

Legalization of Informal *Hibah* and *Wasiat* through *Isbat Hibah* and *Wasiat* in Religious Courts

Rahmat Hidayat^{1*}, Akh. Fauzi Aseri², M. Hanafiah³

^{1,2,3} Universitas Islam Negeri Antasari Banjarmasin, Indonesia

Abstract

Based on the Religious Judiciary Annual Report in 2020, there have been many lawsuits for *hibah* and *wasiat* in the religious courts due to informal *hibah* and *wasiat*. On the other hand, there are no rules governing the religious courts' authority in legalizing the practice of informal *hibah* and *wasiat*. This study initiated the discourse on the legalization of informal *hibah* and *wasiat* through *isbat hibah* and *wasiat* in the religious courts. Hence, what are *isbat hibah* and *wasiat* and their legal basis as a renewal of the religious courts' authority in Indonesia? This study is normative legal research in which legal norms in statutory regulations are examined as research objects. This study's results indicate that informal *hibah* and *wasiat* still occur in society, which raises social problems such as conflicts between recipients of informal *hibah* and *wasiat* and the heirs of informal *hibah* and *wasiat*. These social problems occur when the giver or recipient of informal *hibah* or *wasiat* passes away. Meanwhile, the subject or object of the related *hibah* and *wasiat* does not yet have a formal foundation. Legal problems related to informal *hibah* and *wasiat* lead to legality issues due to the absence of authentic evidence showing that the subject or related object has given or received a certain *hibah* or *wasiat*. Even though every legal action must be carried out legally and formally, The concept of *isbat hibah* and *wasiat* under the authority of religious courts aims to achieve the certainty, fairness, and legal benefits of informal *hibah* and *wasiat*.

Keywords: Legalization, informal *hibah* and *wasiat*, *isbat*, Indonesia Religious Courts.

*Corresponding author, email: rahmathidaiyat@gmail.com

Introduction

Philosophically, every property is essentially the property of Allah Swt, which is entrusted to humans to be used as best as possible. God said in the Qur'an, an-Najm verse 31: "*And to Allah belongs only what is in the heavens and what is in the earth so that He may reward those who do evil for what they have done and reward those who do good with a better reward. (heaven)*". Every property owned by a person while still alive or after death will later be distributed to close family, distant relatives, to certain social institutions in a certain way and purpose. In this regard, it can be done through several mechanisms such as *waris*, *hibah*, and *wasiat*.¹

Hibah, according to Maḏhab Ḥanafī scholars, is giving something without promising anything in return. To Maḏhab Mālikī scholars, it is giving something without reward to the person giving it, aka a gift. Meanwhile, Maḏhab Syāfiī scholars define *hibah* as giving property consciously while living.²

As for *wasiat*, Maḏhab Ḥanafī scholars say it is the act of a person who gives his right to another person to own something, either in the form of material or benefits voluntarily without compensation, whose implementation is suspended until the death of the person who declares the *wasiat*.³ According to Maḏhab Mālikī, Syāfiī dan Ḥanbalī scholars, *wasiat* id transactions that require the person who receives the *wasiat* to have the right to own one-third of the

¹ Abdul Ghofur Anshori, *Filsafat Hukum Hibah dan Wasiat di Indonesia* (Yogyakarta: Gadjah Mada University Press, 2011), p. 39.

² Abdurrahman Al-Jazīrī, *Kitāb al-Fiqh 'alā al-Maḏāhib al-Arba'ah*, Juz III (Beirut: Dār al-Kutub al-Ilmiyah, 1990), p. 208-209.

³ *Ibid.*, p. 310.

inheritance of the person who declares the *wasiat* after he dies.⁴

Juridically, the provisions on *hibah* and *wasiat* are regulated in Islamic law and applicable national law in Indonesia. In Islamic law, the basic legal provisions for *hibah* are regulated in the Qur'an surah al-Baqarah verse 177.⁵ The legal basis for *wasiat* in the Qur'an is in sura al-Baqarah verse 180.⁶ In addition, the provisions for *hibah* are also contained in the hadith narration of Bukhārī (hadith number 2621)⁷ and the provisions of *wasiat* in the hadith narrated by Bukhārī (hadith number 2738).⁸

The provisions on *hibah* in the Qur'an's Surah al-Baqarah verse 177 regarding the legal basis for *hibah*⁹ stipulate that *hibah*, or gifts of property, can be addressed to relatives, orphans, poor people, travelers, and beggars. The next word of Allah in the Qur'an, Surah al-Baqarah verse 180, is regarding the legal basis of *wasiat*. This verse contains an obligation for believers and pious people who are aware of the signs of their death to give *wasiat* for relatives left behind regarding their property.¹⁰ Although, in other contexts, the will obligation in this verse has been superseded by the inheritance verse.

Provisions on *hibah* and *wasiat* also refer to several hadiths, such as the hadith narrated by Imam Bukhari regarding *hibah* (No. 2621).¹¹ This hadith contains the Prophet's instructions regarding the prohibition of

⁴ *Ibid.*

⁵ Depag RI, *Al-Qur'an Terjemahan*, p. 39.

⁶ *Ibid.*, p. 40.

⁷ Muḥammad bin Ismail al-Bukhārī, *Ṣaḥīḥ al-Bukhārī* (Beirut: Dār al-Fikr, 2002), p. 629.

⁸ *Ibid.*, p. 676.

⁹ Depag RI, *Al-Qur'an Terjemahan*, p. 39.

¹⁰ *Ibid.*, p. 40.

¹¹ al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, p. 629.

withdrawing a *hibah*. Imam Bukhari also narrated the following hadith regarding the provisions of *wasiat* (No. 2738).¹² The hadith contains the instructions of the Prophet Muhammad. for every Muslim to make a *wasiat* about good deeds.

Viewed in the context of national law in Indonesia, the provisions on *hibah* and *wasiat* are regulated in several legal provisions. These provisions are regulated in the Compilation of Islamic Law, the Law on Religious Courts, and the Civil Code/ *Burgerlijk Wetboek* (BW).¹³

In this regard, the provisions on *hibah* and *wasiat* in Article 49 letters c and d of Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts. Furthermore, *hibah* provisions are regulated in Chapter VI Articles 210-214 of the Republic of Indonesia Presidential Instruction Number 1 of 1991 concerning the Dissemination of the Compilation of Islamic Law. The provisions of *wasiat* are regulated in Chapter V Articles 194-209 of the Compilation of Islamic Law. In addition, regarding *hibah* provisions are regulated in Chapter X of the Third Book concerning Engagements Articles 1666-1693 of the Civil Code, and *wasiat* provisions are regulated in Chapter XIII of the Second Book concerning Persons Articles 874-956 of the Civil Code.

In the Compilation of Islamic Law (KHI), *hibah* is regulated in 5 (five) articles starting from Article 210 to Article 214 as follows:

Article 210:

¹² *Ibid.*, p. 676.

¹³ Differences in the provisions of *hibah* and *wasiat* according to KHI and the Civil Code in Indonesia, especially in terms of recording *hibah* and *wasiat*. Wahyu Azikin, "Hibah dan Wasiat dalam Perspektif Hukum Perdata (BW) dan Kompilasi Hukum Islam," *Meraja Journal* Vol. 1, No. 3 (November 2018): p. 81.

- (1) A person at least 21 years old, reasonable and without coercion, may donate up to 1/3 of his property to another person or institution in the presence of two witnesses to be owned.
- (2) The donated property must be the grantor's right.

Article 211

Hibah from parents to their children can be counted as an inheritance.

Article 212

Hibah is non-refundable, except for parental *hibah* to their children.

Article 213:

Hibah given to a beneficiary who is sick near his death must obtain the approval of his heirs.

Article 214:

Indonesian citizens residing in foreign countries can make a *hibah* letter before the local Consulate or Embassy of the Republic of Indonesia as long as the contents do not conflict with the provisions of these articles.

