gives his gift to another person before the person who was given the opportunity receives it, while the person who is given on the second opportunity accepts it."
- 3). People "promise to give a Hibah to someone else then he goes or his messenger goes with the Hibah, then the party giving the Hibah dies."
- 4). The delay in "*Hibah* Hibah so that the giver gets sick and dies. In this situation, the Hibah becomes null and void."
- 5). A father canceled his gift, if the father withdraws his gift, then the Hibah is canceled and returns to him. This is only for the father and not other relatives except the mother, with the following conditions:
  - a). If "the gift is intended to establish a close relationship or affection, then under these conditions it is permissible for the father to withdraw the gift."
  - b). If "the gift is intended to hope for the reward of the hereafter (shadaqah), then the father is not allowed to withdraw the gift."
- 6). A "mother withdraws her gift, the mother has the right to withdraw her gift with two conditions as for the father, and on another condition that the child given is old even though he is still small but has a father. return the Hibah."

It should also be noted that fathers and mothers are prohibited from withdrawing their Hibah due to several cases, namely:

- 1). The person "(child) who was given a Hibah has taken advantage of the Hibah, by selling or pawning it or in the process, thereby changing the nature of the item."
- 2). In "the substance of the goods that are donated, there has been a process of increasing the value of the price, such as increasing the size of small items, increasing fat of thin animals."
- 3). The existence of "Hibah is a cause of increased trust in children, so that some people want to give him a debt, or give his daughter in marriage to him, or if it is a girl who is given a gift, some people want to marry him."
- 4). A "child who was given a gift by his father when he was sick. In this situation the father may not withdraw the gift, so that if the child dies, the gift becomes the rights of his heirs. If the child recovers, then the father has the right to withdraw the gift."

c). According to Imam Shafi'i

According to the view of the "Shafi'i opinion, if the Hibah has been assessed perfectly with the receipt or the giver has submitted the goods being donated, then such a Hibah has taken place. Hibah that take place like this are not valid to be withdrawn, except for a father. So a father is considered valid to withdraw his Hibah. Likewise for grandfather, mother, and grandmother. In short, a father has the right to withdraw his gift to his child, whether the child is a boy or a girl, small or large. In carrying out the withdrawal of the Hibah, the following conditions must be met, namely:

- 1). "Father is a free man"
- 2). "The item that is donated is a child, then the father gives it (releases him), then the father is not valid to withdraw the gift."
- 3). "The goods donated are still in the control of the child."
- 4). "The child is not someone who is forbidden to spend his wealth."
- 5). "The items given are not damaged (changed in condition), such as chicken eggs that have hatched or seeds that have grown on the ground."
- 6). "Father does not intend to sell the goods given to his son. If he intends to sell it, then the father is prohibited or has no right to withdraw the gift."

d. According to Imam Hambali,

According to the Imam Hambali opinion the person who gives the goods is allowed to withdraw the gift, before the gift is received, because the gift is considered perfect, except in the presence of an acceptance contract. If there is acceptance, the *Hibah* is considered perfect to be given. In this situation the giver has no right to withdraw the gift, except for the father. <sup>24</sup> If the father overestimates his gift to one of his daughters, then he has

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<sup>23</sup> *Ibid*, hlm. 507

<sup>24</sup> *Ibid*, hlm. 513

the right to withdraw the gift, if he gives one of his children without the permission of the other, because he gives equally or equally to his children according to their rights, according to religious provisions. obligatory. Many scholars are of the opinion that it is unlawful to withdraw a gift that has been given, except for the gift of a father to his child. Thus there is an exception that may be revoked if the gift is from parents to their children.

#### **IV. COMPILATION OF ISLAMIC LAW/ KHI**

In "Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law/KHI , it specifically regulates Hibah, namely in Book II, Chapter VI of Pasal 210-214, while the cancellation of *Hibah* is specifically regulated in Pasal 212 of the KHI. The KHI does not provide too many arrangements regarding Hibah, namely in Pasal 210 to 214 and previously Pasal 171 point g. In the KHI a *Hibah* is the giving of an object voluntarily and without compensation from one person to another who is still alive to be owned. The conditions for *hibah*. *Hibah* are regulated in the KHI:

- a. "The Grantor is a person who is at least 21 years old;"
- b. "Common sense;"
- c. "*Hibah* are given without coercion;"
- d. "Giving up as much as 1/3 of his property to another person or institution;"
- e. "The giving of the *Hibah* is done in the presence of two witnesses."

