

A Preliminary Insight on Collateral Hibah in Malaysia

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Abstract

There are many products based on hibah, such as takaful hibah, *hibah lil waqaf*, Hibah Amanah and many more. Hibah was introduced in Malaysia to cater the problem of unresolved inheritance issues. However, not many products are available to Muslims that are based on collateral hibah due to the fact that most of the Muslim property ownership today is secured through bank financing or loans. Therefore, the objective of this study is to provide some early insights regarding the collateral hibah's uses in Malaysia. The design of this study is descriptive using a qualitative approach whereby the data collection method involves content analysis through library research. The preliminary findings reveal that the validity of secured hibah in the Syariah Court is uncertain. Furthermore, due to legal constraints, trust companies, estate companies, and state religious councils are unwilling to accept hibah properties that are linked to financing. These constraints must be addressed accordingly so that every instrument introduced for Muslim property planning is practical and effective.

Keywords: Collateral Hibah, Al-Rahn, Mortgage, Inheritance, Hibah Charged Property

Introduction

The Muslim community in Malaysia currently deals with an unresolved inheritance issue caused by the growing amount of frozen property. The term "frozen property" refers to real estate that, following the death of the property owner, is still not available for sale or distribution to heirs until a correct administrative procedure has been followed (Md Supi, 2020). Inheritance assets that have been declared frozen have reportedly increased steadily since Malaysia gained independence, reaching RM70 billion in 2020. This indicates the seriousness of the situation brought on by what has been called the ineffective management of faraid, or the Muslim inheritance system (Zulkifli, 2022). Inheritance disputes and unclaimed property cases are piling up in the courtroom, and many of them are still unresolved for various reasons (Kamarudin and Abdul Basar, 2022). It results in challenges for

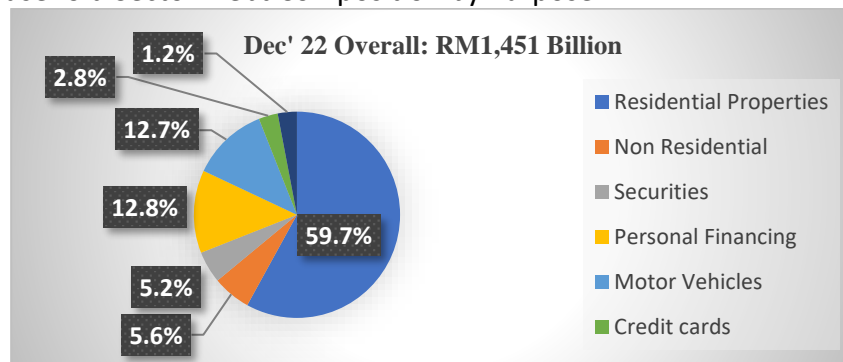
the legal heirs to obtain and grow the asset transfer (Nor Muhamad et al., 2019). The Objectives Shariah requires that inheritance of property to be appropriately handled for the benefit of the public, which is the opposite of asset freezing as it negatively affects the economy (Abd Wahab et al., 2021).

Due to the history of British colonization in Malaysia in the past, it is not surprising that Malaysia's legal system is highly influenced by the West. Consequently, Muslims in Malaysia are confronted with constitutional issues concerning the distribution of Islamic inheritance Noordin, et al (2012) whereby the administration and distribution of Islamic inheritance are governed by a variety of institutions and regulations. The inconsistent practices among different institutions and confusion among civil society become the root of the problems in the distribution of Islamic inheritance (Abdullah et al., 2022). Because of this, settling Islamic inheritance becomes challenging, complicated and a long process (Kamarudin and Abdul Basar, 2022). In addition, the heirs are unaware of the processes and procedures when making a claim, making the procedures to be exceedingly expensive and time-consuming. Besides that, the attitude of legal heirs also contributed to an unresolved problem in inheritance. The property distribution process takes longer than anticipated, particularly when there are issues or lack of cooperation from the heirs. Additionally, beneficiaries' negative attitudes frequently cause some sort of disruption to the estate's administration (Mohamad et al., 2021). This is due to the fact that the inheritance process, according to Islamic law (faraid), is frequently difficult and taints family ties (Ab Rahman et al., 2023). As a result, the faraid system is perceived as being unfair (Zulkifli, 2022).