Regarding *wasiat*, provisions in the Compilation of Islamic Law (KHI) are placed in Chapter V and regulated in 16 articles, starting from Article 194 to Article 209. The basic provisions regulated in it include:

- 1) Article 194 paragraphs (1), (2), and (3) of the KHI regulates the conditions for a person to make a *wasiat*, the inherited property, and the validity period of *wasiat*;
- 2) Article 195 paragraphs (1), (2), (3), and (4) KHI regulates the mechanism for carrying out *wasiat*, the maximum number of *wasiat* that can be justified, and the position of the will to the heirs;
- 3) Article 196 KHI stipulates that in a *wasiat*, it must clearly state who will receive the *wasiat*;
- 4) Article 197 KHI regulates matters relating to the cancellation of a *wasiat*;

- 5) Article 198 KHI regulates *wasiat* related to investments;
- 6) Article 199 KHI regulates the revocation of *wasiat*;
- 7) Article 200 KHI regulates depreciation of *wasiat*;
- 8) Article 201 KHI regulates *wasiat* that exceed one-third while the heirs disagree;
- 9) Article 202 KHI regulates the mechanism for *wasiat* that is not sufficient for the *wasiat*;
- 10) Article 203 paragraphs (1) and (2) KHI regulates the storage of *wasiat* and what if the will is revoked;
- 11) Article 204 paragraphs (1), (2), and (3) KHI regulates what if the testator dies;
- 12) Article 205 KHI regulates *wasiat* in wartime conditions;
- 13) Article 206 KHI regulates *wasiat* in transit;
- 14) Article 207 KHI regulates the prohibition of granting *wasiat* to parties who provide maintenance services for testators;
- 15) Article 208 KHI regulates the prohibition of *wasiat* against Notaries;
- 16) Article 209 paragraphs (1) and (2) KHI regulates for whom the will does not apply, the obligatory will for adoptive parents, the amount and the obligatory *wasiat* for adopted children, and the size.

Provisions for *hibah* and *wasiat* are also regulated in Article 49 letters c and d of Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts. In the latest development, the Law on Religious Courts has been amended with the second amendment through Law Number 50 of 2009.

In the Civil Code/ *Burgerlijk Wetboek* (BW), provisions for *hibah* are regulated in Chapter X of the Third Book concerning Engagements Articles 1666-1693 of the Civil Code or a total of 27 (twenty-seven) articles. *Hibah* in the Civil Code stipulated in Book III concerning engagement law. Provisions of the Civil Code in Chapter X regarding

hibah consist of four parts. The first part is regulated in Articles 1666 - 1675. The Civil Code regulates general provisions. The second part is regulated in Article 1676-1681 of the Civil Code, which regulates the ability to give and receive *hibah*. The third part is regulated in Article 1682-1687 of the Civil Code, which regulates how to donate something. The fourth part is regulated in Article 1688-1693 of the Civil Code, which regulates the revocation and cancellation of *hibah*.

Regarding the provisions of *wasiat*, it is regulated in Chapter XIII of the Second Book concerning Persons, Articles 874-956 of the Civil Code, and Chapter XIV of Articles 1005-1022 of the Civil Code, or a total of 148 articles. *Wasiat* in the Civil Code is regulated in Book II concerning material things. The provisions of the Civil Code in Chapter XIII regarding *wasiat* consist of nine parts. The nine parts of the *wasiat* are as follows:

- 1) Articles 874-894 Civil Code regarding general provisions;
- 2) Articles 875-912 Civil Code regarding the ability to make a *wasiat* or to obtain benefits from the said letter;
- 3) Articles 913-929 Civil Code concerning *legitieme portie* (absolute part) or part of inheritance according to law and withholding *hibah*, which reduces *legitimacy portie* (absolute part);
- 4) Articles 930-953 of the Civil Code concerning the form of a *wasiat*;
- 5) Article 9 54 -95 6 of the Civil Code concerning *wasiat* to appoint heirs;
- 6) Article 9 57 -9 72 of the Civil Code regarding *hibah wasiat*;
- 7) Articles 973-988 Civil Code regarding the appointment of heirs with a *wasiat* for the benefit of grandchildren and offspring of brothers and sisters;

- 8) Articles 989-991 Civil Code regarding the appointment of heirs with a *wasiat* of what the heirs or beneficiaries of the *wasiat* do not transfer or spend as an inheritance;
- 9) Articles 992-1004 Civil Code concerning revocation and annulment of *wasiat*;

Table 1. Legal Provisions on *Hibah* and *Wasiat* in Indonesia

No.	Case Field	The rule of law		
		Religious Courts Act	Islamic Law Compilation	Civil Code
1.	<i>Hibah</i>	Article 49 letter d Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts	Chapter VI Articles 210, 211, 212, 213, and 214 Instruction of the President of the Republic of Indonesia Number 1 of 1991 concerning Dissemination of Compilation of Islamic Law	Chapter X of the Third Book on Engagement Articles 1666-1693 of the Civil Code
2.	<i>Wasiat</i>	Article 49 letter c Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts	Chapter V Article 194-209 Presidential Instruction of the Republic of Indonesia Number 1 the Year 1991 concerning Dissemination of Compilation of Islamic Law	Chapter XIII, Second Book on Persons Articles 874-956 of the Civil Code

Sociologically, the implementation of *hibah* and *wasiat* has occurred in society since ancient times until now. For example, according to Minangkabau Customary Law, the verbal gift of land to the Koto Lansano. In this case, *hibah* made orally and in writing are valid according to Minangkabau customary law but have legal problems according to the Civil Code.¹⁴ Furthermore, the distribution of inheritance by oral *wasiat* in the Pesisir Malay Indigenous People, Kote Village, Singkep District, Lingga Regency, Riau Archipelago Province shows its distinction. The distribution of inheritance to the Pesisir Malay customary community is carried out by conveying a *wasiat* orally and witnessed by other family members and several witnesses but has the potential for disputes in the future.¹⁵

The practice of *hibah* and *wasiat* can be done orally or in writing in both formal and informal contexts. The formal action in question is a legal action confirmed by an authentic deed as perfect proof of the rules of civil law in Indonesia.¹⁶ An authentic deed is a deed made in a form determined by law by or before a public official (Notary) who is authorized to do so at the place where the deed was done.¹⁷

Suppose the implementation of the *hibah* and *wasiat* has fulfilled the pillars and conditions according to the provisions of the Shari'a and is carried out by and/or in front of an authorized official (Notary). In that case, the

¹⁴ Albert Tanjung, "Hibah Lisan Tanah Kaum Koto Lansano Menurut Hukum Adat Minangkabau," *Jurnal Ilmu Dan Budaya* Vol. 41, No. 63 (Juli 2019): p. 749.

¹⁵ Adriosa dan Sri Natin, "Pembagian Waris dengan Wasiat secara lisan di Masyarakat Adat Melayu Pesisir, Desa Kote, Kecamatan Singkep, Kabupaten Lingga, Provinsi Kepulauan Riau," *Universitas Gadjah Mada*, Tesis, 2011, p. 1.

¹⁶ Article 1870 of the Civil Code.

¹⁷ Article 1868 of the Civil Code.

hibah and *wasiat* are categorized as a formal *hibah* and *wasiat*. This refers to the provisions of Article 1870 of the Civil Code. *Hibah* and *wasiat* are formally confirmed in an authentic deed as a grant or will deed. Conversely, suppose the implementation of *hibah* and *wasiat* only fulfills the pillars and conditions according to the provisions of the Shari'a but is not carried out by and/or in front of an authorized official. In that case, the *hibah* and *wasiat* are categorized as informal *hibah* and *wasiat*.

Problems arise in informal *hibah* and *wasiat* later if the giver or even the recipient of the principal grant and will have passed away. Meanwhile, the subject or object of related *hibah* and *wasiat* have no formal foundation. This creates problems for the subject or object of *hibah* and *wasiat* among families, heirs to the managers of certain social institutions as recipients of informal *hibah*, and *wasiat* that are still alive. At least 1052 legal cases were handled by religious courts throughout Indonesia in 2020 due to informal *hibah* and *wasiat*.¹⁸

Based on the description above, it is essential to carry out legal reforms to solve the practice of informal *hibah* and *wasiat* in society. This is because there is no legal regulation to legalize informal *hibah* and *wasiat* if the giver or recipient of informal *hibah* and *wasiat* has passed away. Meanwhile, the subject or object of the related *hibah* and *wasiat* does not yet have a formal foundation. In this regard, legal ideas are carried out through the legalization of informal *hibah* and *wasiat* through *isbat hibah* and *wasiat* in religious courts.

