

ACCEPTANCE OF HIBAH AS AN ALTERNATIVE MECHANISM IN MUSLIMS ASSET MANAGEMENT

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ABSTRACT

This study is aimed to identify the acceptance of *hibah* by beneficiaries based on cases registered in Melaka. Using secondary data collected from the Melaka Syariah Court and Amanah Raya Berhad Melaka, a number of *hibah* cases were identified from 2013-2015 and highlighted for further discussion in the paper. Interviews, telephone and email correspondences were conducted to further understand the issues concerning *hibah* cases and their reasoning. The findings indicated that the highest number of registered on *hibah* cases was recorded in 2015, increasing from 2013. The data result shows that there are more than 20 cases recorded in Melaka except only 12 cases in 2013. Due to increasing number of cases regarding *hibah*, it shows that citizen of Melaka is still low in understanding the concept and implementation of *hibah*. Therefore, it is a need to have a standard guideline regarding *hibah* to avoid any dispute about this matter in the future. Besides that, the dissemination of knowledge about *hibah* should be done in order to increase the awareness about the acceptable procedure of *hibah* because it is considered as the best alternative of asset management and to avoid unclaimed Muslim asset.

Keywords: Hibah, dissatisfaction, beneficiaries, court cases

INTRODUCTION

1.1 Background

Over the last five years, Malaysia has been experiencing an increase in the number of court cases over the dispute in regards to legal beneficiaries and heirs over the transfer of their inheritance to another person through the implementation of *hibah*. The cases are brought to Syariah Court and are heard under *The Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) Part IV Sec. 46 (1) (2) (b) (vi) - Syariah High Court's Jurisdiction*.

In Melaka alone, the Melaka Tengah district recorded a progressive increase on *hibah* cases from 2010 to 2012. As reported in Mohd Yusof and Ahmad (2013), there were only 10 cases in year 2010 and significantly increased in 2011 and 2012 to 24 and 32 cases respectively. The increasing number of court cases showed that the implementation of *hibah* has resulted in growing dissatisfactions among related parties especially among family members who are also the beneficiaries. Eventually, these feelings of dissatisfaction may lead to a more complex dispute among related parties.

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Therefore, it is essential to understand the reasons to this issue. The dissatisfaction may be due to the lack of knowledge and poor awareness on *hibah* among parties involved. *Hibah* may have not been done according to a specific procedure. For that, this research is conducted to understand the acceptance of *hibah* among the legal beneficiaries. Additionally, the significant of this study also lies on the fact that most of the previous research had only focused on issues relating to *zakat*, *baitulmal* and *wakaf* instead of *hibah*.

1.2 *Hibah* as an alternative mechanism for asset management

According to the Islamic term, *hibah* refers to a contract that entails granting ownership of the property to someone else during his/her lifetime without any reprisal (Muda, 2008) outlined five requirements of *hibah* which include: i). an *akad* (contract) of granting property ownership to a specific party; ii). the property that can be given as *hibah* is a physical property and not debt; iii). *hibah* contract is made without imposing any reprisal; iv). *hibah* contract is in effect during the lifetime of the *hibah* provider; v). *hibah* is made voluntarily and the contract is made with no intention to receive reward or honour a particular person. A *hibah* provider must be the genuine owner of the item/s intended for *hibah*. *Hibah* recipient can be anyone as long as he/she has the capability to own property (Muda, 2008).

Hibah refers to a transfer of ownership of an asset from a donor (*wahib*) to a recipient (*mawhub lahu*) without a reward (Bank Negara, 2016). In other words, *hibah* donor makes proposal (offer) to transfer the property to the beneficiary, and in return the beneficiary accepts the proposal, with no consideration (Mujani et al, 2011; Buang, 1993).

Utusan Online, 20 January 2014 reported that RM52 billion outstanding values of the estate owned by majority of Muslims failed to be distributed to the person entitled in the country and by referring to the Chief Marketing Officer of Amanah Raya Berhad. In 2011, RM42 billions of assets were frozen due to the failure to trace the legal beneficiaries (Shafie et. al, 2014). Therefore, it is crucial for Muslims to manage their inheritance property using a more effective and efficient approach.

Currently, the distribution of wealth particularly in regards to inheritance property among Muslims is managed through the law of succession (*fara'id*). However, the administration of property through this method in many instances were found to be less effective due to the current lifestyle people are usually occupied with day-to-day commitments and their chaotic schedules (Abdul Rashid et.al, 2013). On top of that, the process of distributing property via *fara'id* can be time consuming, complicated and costly (Hamid Ghul et.al, 2015). To make it worst, the process may disrupt relationships among family members due to the disputes brought forward. (Shafie et.al, 2014)

In relation to that, *hibah* can be viewed as an adequate solution to overcome issues concerning the use of *fara'id* particularly on the aspect that property may be transferred to family members with the terms of the donor's decision and choice (Abdul Rashid et.al, 2013). In addition, *hibah* is also a transfer of property inter vivos and takes immediate effect after the contract (Buang, 2008). Thus, the implementation of *hibah* will not only ensure the distribution of property to the legal beneficiaries is in accordance with donor's wishes but also to reduce the number of unsolved and complex cases in the distribution of properties through the process of *fara'id* (Abdul Rashid et.al, 2013).

