

Analyzing the Practice of Hibah in Lieu of Inheritance among the Indonesian Muslim Community

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Abstract

This study aims to explore the patterns of Hibah practice as a substitute for inheritance in Indonesian society and the reasons they do so. The research locations include Gayo, Aceh, North Sumatra, Jambi, Madiun, Kediri and Surabaya. In this qualitative study, data were collected through interviews. The participants consisted of ulama, academics, and the community who practice Hibah as a substitute for inheritance. Interviews were transcribed and analyzed through content analysis. This study indicates three patterns of Hibah practice as a substitute for inheritance. First, the Hibah is given at the beginning with a portion of 2:1, which is also considered an inheritance when the parent dies. Second, the Hibah is divided equally as well as the surviving parent gets a share. When someone dies, the assets owned by the parents are divided equally. Third, the Hibah is divided unequally, and after the parent dies, the property becomes a portion of the inheritance calculation. This study concludes that the practice of Hibah is becoming more popular among the people in distributing the inheritance, while Islamic inheritance is increasingly insignificant. The position of religious law which is so important in Indonesian Muslim society is critical.

Keywords: Hibah, Customary Inheritance Law, Islamic Inheritance Law, Substitute for Inheritance

Analisis Praktek Hibah Pengganti Warisan di Kalangan Umat Islam Indonesia

Abstrak

Penelitian ini bertujuan untuk menggali pola praktik hibah sebagai pengganti warisan dalam masyarakat Indonesia dan alasan mereka melakukannya. Lokasi penelitian meliputi Gayo, Aceh, Sumatera Utara, Jambi, Madiun, Kediri dan Surabaya. Dalam penelitian kualitatif ini, data dikumpulkan melalui wawancara. Peserta terdiri dari ulama, akademisi, dan masyarakat yang mempraktekkan hibah sebagai pengganti harta warisan. Wawancara ditranskrip dan dianalisis melalui analisis isi. Kajian ini menunjukkan tiga pola praktik hibah sebagai pengganti warisan. Pertama, hibah diberikan di awal dengan porsi 2:1, yang juga dianggap sebagai warisan ketika orang tua meninggal. Kedua, Hibah dibagi rata dan orang tua yang masih hidup mendapat bagian. Ketika seseorang meninggal, harta yang dimiliki oleh orang tua dibagi rata. Ketiga, Hibah dibagi secara tidak merata, dan setelah orang tua meninggal, harta tersebut menjadi bagian dari perhitungan warisan. Kajian ini menyimpulkan bahwa praktik Hibah semakin populer di kalangan masyarakat dalam pembagian warisan, sedangkan warisan Islam semakin tidak signifikan. Kedudukan hukum Agama yang begitu penting dalam masyarakat Muslim Indonesia menjadi terancam.

Kata kunci: Hibah, Hukum waris Adat, Hukum Waris Islam, Pengganti Warisan

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A. Introduction

Inheritance should be distributed after the testator dies. However, inherited assets are distributed to children before the heirs die. However, the distribution of assets to children before the heir dies has become a phenomenon that is widely practiced in Indonesia.¹ The distribution of property when the parents are still alive is called the practice of "Hibah" (gift). Hibah given before the inheritance is an interesting phenomenon considering that the Indonesian people are a Muslim majority community that is supposed to practice the teachings of Islamic law regarding inheritance, but they carry out the inheritance distribution using Hibah even before the testator dies. This is sometimes done to avoid an unequal distribution of inheritance among sons and daughters of the testator as regulated by Islamic law ².

Many studies on Hibah in lieu of inheritance have been carried out. Studies on Hibah as inheritance have been conducted in Bukabu village, Ambuten district, and Sumenep regency. It has become a custom in these areas. Hibah in lieu of inheritance is given to children or the heirs after they reach adulthood or after they are married ³. A study in Brebes indicates that the practice of Hibah was carried out intentionally to avoid inheritance in Islamic law ⁴. In another study, it was found that the practice of distributing Hibah as an inheritance was carried out to get an equal share among sons and daughters ⁵. This practice has long been carried out by people of many regions in Indonesia ⁶.

A study of the judge's decision at the Medan Religious Court shows that the Hibah property can be claimed as an inheritance after the death of the parents. For example, in the case of the plaintiff, a plot of land along with the house building on

¹ Siah Khosyi'ah and M. Asro, "Penyelesaian Warisan Melalui Hibah Dalam Perspektif Hukum Islam Asy-Syari'Ah," *Asy-Syari'ah* 23, no. 1 (2021): 40–61, <https://doi.org/https://doi.org/10.15575/as.v23i1.12755>.

² Ibnu Rusydi, "Hibah Dan Hubungannya Dengan Kewarisan Menurut Kompilasi Hukum Islam Dan Perdata," *Galuh Justisi* 4, no. 2 (2016): 154–66.