¹⁸ Annual Report of the Republic of Indonesia Religious Courts Year 2020. See also the Electronic Documents of Decisions of Religious Courts throughout Indonesia through the Indonesian Supreme Court Decision Directory Application at the link <https://putusan3.mahkamahagung.go.id>.

Overview of Informal *Hibah* and *Wasiat*

The implementation of *hibah* and *wasiat* has been typical in society since then. In general, the practice of *hibah* and *wasiat* in the community is carried out orally or in writing in formal and informal forms. For example, according to Minangkabau Customary Law, the verbal gift of land to the Koto Lansano.¹⁹ Furthermore, the distribution of inheritance by oral *wasiat* in the Pesisir Malay Indigenous People, Kote Village, Singkep District, Lingga Regency, Riau Archipelago Province.²⁰

If the implementation of the *hibah* and *wasiat* only fulfills the pillars and conditions according to the provisions of the Shari'a but is not carried out by and/or in front of an authorized official (Notary), then the *hibah* and *wasiat* are categorized as an informal *hibah* and *wasiat*. This refers to the provisions of Article 1870 of the Civil Code. It can be understood that informal *hibah* and *wasiat* are *hibah* and *wasiat* that have not been confirmed in an authentic deed in the form of a deed of *hibah* or *wasiat*.

The reality in Muslim communities in Indonesia is that there is still widespread practice of *hibah* and *wasiat* orally and in informal writing based on a sense of mutual assistance and social interests without going through applicable legal or administrative procedures. This understanding of the community can be due to honesty and mutual trust between one another. For example, according to Minangkabau Customary Law, the verbal gift of land to the Koto Lansano. In this case, *hibah* made orally and in

¹⁹ Tanjung, "Hibah Lisan Tanah Kaum Koto Lansano Menurut Hukum Adat Minangkabau."

²⁰ Adriosa dan Natin, "Pembagian Waris dengan Wasiat secara lisan di Masyarakat Adat Melayu Pesisir, Desa Kote, Kecamatan Singkep, Kabupaten Lingga, Provinsi Kepulauan Riau."

writing are valid according to Minangkabau customary law but have legal problems according to the Civil Code.²¹

Public awareness of registering *hibah* and *wasiat* is still low, generally due to conventional views.²² The community considers *hibah* and *wasiat* sufficient if they comply with religious provisions without formal registration.

The practice of informal *hibah* and *wasiat* is generally also intended for families and the general public who are socially oriented. The giver of the *hibah* and *wasiat* practices this informal *hibah* and *wasiat* to obtain two goodness, namely the goodness of the charity of the *hibah* and *wasiat* and the goodness of his friendship to the person giving it. However, on the other hand, informal *hibah* and *wasiat* often cause problems, especially if they are not accompanied by written evidence that is recorded according to the applicable law.

In many cases, informal *hibah* and *wasiat* that do not yet have formal legality are caused by several things, namely:²³

- a. There is a view that the procedure for registering *hibah* and *wasiat* is impractical;
- b. Inadequate registration fees for informal *hibah* and *wasiat*;
- c. Objects of informal *hibah* and *wasiat* are in dispute.

Based on data obtained from the Annual Report of the Indonesian Religious Courts Agency for 2020 and Electronic Documents of Decisions of Religious Courts throughout

²¹ Tanjung, "Hibah Lisan Tanah Kaum Koto Lansano Menurut Hukum Adat Minangkabau."

²² Annual Report of the Republic of Indonesia Religious Courts Year 2020. See also the Electronic Documents of Decisions of Religious Courts throughout Indonesia through the Indonesian Supreme Court Decision Directory Application at the link <https://putusan3.mahkamahagung.go.id>.

²³ *Ibid.*

Indonesia on the Indonesian Supreme Court's Decision Directory website, it shows that in 2020 there were many disputes over informal *hibah* and *wasiat*. It was then sued by the religious court as follows.

Table 2. Informal *Hibah* and *Wasiat* in Religious Courts throughout Indonesia in 2020²⁴

No.	Case Type	Number of Cases
1.	Informal <i>Hibah</i> Lawsuit	147
2.	Informal <i>Wasiat</i> Lawsuit	8
3.	Inheritance Lawsuits containing elements of Informal <i>Hibah</i>	460
4.	Inheritance Lawsuit, which contains elements of Informal <i>Wasiat</i>	437
Total Number of Cases		1052

As illustrated in the data in the related table, it shows that the practice of *hibah* and *wasiat*, both verbally and in informal writing, is still a lot going on, raising social problems in the community. In this case, problems arise in the future if the giver or even the recipient of the main *hibah* and *wasiat* has died. Meanwhile, the subject or object of related *hibah* and *wasiat* does not yet have a formal basis. This causes social problems for the subject or object of *hibah* and *wasiat* among families, heirs to social institutions as recipients of informal *hibah*, and *wasiat* that are still alive.

²⁴ *Ibid.*

Some examples of cases of claims for informal *hibah* and *wasiat* in the Religious Courts include: 1. Decision Number 677/ Pdt.G/2020/PA.Kds in the form of a lawsuit for cancellation of informal *hibah* at the Kudus Religious Court in 2020; 2. Decision Number 9/Pdt.G/2020/PA.Thn in the form of a lawsuit for canceling an informal *wasiat* at the Religious Court in 2020; 3. Decision Number 288/Pdt.G/2020/MS.Bna is an inheritance lawsuit containing elements of an informal *hibah* dispute at the Banda Aceh Syar'iyah Court in 2020; 4. Decision Number 52/Pdt.G/2020/PA.Kis in the form of an inheritance lawsuit containing elements of an informal *wasiat* dispute at the Kisaran Religious Court in 2020.²⁵

There are several studies related to informal *hibah* and *wasiat*. Research conducted by Suisno²⁶ shows that the legal consequences of a *hibah* given to one of the heirs without the approval of the other heirs and not made authentically can be canceled because there is no approval from the other heirs. Then, research by Adam Lukmanto and Munsharif Abdul Chalim²⁷ shows that the legal consequences of a *wasiat* without a notarial deed make the will vulnerable to lawsuits from interested parties. This is because the evidence is not strong enough, and there is no legal certainty.

²⁵ Electronic Documents of Decisions of Religious Courts throughout Indonesia through the Application Directory of the Supreme Court of the Republic of Indonesia at the link <https://putusan3.mahkamahagung.go.id>.

²⁶ Suisno, "Tinjauan Yuridis Normatif Pemberian Hibah dan Akibat Hukum Pembatalan Suatu Hibah Menurut Kompilasi Hukum Islam (KHI) dan Kitab Undang-Undang Hukum Perdata," *Jurnal Independent* Vol. 5, No. 1 (Juni 2017): p. 16.

²⁷ Adam Lukmanto dan Munsharif Abdul Chalim, "Tinjauan Hukum dan Akibatnya terhadap Wasiat Tanpa Akta Notaris Ditinjau dari Kompilasi Hukum Islam dan Kitab Undang-Undang Hukum Perdata," *Jurnal Akta* Vol. 4, No. 1 (Maret 2017): p. 29.

The legal problems related to the practice of informal *hibah* and *wasiat*, both orally and in writing through private deeds, lead to legality issues legally. This is due to the absence of authentic evidence showing that the subject or related object has given or received a certain *hibah* and *wasiat*. Even though every legal action must be carried out legally and formally, this refers to the provisions of Article 1870 of the Civil Code that a formal action is a legal action confirmed by an authentic deed as perfect evidence in the rules of civil law in Indonesia. It aims to provide legal protection for the subject and object of *hibah* and *wasiat* and be authentic evidence for the subject and object of *hibah* and *wasiat* if disputes arise later.