Fara'id is known to be one complicated and less effective approach particularly on the fact that the distribution of wealth to legal beneficiaries must go through several stages involving several

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jurisdictions which may not be fully understood by the beneficiaries (Abdul Rashid et.al, 2013). On the other hand, the process of *hibah* is a more convenient approach as compared to *fara'id* because the distribution of wealth is done in accordance to donor's wishes. Under *fara'id*, the legal beneficiaries have the right over the deceased property and the asset must be distributed to the legal beneficiaries accordingly as stated under the Islamic Law. Therefore, each deceased's asset will be shared (or owned) by many individuals. For example, a piece of land may be owned by several owners with each one of them owning a very small size of the big land. As a result, the land or property cannot be fully developed according to one particular beneficiary's wish.

Under law of succession (*fara'id*), distribution of wealth must follow the portion as stated in Islamic law for example; the daughter will only get half portion of the son. In *hibah*, the owner of the property has the right to decide the amount and proportion of property to be distributed to the heirs according to their needs and economic condition (Abdul Rashid et al., 2013).

Under *fara'id* law, the property will be distributed to the legal beneficiaries only when the person is passed away. Different from *fara'id*, in *hibah* the property can be distributed to heirs while the donor is still alive. But if the donor worried about being neglected after all property being distributed to the heirs, the donor can choose to use *hibah amanah*, where the property will only be transferred after the death of the donor (Yaacob, 2016).

It can be seen that *hibah* have advantage over *fara'id*, however, the current situation in Malaysia, there is no specific *hibah* law enacted which means that the State Legislature and Parliament has never approved the special statute of *hibah* for muslims to be implemented in Syariah Courts. The current status of *Hibah* cases in the Syariah Courts in Malaysia usually involves the verification of *hibah*, dispute on the extent or rate of *hibah* and withdrawal of *hibah* (Mohd Yusof and Ahmad, 2013).

1.3 Acceptance of beneficiaries on *hibah*

Hibah is a practice that is favourable (*sunat*) in Islam especially to the immediate family. This practice based on the *al-Quran*, *al-Sunnah* and consensus. To form a *hibah* contract, the following conditions must be fulfilled. Among the condition are must have a *hibah* provider, *hibah* recipient, goods or property for *hibah* and lastly *ijab* (contract) and *qabul* (grant). When a completed *hibah* contract meets the terms and condition, and there has been a surrender and acceptance of goods, then the property rightfully belongs to the *hibah* recipient even without repayment.

According to the Hanafi sect, it is '*makruh*' to withdraw *hibah* that has been given away. However, in the opinion of Syafie, Hambali and Maliki sects, when the *hibah* accompanied with the delivery and acceptance of goods then the *hibah* cannot be withdrawn unless the *hibah* is made by immediate family (eg: father, mother, grandfather, grandmother) to the children for as long as the property is not related to other people. Furthermore, based on the Prophet's saying meaning:

“One who gets back his give is like a dog which vomits and then swallows that vomit.”
(By Al-Bukhari and Muslim)

Hibah cases in the Syariah Court in Malaysia, usually involves the verification of *hibah*, dispute on the extent or rate of *hibah* and the withdrawal or revocation of *hibah*. In the case of Eshah binti Abdullah and five others vs Che Aminah binti Abdul Razak and two others (2004) XVIII (I) JH 47 where the arising issue was whether or not the acceptance had been clearly stipulated after giving away or sufficient by other evidences to prove that was an acceptance. In this case, the

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donor had decessed and there was no withdrawal of *hibah*. The building in dispute still bore the name of the deceased although the gift had been witnessed by others. The Terengganu Syariah Appeal Court accepted the appeal made by the petitioners based on the accepted *qarinah* (evidence) from the receiver, where all the three *hibah* receivers declared that they have been receiving the rental/lease (tenancy) of the disputed building since the deceased was still alive.