Due to the potential issues with Malaysia's succession law regarding estate distribution, the estate planning during one's lifetime such as hibah should come as priority for Malaysian citizens. Nowadays, people are increasingly inclined to use hibah rather than faraid to distribute their wealth to their loved ones (Abu Bakar, Md Fauzi, and Hashim, 2020). Hibah is categorized as an option for wealth distribution, in addition to will and other methods. So, hibah practice is encouraged in order to help the government in resolving the problems of inheritance. The idea of hibah is applied as the initial step in developing assets so they can continue to provide benefits (Said and Wan Ayub, 2021).

A collateral hibah refers to a person's grant to a property that is still in bank financing. The application of collateral hibah is said to help the community manage the acquired property through financing and at the same time overcome issues related to the estate such as frozen and unclaimed property. According to Said et al (2023); Muhamad (2011), collateral hibah may be able to address the problematic aspects of Islamic estates, particularly those pertaining to the inheritance of intangible goods, and its implementation needs to be extended to ensure a decrease in the problem of unclaimed property among Muslims. However, not many products based on collateral hibah are offered to Muslims. Meanwhile, most Muslim property ownership today is obtained through financing or loans from banks that take almost 25-30 years of the repayment period. Chart 1.1 shows that housing loans remain the main source of household debt, indicating a persistent desire for home purchases stimulated by policies that support home ownership. It is rarely discussed within the community, particularly among Muslims who make an average wage and purchase real estate with cash.

Chart 1.1: Household Sector-Debt Composition by Purpose



Sources: (Bank Negara Malaysia, 2022)

Methodology

The main method adopted in this study involves the use of both primary and secondary data sources to investigate the topic of hibah specifically focusing on the collateral hibah. The primary data in this study refers to the statutory provisions related to collateral hibah practices in Malaysia. This means that the researchers analysed the actual laws, regulations, and official documents that pertain to the subject matter. Analysing primary data is crucial for understanding the legal framework and requirements collateral hibah compliance in the country. This data provides the foundation for the research.

Secondary data refers to the information and materials that are not original but have been created or collected by others for various purposes. In this study, secondary data sources include legal journals and textbooks written by experts in the field of hibah to gain a comprehensive understanding of the subject. Besides that, this study involves systematically searching and reviewing existing literature and documents to gather information and insights on a particular topic. It is a common method in legal and academic research to build a comprehensive understanding of issues regarding collateral hibah in Malaysia (Chen Mei, 2021). In summary, the study used a combination of primary data (statutory provisions related to hibah in Malaysia) and secondary data sources (textbooks, legal journals, articles, seminar papers, and relevant legislation) obtained through library research. This methodology allows the researchers to analyse both the legal framework and scholarly discussions surrounding collateral hibah practices in Malaysia, contributing to a well-rounded and informed study on the subject.

Concept of Collateral Hibah in Islamic law

Collateral hibah is subject to both the hibah contract and the collateral contract. The use of these two contract principles has an indirect impact on several law. Hibah is defined as the voluntary transfer of property ownership from one person to another during the life of a hibah provider; this transfer is undertaken without any expectation of reward and is accomplished by reciting an *ijab*, *qabul*, or other similar expressions (MyGovernment, 2024) The transfer will go into effect immediately during the grant period or lifetime. Collateral, mortgage, security also known as al-Rahn in Arabic refers to a contract where one party, the pledgor (*rahin*), promises an asset to another party, the pledgee (*murtahin*), as collateral to satisfy the obligor's obligation or liability (*marhun bih*) owed to the pledgee in the event of such obligor's default (Bank Negara Malaysia, 2018). Collateral hibah refers to the transfer of assets that remain under pledge or collateral status (Azalan and Said, 2023).