KHI stipulates that parental *Hibah* to their children can be counted as inheritance, this is as regulated in Pasal 211 of the KHI." So that if a parent has given an object to his child, then the object that has been obtained by the child through the *hibah* is calculated as part of the inheritance that will be obtained when his parents die. In addition, the provision "in the KHI, *Hibah* from parents to their children can be withdrawn. Basically the KHI prohibits the withdrawal of Hibah objects that have been given/*Hibah*, but there are exceptions to giving parental *Hibah* to their children.

The provisions in "Pasal 212 of the KHI stipulates that a *Hibah* cannot be withdrawn except for a parent's *Hibah* to his child." Judging from the provisions in Pasal 212 of the KHI, although it basically prohibits the withdrawal of objects that have been given, in certain circumstances, namely parental *hibah* to their children, it can be justified to be withdrawn. so that in other words, parental *hibah* to their children can be requested for cancellation of the *hibah*.

Based on "the provisions contained in the KHI, there are several reasons for the cancellation of the *hibah*, which include:"

- a. the Grantor has not reached the age of 21 years;
- b. the giver of the *hibah* is unreasonable;
- c. the object being donated exceeds 1/3 (one third) of the total assets owned by the Grantor.

Base from that explained that one of the conditions in *Hibah* regulated in the KHI that the assets donated do not exceed 1/3 (one third) of the assets owned by the Grantor. Therefore, if the abandoned property exceeds 1/3 of the total assets owned by the person giving the *hibah*, the *hibah* can be requested for cancellation.

#### **B. Analysis of Judges' Considerations related to Cancellation of *Hibah* to Biological Children according to Islamic Law in Decision 702K/Ag/2017**

The case of cancellation of *hibah* that often occurs is regarding the giving of *hibah* from parents to their children, this can usually be "caused because the recipient of the *hibah* does not meet the requirements in carrying out the *hibah* that has been given." In addition, the cancellation or withdrawal of *hibah* is also due to the fact that the provision of *hibah* does not contain elements of the values of justice, or in other words, the provision of *hibah* assets is only controlled by one of his children.

In the case of Decision Number 702K/Ag/2017, the main issue is the request for cancellation of the *hibah* which has been Hibahed by the Supreme Court for the assets that have been *hibah* to the respondent of cassation, namely Mr. Aslianto who is one of the children of the Grantor. Furthermore, it is necessary to see whether the considerations of the Supreme Court Judge in examining, deciding and completing this Cassation application are in accordance with the provisions in Islamic Law.

The purpose of "the judiciary is to uphold justice and truth, not to enforce laws and regulations in a narrow sense."<sup>25</sup>

Taking into account the decision number 702K/Ag/2017, the basis for the judge stating that the plaintiff's claim regarding the cancellation of the *hibah* was *hibah* are:

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<sup>25</sup> Abdul manan, *Etika Hakim Dalam Penyelenggaraan Peradilan: Suatu Kajian Dalam Sistem Peradilan Islam*, (Jakarta: kencana prenada media group, 2007).

1. *Hibah* the plaintiff's claim in part.

2. To declare that the Deed of *Hibah* Number 21/May/III/1980, dated 27 May 1980, Number 22/May/1980, dated 27 May 1980, and Number 23/May/III/1980, dated 27 May 1980, in the name of Aslianto was cancelled. by law and the deed arising from it has no legal force.

Furthermore, as for the analysis of the judge's considerations in *hibah* the request for cancellation of the *hibah* to this biological child, including:

1. The judge "considered the provisions in Pasal 211 of the KHI which in Pasal 211 of the KHI stipulates that *hibah* to children must be counted as part of the inheritance of the Hibahee;"

Based on the provisions in Pasal 211 of the KHI, if it is associated with the provision of *Hibah* made by the late. Machmud bin Nyak Bugeh for his son Mr. Aslianto, then the *hibah* must be calculated as Mr. Aslianto's share of the inheritance that will be obtained from the inheritance of his parents, namely the late. Machmud bin Nyak Bugeh. According to Islamic law, *hibah* given to those who were originally entitled to the inheritance at the time of the testator's life are not considered as inheritance. However, if parents give *hibah* to their children, even though the inheritance is quite large, Islamic teachings regarding the obligation to do justice in giving *hibah* to other children must also be *hibah* from the inheritance.<sup>26</sup>