According to Mujani et al., (2011), in the case of Eshah Abdul Rahman vs Azuhar vs Ismail (2004), the plaintiff had his piece of land transferred to his adopted son (defendant). After filed up form 14A of the National Land Code affecting the transfer, the plaintiff changed his mind demanding the land to be returned. By then, the defendant had developed the land and had constructed several buildings thereon. The issue was whether the transfer here in constituted a *hibah* and if so whether the plaintiff could demand from the defendant for its return. It was held that the transfer here represented a duly constituted *hibah* given that the plaintiff and defendant had complied with all conditions of *hibah*. In regards to the issue of revocation of the said *hibah*, the court opined that when a value which is inseparable from the subject matter of *hibah* was added there to as for instance when a building was constructed by the beneficiary on the *hibah* land, the donor could no longer retract the gift and demand for its returns.

One of the major issues highlighted on *hibah* in this paper is the dissatisfaction of the beneficiary on the distribution of properties. Based on the above cases and many others, *hibah* can be challenged in a Syariah Court both verbally or documented by an individual or a lawyer. However, it can only be questioned in terms of legality in accordance with Islamic law or if there is any beneficiary who disagrees with the content of the *hibah* after the demise of the donor (Mohd Yusof and Ahmad, 2013). For that matter, many cases on *hibah* in Malaysia generally involves proposal to revoke a gift (*hibah*) earlier given to someone and questioning the validity of a gift awarded to the third party after the demise of the donor (Oseni, 2012).

The increase dispute cases among family members due to the practice of *hibah* may lead to crime. Increase of crime will have great impact on the quality of life of the people. It is important to take actions to help in reducing the cases due to *hibah*. Effort to decrease the dispute will assist the government to achieve its National Key Result Area in reducing crime.

OBJECTIVE OF STUDY

The objective of this study is to identify the acceptance of *hibah* by beneficiaries based on the cases registered at Melaka Syariah Court and *Hibah Trust* product applied with Amanah Raya Berhad Melaka.

METHODOLOGY

This study is conducted based on the data collected from Melaka Syariah Court and Amanah Raya Berhad Melaka. Interview instrument is selected for data collection. Discussion among the research member on location of interview, how the interaction with the subjects would take place and also arranged the setting of the session to ensure the appropriate level of quiet, privacy, and primer data exclusively will be gathered (Business Graduate School, 2010). Following an application letter for setting the appointment to both the Melaka Syariah Court and Amanah Raya Berhad Melaka, stating the purpose of the interview and our objective to collect the data on the number of *hibah* cases in these organisations for the intended study.

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An interview session with an officer from the Melaka Syariah Court was conducted regarding the registered *hibah* cases and their reasoning. The interview was carried out by having a preliminary meeting among the research member prior to the actual interview. Typically, such meetings were conducted roughly a week before the interview. This preliminary meeting is an opportunity to establish trust with the research member, review ethical considerations and complete consent forms. During this initial meeting, the research question has been reviewed and the lists of questions to be prepared for interview session. By going about it in this way it can aid in getting a richer description during the interview without asking too many questions to the interviewee.

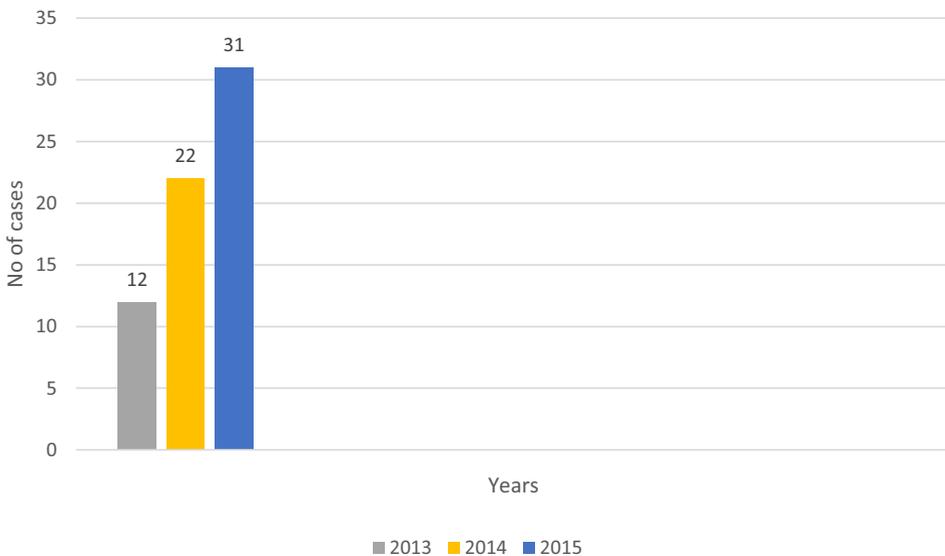
Subsequently, the information data was also provided by the organization through email and telephone conversation to furnish research objective. The document reviews with the assistance of the interviewee, in the library of Melaka Syariah Court were also conducted to search if there are acts for *hibah*. On the other hand, the information and data from Amanah Raya Berhad Melaka were gathered through interviews via telephone conversation with the office, Puan Noraizah.