³ Waro Satul Auliyak and Noer Azizah, "Sistem Hibah Dalam Pembagian Warisan Perspektif Kesetaraan Gender," *Egalita: Jurnal Kesetaraan Dan Keadilan Gender* 16, no. 1 (2021): 1–12.

⁴ S. Sutrisno, "Penghindaran Waris Melalui Hibah Di Pondok Pesantren Al-Hikmah Brebes," *Mozaic : Islam Nusantara* 7, no. 2 (2021): 167–78.

⁵ Sukiati, "The Practice of Hibah As A Substitute Heir Among The Javanese Family," *MIQOT* 42, no. 1 (2018): 59–78, <https://doi.org/http://dx.doi.org/10.30821/miqot.v42i1.552>.

⁶ Aminuddin, Usman Jafar, and Supardin, "Hibah Sebagai Alternatif Pembagian Harta Pada Masyarakat Suku Pattae (Telaah Atas Hukum Islam)," *Jurnal Diskursus Islam* 16, no. 2 (2018): 224–42, <https://doi.org/https://doi.org/10.24252/jdi.v6i2.6553>.

it is determined and calculated as part of the plaintiff's inheritance ⁷. Although of course, in other cases the Hibah may not be recognized as an inheritance or even be canceled for reasons such as trying to kill the Donor ⁸.

The fact that Hibah and inheritance are two different things and cannot be interchangeable, but Hibah given by parents to their children can be considered as an inheritance. This is what causes many people to use the practice of Hibah as inheritance following their previous ancestors and becoming an unwritten customary law provision. Customary law itself is recognized for its existence in Indonesia as one of the three accepted laws. Therefore, people still apply these laws. There is no loss for the heir to such a division, regardless of whether or not the other heirs agree.

Of many studies on the implementation of Hibah in lieu of inheritance, every study explains the reasons why they implement the practice of Hibah. However, there have been no studies that have been discussed broadly regarding the patterns and reasons for the distribution of inheritance through the practice of Hibah. Therefore, this study will explore the patterns of distribution of Hibah in lieu of inheritance in several regions in Indonesia. Of course, these patterns will be influenced by culture and family systems according to their customs. This study is important, especially considering that the Indonesian people are the majority of the Muslim community. However, in the implementation of inheritance, there is a tendency to use the distribution of inheritance by the practice of Hibah.

To obtain patterns of distribution of Hibah in lieu of inheritance, this research follows a qualitative approach. The research location covers the Aceh region in Gayo and Langsa, North Sumatra, Jambi, Madiun, Kediri and Surabaya. Data were collected through interviews. The participants interviewed consist of ulama, academics, and the community who practice Hibah as a substitute for inheritance. The results of the interviews were transcribed and analyzed using content analysis.

⁷ Maulana Hadinsyah Mulia, "Hibah Orang Tua Terhadap Anak Sebagai Pengganti Waris (Studi Keputusan Pengadilan Agama Medan No: 558/Pdt.G/2018/PA.Mdn)" (Universitas Muhammadiyah Sumatera Utara, 2022).

⁸ Lestarina Alfianika Saipе, Ilham Abbas, and Zainuddin, "Pembatalan Hibah Menurut Kompilasi Hukum Islam Dan Kitab Undang-Undang Hukum Perdata: Studi Kasus Perkara Nomor 245/Pdt.G/2009/PA Lbt," *Journal of Lex Generalis* 2, no. 3 (2021): 1032–46.

Then the results of processing and analyzing this data will be reported descriptively and describe the answers and problems of this study.

The results of this study are expected to provide a clear description of the patterns of distribution of Hibah in lieu of inheritance or distribution of inheritance through Hibah among the Indonesian Muslim community. In addition, this study provides an overview of the reasons they use Hibah instead of inheritance law. This study will provide an inspiring contribution to religious authorities regarding the implementation of Islamic law in the community, so that they can take policies to carry out socialization about the importance of practicing Islamic law, especially in this case inheritance law.

B. Research Methods

To obtain patterns of distribution of Hibah in lieu of inheritance, this research follows a qualitative approach. The research location covers the Aceh region in Gayo and Langsa, North Sumatra, Jambi, Madiun, Kediri and Surabaya. Data were collected through interviews. The participants interviewed consist of ulama, academics, and the community who practice Hibah as a substitute for inheritance. The results of the interviews were transcribed and analyzed using content analysis. Then the results of processing and analyzing this data will be reported descriptively and describe the answers and problems of this study.

C. Results and Discussion

From the results of a study conducted with participants in the areas of the study, three patterns of Hibah practice were found as a substitute for inheritance and the reasons for implementing the Hibah.

Hibah as a Substitute for Inheritance among the Gayo Takengon Community

These patterns and traditions occur in some Gayo communities. Gayo people speed up the distribution of inheritance. In this case, the Gayo people have two patterns of implementing Hibah as a substitute for an inheritance; the first is *Nas* property, and the second is *Pematang* property.

