



Cancellation of Parents' Land Grant to Children Based on Indonesian Positive Law

Sunarti¹, Sulistyandari¹, Tri Lisiani Prihatinah¹

¹ Universitas Jenderal Soedirman, Purwokerto, Indonesia
sunarti@mhs.unsoed.ac.id

Abstract. Grants in Indonesia are regulated by several legal rules, namely Islamic Law, Civil Law based on the Civil Code, and Customary Law. There is one case of cancellation of grants made by parents against their children. Initially, the grantor gave a plot of land measuring 1938 m² on February 17, 2003 to one of his children without the consent of 4 (four) other children of the grantor. It was known that the object of the grant had two houses and two shops on the disputed land. The plaintiff intended to revoke the grant because the grantee had changed his attitude, often treated the grantee badly, behaved rudely and hurt the grantor. The purpose of this research is to analyze the cancellation of land grants by parents to children according to Indonesian positive law regulations and analyze the status of buildings on the object of grants canceled by the Court. This research is a normative juridical research that uses a statutory approach and a case approach. The data source used is secondary data. Qualitative normative data analysis method. The results showed that the Grant Arrangement in the Civil Code adheres to the notion of Obligator separation and laving where the will arises and is valid when he laving it. That the lawsuit to cancel the grant from the plaintiff (biological mother) as the grantor to the defendant (biological son of the defendant) as the grantee is an underhand grant. Thus, the grant according to Civil Law/BW has not been delivered in accordance with what the law instructs. Based on the aforementioned article, the grant made by the Plaintiff to the Defendant can be annulled because the handover process has not yet occurred. One of the principles adopted by national agrarian law is the principle of horizontal separation. There is no legislation in Indonesia relating to the status of buildings erected on grant land that has been annulled by a court decision. According to the author, the application of the principle of horizontal separation in the aforementioned case is appropriate because land rights do not include ownership of buildings on it. Buildings, and other objects on a piece of land belong to the party who built it, namely the defendant.

Keywords: Cancellation of Grant, Positive Law, Obligator, Lavinging

1. Introduction

The enactment of the Basic Agrarian Law (UUPA) is a significant change for the Indonesian legal system, especially in the land sector. Various changes made by the government are solely for the sake of achieving better changes in dealing with problems in the land sector.[1] One of the acquisition of land rights is through grants.

© The Author(s) 2023

A. A. Nassihudin et al. (eds.), *Proceedings of the 3rd International Conference on Law, Governance, and Social Justice (ICoLGS 2023)*, Advances in Social Science, Education and Humanities Research 805,
https://doi.org/10.2991/978-2-38476-164-7_88

The application of grants in everyday life has been applied and implemented in the community, especially land grants. A grant is an agreement in which the grantor during his lifetime freely and irrevocably hands over an object for the needs of the grantee who accepts the handover. Granting includes a one-sided agreement, where only one party has an obligation to the agreement, namely the grantor, while the party receiving the grant has absolutely no obligation.[2] Hibah means a contract whose subject matter is the giving of one person's property to another person while he is alive, without any reward.[3]

In the Compilation of Islamic Law, in principle, grants cannot be withdrawn. However, specifically grants from parents to their children can be withdrawn, as stated in Article 212 of the Compilation of Islamic Law.[4] One of the things regulated in Islamic Law is about property, about giving one's property to others, whether it is a matter of inheritance, grants, or wills. In Law Number 7 of 1989 Article 49 Paragraph (1) the three types of cases above are included in the authority of the Religious Courts. Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts emphasizes that those who are Muslims in distributing their property must be subject to Islamic Law.[5]

Based on what has been described above, the problem to be studied in this research is there is a case that occurs in practice, namely the Supreme Court decision number 37/PK/Ag of 2021 which has permanent legal force (inkrah) that initially the grantor A (Plaintiff) gave a plot of land measuring 1938 m² on February 17, 2003 to a child named N (Defendant) without the consent of 4 (four) children of the grantor (Plaintiff). The grant was in the form of a piece of residential land with an area of approximately 1,938 M² located in New Guava, Jorong Padang Tujuh Kenagarian Aur Kuning, Pasaman Sub-District, West Pasaman Regency. It was known that the object of the grant had two houses and two shops on the disputed land. The Plaintiff intends to withdraw his grant in the form of a 1,938 M² plot of land that was given to the Defendant on February 17, 2003 because the Defendant has changed his attitude, often treats him badly, is rude and hurts the Plaintiff's heart.