Islam allows the practice of hibah and al-Rahn and its legality based on al-Quran and hadith. In Quran Allah said that:

"...who give charity out of their cherished wealth to relatives, orphans, the poor, needy travellers, beggars, and for freeing captives..." [al-Baqarah: 177]

"and if you are on a journey and cannot find a scribe, then let there be a pledge taken (mortgaging); then if one of you entrust the other, let the one who is entrusted discharge his trust (faithfully), and let him be afraid of Allah, his Lord". [al-Baqarah:283]

In discussing collateral hibah, the primary prerequisite for hibah should be highlighted. According to Islamic law, the hibah contract must meet specific requirements in order to be legally binding. Four elements, or pillars (*arkaan*), must be satisfied for the hibah contract to be deemed valid. The four pillars in the hibah contract are the donor, donee, subject matter and *sighah* (offer and acceptance). The donor here is the owner of the subject matter of the hibah. The donor must be good of mind, has attained puberty and *rushd* (prudent in property management) (Al-'Aynayn, 1985). Hibah must be performed voluntarily, without outside pressure, and without force; otherwise, the hibah will be revoked (Ali et al., 1997). The property must belong to the donor and be unencumbered by any obligations, including collateral. In other words, the donor must fully own the property used for hibah (Wan Ayub & Said, 2020).

Besides, in the collateral hibah, the property is no longer fully owned because the donor or giver can no longer freely execute transactions on it. When the item is pledged, it is still considered to be in the ownership of the giver of the hibah, although the ownership is not complete to the original owner who pledged the item to the pledgee (Al-Syirbini, 2004). The buyer is not entirely free to transact with debt that has not been paid off because the asset is still the financial institution's collateral (Said et al., 2023). Pledged items cannot be used for any contract by the pledger, whether it is buying and selling, hibah, wakaf, or similar transactions. If the pledger enters into a contract that results in the loss of ownership of the pledged item, the contract is deemed invalid unless approved by the pledgee. This is because the pledged item serves as collateral for the debt provided by the pledgee. Contracts for the sale or hibah of the pledged item will render the pledge useless, and the benefits to the pledgee will be in vain (Mustafa et al., 1992).

However, if the pledgee grants permission for the execution of such a contract, the contract is considered valid, and the pledge agreement will be annulled in the view of the majority of scholars. The pledgee can also withdraw the permission granted, as agreed by the majority of scholars (Al-Mutayri et al., 2014).

Based on the statement above, the hibah of pledged item depends on the consent of the pledgee. If the pledgee does not allow the hibah contract, then the hibah is invalid. Conversely, if the pledgee consents to the hibah, then the hibah is valid, and the pledge contract is cancelled. The pledgee can also revoke the consent as long as the hibah does not bind the parties to the hibah contract. In the context of conditional hibah, the pledge contract is only cancelled when the pledged item is completely delivered to the hibah recipient. Although the donor is the legal owner of the collateral property, when utilised as security, the collateral holder's rights are established, which prevents the execution of any transaction that could affect these rights, encompassing hibah. Shariah law allows for hibah against indebted

property, even in cases where the mortgagee consents after the contract for hibah has been finalised.

In today's context, aqad collateral is an agreement or contract made primarily in dealing with purchases through loan financing of financial institutions such as banks. According to Mujani et al (2012), when a collateral is pledged by the financial institution for the purpose of repayment of loan, one does not have any access to the collateral and any devolution on the property is void unless it is approved by the bank. The bank also does not allow any transfer transactions to be made during the debt tenure or debt not fully repaid. This gives the perspective that the policy practiced by the bank has yet to offer a transfer-related collateral asset. It can therefore be seen that the banks make every purchase of property made through loan financing as collateral during the loan repayment that has yet to be fully repaid. This is to ensure the interest of the bank to recover their money if the debt cannot be settled by the borrower within the agreed period (Said et al., 2023).