1. *Nas* Property

The distribution of this first model is carried out when someone inherits all of his property to the heirs absolutely and cannot be taken back whatever happens, unless the heir is disobedient to the person who gives the property, or the heir kills the person who gives the property for various reasons. This will be able to cancel the Hibah (*nas*) that has been given by the parents. This is as revealed by the informant in an interview that all property is given to his children. As long as all is well, the property is not asked for a given back. It is called *Nas* property and it is legal.⁹

The distribution of *Nas* property has also been carried out by the Chairman of the Gayo Traditional Council of Central Aceh Regency, Mr. H. Jusin Saleh, as he stated when the researcher interviewed him. His wealth has been divided equally among the children and is no longer in his hands. According to him, he did this because he understands his children's needs. They are married and have many children. They live in harmony so I believe in dividing them all and entrusting my property to them.¹⁰

2. *Pematang* Property

The second model of Hibah is called the *Pematang* property. This second model of property is the property left for the heirs of the property which is decided by mutual agreement through deliberation conducted by the person who gives the property and the heirs. The *Pematang* property is also a property left for the living needs of the heir. This is based on the explanation of the informant in an interview. He mentioned that the parents are still alive, and the property may be distributed, but there must be something left, at least 1/3 depending on the agreement of all the potential heirs.¹¹

However, when the one who gives the property dies and leaves the property, there are two types of distribution. First, the property of the *Pematang* can be fully inherited by the person who guards, maintains, and cares for the one who previously owns the property until he/she dies. This is based on the Gayo term '*kusi bebelohku*

⁹ Interview with Mr. Cut Banta Aspala in Takengon, October 2019.

¹⁰ Interview with Mr. M. Jusin Saleh in Takengon, October 2019.

¹¹ Interview with Mr. Dr. Joni in Takengon, October 2019.

kone babayakku' which means everywhere I go, my shadow follows me. Second, the Pematang property left may be inherited by the heirs by way of distribution based on Islamic law or by way of equal distribution, and it depends on mutual agreement among the families in the agreed deliberation. This deliberation was carried out, witnessed by the family and other people outside the family who should be at least 40 years old.¹² However, in general, family deliberations in resolving this issue are not attended by outside witnesses, but when it has been agreed by the family in the deliberation, it will be notified to the village head/*lurah*. This is based on the explanation given by M. Jusin Saleh. Muhammad Isa added that the property is divided among sons and daughters through family deliberation. After that, the results of the deliberation regarding the distribution of the assets are notified to the *Pak kecil* (the head of village).¹³

Hibah that has been given basically cannot be transferred or sold because if it is sold, things that are not wanted will happen to the heirs. This is also a form of respect for their parents. However, if the condition of the Hibah property is not good, it may be sold and then the money is used to buy more or less the same property, but in better condition. For example, fields received from Hibah but are not fertile can be sold to buy more fertile land for farming.¹⁴

In the Gayo Takengon tradition, the distribution of Hibah as a substitute for inheritance has been carried out while the parents are still alive, as mentioned above. This policy is carried out in the Gayo tradition, and of course, it is not carried out without having certain philosophical values. Because many cases have occurred in families in the community, for example, disputes that have broken kinship ties, fights between brothers and sisters, and even murders among brothers or sisters or others in the fight for the inheritance.

This case occurs whether the heirs are alive or dead. This is the reason for the Gayo people to take such a policy. With that, the Gayo people have local wisdom specifically to regulate this issue, so family relations remain intact and undesirable things will not happen in a family bond. At least there are several reasons for the

¹²Interview with Mr. H. Banta Cut Aspala, in Takengon, October 2019.

¹³ Interview with Mr. Muhammad Isa in Takengon, October 2019.

¹⁴Interview with Mr. H. Jusin Saleh in Takengon, October 2019.

Gayo people to use Hibah as a substitute for an inheritance, firstly to maintain brotherhood, secondly to let the one who leaves the property return to Allah SWT and rest in peace because all the problems in the world have been resolved properly.

This tradition has been carried out by the father of Muhammad Isa as a cultural Gayo tribe. His property has been distributed to his children except for the *Pematang* property left for him. He has done this to avoid disputes or quarrels among his children. This is following the mandate of Allah in the Qur'an Surah Ali-Imran verse 103.¹⁵ After that, he feels calm when the time for him to return to Allah arrives.

The practice of Hibah as an inheritance in Langsa City, Aceh, is carried out based on Islamic law by some parties and customary law by others. However, the practice is mostly using the customary law of inheritance. However, they still use the principle of Islamic law 2:1 or depend on the customary and family agreement.