Some Examples of Legal Cases in Religious Courts related to Informal *Hibah* and *Wasiat*

There are several examples of legal cases in the Religious Courts regarding Informal *Hibah* and *Wasiat*. The following will describe the position of the legal case:

1. Decision Number 677/Pdt.G/2020/PA.Kds is in the form of a lawsuit for canceling informal *hibah* at the Kudus Religious Court in 2020. The subject matter of this case is the Plaintiff, the child suing an informal *hibah* against land objects that were granted informally by his father, who had passed away as the grantor to the Defendant, who is also the brother of the Plaintiff. This case was decided by granting the revocation of the case because the Plaintiff withdrew his case before the panel of judges examining the case examined the main case;²⁸

²⁸ Electronic Documents of Decisions of Religious Courts throughout Indonesia through the Application Directory of the Supreme Court of the Republic of Indonesia at the link <https://putusan3.mahkamahagung.go.id>.

2. Decision Number 9/Pdt.G/2020/PA.Thn is in the form of a lawsuit for canceling an informal *wasiat* at the Religious Court in 2020. The subject matter of this case is the Plaintiff, namely the child's party suing an informal *wasiat* on land and garden objects inherited informally by his father, who has passed away as testamentary against the Defendant, who is also the mother of the Plaintiff. In this case, an examination of the principal case has been carried out. This case was decided by an unacceptable lawsuit because the Plaintiff's lawsuit was considered formally recorded by the panel of judges examining the case;²⁹
3. Decision Number 52/Pdt.G/2020/PA.Kis is an inheritance lawsuit containing elements of an informal *hibah* dispute at the Kisaran Religious Court in 2020. The subject matter of this case is the Plaintiff, the child as the heir suing the inheritance containing dispute over informal grants against land objects informally bequeathed by his father who passed away as the grantor to the Defendant, also the brother of the Plaintiff. In this case, an examination of the principal case has been carried out. This case was decided with an unacceptable lawsuit because there was an exception from the Defendant who stated the lawsuit was vague so that the exception was accepted, and the Plaintiff's lawsuit was considered formal by the panel of judges examining the case;³⁰
4. Decision Number 288/Pdt.G/2020/MS.Bna is an inheritance lawsuit containing elements of an informal *wasiat* dispute at the Banda Aceh Syar'iyah Court in 2020. Regarding the subject matter of this case, it is an

²⁹ *Ibid.*

³⁰ *Ibid.*

inheritance claim among grandchildren as heirs, which contains an informal *wasiat* dispute against land objects that were inherited informally by the heir who has passed away. This case was decided by granting the revocation of the case because the Plaintiff withdrew his case before the panel of judges examining the case examined the main case;³¹

The conception of *Isbat Hibah* and *Wasiat* to Informal *Hibah* and *Wasiat* as Legal Reform for the Authority of the Religious Courts in Indonesia

The legal provisions in Article 49 of Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts, which was most recently amended by Law Number 50 of 2009, emphasize the authority of the religious courts in adjudicating cases on *hibah* and *wasiat*. The provisions of Article 49 of the Law on the Religious Courts stipulate that:³² "The Religious Courts have the duty and authority to examine, decide and resolve cases at the first level between Muslim people in the areas of a. marriage; b. heir, c. will, d. grant, e. waqf, f. zakat, g. infaq, h. alms and i. sharia economy".

Explanation of Article 49 letter c of Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts contains provisions that what is meant by a *wasiat* is the act of a person giving an object or benefit to another person or applicable legal institution/entity after the giver dies. The explanation of Article 49 letter d of Law Number 3 of 2006 concerning amendments to Law Number 7 of 1989 concerning Religious Courts contains a provision that what is meant by a *hibah*

³¹ *Ibid.*

³² Article 49 of Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts.

is the giving of an object voluntarily and without compensation from a person or legal entity to another person or legal entity to own.

Based on the explanation of Article 49 letters c and d of the Law on Religious Courts, there is no explicit confirmation regarding the form of authority of the religious courts in *hibah* and *wasiat*. In a sense, is the authority of the religious court limited only in cases of dispute/claim (*contentious*)³³ in the field of *hibah* and *wasiat* or includes cases that do not contain an element of dispute, such as requests for determination or *isbat* (*volunteers*)³⁴ against informal *hibah* and *wasiat*. However, when viewed literally, Article 49 letters c and d Number 3 of 2006 concerning amendments to Law Number 7 of 1989 concerning Religious Courts open up opportunities for different interpretations of the law.³⁵

The first legal interpretation, cases of *hibah* and *wasiat*, which are the authority of the religious courts, are only in the form of disputes/claims or in the form of contesting a right (*contentious*). This is not included in cases that do not contain an element of dispute, such as cases of application for *hibah* determination/*isbat* informal *hibah* and *wasiat* (*volunteers*). If so, there *wasiat* be a legal

³³ A *contentious* lawsuit or *contentious jurisdiction* is a lawsuit that contains a dispute between two or more parties. Hazar Kusmayanti, "Tindakan Hakim dalam Perkara Gugatan Wanprestasi Akta Perdamaian," *Jurnal Yudisial* Vol. 14, No. 1 (April 2021): p. 105.

³⁴ *Voluntair* lawsuits that are unilateral in nature (*ex parte*), namely problems submitted to be resolved by the court do not contain disputes (*undisputed matters*), are purely unilateral in nature (*for the benefit of one party only*), without disputes with other parties, and no other person or third party is drawn as an opponent (defendant). Kusmayanti, "Tindakan Hakim dalam Perkara Gugatan Wanprestasi Akta Perdamaian."

³⁵ This legal interpretation is carried out by researchers who conduct research in the field of *hibah* and *wasiat*. In addition, the researcher also served as a judge in the Religious Courts.

vacuum (*recht vacuum*), both regarding the void of legal norms and the vacancy of the legal authority of the religious courts in handling cases that do not contain elements of disputes in the field of *hibah* and *wasiat*, such as cases of application for determination or *isbat hibah* and *wasiat* (*volunteers*).³⁶

The second legal interpretation, cases of *hibah* and *wasiat* under the authority of the religious courts, include cases of disputes/claims for *hibah* and *wasiat* (*contentious*) as well as cases that do not contain an element of dispute, such as cases of application for determination or *isbat hibah* and *wasiat* (*volunteers*). This is because the provisions in Article 49 letters c and d of the Law on Religious Courts and the article's explanation do not contain explicit restrictions on *hibah* and *wasiat* cases. However, it only mentions the authority of the religious court in the field of *hibah* and *wasiat* and their definitions. The explanation of articles regarding *hibah* and *wasiat* in the Religious Courts Law is not in the form of details of *hibah* and *wasiat*, such as the explanation of articles in the field of marriage, such as divorce claims and marriage certificates and explanations in the field of inheritance, such as inheritance claims and the determination of heirs.

Based on the description above, carrying out legal reform through amendments to the current religious court law is crucial. This solved the informal practices of *hibah* and *wasiat* in society. Regarding this matter, efforts can be

³⁶ The judiciary may not reject a case on the grounds that there is no law governing it. Therefore, the progress of judges is needed, not only in applying the law, but also in finding the law (*rechtsvinding*) and even forming the law (*rechtsschepping*). In addition, judges must explore the values of justice, certainty and legal benefits for the community or parties seeking justice. See Pasal 5 dan Pasal 10 Undang-Undang Nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman.

made to legalize informal *hibah* and *wasiat* through *isbat hibah* and *wasiat* in the religious courts as a legal reform of the authority of the religious courts in Indonesia.

Legal reform is often interpreted as updating a law's concept or basic idea. Legal reform is a planned and continuous effort to build a legal system in terms of substantive (legal content) and legal institutions.³⁷ Including the normative and practical side, it covers all aspects of life to establish justice and order in society.

Concerning the direction of legal reform in this study, it is in the form of updating the legal substance. The researcher argues that there is a legal vacuum in the normative framework regarding the authority of the religious courts in the field of *hibah* and *wasiat*. Therefore, it is vital to carry out legal construction to fill the void of legal norms regarding the authority of the religious courts in handling cases of *isbat hibah* and *wasiat* that occur in the community.³⁸

Legal reform in this study aims to solve legal and social problems related to informal *hibah* and *wasiat* in the community. In this regard, efforts can be made to legalize informal *hibah* and *wasiat* through *hibah* and *wasiat* in the religious courts.

The definition of *isbat hibah* and *wasiat* in religious courts is the ratification or determination of informal *hibah*

³⁷ Rocky Marbun, *Kamus Hukum Lengkap* (Jakarta: Visi Media, 2012), p. 340.

