

Vagueness in The Hibah Amanah

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Abstract

Products with the concept of hibah amanah are growing in the Muslim property planning industry in the country. Hibah amanah is an alternative mechanism for Muslims to plan and manage property division effectively. However, there is confusion in the community about the implementation of this product. Therefore, this study aims to analyze the confusions that often arise in the community about hibah amanah products. This study is qualitative research based on a narrative study. The data was collected from articles related to hibah amanah. All articles were analyzed using content analysis to achieve the objectives of the study. The results of the study found that there is confusion in the hibah amanah product, especially regarding the concept of hibah and trust used, namely aqad hibah ruqba, the stipulation in aqad hibah, ownership and delivery of goods, acceptance after death, hibah in secured property, aqad in trust, acceptance of wages in trusts and combinations of trust contracts in aqad hibah. Therefore, there needs to be a specific study to look at this problem through the lens of Islamic law so that commercialized hibah amanah products can be made and applied by the community without any doubt.

Keywords: Hibah, Hibah Amanah, Syariah Issue

Introduction

Hibah is a property management instrument for Muslims who are not strangers and are beginning to gain a place among the Muslim community in Malaysia. Through the concept of hibah, the management of one's property is seen to be able to be managed more quickly and efficiently. Hibah becomes an alternative organized in Islam through the gift of property during life by the owner of the property to someone else (Muda, 2008) either to heirs or non-heirs. The hibah's ability to handle some of the problems that arise in existing property management instruments makes it a suitable alternative to implement today.

In Malaysia, the hibah truly captures the attention of contemporary scholars started 2003 (Jamal & Moidin, 2023) and been practised by the Islamic financial industry. It can be divided into two categories: non-commercial hibah, also known as classical hibah, and commercial hibah, which is contemporary hibah (Azhar et al., 2014). Each category of hibah (illustrated in Figure 1) is subject to differences in Shariah contracts, laws and courts.

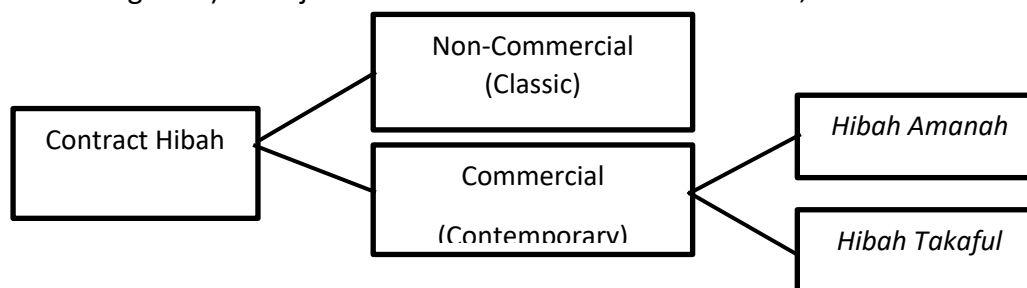


Figure 1: Grant Categories in the Financial Industry

Source: Markom & Arif (2022)

Hybrid contracts or commercial grants are based on property management products offered by takaful or trust operating companies. The commercial grant these two operating companies offer is called a "hibah amanah" or "trust hibah" product. This product combines two contracts: hibah and trust (Halim & Bustami, 2017). A hibah amanah will be implemented after the grantor dies (Azhar, 2017; Muda, 2008). This contract allows the grantor to have complete control over the grant property during their lifetime and the grant property will only be obtained by the grant recipient after the death of the grantor (Halim & Bustami, 2017).

The use of a combination of contracts in the hibah amanah makes this product not in line with the classic hibah (Halim & Bustami, 2017), which has a Shariah basis from the Quran, Sunnah, practices of the companions and ijtihad of the jurists' (Nordin et al., 2016). Meanwhile, from the aspect of Shariah law, there are several jurisprudential issues that can be linked to hibah amanah instruments in Malaysia. This confuses the community regarding hibah amanah products. Therefore, this study aims to analyze the confusions that often arise in the community about hibah amanah products.