In Islamic inheritance law, the division between men and women is clear. In Aceh's customary inheritance law, the share for the heirs depends on the context. For example, in terms of caring for parents, if more daughters take care of parents, the share will be greater than the others, and vice versa. In Aceh's customary inheritance law, there is also an excuse for an unmarried daughter, namely getting a share of one house. The distribution of inheritance in Aceh itself may be textually different, and indeed not follow Islamic inheritance law. There has been no conflict in this way so far because the law of inheritance is carried out customarily according to the community and carried out sincerely. Hibah is given by parents to children during their lifetime, and after their parents die, the grants will be recalculated as an inheritance.¹⁶

Hibah as a Substitute for Inheritance in the Javanese community

In Javanese society with its parental (bilateral) kinship system, the right to inherit is equally owned by males and females, so there is no difference in share between them. The structure of the parental indigenous community (Javanese) draws the lineage from the father and the mother. The distribution of inheritance in

¹⁵ Interview with Mr. Muhammad Isa in Takengon, October 2019.

¹⁶ Interview with the leader of LPPM IAIN Langsa, October 2019.

this system is not determined by whether he is male or female, but the division of inheritance is determined by the results of deliberation by all parties concerned.¹⁷ This inheritance system does not differentiate between male heirs and female heirs.

In practice, the property to be left is divided before the parents die. When looking at the traditions of the Javanese people, most of them carry out the distribution of the property from parents to children, when the parents are still alive. This distribution is called Hibah. Thus, in Javanese society, they are more familiar with Hibah than *Mawaris* or inheritance.

This method has been carried out from generation to generation or has been a tradition among them. The division of this model is specifically used to carry out the life of their descendants. For example, parents provide provisions for their children, in the form of inheritance. They donated their wealth to their children. This tradition continues from generation to generation so that when Islam came, this tradition remained strong in the community itself for the good of their families and children.¹⁸

When parents have the desire to donate all their wealth to their children so that there is no more property left for them, the needs of the parent's life are fulfilled by their children. However, if there is a property left for the parent, the remaining property left is only to fulfill his life needs until his death. This is done not to measure death,¹⁹ instead, it happens naturally.

The assets donated by parents to their children are usually carried out when one of their children is married. They do this so that their children who are married can continue their household life. It is a parent's responsibility for the survival of their children. The Hibah assets are usually in the form of houses or land.²⁰

The Hibah given by parents to their children who are already married are done so that their children can live independently. For example, the land that was donated by their parents was built into a house so that they can freely build their household. Moreover, in reality, it can be judged that the daughter-in-law has a high

¹⁷ Otje Salman Soemadiningrat, *Rekonseptualisasi Hukum Adat Kontemporer* (Bandung: Alumni, 2002).

¹⁸ Interview with Mrs. Kandi in Jawa, Agustus 20, 2019.

¹⁹ As mentioned in Q.S. an-Nahl/16 : 61.

²⁰ Interview with Mrs. Kandi, a resident in Madiun, Jawa Timur, Agustus 21, 2019.

sense of reluctance toward her in-laws if she stays too long with her in-laws. Thus, it is not uncommon for miscommunication to occur among them.

The tradition of Hibah as a substitute for inheritance is deeply rooted in Javanese society, so Hibah from parents are divided equally among their children when their parents are still alive. If any property is left behind, it is only to meet the person's needs, it is not less than 1/3 of the property he has. The property left for the needs of the parents is called the *Harta Gantungan* (survival property). Maybe later when the parent dies, it will be distributed to the children. This treasure can be sold when the parents are still alive, but when the parents no longer need it, the treasure can be distributed to the children. The distribution is given to the children through family deliberation.²¹

However, if a parent dies, then leaves the '*Harta Gantungan*', the children left by him divide equally. Thus, the Javanese people no longer recognize the distribution of assets based on the science of Mawaris, but the parents' assets are distributed according to a grant system. This division of property is carried out when the parents have died for 1000 (one thousand) days or more or less three years. This is the ideal rule, but now the property is prioritized before his parents die. This is as stated by the Head of Dawung Village when interviewed in this study.²²

This division of property is usually carried out by collecting all of their children and witnessed by other family members, and some are also witnessed by traditional leaders, religious leaders, and village officials. The property is divided and the property letters are made to make it easier to manage ownership and taxes. This is done so that later there will be no prolonged disputes among their children. This is as explained by Mr. Masduki when the researchers asked for information in an interview.²³

In the distribution of assets that are donated, it is usually divided equally, there is also an unequal distribution based on the terms they agreed upon based on deliberation and consensus. The distribution of the Hibah assets equally is usually done to create a sense of justice among their children. However, sometimes the

²¹ Interview with Mrs. Kandi, a resident in Madiun, Jawa Timur, Agustus 21, 2019.

²² Interview with the village head in Dawung, Kediri, Jawa Timur, Agustus 20, 2019.