Collateral in Islamic Banking Contracts in Malaysia

Collateral (security) has taken up a significant amount of space in the financing activities conducted by financial institutions given its significant function. In general, any loan facility provided by an Islamic financial institution, whether under a sale-based model or another approach, will be backed by acceptable collateral (Bank Negara Malaysia, 2010). Islamic banks, like their conventional counterparts, require collateral or a guarantee to cover loans against possible default. They are not requesting for loan security to create complications but to avoid the effect of moral hazard from dubious customers who wish to illegally extort banks' money. They also rely on the permissibility of collateral and guarantee from Islamic perspective to create a comfort zone for themselves. Islamic banks use the concept of loan security to ensure that only committed and serious-minded borrowers are being financed (Adamu, 2018). Taking security against loans and advances will significantly lower the risk that an Islamic bank is bound to face, including credit risk, liquidity risk, etc. However, if such loans are taken out on the basis of a borrower's simple promise to repay when due, the bank is at the borrower's mercy because the risk of such is high on the bank's part in the event of default (Lawal, 2016).

For instance, the bank (creditor) would often finance the purchase of a house or a car so that the consumer might pay it back over a specified length of time. According to this agreement, the financed property is designated as collateral, which the debtor is not allowed to sell without the bank's consent. And if there is a default, the bank has the right to sell the house to recover the loan and, if possible, credit the debtor with the selling proceeds (Lawal, 2016). The financed property will be mortgaged to a financial institution by registering Form 16A of the National Land Code (NLC) 1965 as proof of assignment of rights to guarantee the payment of the debt (Section 242 NLC 1965). Because of this, borrowers are unable to transfer ownership of real estate while the loan is still outstanding (Muda et al., 2022).

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This may ultimately lead to more unresolved issues with distributing assets under the law of succession, which will have an impact on Malaysian economic loss. However, collateral hibah may be used in cases where the loan is insured under insurances or takaful. In the event of death or total permanent disability, this type of policy offers full repayment of the remaining balance of the landed property loan with the lending institution. As a result, the chargor may request permission from the bank or lender (chargee) to transfer his charged property by sending a letter in writing expressing his desire to do so (Abdul Rashid et al., 2013). Nevertheless, because it does not entirely belong to the buyer, no charged property other than the property itself may be transferred through hibah, according to the bank policy (Said & Wan Ayub, 2021).

Mortgage Reduction Term Takaful (MRTT) And Mortgage Level Term Takaful (MLTT)

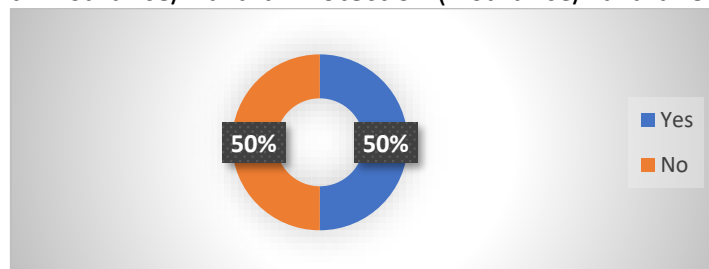
The Mortgage Reducing Term Assurance (MRTA) or Mortgage Reduction Term Takaful (MRTT) or Mortgage Level Term Assurance (MLTA) or Mortgage Level Term Takaful (MLTT) is a specific

type of insurance on home mortgages. MRTA and MLTA are conventional insurance plans whereas MRTT and MLTT are offered by takaful companies and are in compliance with Shariah principle. This insurance is only intended to be used for debt repayment (i.e. pay off the mortgage balance). MRTT or MLTT makes sure that the property is not sold at auction for non-payment of debt in the event of the mortgagor's infirmity, illness, or demise so that his family would still have a place to live. Additionally, insurance makes sure that any remaining debt is fully repaid, pleasing the debt guarantor (Abdul Aziz and Mohamad, 2013).