Concept of Hibah

The word hibah comes from the Arabic word '*wahaba*' which means *tabarru'* (Al-Jurjani, 1988) or is understood as a gift without return (Al-Fayumi, 1990). The same meaning is also written by Abdul Ghani & Ahmad Razali, in their writing and used by Bank Negara Malaysia (2016) (Abdul Ghani & Razali, 2018). Ibnu Manzur (2003) defines a hibah as a form of giving that does not expect any return or other goals. Pustaka, defines hibah as the voluntary giving of rights (property) to someone with good intentions (Pustaka, 2014).

From a terminological point of view, hibah means a contract of giving ownership rights (*tamlík*) of something voluntarily to someone during life without expecting anything in return (Ibn. Nujaim, t.t; Al-Syarbini, 1994; Al-Zuhaily, 1989) or compensation and without any conditions (Kambol, 2019). According to the Syafi'e school, the term hibah is a form of giving which is the gift of property by one person to another and has two points of view. First from a general perspective, which is a gift that includes a gift, which is a gift to honour someone, a

grant, which is a gift without compensation, and alms, which is a gift simply expecting a reward.

While the second one from a specific perspective, hibah can be concluded as a gift of ownership by someone to someone else without expecting a return and subject to specific principles (Al-Nawawi, 1991; Al-Haytami, t.t; Al-Qaylubi & ' Umayrah, t.t; Al-Syarbini, 1994). An explanation of the category of hibah can be seen through the case of Harun bin Muda and others v Mandak binti Yahya [1999] JH 63. The case in question is related to the issue of authentication of hibah, the Terengganu Syariah High Court Judge at that time, Dato' Hj Ismail bin Yahya, mentioned the difference between hibah, alms and gifts. He has also confirmed that the gift is a mere hibah. This is because the purpose of giving is not to get a reward which is alms and it is not to glorify the recipient which is a gift and is accompanied by the pronouncement of *ijab* and *qabul*. There are also fuqaha' Syafi'e who define hibah as an agreement to voluntarily transfer ownership of an item during life (Al-Ansari, 2018). In conclusion, hibah means an agreement to transfer ownership of a property while still alive without expecting any return and made voluntarily.

Concept of Amanah

According to Buang (2006), trust or trust property means a person entrusted to hold the trust property for the benefit of a certain person. Trust property can be held in various forms, whether the movable property (*manqul*), immovable property (*aqar*), by way of payment or for free, i.e. without payment.

The definition of trust is not clearly stated in the Trustee Act 1949 (Act 208) but can only be found from the judge's interpretation. As an example based on the case of Parmeshiri Devi & Anor v Pure Life Society [1971] MLJ 42 that is:

"An equity obligation that binds a person called the trustee, to manage the property under his control called the trust property, for the benefit of a person or several persons called beneficiaries of which he may be one, and any person who may enforce the obligation said."

Therefore, from the above statement it can be concluded that trust is one of the instruments that can be used in property management and is recognized in the legislation. Through this instrument, a responsibility is formed which is then given to someone else as a trustee to manage the property of the trustee. The term responsibility here means that a trustee's holding of a property does not cause the property to be transferred to him. Still, the property is the whole property of the beneficiary or known as the beneficiary (Said et al., 2019).

Trust According to Islamic Perspective

Trust in Islam leads to two interpretations. Referring to al-Wizarah al-Awqaf (2005) in the book *al-Mausu'ah al-Fiqhiyyah* explains trust refers to 1) something attributed to someone who is trusted (amin) that is; a) a trust contract such as *wisoyah* and *wadi'ah* or b) a contract that has a trust as part of the contract *ijarah*, *musyarakah*, *'ariyah* and *rahnu*, called a *tabi'* contract or c) something that does not require a contract such as found property (*luqatah*); and 2) trust which refers to the nature of a *qadhi* or *nazir* who needs to have the nature of trust in managing the will's property (Said et al., 2019). Halim & Bustami, in their writings specialize the meaning of trust more to the formation of trust in estate planning

instruments, (Halim & Bustami, 2017). He explained that trust is a responsibility given to trustees who are appointed to manage and look after trust property. Muhamad (2011) adds the responsibility of looking after and managing the trust property subject to the terms and conditions set by the trust maker. It is also written by Buang (2006), that trust refers to a trustee who holds a trust property for the benefit and benefit of a certain person.