²³ Interview Mr. Masduki in Desa Dawung, Kediri Jawa Timur, Agustus 20, 2019.

distribution of the Hibah assets is divided unevenly due to certain reasons, for example, children who take care of their parents until their parents die usually receive more share.

The assets that are donated are usually in the form of dry land and the form of wetland. This dry land is in the form of land used to build houses, but wetland is land used for farming, be it rice fields or plantations. In short, wetland is land that can be produced from the soil, but dry land can only be built on it. However, sometimes property is valued in money and divided based on an agreement among children.

The reason parents donate property, in this case, is to avoid conflict. In addition, the property can be divided equally between sons and daughters or based on their agreement. Furthermore, by giving an inheritance before their parents die, children who are adults or married are faster to be independent and parents are still witnessing it.

Hibah among the Malay Community

Malay society has also experienced a significant shift in the division of inheritance. The shift in inheritance principles in Malay custom in the Districts of Kuala Jambi and Muara Sabak, Tanjung Jabung Regency can be seen in the practice of giving grants in lieu of inheritance.

In Malay society, inheritance prioritizes the nuclear family (which consists of a husband, a wife, and children), rather than a large family, meaning that even though the condition is that the extended family is also entitled to inheritance, the distribution is only given to the nuclear family provided the heir is not married and has no children.²⁴ Each family is more likely to resolve the issue of inheritance distribution without outside interference. This means that the nuclear family has more power in regulating the distribution of inheritance in the family.²⁵

The distribution of community heritage here prioritizes peace and the principle of avoiding '*sibuk*' (commotion). Therefore, now the distribution of inheritance is not only done by way of *faraid* alone but is followed by the process of

²⁴ Interview with Saudi, a resident in Desa Rano, Muara Sabak, Jambi, October 14, 2019.

²⁵ Interview with ibu Rena, October 14, 2019.

giving, and some parties do not use *faraid* law but directly share it equally using deliberation and consensus, meaning that the nominal value received by each heir is the result of deliberation where parents always want justice for each child.²⁶

The parties desire that there is a division of inheritance before the parents die, which aims that later after the parents die there will be no commotion and disputes among the heirs. In addition, parents say that children can be guided by parents, for example for business or entrepreneurship with these assets. Giving inheritance to children, by way of Hibah is also recognized and carried out as one way to divide inheritance fairly between boys and girls.²⁷ Although the amount is not the same, the agreement this method is considered fair. The Hibah assets are then calculated as part of the inheritance portion which is combined with the assets left by their parents later.

The position of daughters is also stronger, meaning that although there are no sons in a family, daughters are more entitled to their parent's property. In other words, daughters control the nuclear family property. Even if there are siblings from the father or mother, they only get a part that is given to them.²⁸

Hibah as Substitute for Inheritance in the Bataknese Community

Regarding the distribution of inheritance among the Bataknese people, the sons get the inheritance because they have a patrilineal kinship system. Meanwhile, girls get a share from their parents, or inheritance by way of a Hibah. The division of inheritance for sons is also not arbitrary because the distribution of inheritance is specific, namely the youngest son or in the Batak language is called Siapudan who gets a special inheritance.

If he does not have a son, his property falls into the hands of his father's brother. Meanwhile, his daughter did not get anything from the property of her parents because the father's brother who gets the inheritance must provide for all the needs of the daughter of the heir until she has a family. Looking at the inheritance

²⁶ Interview with Zakariya, the village head in Payung Mas, Teluk Majelis, Kualu Jambi, October 14, 2019.

²⁷ Interview with Lindawati, a resident in Desa Rano, October 14, 2019.

²⁸ Interview with Grandma Nafisah, October 14, 2019.

distribution system in Batak customs, it appears that the customs regulations are stricter. It can be seen from the inheritance of daughters who get nothing.

In the Toba Batak people, for example, in the inner Batak land, usually daughters are not the heirs, but they have the right to use and enjoy their parents' property within the limits of their livelihood needs. The widow is not the heir of her husband.²⁹ Therefore, Hibah is an alternative and a way out for the Batak community to give inheritance to their daughters ³⁰.

In the case of a family that does not have sons but only has daughters, to avoid distribution of property outside the nuclear family and to ensure that their daughters will inherit their property when they die, they give Hibah to their children before they die. They are worried about the fate of their daughters. They also do not have a sense of trust in the big family whether they will pay attention to the fate of their children in the future when they are gone.³¹

Hibah Can Resolve Inheritance Disputes

In Islam, the distribution of inheritance has special provisions that have been determined by Allah in the Qur'an in a *qoth'i* manner. This division of inheritance is known as *faraidh* or *Mawaris*. Each heir has his share, but the main principle is that men have 2 portions and women have 1 portion. In fact, in some indigenous people, this is often considered unfair and creates disputes.