Based on the aforementioned description, the grant given by the Plaintiff to the Defendant was in the form of a grant declaration dated February 17, 2003, with no grant deed made by a PPAT. Thus, the grantee has not become the legal owner of the grant object. The grant has been running for 18 (eighteen) years. The author is very interested in analyzing the cancellation of land grants by parents to children according to Indonesian positive law regulations and analyzing the status of buildings on the object of grants canceled by the Court.

2. Problems

- a. How is the cancellation of land grants by parents to children according to Indonesian positive law regulations?
- b. What is the status of the building on the object of the grant that was canceled by the Court?

3. Method

This research is a normative juridical research that uses a statutory approach, conceptual approach, and case approach. The data collection method used by the author is by collecting secondary data consisting of primary legal materials and secondary legal materials that are related to the subject matter of the research. The data analysis method is carried out in a qualitative normative manner, namely interpreting and discussing the research results based on legal notions, legal norms, legal theories and doctrines related to the subject matter.

4. Discussion

4.1. Cancellation of Land Grants by Parents to Children According to Indonesian Positive Law Regulations

Court is a special definition, which is an institution that hears or resolves legal disputes in the framework of judicial power which has absolute and relative authority in accordance with statutory regulations.[6] Grants in Indonesia are regulated by several legal rules, namely Islamic Law, Civil Law based on the Civil Code (KUH Perdata), and Customary Law. In essence, the regulation of grants according to the three legal systems has several elements in common, although there are also some differences in several respects. Grants in the Civil Code are regulated in Articles 1666 to 1693 of the Civil Code. Article 1666 of the Civil Code, grants are formulated as follows: "A grant is an agreement by which the grantor, during his lifetime, freely and irrevocably, hands over an object for purposes in the community often has a wrong legal perception of the act of granting". The granting of a grant is based on a "free of charge" agreement, which means that the achievement of one party only (the grantor), while the other party does not provide a counter-presentation in return. The words "during the life" of the grantor are to distinguish between grants made in a will (testament) which will only have force and effect after the grantor dies with grants made while the grantor is still alive.[7]

According to Article 1666 of the Civil Code, a grant refers to an agreement in which the grantor, with pleasure and without the desire to revoke it, hands over an object to the grantee for his needs.[8] Article 1686 states that the right of ownership of the objects contained in the grant that has been legally accepted does not pass to the grantee, other than by way of delivery made according to articles 612, 613, 616 and so on. As stipulated in Article 1682 of the Civil Code that Grants for immovable property such as land and buildings made by the parties by not using an authentic deed, the validity of the grant is invalid because the grant must be made in an authentic deed, it cannot be made in a deed under hand.

Provisions regarding the withdrawal of grants are regulated in Article 1688- Article 1693 of the Civil Code. Article 1688 of the Civil Code states that a grant cannot be revoked and therefore cannot also be canceled, except for the following circumstances:

- a. If the conditions of the grant are not fulfilled by the grantee;

- b. If the person to whom the grant is made is guilty of committing or participating in committing a murder or other crime against the grantor;
- c. If the grantor becomes poor and the grantee refuses to provide for him.

Grant according to the Compilation of Islamic Law abbreviated as KHI, as has been described that a grant is a gift from a grantor to another person as a grantee when the grantor (who has assets) is still alive. Furthermore, according to Article 210 of the Compilation of Islamic Law in paragraph (1) states that a person who is at least 21 years old, of sound mind without coercion can grant as much as 1/3 of his property to another person or institution in front of two witnesses to be owned. Furthermore, paragraph (2) states that the property granted must be the right of the grantee. Based on the above provisions, it can be said that everyone can give or receive a grant, except those who are declared incapable of doing so. In addition, the willingness to perform legal actions without coercion from other parties is an element that must exist in the implementation of grants.

Article 212 of the Compilation of Islamic Law states that grants cannot be withdrawn, except for grants from parents to their children. The scholars agree that grants have pillars and conditions that must be met, so that the grant is considered valid and the law applies. According to the majority of scholars, there are four pillars of grants, namely:

- a. *Wahib* (grantor) *Wahib* is the grantor, who gives away his property. The majority of scholars are of the view that if a sick person makes a bequest and then dies, the bequest is one-third of the estate.
- b. *Mauhub lah* (recipient) The recipient of the grant is all human beings. Scholars agree that it is permissible for a person to grant all assets.
- c. *Mauhub*, *Mauhub* is an item that is donated.
- d. *Shighat* (*Ijab* and *Qabul*) The *Shighat* of the grant is anything that can be said.