MRTT is a takaful plan offered to home financing customers against unexpected or sudden loss of life or total permanent disability on the outstanding amount financed by the financial institution. In such an event, MRTT provides indemnification to the participant's family for the outstanding mortgage (Mikail et al., 2016). The amount of your remaining debt will decrease as you pay off your home loan. MRTA is designed so that the sum that would be paid out upon filing a claim covers the whole amount of your home loan as of the time of the claim. Hence, "mortgage reducing" in the MRTT definition (PropertyGuru Editorial Team, 2021). However, the amount paid out by MRTT may not completely cover the outstanding financing balance if the amount covered under MRTT at the time of the claim is less than your mortgage. If a home buyer obtained MRTT with a 20-year insurance term and a 35-year mortgage, the remaining debt would not be paid off if death occurred after the 20-year coverage period was up (for example, at 21 years). In that instance, the beneficiary of the house will have to make a lump sum or ongoing monthly payments to settle the remaining balance of the mortgage (Yeong, 2022). On the other hand, MLTT is intended to pay off your remaining mortgage payment and distribute any additional insured money to your beneficiary, easing your loved ones of this financial burden (Yeong, 2022). That means MLTT does not just cover the essential value of a home loan, but can also provide an additional financial lump sum to your family or loved ones.

However, In Malaysia, MRTT or MLTT is optional, even though the terms and conditions of a certain house loan provider may make it so. This implies that even while you are not required by law to get this policy, the bank that is granting you a house loan may insist that you do so in order to cover the loan's value. According to a report from the Central Bank of Malaysia (CBM) published in 2021, 50% of residences in Malaysia are without Takaful or Insurance coverage (Chart 2). This show that many Malaysian properties are not covered by takaful or insurance.

Chart 2: Homes With Insurance/ Takaful Protection (Insurance/Takaful Cover for Homes)



Sources: (Central Bank of Malaysia, 2021)

Lack of Legislation of Hibah

To date, no specific and substantive hibah law has been enacted or passed within the parameters provided by the Federal Constitution. Hibah is naturally listed within the jurisdiction of a state, which is under the jurisdiction of the Syariah Courts, under List II of the

Ninth Schedule of the Federal Constitution of Malaysia. Nonetheless, the Federal Constitution's hibah provision is quite narrowly construed (Saad et al., 2023). According to the Federal Constitution, a State Legislature can pass laws on a variety of topics, including Muslim personal and family law, Muslim Waqf, hibah, Zakat, Fitrah, Baitul Mal, mosques, the creation of Islamic courts, the control and dissemination of Islamic doctrines and beliefs among Muslims, and the determination of matters pertaining to Muslim law. As hibah is covered by List II of the Federal Constitution's Ninth Schedule, it falls under the purview of Islamic affairs. Therefore, hibah is under the authority of Syariah Courts.

Since subjects pertaining to Islamic law lie under state jurisdiction, each state must come up with its own legislations. Each state has its own Islamic administrative statute, which is a law that assembles various matters concerning Islam (Shuaib, 2008). The state enactment's hibah section just briefly discusses the rules governing the syariah court's authority to hear hibah cases and does not explicitly define or explain hibah in any depth. Every judicial ruling Syariah court is governed by Islamic law. Given this fact, any discussion regarding the legitimacy of hibah and the legislation surrounding it simply alludes to the texts of Islamic jurisprudence rather than the statute itself. While it is appropriate to consult Islamic jurisprudence books directly, it is important to note that the legislative provision is essential as the primary source of authority for any disputed subjects before the Syariah Court. Therefore, it is possible that, depending on the specific demands of the moment, the judges will only cite the opinions of a selected group of scholars. The court is exposed to the acceptance of diverse views, due to differences in views by Islamic scholars or sects. This will impact numerous court decisions (Muhamad, 2019). Syariah court also does not apply to the concept of binding precedent or *stare decisis* as in common law. Every case must be judged on its own merits, and past rulings should only be used as a guide for upcoming cases (Mikail & Arifin, 2014). As a result, judgements vary depending on how the judge accepts and interprets Islamic law.