Concept of Hibah Amanah

Hibah amanah is a newly created contract in Malaysia. Different from traditional hibah contracts practised since independence (Mujani et al., 2011). This point can be proven based on a court case in 1953 proving the implementation of hibah through the case of Kiah v. Som [1953] 19 MLJ 82. Hibah Amanah became popular in the financial industry after it was introduced by Amanah Saham Nasional Berhad (ASNB) in the year 2013 (Noordin et al., 2016). A trust hibah contract is also known as a commercial hibah (Hassan & Zaizi, 2020) since it is an instrument commercialized by the financial industry in Malaysia, especially in the planning and property management section (Azhar, 2014; Azhar et al., 2014). Even now, it is found that there are Islamic banking institutions that collaborate with trust companies to offer trust grants, namely Bank Islam Malaysia Berhad with Amanah Raya Berhad (Islamic Bank, Amanah Raya Grant Document) and Bank Muamalat Malaysia Berhad with As-Salihin Trustee Berhad (Muamalat Bank, Pre-Hibah or Grant Document Declaration). The earliest study that examines hibah amanah is by Ahmad & Ibrahim (2002). However, their research is more focused on naming issues in Islamic Financial Institutions, especially in the Employees' Provident Fund (KWSP), Tabung Haji (TH) and Bank Simpanan Nasional (BSN) and does not discuss the full hibah amanah contract.

Methodology

This study is qualitative through the method of document analysis. Data sources are obtained by reading primary and secondary sources related to the topic of the study. Among the documents referred to are the Book of Testaments, journal articles and theses are also referred to regarding the ambiguity of the trust grant as a research variable. The collected data will be analyzed through inductive, deductive analysis methods and thematic analysis methods (Talib, 2019).

Result and Discussion

Based on the results of the study, it was found that there is some vagueness in the implementation of Hibah Amanah, which can be divided into four themes, as shown in Figure 2 below.