³⁸ Legal vacancies can be filled by judges, so judges in this case turn into legislators. Law enforcers are expected by justice seekers to refrain from discriminatory actions because it will lead to injustice. Discriminatory behavior occurs when there is different legal treatment in society. See Ratnawati et al., "Law Enforcement in Indonesia: A Review from Legal Apparatus Roles," *Journal of Law, Policy and Globalization* Vol. 58 (2017): p. 57.

and *wasiat* by the religious courts.³⁹ The ratification or determination of informal *hibah* and *wasiat* is carried out by the panel of judges of the religious court on the subject, object, and practice of *hibah* and *wasiat* that do not yet have authentic evidence in the form of *hibah* deeds and *wasiat*. Even though the *hibah* and *wasiat* have fulfilled the material provisions in the form of fulfilling the pillars and conditions of the *hibah* and *wasiat* in Islamic law, because they were carried out verbally/informally in writing, they have not obtained legitimacy according to the provisions stipulated in the laws and regulations in force in Indonesia.

It is understood that the practice of *hibah* and *wasiat* that have fulfilled the pillars and requirements of Islamic law but are not carried out by and/or in the presence of an authorized official (Notary) are categorized as informal *hibah* and *wasiat*. To solve this problem, it is essential to reform the law through efforts to legalize informal *hibah* and *wasiat* through *isbat hibah* and *wasiat* in the religious courts. This is because no legal regulation in Indonesia regulates the legalization of informal *hibah* and *wasiat* if the giver or recipient of informal *hibah* and *wasiat* has passed away. Meanwhile, the subject or object of the related *hibah* and *wasiat* does not yet have a formal basis.

³⁹ Tim Penyusun, *Kamus Bahasa Indonesia* (Jakarta: Pusat Bahasa, 2008), p. 564. See also Penjelasan Pasal 49 huruf c dan d Undang-Undang Nomor 3 Tahun 2006.

Table 3. Legal Reform Scheme for Legalization of Informal *Hibah* and *Wasiat* through *Isbat Hibah* and *Wasiat* in the Religious Courts

PA Authority in the Field of <i>Hibah</i> and <i>Wasiat</i>	Legal Basis of Authority of PA in the Field of <i>Hibah</i> and <i>Wasiat</i>	Legal Vacuum in the Authority of the PA <i>Hibah</i> & <i>Wasiat</i>	Idea PA Legal Reform Authority in the field of <i>Hibah</i> & <i>Wasiat</i>
<p>The Religious Courts have the duty & authority to examine, decide, and settle cases at the first level between Muslim people, including in the field of <i>hibah</i> and <i>wasiat</i>.</p>	<p>Article 49 letters c and d of Law No. 3 of 2006 concerning Amendment to Law No. 7 1989 concerning the Religious Courts, which was last amended by Law No. 50 of 2009.</p>	<p>If the authority of the religious court in the field of <i>hibah</i> and <i>wasiat</i> is limited to disputes/claims for <i>hibah</i> and <i>wasiat</i> (<i>contentious</i>), then:</p>	<p>It is necessary to renew the legal authority of the religious courts in the field of <i>hibah</i> and <i>wasiat</i> covering cases that do not contain elements of the dispute. In this case, through the renewal of the authority of the religious court in handling cases of <i>isbat hibah</i> and <i>wasiat</i> (<i>volunteers</i>) to realize legal certainty.</p>
<p>So far, the authority of the religious courts in the field of <i>hibah</i> and <i>wasiat</i> is in the form of disputes/claims for <i>hibah</i> and <i>wasiat</i> (<i>contentious</i>).</p>		<p>There is a legal vacuum (<i>recht vacuum</i>), both regarding the void of legal norms and the vacancy of the legal authority of the religious court in handling <i>hibah</i> and <i>wasiat</i> cases that do not contain elements of dispute, such as cases of application for determination or <i>isbat hibah</i> and</p>	<p><i>Isbat hibah</i> and <i>wasiat</i> is the ratification or determination of informal <i>hibah</i> and <i>wasiat</i> by the religious court on the subject, object, and practice of</p>

<i>wasiat</i> (volunteers).	informal <i>hibah</i> and <i>wasiat</i> that have fulfilled the pillars and requirements of Islamic law but do not yet have authentic evidence in the form of a <i>hibah</i> deed and a <i>wasiat</i> deed. Meanwhile, the giver and/or recipient of the primary informal <i>hibah</i> and <i>wasiat</i> has passed away.
--------------------------------	---

Source: The results of the thoughts of researchers in legal research on the legalization of informal *hibah* and *wasiat* through *isbat hibah* and *wasiat* in the Religious Courts.

Based on legal research conducted by researchers, both on legal interpretations of the Law on Religious Courts as well as on various legal cases and decisions of religious courts regarding informal *hibah* and *wasiat*, several categories of informal *hibah* and *wasiat* were found that could be submitted for approval through *isbat hibah* and *wasiat* in religious courts, among others:⁴⁰

- a. *Hibah* and *wasiat* are made informally, both verbally and in informal writing. In this case, related *hibah* and *wasiat* are not made and/or before the authorized official (Notary/PPAT);⁴¹

⁴⁰ Electronic Documents of Decisions of Religious Courts throughout Indonesia through the Application Directory of the Supreme Court of the Republic of Indonesia at the link <https://putusan3.mahkamahagung.go.id>.

⁴¹ Article 1868 Civil Code.

- b. The main subject, the giver or the recipient of the informal *hibah* or *wasiat*, has died. Meanwhile, the related *hibah* or *wasiat* does not yet have an authentic deed in the form of a *hibah* deed or *wasiat*;⁴²
- c. The implementation of informal *hibah* and *wasiat* has complied with the provisions of Islamic law. In the sense that it has fulfilled the pillars and conditions for the implementation of *hibah* and *wasiat* according to Islamic law;⁴³
- d. In the implementation of informal *hibah* and *wasiat*, it is carried out voluntarily, and there is no element of threat, coercion, or pressure from any party;⁴⁴
- e. There is a legal interest in submitting *isbat* informal *hibah* and *wasiat* to the Religious Courts. In this case, in order to obtain legal certainty over the implementation of informal *hibah* and *wasiat*;⁴⁵
- f. Submission of *isbat* informal *hibah* and *wasiat* to the Religious Courts is carried out by the core heirs of the subject of the informal *hibah* or informal *wasiat*.⁴⁶

Some of the objectives of *isbat hibah* and *isbat wasiat* as a renewal of the authority of the Religious Courts include:⁴⁷

⁴²Article 1870 of the Civil Code .

⁴³Article 210 Compilation of Islamic Law.

⁴⁴Article 617 of the Civil Code .

⁴⁵ Decree of the Chairman of the Supreme Court of the Republic of Indonesia Number: KMA/03/SK/IV/2006 concerning the Implementation of Book II Guidelines for the Implementation of Duties and Administration of the Religious Courts.

⁴⁶ *Ibid.*

⁴⁷ The results of the thoughts of researchers in legal research regarding the legalization of informal *hibah* and *wasiat* through *isbat hibah* and *wasiat* in the Religious Courts are related to various legal cases of claims for informal *hibah* and *wasiat* handled by the religious courts. See the 2020 Annual Report of the Religious Courts of the Republic of Indonesia. See also the Electronic Documents of Decisions of Religious Courts throughout Indonesia through the Application

1. Justify the implementation of the law on informal *hibah* and *wasiat*;
2. Provide legal protection to the subject and/or object of informal *hibah* and *wasiat*;
3. As a guarantee that there is no misappropriation and/or usurpation without rights to the object of informal *hibah* and *wasiat*;
4. Become authentic evidence against the implementation of the law of informal *hibah* and *wasiat*.