Obviously, inheritance is not the same as Hibah. Inheritance is distributed after the parents die. When the parents are not there because they have died, the parents can no longer intervene in a dispute among their children. Therefore, some people often make excuses by donating their wealth before they die. This is to avoid conflicts between families, so they divide assets equally, and guide their children in using the assets that are donated.

²⁹ Tua Siahaan, Edwin Marganda; Nadeak, Abdi Pertiwi, Pembagian Harta Warisan Untuk Anak Perempuan Tunggal Dalam Adat Batak Toba. *Mizan: Jurnal Ilmu Hukum*, Vol. 11, No. 1, (2022), pp. 43-51.

³⁰ Dian Kemala Dewi, "Hak Waris Perempuan Menurut Hukum Adat Batak Toba Sebelum Dan Sesudah Keluarnya Keputusan MA. No. 179k/SIP/1961" 14, no. 4 (2020): 585–601.

³¹ Interview with Bapak Andri dan Ibu Harti, in Jakarta, Juli 2022.

According to Ustad Zulfa, the caretaker of the Lirboyo Islamic boarding school, the distribution of Hibah can be a solution to inheritance disputes. However, Hibah cannot replace inheritance because inheritance already has its rules in the Qur'an and hadith. The inheritance is divided according to the rules of Islamic law, and there is no objection. However, if afterward there are objections and disputes, an agreement is made that the share of men can be granted to women so that their share is equal to men. Therefore this is not an inheritance anymore, but the male share is distributed to the female.³²

However, in the case of the distribution of Hibah among the Batak community, Hibah is a solution to give property rights to girls who traditionally do not have inheritance rights from their parents. The inheritance rights are given even if the number may not be the same as that of a son³³. In some Minang communities whose parents' assets go to their nephews, the distribution of Hibah is a solution for girls to get their property rights, in *pusako rendah*³⁴.

The Factors of Hibah which is Commonly Used in Lieu of Inheritance

1. The Power of Customary Law within the Community

The very strong implementation of customary law seems to be influenced by the shift in views and values that live in the community, especially those related to inheritance. Thus, the shift in views and judgments in inheritance law has shifted along with the development of society itself. According to Eugen Ehrlich "*At the present as well as at any other time, the center of gravity of legal development lies not in legislation, not in juristic science, nor judicial decision, but in society itself*"³⁵. The factors that influence the cause of the shift are as follows³⁶:

- a. The shift in family life from large family life (kinship) towards prioritizing the interests of small family life (nuclear family) has created a closer relationship

³² Interview with a supervisor in Pondok Pesantren Lirboyo Jawa Timur, October 19, 2019.

³³ Dewi, "Hak Waris Perempuan Menurut Hukum Adat Batak Toba Sebelum Dan Sesudah Keluarnya Keputusan MA. No. 179k/SIP/1961."

³⁴ Yustisia, "Hibah Harta Pusako Tinggi Pada Masyarakat Sariak Sungai Pua Kabupaten Agam (Sumatera Barat)."

³⁵ Achmad Ali, *Menguak Teori Hukum Dan Teori Peradilan* (Jakarta: Kencana Prenada Media Group, 2012).

³⁶ Runtung Sitepu, "Kapita Selekta Hukum Adat" (Medan, 2012).

of solidarity between husband and wife and children. This situation affects the husband and wife's view of the position of their wealth in marriage.

- b. Improvement in the field of education where men and women have the same opportunity to pursue the highest level of knowledge and work in the community causes the wife's participation in acquiring wealth to be greater, even sometimes exceeding that of the husband.
- c. Improvement in the field of transportation and information technology has caused the mobilization of people so quickly. Several events that occur in other places and even in any part of the world can quickly be read, heard, or seen through various modern means of communication, so there are almost no regions in Indonesia isolated. This certainly affects the mindset of the community, including in the field of marital property law.

An academic expressed his opinion that the issue of Hibah and inheritance indicates that customary law is more alive in the midst of society. For example, in Aceh, it seems that what Snouck Hurgronje concluded is correct, that what works in Aceh is customary law, not sharia. This can still be proven in Aceh, where most of the people do not practice Islamic inheritance law and prioritize customary inheritance law.³⁷

This means that the practice of grants as a substitute for inheritance has become a living law in the community (living law). Factors that influence the practice of grants as a substitute for inheritance are humanistic (human reasons), customs and benefits.

Customary law also has similarities in nature, for example, there is a similarity in the model of Hibah distribution among the Javanese and Gayo Takengon communities. It is similar in terms of the property which is divided entirely. Parents follow one of the children, and the second similarity is that parents take part in his life, so it is not entirely given to the heirs. This residual property is called the *Pematang* treasure for the Gayo Takengon community and the *Warisan gantung* among the Javanese people.

³⁷ Interview with an Islamic Law scholar at IAIN Langsa, October 2019.