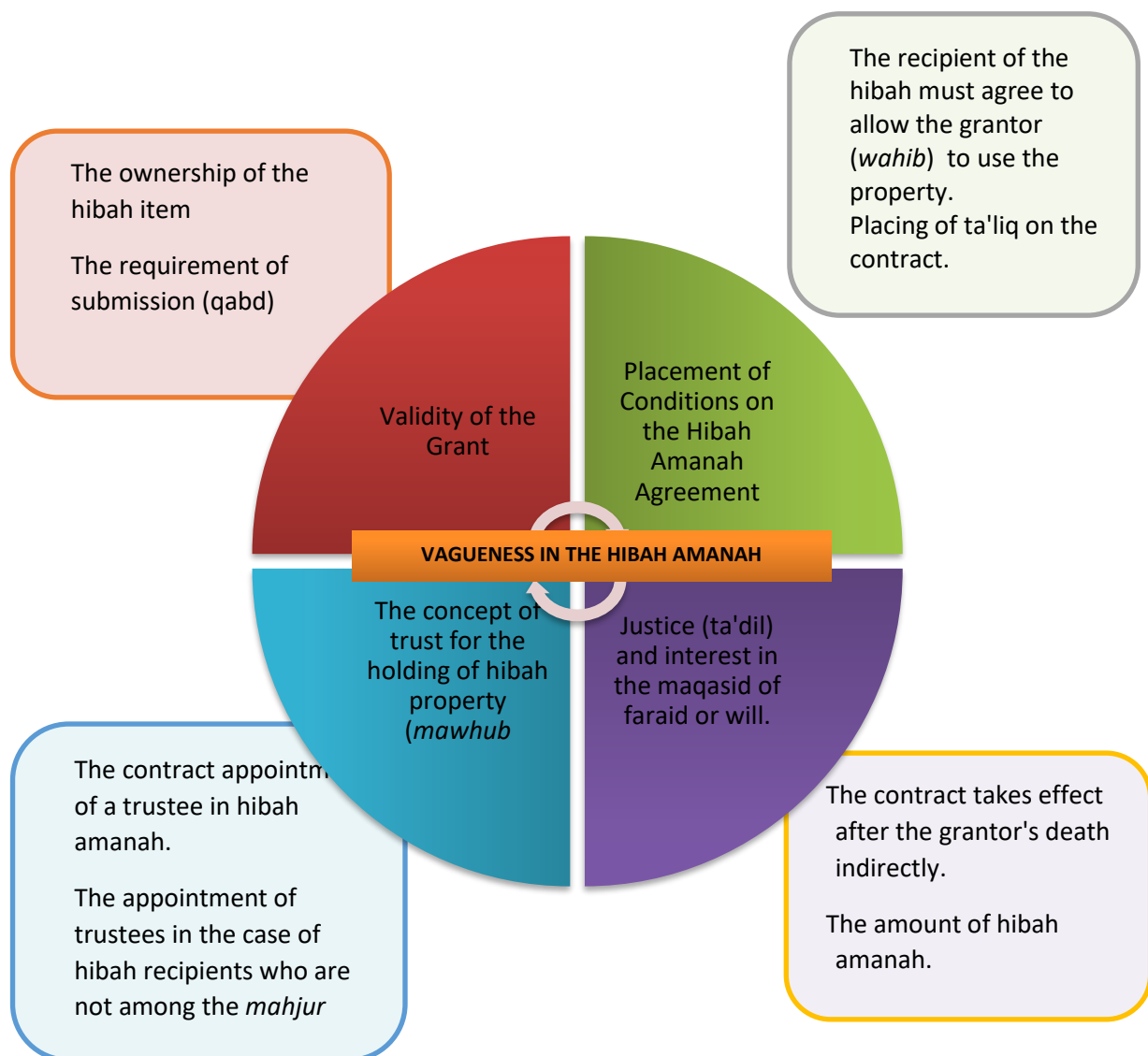


Figure 2 : Vagueness in The Hibah Amanah

Source: Author

1) Validity of the Grant

The validity of a hibah contract based on Islamic law must comply with all the rules and conditions set. The effect of the validity of the hibah will have implications for the ownership of the hibah item (*mawhub*). Doubts arise in the hibah amanah instrument when it involves ownership (*tamlík*), which is contrary to the original hibah concept. The implementation of the original concept of hibah, which is a gift during life that makes ownership of assets transferred completely to the recipient of the hibah. However, in the hibah of trust, the implementation of the hibah only occurs after the grantor's death, known as *wahib* (Azhar, 2017; Halim & Bustami, 2017; Muda, 2008). This concept seems to make the hibah item still under the ownership of the grantor (*wahib*).

Confusion about ownership leads to the second issue, the requirement of submission (*qabd*) in the hibah instrument (Noordin et al., 2016). The requirement of handover (*qabd*) in hibah means making the hibah effective, that is, the property of the hibah (*mawhub*) must be held, received or controlled by the recipient of the hibah (Muda, 2008). Next, it allows the recipient to transact (*tasarruf*) with the item handed over (*qabd*) or at least the grant recipient is able to control and deal with the gift property (*mawhub*), which is the concept of *al-tamakkun min al-tasarruf fi al-maqbud* (Al-Kasānī, 2003).

Possession (*qabd*) is also one of the main Shariah issues in the hibah contract (Muda, 2008). The validity of a hibah can be seen from the possession of the hibah property after the contract is made. However, it is different on the side of the Maliki School, which does not require the handing over goods as a gift and is sufficient with the occurrence of a contract alone. However, the *qabd* conditions for the enforcement of hibah emphasized by fuqaha' are flexible in their implementation, and it is in line with the concept of Maqasid Syariah (Muhamad, 2009). Differences in the views of jurists also affect the validity of the hibah made by syarie judges (Azalan & Said, 2016). There are differences of opinion among syariah judges in deciding cases of hibah confirmation, even regarding the same issue. This is due to the use of different jurists' opinions, and no specific statute can be a reference in the issue of hibah. Institutions that offer Muslim property management services involving hibah need to issue products that are in line with the judge's decision so that the determination of a hibah is valid or otherwise.

The issue of confusion regarding the difference in the validity of the hibah decided by the judge is not seen from the angle of *sighah* alone but can be proven through *bayyinah* and *shahadah* which refers to testimony, *iqrar* (confession), *qarinah* (proof), oath and document evidence as well as expert testimony (Nor et al., 2018; Mokhtar et al., 2020). According to Mokhtar, the acceptance of documents as evidence in the case of hibah validity coincides with the law of evidence and can be used either through public documents and verified as true by public officials who keep them or through private documents (Mokhtar et al., 2020). However, the validity and authenticity of private documents must first be verified through the acknowledgement of the document maker or the testimony of two witnesses. The study of the proof of this document can help the understanding of legal practitioners, companies that offer grant instruments and the general public. However, the existing grant declaration document still has some weaknesses looking at the differences in the judges' decisions (Ismail et al., 2020). The drafting of hibah laws in the future needs to consider the provisions of Shariah and local laws to avoid any conflicts and disputes, including in matters of grant declaration documents, by referring to the experience of legal practitioners and the practice in institutions that offer their grant products.