Construction of the Legal Basis for *Isbat Hibah* and *Wasiat* in the Religious Courts

The legal basis for *isbat hibah* and *wasiat* is philosophically juridical in the context of Islamic law, referring to the provisions of the Qur'an. In this regard, the word of Allah in surah al-Baqarah verse 282 emphasizes the importance of a record as the legality of various muamalah transactions is: "*O you who believe, if you do not do charity in cash for a specified time, you should write it down.*" (Q.S. Al-Baqarah verse 282)

Regarding the juridical basis in the context of national law relating to cases of *isbat* for *isbat hibah* and *wasiat* in the religious courts, it refers to various applicable legal provisions. This includes statutory provisions, jurisprudence, and decisions of the Chief Justice of the Supreme Court which implicitly can be used as a legal basis for handling cases of *isbat hibah* and *wasiat* in the Religious Courts.

In connection with cases of *isbat hibah* and *wasiat* in the religious courts, it is necessary to carry out legal construction and find laws to fill the legal vacuum regarding

the legal basis. In this case, referring to several applicable legal provisions is necessary.

First, it is the legal provisions in the Judicial Powers Act. Article 5, paragraph (1) of Law Number 48 of 2009 concerning Judicial Power stipulates, "Judges and constitutional judges are obliged to explore, follow, and understand legal values and a sense of justice that lives in society."⁴⁸

If the word digging is interpreted, it can be assumed that the law already exists, but it is still hidden, so to find it, the judge must try to find it by exploring the legal values that live in society. Then, follow it and understand it so that decisions follow the sense of justice that lives in society.⁴⁹

Article 10 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power stipulates that: "The court is prohibited from refusing to examine, try and decide on a case filed on the pretext that the law does not exist or is unclear, but it is obligatory to examine and adjudicate it."⁵⁰

The provisions of this article give meaning to the judge as the main organ in a court and as the executor of judicial power, to receive, examine, and adjudicate a case and then make a decision or determination. Thus, the judge must find the law in a case even though the legal provisions are unclear or unclear.

Suppose the above legal provisions are connected with cases of *isbat hibah* and *isbat wasiat* in the religious court. In that case, the religious court institution cq the panel of judges examining the case is prohibited from refusing to

⁴⁸Article 5 paragraph (1) Law Number 48 of 2009 concerning Judicial Power.

⁴⁹ Legal voids can be filled by judges. Lihat Ratnawati dkk., "Law Enforcement in Indonesia: A Review from Legal Apparatus Roles," p. 57.

⁵⁰Article 10 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power.

examine, adjudicate and decide on every case, including cases of *isbat hibah* and *isbat wasiat*, if there is a seeking party justice that submits it to the religious court. Furthermore, religious court judges must explore the legal basis for law enforcement and justice in *hibah* and *wasiat*.

Second, the legal provisions in the Law on Religious Courts. In Article 49 of Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning the Religious Courts, the last amendment was made by Law Number 50 of 2009, which emphasizes the authority of the religious courts in adjudicating cases on *hibah* and *wasiat*. The provisions of Article 49 of the Law stipulate that: "The Religious Courts have the duty and authority to examine, decide and resolve cases at the first level between Muslim people in the fields of a. marriage; b. heir, c. will, d. grant, e. waqf, f. zakat, g. infaq, h. alms and i. sharia economy".⁵¹

Based on the elucidation of Article 49 letters c and d of the Religious Courts Law, there is no explicit confirmation regarding the form of authority of the religious courts in *hibah* and *wasiat*. In a sense, is the authority of the religious courts limited only in cases of disputes/lawsuits (*contentious*) in the field of *hibah* and *wasiat*, or does it also cover cases that do not contain an element of dispute, such as requests for determination or *isbat (voluntary)* for informal *hibah* and *wasiat*. Therefore, judges can interpret or interpret the law so long as a case is still within the scope or area of the absolute authority of the religious courts and as long as there are interests of the parties seeking justice, then cases of petition (*voluntary*) in the field of *hibah* and *wasiat* fall under the authority of the religious courts.

⁵¹Article 49 of Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts which was last amended by Law Number 50 of 2009

The elucidation of Article 60 of Law Number 7 of 1989 concerning the Religious Courts also emphasizes that the legal products of the religious courts consist of two kinds: decisions and decisions. Based on the elucidation of Article 60, what is meant by determination is a court decision on an application case, while a decision is a court decision on a lawsuit based on the existence of a dispute.⁵² Suppose these provisions are related to the authority of the religious courts in the field of *hibah* and *wasiat*. In that case, it can be concluded that the religious courts have the authority to handle *hibah* and *wasiat* cases, both lawsuits (*contentious*) with legal products in the form of decisions and petition cases (*voluntary*) with legal products in the form of decisions.

Third, the provisions of several Jurisprudence of the Supreme Court of the Republic of Indonesia's Religious Chamber in cases of *hibah* and *wasiat*. In this case, the Jurisprudence of the Chamber of Religion of the Supreme Court of the Republic of Indonesia Number 27 K/AG/2002 in the *hibah* claim case. Regarding the rule of law in jurisprudence, namely: "Someone who argues that he has land rights based on a *hibah*, must be able to prove ownership of the *hibah* as referred to in Article 210 paragraph (1) KHI".⁵³ Article 210, paragraph (1) of the KHI relates to the provisions of pillars, conditions, and procedures for *hibah*, according to KHI. Understandably, the rule of law in jurisprudence implicitly determines that informal *hibah* can be legalized if it can be proven in a religious court that they have fulfilled the pillars, requirements, and procedures for *hibah*, according to KHI.

⁵²Article 60 and its explanation in Law Number 7 of 1989 concerning the Religious Courts.

⁵³Decision of the Supreme Court of the Republic of Indonesia Number 27 K/AG/2002.

The jurisprudence of the Chamber of Religion of the Supreme Court of the Republic of Indonesia is Jurisprudence Number 662 K/AG/2015 in cases of *wasiat* suits. One of the legal considerations in the jurisprudence is: "That the *wasiat* statement made and signed on March 13, 1969, which contained a *wasiat* from Romadin alias H. Yakup bin Samin to Amina alias B. Nurhayati binti Padli in the form of land 0.757 Ha/7,570 m² from the plot of land Petok C Number 795, Persil Number 225 Klas D.II, area 1.514 Ha in the name of H. Yakup is valid; thus the object of the dispute is the Plaintiff's right".⁵⁴ Jurisprudence determines the legality of a *wasiat* through informal writing if it can be proven in a religious court.

Based on the description above, informal *hibah* and *wasiat* can be tested for legality in religious courts. In addition, the religious court has the authority to determine the legality of informal *hibah* and *wasiat* to determine their legal status further. So far, testing the legality of informal *hibah* and *wasiat* in religious courts has been carried out through lawsuits (*contentious*) or after a dispute between the litigants. The idea of legal reform going forward would be better if testing the legality of informal *hibah* and *wasiat* in the religious courts could be taken through a request (*voluntary*) from parties with legal interests without having to start with a dispute. The mechanism used is filing cases for *isbat hibah* and *isbat wasiat* in religious courts.

Fourth, the legal provisions in the Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia Number: KMA/03/SK/IV/2006 concerning the Implementation of Book II Guidelines for the Implementation of Duties and Administration of the

⁵⁴Decision of the Supreme Court of the Republic of Indonesia Number 662 K/AG/2015.

Religious Courts. In this regard, Book II becomes one of the references for all religious court apparatus, especially judges, clerks/substitute clerks, and bailiffs, in carrying out their duties in judicial administration and court techniques.⁵⁵

In Book II of the Religious Courts, which regulates the general guidelines for petition cases (*voluntary*), one of the provisions is that the Religious Courts/Syar'iyah Courts have the authority to examine and adjudicate petitioned cases as long as they are determined by statutory regulations and/or if there is a legal interest. Editorial and/or if there is a legal interest, it means that a petition (*voluntary*) case that is still within the scope of the authority of the religious court can or is possible to be filed by the parties if there is a legal interest of the parties seeking justice.

If the above legal provisions are related to cases of *isbat* for *hibah* and *isbat wasiat* in the religious court, then the religious court institution, in this case, the panel of judges examining the case, is authorized to examine, adjudicate, and decide on cases of *isbat hibah* and *wasiat* against informal *hibah* and *wasiat* submitted by the parties seeking justice. This is because the parties seeking justice have a legal interest in legalizing informal *hibah* and *wasiat* through cases of *isbat hibah* and *wasiat* in the religious courts. Furthermore, cases of *hibah* and *wasiat* are included in the absolute authority of the religious courts.