The Compilation of Sharia Economic Law (KHES) regulates the issue of withdrawing property that has been granted in several articles as follows: Article 712 KHES states that "the grantor can withdraw the grant after the delivery is carried out, provided that the grantee agrees". Article 29 of the Compilation of Sharia Economic Law (KHES), states:

- a. A valid contract as stipulated in Article 27 letter a is a contract that is agreed upon in the agreement, does not contain elements of *ghalath* or deception, and *ghubn* or disguise.
- b. The agreed upon contract must contain provisions:
 - 1) A binding agreement;
 - 2) Capacity to enter into an agreement;
 - 3) Against a certain thing;
 - 4) A cause that is *halal* according to Islamic law.

In the Compilation of Sharia Economic Law (KHES) in Article 717 KHES "If something is added and becomes an inherent part of the grant property, the grant may not be withdrawn. But an addition that does not become part of a grant item, does not preclude the possibility of withdrawal.

Grant according to customary law According to Ter Haar, granting or inheritance (*Toescheidingen*) is the opposite of indivisible inheritance, which is the division of the whole or part of the property while the owner is still alive.[9] The basic motive for this granting is no different from the motive for not allowing the division of inherited property to the rightful heirs, namely that the somah's wealth is the basis of material life provided for the somah residents concerned and their descendants.

Parents' grants to their children can be counted as inheritance, has become a tradition or custom among the people of Indonesia, in the parental, Matrilineal, patrilineal family system, where the gift is made when the child becomes an adult and forms an independent family. Then after the granting parent dies, the distribution of the inheritance to the heirs is carried out, then the grant will be considered and taken into account with the part that should be received by the children concerned if they have not received part of the family property by grant.

In the context of customary law, a grant refers to the act of a person dividing his or her property among his or her children while he or she is still alive. Granting often occurs when children start to become independent or when they marry and form their own families. The granting process is done while the grantor is still alive, with the aim of preventing disputes among the children after the grantor's death. This is often done due to concerns, for example if the children's mother is not a biological mother but a stepmother, or if there are adopted children who may have questionable status as heirs. In addition, there are also situations where the grantor loves the adopted child very much and feels that the child lacks understanding of the application of Islamic law, so parents often grant all of their property to their children.

Basically, customary law regulates the withdrawal or cancellation of grants that have been given, if the grant is not in accordance with the applicable provisions, in this case there are several regions that allow the withdrawal of grants. In the event that a grant is withdrawn or canceled, according to the three legal systems in Indonesia that regulate grants, namely Islamic Law, Customary Law and Civil Law, grants that have been given cannot be canceled. Except: the grant of a parent to his/her child (according to Islamic Law), the grant is contrary to the provisions of local custom (according to Customary Law) and if the grantee does not fulfill the requirements in carrying out the grant that has been given (according to Civil Law).

According to the author of the grant made between the mother and her biological child, the grant is classified as what is called a Free-only agreement where it is aimed at only one party while the other party does not need to provide counterproduction in return. On this basis, the grant indirectly has legal consequences, namely where the grantor is obliged to submit and transfer the goods granted to the grantee and transfer the goods granted to the grantee, this is contained in the provisions of Article 1682 of the Civil Code which states that the grant must be made

by an Authentic Deed made before an authorized official, namely a Notary, otherwise it will be threatened with cancellation.

In addition to the aforementioned Article, there is the provision of Article 1686 of the Civil Code which states that the property rights to the objects contained in the grant, as well as the grantee being considered valid, do not pass to the grantee other than by way of delivery made in accordance with Articles 612, 613 616 and furthermore, that BW adheres to the understanding of Obligoir separation and the laving of free will arises and is valid at the time of the laving. That the lawsuit for the annulment of the grant in the above case is that where the plaintiff (biological mother) made a grant to the Defendant (biological son of the defendant), on February 17, 2003 (grant declaration letter), according to the author, the grant made on the date mentioned above and until the filing of the annulment lawsuit there has been no making of an authentic grant, so according to the author, the grant in the above case is an underhand grant, thus the grant according to Civil Law / BW has not been made in accordance with what the law instructs, namely Articles 1682, 1686 of the Civil Code. So according to the author based on the aforementioned articles, the grant made by the Plaintiff to the defendant can be canceled because the handover process has not yet occurred.