2) Placement of Conditions on the Hibah Amanah Agreement

The doubt often raised about this product from the perspective of Islamic law is the placing of conditions on the hibah amanah agreement (Halim & Bustami, 2017), whether subject to certain conditions or conditioned by a certain period (Othman et al., 2017). The imposition of these conditions may affect the period of ownership of the grant property (Moidin et al., 2023). Among the stipulated conditions is the condition of the grantor (*wahib*) himself (Muhamad, 2011). The recipient of the hibah (*mawhub lahu*) must agree to allow the grantor (*wahib*) to use the property or transact business and benefit from the grant property as long

as the grantor (*wahib*) is still alive. The stipulation of law among jurists related to hibah linked to conditions is not fixed. It depends on the status of the set conditions, whether they are mandatory conditions or fasid conditions (Muhamad, 2011). The placement of conditions that restrict the recipient of the hibah from carrying out transactions on the gifted property such as the prohibition of endowment, selling, or re-gifting the received property, leads to the status of a null condition in the eyes of the jurist' (Said et al., 2012). This condition is seen as denying the grantee's absolute transaction (*tasarruf*) on the granted property (*al-mawhub*), as if the grantor (*wahib*) still owns the asset or property and ownership of the granted property throughout his life.

The practice of imposing this condition is seen in the case of Rozaimi bt Awang, Rosnida bt Awang, Mustafa Kamal Arifin bt Awang, Rohaya bt Awang and Cik Rosnaini bt Abdul Hamid v. Fatimah bt Ishak (11200-044-0148-2011). In this case, the plaintiff confirmed the hibah made through the Letter of Grant by Awang bin Muda as the grantor (*wahib*). Awang bin Muda placed some conditions in the Letter of Grant, which were agreed upon by the recipient of the hibah. The condition placed is that the grantor during his lifetime is still and continues to be in effect on the property without interference from any other heir including the recipient of the hibah (*mawhub lahu*) (Othman et al., 2017).

The vagueness involving the placing of conditions on the hibah amanah is also linked to the placing of *ta'liq* on the contract of hibah amanah, which means that if the recipient of the grant (*mawhub lahu*) dies first, the property of the hibah amanah will return to the grantor (*wahib*) (Yaacob, 2006). This condition shows that the hibah amanah seems to be in the form of a loan (*a'riyah*) which is the giving of benefits only. The hibah property must be returned to the grantor (*wahib*) and does not become the right of the grantee's heirs after the grantee's death. While the concept of hibah is something that is given voluntarily on the basis of love without needing to be replaced or returned (Saputra et al., 2021). This *ta'liq* condition refers to the type of *hibah 'umra* and *hibah ruqba*.

The validity of the *'umra* and *ruqba* type hibah have different views from the jurists' side. In fact, the acceptance of the law regarding the contract of *'umra* and *ruqba* is included in the law of *khilafiyah*, but there are still views that justify it (Moidin et al., 2023b). On the side of the Syafi'e school, the *hibah 'umra* and *ruqba* contracts are valid but the conditions imposed are null and void. Based on this view, the implementation of hibah amanah that use the conditions of *'umra* and *ruqba* cannot be practiced. While according to Rosyid (2010) *'umra*-type hibah were accepted by Imam Malik. Differences in the views of jurists regarding the acceptance of *hibah 'umra* and *ruqba* and their application can be seen in joint tenancy, family *takaful* benefits, temporary *waqf* and *wasiyyah wajibah* (Rahman, 2018). The study results found that the concept of hibah *'umra* and *ruqba* can be the basis for joint tenancy contracts, *takaful* benefits and alternatives to obligatory bequests. However, these studies do not specifically examine the implementation of *'umra* and *ruqba* in the implementation of hibah amanah and require further research.

3) Justice (*ta'dil*) and interest in the maqasid of faraid or will.