Based on the description above, it can be understood that the construction of the legal basis for *isbat hibah* and *wasiat* in religious courts is at least based on four legal

⁵⁵Decree of the Chairman of the Supreme Court of the Republic of Indonesia Number: KMA/03/SK/IV/2006 concerning the Implementation of Book II Guidelines for the Implementation of Duties and Administration of the Religious Courts.

provisions. First, the legal interpretation of Article 5 and Article 10 of Law Number 48 of 2009 concerning Judicial Power. The second, legal interpretation of Article 49 letters c and d of Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts, most recently amended by Law Number 50 of 2009 and Article 60 of Law Number 7 of 1989. Third, the provisions of the Jurisprudence of the Supreme Court of the Republic of Indonesia's Chamber of Religion Number 27 K/AG/2002 and Number 662 K/AG/2015. Fourth, the legal interpretation of the Decree of the Chairman of the Supreme Court of the Republic of Indonesia Number: KMA/03/SK/IV/2006 concerning the Implementation of Book II Guidelines for the Implementation of Duties and Administration of the Religious Courts.

Aspects of Certainty, Justice, and Legal Benefits of Informal Hibah and Wasiat through Isbat Hibah and Isbat Wasiat in Religious Courts

Legal certainty of a *hibah* or *wasiat* is a necessity as a guarantee that there has been a legal event of a *hibah* or *wasiat*. Among the forms of legal certainty is recording evidence (written evidence) in an authentic deed in the form of a *hibah* or *wasiat*.

The conception of the Qur'an surah al-Baqarah verse 282 emphasizes that to guarantee legal certainty, a muamalah contract (transaction) must be recorded, taking precedence over testimony.⁵⁶ This signals that written evidence has a higher strength than witness evidence.

⁵⁶ Interpretation of QS Al-Baqarah verse 282 that believers are commanded, when conducting muamalah transactions (not in cash) with a specified time, the time must be clear, note the time to protect each other's rights and avoid disputes. The party in charge of recording it should be a fair person. Don't let the registrar be reluctant to write it down as an expression of gratitude for the

Philosophically, it can be understood because the recording is more certain and fixed so that there is less chance of errors, compared to testimony evidence which tends to change, depending on the ability, memory, and subjectivity of the witness, so that it contains the possibility (probability) of doubt. However, in practice, recording is often accumulated with testimony in an engagement (transaction) to ensure the perfection of its implementation.

In the development of the modern world, there is a tendency to make written evidence in the form of a deed as evidence that must be fulfilled from a contract. For example, marriages did not require registration in the past, but nowadays, the legislation in several Muslim countries, including Indonesia, stipulates that a marriage certificate can only prove marriage.⁵⁷

In the reality of people's lives, many legal acts of *hibah* and *wasiat* in the past do not have written evidence. This may be because, in the past, *hibah* and *wasiat* were only based on sincerity without needing written evidence. In

knowledge He teaches. M. Quraish Shihab, *Tafsir Al-Mishbah (Pesan, Kesan dan Keserasian Al-Qur'an)*, Cet. V, Volume 1 (Jakarta: Lentera Hati, 2005), p. 602.

⁵⁷ As is the case in Indonesia, Malaysia's state marriage law also requires registration or registration of marriages. Among the laws that regulate is the Pinang Law of 1985 article 25. The State of Brunei Darussalam also requires registration (recording) of marriage, even if it is done after the marriage contract has been held. This is regulated in the Religious Council and Kadis Courts article 143 paragraph (1) and (2). Registration of marriages in Pakistan is one of the most important provisions in the implementation of marriages, as is the case in Indonesia. In the country of Jordan, the provisions for registering marriages are regulated in Article 17 of the 1976 Law. In the country of Libya, the provisions indicating the necessity of registering marriages are contained in Article 5 of Law Number 10 of 1984 which specifically relates directly to issues of marriage, divorce and the consequences that go with it. Ahmad Tholabi Kharlie, "Administrasi Perkawinan di Dunia Islam Modern," *Jurnal Bimas Islam* Vol. 9, No. II (2016): p. 274.

addition, from the perspective of classical fiqh, it is also not mandatory to have written evidence in every legal act of *hibah* or *wasiat*. Informal *hibah* and *wasiat* are very vulnerable to becoming a source of conflict between parties who become heirs in the future. At least 1052 legal cases were handled by religious courts throughout Indonesia in 2020 due to informal *hibah* and *wasiat*.⁵⁸

The idea of *isbat hibah* and *wasiat* cases within the authority of the religious court is oriented towards realizing certainty, justice, and legal benefits for informal *hibah* and *wasiat*. Therefore, the religious court as a judicial institution should have the authority to authorize informal *hibah* and *wasiat* as the basis for issuing *hibah* and *wasiat*.

Decisions and subsequent judges are expected to fulfill the sense of justice as far as possible. Namely, the justice felt by the parties in the case. The justice referred to as far as possible fulfills substantial justice,⁵⁹ not limited to formal justice.⁶⁰ In this case, substantial justice means that the litigants receive and feel natural justice. Meanwhile, formal justice is based on the law alone, which the parties may not necessarily accept and perceive as fair.

⁵⁸ Annual Report of the Republic of Indonesia Religious Courts Year 2020. See also the Electronic Documents of Decisions of Religious Courts throughout Indonesia through the Indonesian Supreme Court Decision Directory Application at the link <https://putusan3.mahkamahagung.go.id>.

⁵⁹ Substantive justice is justice related to the contents of a judge's decision in examining, hearing and deciding a case that must be made based on considerations of rationality, honesty, objectivity, impartiality (impartiality), without discrimination and based on conscience (judge's belief). M. Syamsudin, "Keadilan Prosedural dan Substantif dalam Putusan Sengketa Tanah Magersari," *Jurnal Yudisial* Vol. 7, No. 1 (April 2014): p. 28.

⁶⁰ Formal justice is justice based on articles of legislation or justice called procedural. Haryono, "Penegakkan Hukum Berbasis Nilai Keadilan Substantif," *Jurnal Hukum Progresif* Vol. 7, No. 1 (April 2019): p. 28.

Likewise, the legalization of informal *hibah* and *wasiat* through *isbat hibah* and *wasiat* in religious courts is one of the efforts to bring justice to those seeking justice. This is due to the absence of legal rules relating to efforts to realize the legality of informal *hibah* and *wasiat* when the parties giving and receiving informal *hibah* and/or *wasiat* have died. Meanwhile, the implementation and objects of informal *hibah* and/or *wasiat* do not yet have formal legality in authentic deed form. This is where the role of the religious court in realizing the value of justice is needed for the parties involved.

The judge's decision and determination should benefit the parties seeking justice. In addition, it is also expected to be beneficial to society in general. This can be realized through legal products of decisions or judge decisions based on rationality, honesty, objectivity, impartiality, without discrimination, and based on conscience (judge belief) and fulfilling the sense of justice of those seeking justice. This includes the judge's decision regarding the *isbat* for *hibah* and *wasiat* in the religious court regarding informal *hibah* and *wasiat*.

Legal reform of the legalization of informal *hibah* and *wasiat* through *hibah* and *wasiat* in the religious courts is one of the legal reform ideas to provide benefits in efforts to protect the assets of informal *hibah* and *wasiat*. In this case, *isbat hibah* and *wasiat* in the religious courts have urgency and relevance to the aspect of legal expediency, considering that the protection of property (*ḥifẓ al-māl*) is one of the objectives of Islamic law (*maqāṣid syari'ah*), in addition to protection of religion (*ḥifẓ ad-din*), protection of soul (*ḥifẓ an-nafs*), protection of mind (*ḥifẓ al-'aql*) and protection of generation (*ḥifẓ an-naṣl*).

Referring to the Jurisprudence of the Chamber of Religion of the Supreme Court of the Republic of Indonesia

Number 27 K/AG/2002 in the *hibah* claim case, there is the rule of law "That someone who argues that he has land rights based on a *hibah* must be able to prove ownership of the *hibah* as referred to in Article 210 paragraph (1) KHI".⁶¹ Article 210, paragraph (1) of the KHI is related to the provisions of pillars, conditions, and procedures for *hibah*, according to KHI. Understandably, the rule of law in jurisprudence implicitly determines that informal *hibah* can be legalized if it can be proven in a religious court that they have fulfilled the pillars, requirements, and procedures for *hibah*, according to KHI.