In the case *Murshida bte Mustakim lwn Hassim bin Abdullah* [2006] 4 SHLR 43 dan *Awang bin Abdul Rahman lwn. Shamsuddin bin Awang & lain-lain* [2004] CLJ (Sya) 139, the Syariah Court rejects the collateral hibah absolutely, since it does not meet the requirements for property ownership, i.e. there is no complete ownership. The gift inter vivos of property that has not been fully owned is invalid and void. Once the payment was completed, the property could then be transferred. In the case *Raihanah Mohd Ali v. Kamaruddin Mohd Nor & others* [2008] 26(2) JH 253, the Terengganu Syariah High Court judge concluded that the collateral hibah is permissible if consent is acquired from the mortgage holder (bank). However, there is still no bank policy that allows collateral hibah to be granted because it can invite various risks in the future. Instead, in case *Yati Suraya v. Supiah Binti Abu* (unreported case), the Negeri Sembilan Syariah Court permitted the transfer of the charged property even without the mortgagee's consent, provided that the charged property was completely covered by takaful or insurance (Kambol, 2019). This decision is also in line with the decision in the case of *Mohd Pauzi Bin Ibrahim v. Nor Aliah Binti Ibrahim (06100-044-0306-2015)*, the Kuantan Syariah High Court judge decided that even without the bank's consent, the mortgagor can donate collateral property provided it is covered by takaful (Azalan and Said, 2023).

Conflict of Jurisdiction Between Syariah Court and Civil Court

According to Azmi et al (2020) the lack of legislation has resulted in a jurisdictional dispute; there is a conflict of jurisdiction between the Syariah and Civil Courts. The Federal

Constitution's Article 121 (1A) explicitly states that Syariah Courts are the only bodies having the authority and jurisdiction over Civil Courts:

“The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.”

This amendment has stipulated that the civil court is not authorised to hear cases that fall under the purview of the Syariah Court. This can be seen in the case of *Latifah bte Mat Zin v Rosmawati bte Sharibun & Ors* [2007] MLJ 101 whereby the federal court has certified the Syariah court's jurisdiction in hibah. On the contrary, the finding in *Dato' Kadar Shah bin Tun Sulaiman v Datin Fauziah binti Harun* [2008] 7 MLJ 779 by the Kuala Lumpur High Court shows otherwise. According to Muhamad (2019) the current state of affairs indicates disagreements regarding jurisdiction over hibah issues between the Civil Court and the Syariah Court are still ongoing. In reality, there have been instances where judges on the Syariah Court have denied to hear cases involving hibah.

Seeing the existing room for disputes between the civil and Syariah courts in the case of hibah, there is a need to address the loopholes in hibah, particularly with regard to how hibah are implemented in Malaysia, where they are now being aggressively offered by various commercial entities, including Islamic banking and financial institutions and the Muslim property planning and management sector (Saad et al., 2023). Lack of hibah provisions could lead to misconceptions and undermine the Syariah court's legitimacy and authority (Muda, 2009). Therefore, it is important to outline the law that is specifically written about hibah or its equivalent since it will be able to capture all the disagreements and provide sound clarifications regarding hibah issues in the form of consistent legal provisions that have legislative authority.

Conclusion

Over the past few years, hibah products have grown significantly in Malaysia. Many organisations have promoted hibah as a method to help Malaysian Muslims manage their properties and assets. In order to address the serious problems associated with Islamic inheritance that are becoming more and more pressing every year, the Islamic wealth planning sector is developing and putting a range of solutions in the market. One of the products is the collateral hibah which is a necessity in today's society. The implementation of collateral hibah products is seen to be able to help the community manage their property through loan financing such as houses, real estate and vehicles in a more secure way. In addition, this instrument has its own advantages because there is no need to go through complicated administrative matters and high costs, making the instrument more effective and meeting the needs of the local community in dealing with issues related to inheritance. Some constraints are identified such as permission from the collateral holder, that is the bank that has not yet allowed the property pledged to them to be transferred through a grant or otherwise. Otherwise, The Syariah High Court judges have rendered a variety of decisions supporting the compliance with collateral hibah cause. Finally, this study sheds light on several problems with Malaysia's collateral hibah. The issues highlighted can pave the way for several Islamic financial organizations such as banks, takaful providers, Amanah Saham Nasional Berhad (ASNB), State Islamic Religious Council, the estate planning sector, lawyers, and others to make improvements to collateral hibah products because the products offered

must not only meet the requirements set in Islam but also be enforceable according to national law.

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