The provisions in Pasal 211 of the KHI are intended that parents in giving assets to their children either through *hibah* or wills must be fair. other. Based on the Messenger of Allah narrated from An-Nu'man bin Basyir r.a., he said: My father gave me something, but my mother, Amrah Binti Rawahan, did not agree before she asked the Prophet for testimony. "I gave something to my son and my wife..." Rasulullah asked "do you also give your other children like that?" my father said "no". The Messenger of Allah said, "Fear Allah and treat your children fairly". An-Nu'man said: so my father came home and took back his gift. (H.R Al-Bukhari Number 2587).<sup>27</sup>

2. Furthermore, the judge considers the provisions of Pasal 210 of the KHI, which confirms that the *hibah* cannot be more than 1/3 (one third) of the heir's property;

Both in the Compilation of Islamic Law, Al-Qur'an, Hadith and in the *Ijma Ulama*, it is agreed that the giving of a gift should not be more than 1/3 of the wealth of the Grantor. If we relate to the provision of *hibah* by Alm. Machmud bin Nyak Bugeh against his son Tuan Aslianto has exceeded 1/3 of the total property of the late. Machmud bin Nyak Bugeh. Where based on the information and existing evidence, the assets donated by Alm. Machmud bin Nyak Bugeh towards his son, Tuan Aslianto, is almost the entirety of the deceased's property. Machmud bin Nyak Bugeh and his late wife. Hj. Nurtifah binti Husen.

Therefore it is fitting that the *hibah* of the Alm. Machmud bin Nyak Bugeh against his son Tuan Aslianto which has been made in the form of an authentic deed must be canceled because it is contrary to the provisions of Islamic law.

3. Furthermore, in his consideration, the judge also considered the provisions of Pasal 213 of the Compilation of Islamic Law, which stipulates that *hibah* must obtain approval from the heirs are *Hibah* given to other than heirs, not *Hibah* to heirs (children);

The Panel of Judges of the Supreme Court is of the view that "Pasal 213 which determines that a *hibah* is given when the Grantor is sick and close to death, must obtain the approval of his heirs." In this decision, the panel of judges is of the opinion that *hibah* must obtain approval from the heirs are *hibah* given to other than heirs, not *hibah* to heirs (children). However, in this case it is contrary to the regulations contained in Pasal 213 of the Compilation of Islamic Law, the *hibah* must also obtain the approval of the other heirs, because this element is an important part that must be fulfilled for each party who will make a *hibah* due to eliminate a dispute that will occur in the future. If there is an act of *hibah* that is carried out without the consent of the other heirs, then the *hibah* is null and void by law.

Based on the considerations of the Supreme Judges, in the author's opinion, these considerations are in accordance with the provisions of Islamic law, both those regulated in the Qur'an, Hadith, *Ijma'* and in the KHI. However, there is a fact that in the author's opinion is very important that was not included by the Supreme Court Judge in examining, deciding and resolving this dispute, namely the fact that the *hibah* of the late Machmud bin Nyak Bugeh to Tuan Aslianto without the consent of his late wife. Hj. Nurtifah binti Husen., while the assets that were donated were joint assets of the late. Machmud bin Nyak Bugeh with his late wife. Hj. Nurtifah binti Husen.

Provisions "in the provisions of Law no. 1 of 1974 concerning Marriage (hereinafter referred to as the Marriage Law) that there is no separation of joint assets obtained during marriage except before the marriage agreement is made for the separation of assets. This is as regulated in Pasal 35 of the Marriage Law which stipulates that property acquired during marriage becomes joint property. Furthermore, Pasal 36 paragraph (1) of

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<sup>26</sup> Ahmad Azhar, *Hukum Waris Islam* (Yogyakarta: uii press, 2004).

<sup>27</sup> Imam Az-zabidi, *Ringkasan Hadis Shahih Al-Bukhari* (Jakarta: pustaka amani, n.d.).

the Marriage Law stipulates that legal actions against joint assets must obtain the approval of the husband or wife. As we know, Pasal 1320 of the Civil Code which regulates the legal terms of an agreement, where it is determined that regarding the validity of an agreement, four conditions must be met, namely: agreement, skill, certain things and lawful reasons.