2. Islam inculcates the Ummah with *Maslahah*

The element of avoiding family conflict and peace is one of the reasons for grants in lieu of inheritance. There is a strong belief in the community that this is also recommended by Islamic teachings. That promoting peace and avoiding conflict is a benefit recommended by Islam.

Moreover, Hibah that refers to customary law does not set a rigid portion but is based on family agreements. This customary law does not recognize the term *legitime portie* (absolute part), where the heirs inheritance rights have been determined for a certain part of the inheritance as regulated in Article 913 of the Civil Code (KUHPerduta), or in the Al-Quran Surah An-Nisa which discusses inheritance.

Avoiding conflict is the most important thing in the division of property to achieve comfort and peace. People do not think negatively because they are comfortable, and for them comfort is justice.

In general, this action is a preventive measure. Each tribe has a diverse culture and prioritizes taste and preventive actions which are always preceded. Those are the tribes that have a high culture like the Javanese and Gayo tribes earlier. Thus, they prioritize preventive measures. A lot of inheritance is distributed when the parents are still alive to avoid divisions and disputes.³⁸

3. Islam encourages to leave strong descendants

Children should live well as Allah mentioned in the Qur'an that we should not leave a weak generation in terms of faith and economy.

وَلْيَخْشَ الَّذِينَ لَوْ تَرَكَوْا مِنْ خَلْفِهِمْ ذُرِّيَّةً ضِعَافًا خَافُوا عَلَيْهِمْ فَلْيَتَّقُوا اللَّهَ وَلْيَقُولُوا قَوْلًا سَدِيدًا

“And let those [executors and guardians] fear [injustice] as if they [themselves] had left weak offspring behind and feared for them. So let them fear Allah and speak words of appropriate justice. (An-Nisa [4]: 9).”

³⁸ Interview with Dr. Joni, a Sociologist in Takengon, October 2019.

Although the inheritance of property left by someone to his/her heir is not a factor that can guarantee the life of the heir.³⁹ Religion is a role of thinking and a way of life of the heirs.

4. The Support for Indonesian Positive Law

The implementation of Hibah as a substitute for inheritance has become popular in the community as well because of the support of positive Indonesian law, which includes an acknowledgment of Hibah that can be considered inheritance later when parents die.

In this context, Hibah can be recognized as inheritance, namely, the Civil Code relates to *inbreng* (income). In the Civil Code, it is stated that Hibah has a close relationship with inheritance because Hibah provides income (*inbreng*)⁴⁰. *Inbreng* (Income) is the process of considering the gift of goods made by the person who left the inheritance while he was still alive to the heirs.⁴¹ All type of Hibah is given to the heirs in a straight line down (children, grandchildren, and so on) unless the heirs expressly exempt them from income as if they were a down payment (advanced payment) on the heirs' share of the inheritance left by the testator.

Inbreng (Income) is regulated in Article 1086 to Article 1099 of the Civil Code (KUHPerdata). The calculation must be carried out by the heirs of the person who left the inheritance, namely children, grandchildren, and so on down, except when the person who left the inheritance expressly exempts them from this share while the calculation is carried out by other heirs only if this is agreed by the person who left the inheritance. This practice is also accommodated by Article 211 of KHI which explicitly states that Hibah from parents to their children can be considered an inheritance.

The perspective of the Civil Code (KUHPerdata) and the KHI both prioritize the *legitime portie* section. The Hibah is categorized as an inheritance bundle. If the

³⁹ Property is not a determinant of a person's faith, even so, we are required to be rich, this is as mentioned in a hadith narrated by Abu Na'im, that the Prophet once said "*poverty brings you closer to disbelief*".

⁴⁰ Djaja S. Meliala, *Hukum Perdata Dalam Perspektif BW* (Bandung: Nuansa Aulia, 2014).

⁴¹ Ramulyo, *Perbandingan Hukum Kewarisan Islam Dengan KUHPerdata*.

testator has died, the heir is considered to have received the inheritance. However, if the *legitime portie* is not fulfilled, the Hibah can be recalculated.

Although there is a deviation in the implementation of the Hibah as a substitute for an inheritance, for example, the limit on the number of Hibah according to the provisions of KHI is 1/3. Some people do not limit the number of their Hibah, and it is more of a mutual agreement. According to KHI, the practice of handing over Hibah is done in a recorded manner, but in reality, some people practice grants verbally only.

The Hibah given by the Donor while he/she is still alive can be considered a solution in the distribution of inheritance to the heirs ⁴². The opening of positive law on Hibah does not mean that Hibah can be canceled either as a Hibah alone or as an inheritance ⁴³.

Inheritance Law is among the Three Laws of the Indonesian Legal System

In terms of the implementation of inheritance law, the Indonesian Muslim community is among the three laws; customary law, Islamic law, and positive law. In terms of inheritance and distribution of property, most of them prefer customary law as their obedience to Islamic law and state law ⁴⁴. John R. Bowen called this position the *compting norm* ⁴⁵, where the legal competition takes place.