4.2. Status of Buildings on Grant Objects Canceled by the Court

Cancellation cases are cases that often occur because the first party to the grant does not fulfill the requirements in carrying out the grant that has been given. According to the law, grants that have been given cannot be withdrawn or canceled but there are some exceptions. The law does not systematically regulate the consequences of nullification. In general, the effect of a revocation is retroactive and returns to the original state or *ex tunc*. Legal consequences are all consequences that occur from all legal actions carried out by legal subjects against legal objects or other consequences caused by certain events by law.

This legal effect then gives birth to a right and obligation for the parties to the legal action. With the cancellation of this grant in a state clean of the burdens attached to the goods.[10] Then if what is granted is a plot of land and if the land has been erected a permanent building then the building must be demolished and the land must be leveled again within a predetermined period of time.[11] One important aspect of land law is the legal relationship between land and other objects attached to it. The legal certainty of the legal position of objects attached to the land is very important because this has a broad influence on all legal relations concerning the land and objects attached to it.

According to Article 1682 of the Civil Code which states that a grant must be made by an authentic deed made before an authorized official, otherwise it will be threatened with cancellation. In grant annulment case Number 37/PK/Ag/2021, it is known that the grant made is an underhand grant so that based on the Civil Code, underhand grants are considered invalid. In this case, it was found that there was a building attached to the land grant. The Civil Code recognizes the existence of *zaakwaarneming* arrangements. According to Akhmad Fathoni, *Zaakwaarneming* is considered a binding matter as an engagement which will have legal consequences

and consequences for the parties, namely Dominus and Gestor.[12] The provisions of *Zaakwarneming* are regulated in Article 1354 of the Civil Code which stipulates that "If a person voluntarily without being assigned, represents the affairs of another person, with or without the knowledge of that person, then he tacitly binds himself to continue and complete the business, until the person whose interests he represents can do the business himself. He must also carry out all the obligations that he would have assumed if he had received an express power." Article 1357 of the Civil Code "The party whose interests are properly represented by another person, is obliged to fulfill the obligations, which are carried out by the representative on his behalf, give compensation and interest caused by all obligations that are personally made by him, and reimburse all expenses that are useful and necessary."

The author analyzes that the defendant is categorized as a Gestor, which is a party who represents the affairs of others voluntarily. The author also analyzes that the plaintiff is categorized as Dominus, which is the party being represented. In this case the plaintiff as Dominus had given the defendant freedom to manage the land and buildings on the land that had been granted, but after 16 years the plaintiff as the grantor canceled the grant that had been given to the defendant. Therefore based on Article 1357 of the Civil Code the plaintiff as the party whose interests are represented is obliged to provide compensation for costs including the cost of building on the land whose grant was canceled. Article 1365 of the Civil Code "Every act that is unlawful and brings harm to another person, obliges the person who causes the harm through his fault to compensate for the loss." The author analyzes that the Plaintiff must provide compensation to the Defendant as a result of the cancellation of the grant, if the plaintiff does not provide compensation voluntarily for the costs and buildings incurred by the defendant, then based on Article 1365 of the Civil Code the plaintiff can be sued by the defendant as a tort.

Law No. 5/1960 on the Basic Regulation of Agrarian Principles regulates land law in Indonesia. One of the principles adopted by national agrarian law is the principle of horizontal separation. The principle of horizontal separation is the principle that every legal action concerning land rights does not automatically include legal actions on objects on the land.[13] The meaning of the principle of horizontal separation can also be heard from the opinions of several experts such as Imam Sudiyat who stated something similar that the principle of horizontal separation is the ownership of land and objects or everything that stands on the land is separate.[14]

There is nothing in the laws and regulations related to the status of buildings built on land grants that are canceled by court decisions. According to the author, the application of the principle of horizontal separation in the aforementioned case is appropriate because land rights do not include ownership of buildings on it. Buildings, and other objects on a piece of land belong to the party who built it, namely the defendant.

5. Conclusion

The regulation of grants in the Civil Code adheres to the notion of Obligatory separation and laving where the will arises and is valid at the time of the laving.

That the lawsuit to cancel the grant from the plaintiff (biological mother) as the grantor to the defendant (biological son of the defendant) as the grantee is an underhand grant. Thus the granting according to Civil Law / BW has not yet taken place in accordance with what the law orders, namely Articles 1682, 1686 of the Civil Code. Therefore, according to the author, based on the aforementioned articles, the grant made by the Plaintiff to the defendant can be canceled because the handover process has not yet occurred.