Furthermore, Jurisprudence Number 662 K/AG/2015 in the *wasiat* suit. One of the legal considerations in the jurisprudence is: "That the *wasiat* statement made and signed on March 13, 1969, which contained a *wasiat* from Romadin alias H. Yakup bin Samin to Amina alias B. Nurhayati binti Padli in the form of land 0.757 Ha/7,570 m² from the plot of land Petok C Number 795, Persil Number 225 Klas D.II, area 1.514 Ha in the name of H. Yakup is valid; thus the object of the dispute is the Plaintiff's right".⁶² It is understood that jurisprudence determines the legality of a *wasiat* through informal writing if it can be proven in a religious court.

The two jurisprudence above relates to material disputes in informal *hibah* and *wasiat*. The purpose of filing lawsuits for informal *hibah* and *wasiat* to the religious court is to obtain legal certainty regarding the objects of informal *hibah* and *wasiat*. In the end, this is oriented towards protecting the property (*ḥifẓ al-māl*) of the parties seeking justice concerning disputes of informal *hibah* and *wasiat* in society.

⁶¹Decision of the Supreme Court of the Republic of Indonesia Number 27 K/AG/2002.

⁶²RI Supreme Court Decision Number 662 K/AG/2015.

Therefore, applying *hibah* and *wasiat* in the religious courts is crucial. Through *isbat hibah* and *wasiat* in the religious courts, it is hoped that they can provide legal certainty regarding the subject and object of informal *hibah* and *wasiat* if the prominent donors and recipients of informal *hibah* and *wasiat* have passed away. Meanwhile, the subject and object of informal *hibah* and *wasiat* do not yet have legality. Thus, it can prevent future conflicts between the heirs of grantors and recipients of informal *hibah* and *wasiat*.

It also aims to solve legal and social problems for people who practice *hibah* and *wasiat* informally. Through *isbat hibah* and *wasiat* in the religious courts, it is hoped that legality can be realized for the subject and object of the giver and recipient of informal *hibah* and *wasiat*. Through certainty, justice, and the law's benefits, the nature of a just law can be upheld, and social benefits can be achieved. This is the highest goal of law enforcement.

Conclusion

The practice of *hibah* and *wasiat*, both verbally and in informal writing, is still common in the community, creating social problems. These social problems occur if the giver or even the recipient of the main *hibah* and *wasiat* has died. Meanwhile, the subject or object of related *hibah* and *wasiat* does not yet have a formal basis. Furthermore, legal problems related to informal *hibah* and *wasiat*, both orally and in writing through private deeds, lead to issues of legality and legal validity. This is due to the absence of authentic evidence showing that the subject or related object has given or received a certain *hibah* or *wasiat*.

Applying *isbat hibah* and *wasiat* in religious courts is very important and necessary. It aims to solve legal and social problems for people who practice *hibah* and *wasiat*

informally. Through *isbat hibah* and *wasiat* in religious courts, it is hoped that the legality of the subject, object, and recipient of informal *hibah* and *wasiat* is expected. Through certainty, justice, and legal benefits, the nature of a just law can be enforced, and social benefits can be achieved.

BIBLIOGRAPHY

- Adriosa, dan Sri Natin. “Pembagian Waris dengan *Wasiat* secara lisan di Masyarakat Adat Melayu Pesisir, Desa Kote, Kecamatan Singkep, Kabupaten Lingga, Provinsi Kepulauan Riau.” *Universitas Gadjah Mada*, Tesis, 2011.
- Al-Jazirī, Abdurrahman. *Kitāb al-Fiqh ‘alā al-Mazāhib al-Arba‘ah*. Juz III. Beirut: Dār al-Kutub al-Ilmiyah, 1990.
- Anshori, Abdul Ghofur. *Filsafat Hukum Hibah dan Wasiat di Indonesia*. Yogyakarta: Gadjah Mada University Press, 2011.
- Azikin, Wahyu. “*Hibah dan Wasiat* dalam Perspektif Hukum Perdata (BW) dan Kompilasi Hukum Islam.” *Meraja Journal* Vol. 1, No. 3 (November 2018).
- Bukhārī, Muḥammad bin Ismail al-. *Ṣaḥīḥ al-Bukhārī*. Beirut: Dār al-Fikr, 2002.
- Depag RI. *Al-Qur’an Terjemahan*. Semarang: CV. Toha Putra, 1989.
- Haryono. “Penegakkan Hukum Berbasis Nilai Keadilan Substantif.” *Jurnal Hukum Progresif* Vol. 7, No. 1 (April 2019).
- Kharlie, Ahmad Tholabi. “Administrasi Perkawinan di Dunia Islam Modern.” *Jurnal Bimas Islam* Vol. 9, No. II (2016).
- Kusmayanti, Hazar. “Tindakan Hakim dalam Perkara Gugatan Wanprestasi Akta Perdamaian.” *Jurnal Yudisial* Vol. 14, No. 1 (April 2021).
- Lukmanto, Adam, dan Munsharif Abdul Chalim. “Tinjauan Hukum dan Akibatnya terhadap *Wasiat* Tanpa Akta Notaris Ditinjau dari Kompilasi Hukum Islam dan Kitab Undang-Undang Hukum Perdata.” *Jurnal Akta* Vol. 4, No. 1 (Maret 2017).

- M. Syamsudin. “Keadilan Prosedural dan Substantif dalam Putusan Sengketa Tanah Magersari.” *Jurnal Yudisial* Vol. 7, No. 1 (April 2014).
- Marbun, Rocky. *Kamus Hukum Lengkap*. Jakarta: Visi Media, 2012.
- Ratnawati, Sukarno Aburaera, M. Said Karim, dan Hasbir Paserangi. “Law Enforcement in Indonesia: A Review from Legal Apparatus Roles.” *Journal of Law, Policy and Globalization* Vol. 58 (2017).
- Shihab, M. Quraish. *Tafsir Al-Mishbah (Pesan, Kesan dan Keserasian Al-Qur’an)*. Cet. V. Volume 1. Jakarta: Lentera Hati, 2005.
- Suisno. “Tinjauan Yuridis Normatif Pemberian Hibah dan Akibat Hukum Pembatalan Suatu Hibah Menurut Kompilasi Hukum Islam (KHI) dan Kitab Undang-Undang Hukum Perdata.” *Jurnal Independent* Vol. 5, No. 1 (Juni 2017).
- Tanjung, Albert. “Hibah Lisan Tanah Kaum Koto Lansano Menurut Hukum Adat Minangkabau.” *Jurnal Ilmu Dan Budaya* Vol. 41, No. 63 (Juli 2019).
- Tim Penyusun. *Kamus Bahasa Indonesia*. Jakarta: Pusat Bahasa, 2008.

Laws and Legal Regulations

- Undang-Undang Nomor 14 Tahun 1985 tentang Mahkamah Agung
- Undang-Undang Nomor 7 Tahun 1989 tentang Peradilan Agama
- Undang-Undang Nomor 3 Tahun 2006 tentang Perubahan Atas Undang-Undang Nomor 7 Tahun 1989 tentang Peradilan Agama.
- Undang-Undang Nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman

Undang-Undang Nomor 50 Tahun 2009 tentang Perubahan Kedua atas Undang-Undang Nomor 7 Tahun 1989 tentang Peradilan Agama

Instruksi Presiden RI Nomor 1 Tahun 1991 tentang Penyebarluasan Kompilasi Hukum Islam

Kitab Undang-Undang Hukum Perdata (KUHPerdata/BW)

Supreme Court Jurisprudence

The decision of the Supreme Court of the Republic of Indonesia Number 27 K/AG/2002

The decision of the Supreme Court of the Republic of Indonesia Number 662 K/AG/2015

Religious Court Decisions

Decision Number 677/Pdt.G/2020/PA.Kds

Decision Number 9/Pdt.G/2020/PA.Thn

Decision Number 52/Pdt.G/2020/PA.Kis

Decision Number 288/Pdt.G/2020/MS.Bna