With this legal competition, Islamic law as a religious law should be obeyed by its adherents. In fact, in terms of inheritance distribution, some Indonesian Muslims do not want to share their inheritance with the Islamic inheritance system. They are more likely to divide the property before death.

In terms of the distribution of Hibah as a substitute for an inheritance, sociological factors play an important role. The Muslim community knows that Islamic law adopts 'uruf or adat. 'Uruf or custom is accepted as one of the sources of

⁴² M. Nur Kholis Al-Amin, "Hibah Orang Tua Kepada Anak Sebagai Pengganti Waris: Tela'ah Hermeneutika Terhadap Pasal 211 Kompilasi Hukum Islam," *Al-Ahwâl: Jurnal Hukum Keluarga Islam* 6, no. 1 (2013).

⁴³ Azni, "Eksistensi Hibah Dan Posibilitas Pembatalannya Dalam Perspektif Hukum Islam Dan Hukum Positif Di Indonesia," *Jurnal Pemikiran Islam* 40, no. 2 (2015): 100–109.

⁴⁴ Azhari Akmal Tarigan, "Pelaksanaan Hukum Waris Di Masyarakat Karo Muslim Sumatera Utara," *Ahkam XIV*, no. 2 (2014).

⁴⁵ John Bowen, *Islam, Law, and Equality in Indonesia: An Anthropolgy of Public Reasoning*. (London: Cambridge University Press, 2003), p. 5.

law in Islam. *Al-Adah almuhakammah* (customs are law). As long as the law does not conflict with the principles of Islamic law and prioritizes the common good, the *'uruf* and custom are considered as not violating the law. Therefore, when customary law exists and creates peace and benefit, then the law is considered accepted by religious law.

D. Conclusion

The patterns of implementation of Hibah in Lieu of Inheritance can be categorized into two:

1. The pattern of distribution of all assets to their children. The size of the portion depends on deliberation and agreement but in general, it is divided equally between boys and girls. Parents do not get any parts. They live with their children. This Hibah is considered an inheritance when their parents die. In the Gayo Takengon community, this is referred to as *Nas* property.
2. The pattern of distribution of the majority of assets to children, and the amount of the portion divided generally depends on deliberation and agreement, usually divided equally between men and women. Parents take their share. In the future, when a parent dies, his share of the property will be inherited by dividing it again according to the agreement or inherited by the child who takes care of the parent. This depends on the agreement. This parental share of the property is called *Pematang* property among the Gayo Takengon community or it is called *warisan gantung* (premature inheritance) among the Javanese people.

The reasons for Hibah given by parents to children are very diverse. The most widely cited reason is to avoid conflict among family members. Therefore, parents usually divide their wealth in the form of grants. This is almost the reason for all families in all regions. The second most common reason is to avoid an unequal distribution of property between sons and daughters. Also, it is done so that the child is established and independent before the parents die so that the parents can die in peace.

Some parents say that this approach will let children be guided by their parents for example for business or entrepreneurship with these assets. Another reason is to give daughters property rights. In some indigenous communities, daughters sometimes do not receive the inheritance, for example, in the Batak community. Another reason is to avoid dividing the property to the heirs outside the nuclear family.

Of course, the practice of Hibah as a substitute for inheritance and the reason for this seems to fulfill justice in the community, but the principles of the Islamic law that are adhered to by the Muslim community are violated and neglected. Whereas Islamic teachings are believed to essentially provide justice and benefit. As a believing Muslim, perhaps the community should reconsider the teachings of their religion. Religious authorities such as the ulama should also discuss and provide in-depth socialization about the justice of Islamic inheritance law. Islam is believed to provide justice and benefit. This one has not been paid attention to in this study. Future researchers can use the research opportunity related to social justice and the benefits of Islamic inheritance law.

In Islam, the property given in the form of Hibah by a person to his child is intended to provide justice for those who are not entitled or do not receive an inheritance. To avoid disputes that may occur at a later date after the death of the donator, the Hibah should be made with the approval of all other families (heirs), so that the position of the assets of the Donee becomes clear, including the share of every heir after the Donor dies. The grant must be made in a written form (notary).

Hibah must not violate the rights of others as heirs, so the integrity of the family is maintained. Restrictions provided by law in terms of grants must be implemented properly. This is to avoid losses suffered by the heirs due to the Hibah. If there is a dispute, it should be resolved peacefully so that the balance disturbance that destroys family harmony can be returned to being harmonious and intact again. It also provides the same limitations. This also provides the same limitation in Hibah. This is intended to protect the rights of the heirs and to avoid losses suffered by the heirs whose share according to the law may not be reduced, so with the Hibah the share of the heirs becomes less than what should be received as the main

purpose of the Hibah, which is to continue the friendship and strengthen kinship relations.

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