FINDINGS

4.1 Melaka Syariah Court

Based on the data collected from the Melaka Syariah Court from 2013-2015, the highest record on *hibah* was in 2015. The data result shows that there are an increase no of cases registered in Melaka state where 12 cases in 2013 followed by 22 cases in 2014 and 31 cases in 2015.

Figure 1: Trend of cases on *Hibah* in Melaka Syariah Court



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The existence of cases in Melaka Syariah Court has showed that there is still lack of acceptance or dissatisfaction by beneficiaries on *Hibah* which will lead them to file the case in Syariah Court. The increase number of court case shows that the giving of *hibah* has caused dissatisfaction among related parties especially family members who are the beneficiaries. Oseni (2012) mentioned that most cases in Syariah Court involving *hibah* and *wassiyah* (will) - related involve family relations. This feeling of dissatisfaction may lead to dispute among related parties. Therefore, it is essential to understand the reasons to this problem. The dissatisfaction may be due to the lack of knowledge and awareness on *hibah*. *Hibah* may be done not according to any procedure.

Figure 2: No of cases registered in Melaka Syariah Court

Years	No. of cases
2013	12
2014	22
2015	31

Based on documentation observation session at Melaka Syariah Court, it is evidenced that no such of Act or Enactment on *hibah*, only the Enactment on *wassiyah* (will). State government of Melaka should come out with a guideline on *hibah* so that potential donor can follow to avoid any unforeseeable problem in the future. According to Oseni (2012), in some cases the judge may refer the parties for out-of-court settlement which should begin with a psychotherapy procedure purposefully meant to remind of their family ties and the ephemeral nature of properties and worldly life in general.

4.2 Amanah Raya Berhad Melaka

Amanah Raya Berhad Melaka was only started operation in May 2013. Based from the data collected from Amanah Raya Berhad Melaka there are only 1 case in 2013 and 3 cases in 2014. There is no application for *Hibah* Trust product in 2015. According to Puan Noraizah (Officer of Amanah Raya Berhad Melaka), client prefers to choose *wassiyah* (will) as compare to *Hibah* product. One of the major reasons is the difficulties in preparing the documentation for *hibah* as compare to will and the types of asset that can be given away (*Hibah*). Today, various institutions and agencies are involved in documenting *hibah* and there are also various *hibah* methods have emerged (Ahmad Yusof and Ahmad, 2013).

Figure 3: Number of registered *Hibah* Trust

Years	<i>Hibah</i> Trust
2013	1
2014	3
2015	0

Findings from these two organisations is consistent with Mohd Yusof and Ahmad (2013), where *hibah* are considered as new product and are recently introduced in Melaka (2013) upon realizing that it is a best method to reduce difficulties as well as to create awareness in property distribution among the Muslims in Melaka compare with will and inheritance.

LIMITATION

The present study has several limitations that may potentially influence the interpretation of the results. The data for this study were based on the *hibah* cases registered for the Melaka State only. This is because the Syariah Court is governing by the State Government and there is no standard *Hibah* Act/Enactment yet to be established by the Malaysian Government. Each state has their own way of handling the matters regarding *hibah*. Thus, it is highly suggested that the further study focused on the implementation of *hibah* throughout Malaysia and from there we can make comparison regarding the implementation of *hibah* for each state in Malaysia.

CONCLUSION AND RECOMMENDATIONS

The proper disseminations of information and knowledge on *hibah* can allow Muslims in Malaysia to better understand their rights when facing a dispute. By having proper understanding on this matter, parties involved may avoid further dispute. This study revealed an increasing number of registered cases on *hibah* dispute in Melaka Syariah Court Melaka. The growing dispute cases among family members in lieu of the poor understanding and awareness on the practice of *hibah* have led to a substantial number of crime cases. This may eventually have an impact on the quality of life and their harmony. It is important to take actions to help in reducing the cases due to *hibah*. Effort to decrease the dispute will assist the government to achieve its National Key Result Area in reducing crime. Each state needs to establish a standard Muslim *Hibah* Act/Enactment as reference when matters about *hibah* arise. It will become a guideline for the Syariah Court to decide on the validity of a *hibah*. Besides that, the Fatwa Committee should issue a clear and strict fatwa regarding *hibah* that suits the current needs and parallel with the Islamic Law requirements. Furthermore, centralised monitoring and supervision should be implemented to any agencies that manage Muslim asset especially regarding the distribution of wealth through *hibah*. Therefore, further study should focus on determining the reasons behind these *hibah* cases particularly on the aspects of dissatisfactions among legal beneficiaries or heirs in the wealth distribution held through *hibah*. Subsequently, the focal point here is to develop a model or a guideline which can be applied in order to reduce dissatisfactions among legal beneficiaries when distributing wealth via *hibah*.

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