The existence of "agreement and skill is a subjective requirement, which relates to the subject in the agreement, while a certain thing and a lawful cause relates to the objective conditions relating to the object of the agreement" which are agreed upon by the parties.<sup>28</sup> So, if it is related to the provisions of Pasal 1320 of the Civil Code mentioned above, regarding the conditions for the validity of the agreement there are several conditions that are not fulfilled:

### **1. Agree**

In this case, one of the owners of the donated property is the late. Hj. Nurtifah binti Husen did not give her approval or there was no agreement from the late. Hj. Nurtifah binti Husen to donate the property to Mr. Aslianto. So there is no complete agreement from the owner of the goods that have been donated. In addition, Pasal 92 of the KHI stipulates that *hibah* for joint assets must be approved by the husband or wife.

Based on Pasal 92 of the KHI that a husband or wife without the consent of another party is not allowed to sell or transfer joint property.<sup>29</sup> In this case it can be take a point that a legal act in the form of a transfer of rights through a *hibah* whose object is joint property, then the agreement of both parties is very necessary because it is in accordance with the rules in Law Number 1 of 1974 and the Compilation of Islamic Law. This means that both in Law Number 1 of 1974 and in the KHI, the legal act of transferring joint assets without the permission of one of the parties violates the two legal rules so that the act of transferring rights can be canceled.

### **2. Halal Reasons**

Regarding "this lawful cause is regulated in Pasal 1335 to 1337 of the Civil Code. Pasal 1335 of the Civil Code states that ": "an agreement without a cause, or which has been made for a false or prohibited cause, has no power." Furthermore, regarding the meaning of the cause, it is not explained in more detail in the Civil Code. However, Pasal 1335 of the Civil Code states that the halal causes are:

- a. With a cause;
- b. Not a false cause;
- c. Not a forbidden cause.

Basically, the law only pays attention to what is written in an agreement, regarding everything that must be fulfilled by the parties in the agreement. In other words, the law does not pay attention to the reasons for the legal subjects to bind themselves in an agreement. Pasal 1336 of the Civil Code further states that an agreement made by the parties is valid if it does not conflict with the prohibited causes. Furthermore, Pasal 1337 of the Civil Code states that a lawful cause means that the contents of the agreement must not conflict with the law, public order and morality.

If associated with the case of *hibah* by the late. Machmud bin Nyak Bugeh to his son Aslianto without the consent of his wife, while the assets that were donated were joint assets with his late wife. Hj. Nurtifah binti Husen, then we can say that the object that is the property of the *hibah* is not a lawful object because the object is contrary to the provisions in the legislation. The Law on Marriage and the KHI stipulates that in the case of taking legal actions against joint property, the husband or wife must first obtain the approval of the husband or wife. Therefore, because the laws and regulations have regulated this matter, that the object being *hibah* is contrary to the laws and regulations. Therefore, it is appropriate if the Panel of Judges of the Supreme Court decides that the Deed of *hibah* Number 21/May/III/1980, Number 22/May/III/1980, dated May 27, 1980, and Number 23/May/III/1980 dated May 27, 1980 are null and void. by law and the deed arising from it has no legal force.

Based on the explanation above, in the opinion of the author, the fact that in *hibah* by the late. Machmud bin Nyak Bugeh to Tuan Aslianto without the consent of his wife must be one of the considerations of the Supreme Court Judges in considering its decision, because of the actions of the late. Machmud bin Nyak Bugeh who donated assets with him with the late. Hj. Nurtifah binti Husen to Tuan Aslianto without the late approval. Hj.

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<sup>28</sup> Kartini Muljadi dan Gunawan Widjaja, *Perikatan Yang Lahir Dari Undang-Undang* (Jakarta: raja grafindo persada, 2005).

<sup>29</sup> Agustina Dewi Putri, "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* 3 (2009).



Nurtifah binti Husen contradicts the legal terms of the agreement as regulated in Pasal 1320 of the Civil Code and also contradicts the provisions of the Marriage Law and the KHI.

## V. CONCLUSION

From the results of the above discussion, we can conclude that “the case of cancellation of *hibah* still often occurs in social life, especially parents against their children. In the case of cancellation of *hibah*, there are many factors that are the reason for the cancellation of *hibah* by parents to their children, one of which is because the Hibah given exceed 1/3 of their assets. In Islam the withdrawal of *hibah* from parents to their children is allowed, this is also based on the provisions in the Hadith, Ijma', and the Compilation of Islamic Law (KHI) Pasal 212 which also says that *hibah* cannot be withdrawn except for the *hibah* of parents to their children.

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