The next vagueness involves the issue of justice (*ta'dil*) and the importance of the maqasid of faraid or wills (Zulkepli & Bustami, 2019). The hibah amanah that takes effect after the grantor's death indirectly leads to this issue. Faraid legislation provides that property can only

be transferred after the property owner's death. However, the clear difference between faraid and hibah is that in faraid, property owners are not allowed to determine their own distribution rate and who is entitled to receive the distribution of their inheritance (Muhamad, 2011). Indirectly, this leads to the problem of the amount of hibah contracts. Is it possible to distinguish especially the hibah of parents to each of their children?

A will generally refers to the giving of something and its execution is carried out after the testator's death, whether by using pronouncement or not (Wahab et al., 2015). However, there is a difference that negates the concept of will in the hibah amanah which is that there is no limit imposed on the property that is donated, unlike the will that provides for a maximum limit for giving a will which is 1/3 of the total property (Halim & Bustami, 2017; Muhamad, 2011). While from the point of view of the recipient of the property, the will legislation limits the recipient of the will not from among the heirs who are entitled to inherit property, but there are no conditions for the recipient of the hibah, whether Muslim or not, heir or non-heir (Muhamad, 2011; Wahab et al., 2015; Halim & Bustami, 2017). Muhammad Serji and Shapie, in their study stated that if property ownership is stipulated only after the death of the giver, this contract refers to a will and not a hibah (Serji and Shapie, 2018). This decision cannot be made directly since there is still a difference between the concept of hibah amanah with will or faraid. This issue needs to be detailed through the view of fuqaha' using methods according to the current situation (*waqi'iyah*) on the property management of Muslims in Malaysia.

4) The concept of trust for the holding of hibah property (*mawhub*).

In addition, there is also vagueness regarding the concept of trust regarding the holding of hibah property (*mawhub*). The appointment of a trustee in Islam can exist through several contracts such as *wadi'ah*, *wakalah* and *wisoyah* (Al-Wizarah al-Awqaf, 2005). These three trust concepts can be applied as trust instruments but have different implementations and laws. This clearly shows that the hibah amanah instrument does not apply the hibah contract alone but there is a combination of other contracts. The concept of *wisoyah* in Islam is more focused on managing *al-qasir* property by an executor, which is developed in a trust institution. In this problem, hibah amanah are associated with the appointment of trustees in the case of hibah recipients who are not among the *mahjur alaihi*, such as children and the insane (Halim & Bustami, 2017).

If seen from the point of view of the concept of trust, the most suitable contract to be used in the hibah amanah is *wakalah* and *wisoyah* because these two forms of trust can give transaction power (*tasarruf*) to the trustee over the entrusted property (Said et al., 2019). However, the formation of a trust in a hibah amanah instrument needs to be explored more carefully using an appropriate contract so that the concept of a hibah amanah that can be applied by the financial industry in Malaysia coincides with the purpose of this instrument. Implementing the correct hibah amanah can avoid being confused with the practice of civil trust, especially concerning jurisprudence's perspective.

From the analysis above, it can be concluded that commercialized hibah amanah in the financial industry in Malaysia is closely related to Shariah issues. There is vagueness in the principles and conditions of the implementation of the hibah amanah, which can make it inconsistent with the requirements of Shariah. In relation to that, further research is needed

to detail the resolution of the Shariah issues that arise by referring to the discussions of jurists in the definitive books, current and contemporary fatwas.

Conclusion

The hibah amanah instrument is the best innovation in the planning and managing Muslim property. However, the vagueness that exists causes this instrument to be doubted about its usefulness in the community. It is recommended that further research be done to detail the resolution of the Shariah issues that arise by referring to the discussion of jurists in the definitive books, current and contemporary fatwas. In addition, this study also suggests that a uniform fatwa be created by taking an approach that celebrates the views of all the official fatwa institutions involved. In addition, comprehensive guidelines on the grant of trust contracts can also be issued by providing explicit provisions on recognized and differing opinions on the grant.

This study also hopes that the proposed structuring of hibah amanah that is free of doubt can fully meet the needs of Muslims who require property management instruments that fully comply with Shariah principles to guarantee the economic benefits of Muslims in line with the demands of Maqasid Shariah, which is to protect property.

To conclude, innovative Islamic products of Hibah Amanah should be welcomed but cautiously implemented. In the end, any Shariah decisions taken for the innovation of products should be of moderation (*al-wasatiyyah*) and it should not be too rigid (*al-tadyiq wa al-tashaddud*) or too liberal (*al-tasahul*).

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