The Civil Code recognizes the existence of *zaakwaarneming* arrangements. *zaakwaarneming* is considered a binding matter as an engagement which will have legal consequences and consequences for the parties, namely Dominus and Gestor. That the defendant is categorized as the Gestor, namely the party who represents the affairs of others voluntarily, while the plaintiff is categorized as the Dominus, namely the party being represented. In this case the plaintiff as the Dominus had given the defendant freedom to manage the land and buildings on the land that had been granted, however after 16 years the plaintiff as the grantor canceled the grant that had been given to the defendant. Thus based on Article 1357 of the Civil Code the plaintiff as the party whose interests are represented is obliged to provide compensation for costs including the cost.

References

- [1] S. Azam, "Eksistensi Hukum Tanah Dalam Mewujudkan Tertib Hukum Agraria," 2003.
- [2] Azni, "Eksistensi Hibah Dan Possibilitas Pembatalannya Dalam Perspektif Hukum Islam Dan Hukum Positif Di Indonesia," *An-Nida*, vol. 40, no. 2, pp. 100–109, 2015, doi: <http://dx.doi.org/10.24014/an-nida.v40i2.1499>.
- [3] S. Sabiq, *Fiqih Sunnah*. Bandung: Al-Ma'arif, 1987.
- [4] Tim Redaksi Nuansa Aulia, *Kompilasi Hukum Islam (Hukum Perkawinan, Kewarisan Dan Perwakafan)*. Bandung: Nuansa Aulia, 2008.
- [5] R. A. Rasyid, *Hukum Acara Peradilan Agama*. Jakarta: Raja Grafindo Persada, 1991.
- [6] D. C. Bashori and M. Ichsan, "Pembatalan Hibah Oleh Pengadilan Agama," *HAKAM J. Kaji. Huk. Islam dan Huk. Ekon. Islam*, vol. 5, no. 1, pp. 44–56, Jun. 2021, doi: [10.33650/jhi.v5i1.2738](https://doi.org/10.33650/jhi.v5i1.2738).
- [7] A. Rofiq, *Hukum Islam di Indonesia*. Jakarta: Raja Grafindo Persada, 1997.
- [8] N. Gultom and Tjempaka, "Analisis Pertimbangan Hakim dalam Memutus Perkara Pemberian Hibah yang Ditarik Kembali (Studi Putusan Nomor: 33/Pdt. G/2019/PN/PMS)," *AL-MANHAJ J. Huk. dan Pranata Sos. Islam*, vol. 5, no. 2, pp. 1051–1058, 2023, doi: <https://doi.org/10.37680/almanhaj.v5i2.3227>.
- [9] S. Wignjodipoero, *Pengantar Hukum Adat Indonesia*. Bandung, 1973.
- [10] E. Suparman, *Hukum Waris Indonesia Dalam Prespektif Islam, Adat, BW*. Bandung: PT Refika Aditama, 2018.
- [11] M. S. R. Oping, "Pembatalan Hibah Menurut Pasal 1688 Kitab Undang-Undang Hukum Perdata," *LEX Priv.*, vol. 5, no. 7, pp. 29–35, 2017, [Online]. Available:

- <https://ejournal.unsrat.ac.id/index.php/lexprivatum/article/view/18225>
- [12] A. F. Hendrawan, “Perlindungan Hukum Bagi Gestor yang Telah Melakukan Zaakwaarneming (Perwakilan Sukarela) tanpa Disetujui Pembayaran Biaya oleh Dominus,” *Brawijaya Law Student J.*, vol. 1, no. 1, pp. 1–20, 2014, [Online]. Available: <https://core.ac.uk/download/pdf/294926072.pdf>
- [13] Melvina, “Akibat Hukum Pembatalan Akta Hibah Yang Dibuat Di Bawah Tangan Dan Tanpa Persetujuan Ahli Waris Lainnya,” *Lex Jurnalica*, vol. 20, no. 1, pp. 59–64, 2023, doi: <https://doi.org/10.47007/lj.v20i1.6433>.
- [14] I. Sudyat, *Hukum Adat Sketsa Asas*. Yogyakarta: Liberty, 1978.

Open Access This chapter is licensed under the terms of the Creative Commons Attribution-NonCommercial 4.0 International License (<http://creativecommons.org/licenses/by-nc/4.0/>), which permits any noncommercial use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license and indicate if changes were made.

The images or other third party material in this chapter are included in the chapter's Creative Commons license, unless indicated otherwise in a credit line to the material. If material is not included in the chapter's Creative Commons license and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder.

